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INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

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Submission to

New South Wales Parliament Legislative Council

Joint Select Committee on the NSW Workers Compensation Scheme

Workers Compensation in New South Wales: A call for Best Practice not the Lowest Price

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Disclaimer statement

Whilst all due care has been taken in collecting, collating and interpreting relevant information, some omissions may have occurred. The statements and opinion contained in this document are given in good faith and in the belief that they are not false or misleading.

Introduction

The Finance Sector Union of Australia (FSU) welcomes the opportunity to contribute to the Inquiry on the New South Wales (NSW) Workers Compensation Scheme.

The FSU represents workers employed in the finance sector in New South Wales and exists for the purposes of providing a collective forum for them in pursuing fairness in their employment and improvements to their working conditions. The finance sector employs over 150,000 people in NSW and is a key contributor to the state's economy. The FSU has a strong and real interest in any proposed changes or reforms to the current NSW Workers Compensation Scheme.

On the 23 April 2012, the Work Cover Authority released the *NSW Workers Compensation Scheme Issues Paper* that asserts that the scheme is "failing the people of NSW, and urgent action is required"[1].

In addition, the paper highlights six key areas where it considers significant change to be necessary:

- The premiums paid by NSW employers, that are estimated to be between 20-60 percent higher than the premiums paid by equivalent employers in competitor states and are likely to rise by a further 28 percent.
- The scheme is 'difficult to navigate... with a lot of red tape'.
- Payments for seriously injured workers are inadequate.
- Return to work is not effectively promoted.

[1] New South Wales Government Work Cover Authority 2012, *NSW Workers Compensation Issues Paper,* New South Wales, viewed 11 May 2012, <http://www.workcover.nsw.gov.au/aboutus/newsroom/Pages/WorkersCompensationIssuesPaper.aspx> (*'Issues Paper'*)

- Less seriously injured workers are not encouraged to recover.

- There is limited power to discourage payments, treatments and services that do not contribute to return to work.

Whilst the FSU agrees with the premise that payments to seriously injured workers are inadequate and notes that there are multiple issues with the management of the rehabilitation and return to work process, the FSU submits that the Government is yet to make a genuine case as to why the current NSW Workers Compensation Scheme should undergo the suggested reforms.

Instead, the FSU views the issues paper as seeking to unfairly highlight the 'competitive premiums'[2] doctrine in order to facilitate artificial and potentially unsustainable reductions in worker's compensation insurance premiums for employers. The suggested changes would also constitute a windfall gain for self insured employers. This reduction in costs can only be achieved if it successfully propels the externalisation of work-related injury costs to the injured workers and to taxpayers via the social security system and Medicare.

The FSU submits that the core reforms proposed in the paper give little consideration for the plight of injured workers and their needs. Instead, the paper is dominated by a narrow discourse centred on the economics of the scheme that aims to incite 'invidious competition'[3] between NSW and the compensation schemes of other jurisdictions. This competition will engage NSW in a race to the bottom, to the detriment of injured workers in NSW and potentially throughout Australia.

The FSU submits that it is in all NSW workers interests to have a well-managed fund that is financially viable. Further to this, the FSU submits that injured workers overwhelmingly want to return to productive work. However, the FSU wishes for

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[2] Purse, K. 2011, 'Winding Back Workers Compensation Entitlements in Australia', 24 *Australian Journal of Labour Law* 1.

[3] Industry Commission 1994, *Workers Compensation in Australia,* February 1994, report No. 36, Australian Government Publishing Service Canberra, viewed 11 May 2012, <*www.pc.gov.au/__data/assets/pdf_file/0004/6961/36worker.pdf*>.

workers to be able to return to work and the community in a safe and sustainable manner without unnecessary burdens imposed by work related injuries.

The FSU is concerned that in the current debate there is a view that the financial position of the scheme can only be improved by blaming and punishing the injured worker and that the push for a reduction in workers compensation costs and premium reduction will be achieved at the expense of injured workers and their full recovery.

The FSU submits that employers of NSW have a responsibility to ensure workplaces are safe and that if workers are injured that they are rehabilitated and returned to work as soon as reasonably practicable.

The existence of a strong and effective workers compensation system paid for by employers and their insurers is an essential part of the NSW workplace health and safety regime.

The FSU calls for a rational and informed debate on the current NSW workers compensation scheme that seeks to balance the interests of employers and injured workers within a financially viable scheme. The FSU believes that if the Government feels that the NSW workers compensation system needs to be reformed then we should have the debate using the facts.

The FSU calls on the Government to lead a NSW workers compensation debate where all options are on the table, including national harmonisation systems so that States do not seek to undercut one other and the balance is maintained between long term benefits and common law rights.

Scope

The FSU submission will discuss the following issues in accordance with the terms of reference as set out by the *Joint Select Committee on the NSW Workers Compensation Scheme*.

Please note that our submission is primarily based on our experience as an organisation representing the finance sector workers of NSW. This submission responds to the *NSW Workers Compensation Scheme Issues Paper* released by the WorkCover Authority on the 23 April 2012 that asserts that the scheme is "failing the people of NSW, and urgent action is required"[4].

The FSU considers the current performance of the Scheme in the key objectives of promoting better health outcomes and return to work outcomes for injured workers, as well as the financial sustainability of the Scheme and the impact on NSW's 'competitiveness' compared with other states.

The FSU also considers the functions and operations of the Work Cover Authority and examines briefly the history of Workers Compensation in NSW and how it has come to be influenced by financial interests at the expense of injured workers.

Finally, the FSU makes comments and recommendations on the Governments proposed suite of reforms and provides some case studies to demonstrate how the reforms may detrimentally impact injured workers in NSW.

[4] *Issues Paper*, page 2.

Background

Workers compensation in Australia, as elsewhere, emerged as a belated by-product of 19th century industrialisation. Its public policy significance has been considerable. Historically, it provided financial and related assistance, albeit limited, to workers and their families in the event of work-related injury or death. Secondly, it instituted the no-fault principle as the primary basis for compensation to ensure compensation was paid irrespective of who was responsible for the injury or death. Thirdly, it established employer liability as the financial foundation for workers compensation, a development which implied that at least some of the costs arising from work-related injury should be borne by industry rather than solely by workers and their families, and fourthly it heralded an important change in the role of the state recognising the need for 'public solutions to social problems'[5].

Constitutional responsibility for workers' compensation legislation in Australia has resided principally with the states and territories rather than the Commonwealth government. This federalist division of labour is comparable to that which also prevails in the United States and Canada. However, it stands in contrast to most other countries where legislative responsibility for workers' compensation has been the business of national governments[6].

The current NSW Workers compensation scheme in NSW is regulated by two complementary pieces of legislation, that is the *Workers Compensation Act 1987 (NSW);* and the *Workplace Injury Management and Workers Compensation Act 1998 (NSW).*

In the latter part of the 1980s the policy landscape of workers compensation began to dramatically change. The hard won improvements in workers entitlements came

[5] Purse, K. & Guthrie, R. 2008 ' Workers Compensation Policy in Australia: New Challenges for a New Government', 1(1) *Journal of Applies Law and Policy*, 99.
[6] Purse, K. 2011, 'Winding Back Workers Compensation Entitlements in Australia', 24 *Australian Journal of Labour Law* 1.

under sustained attack and were wound back to varying degrees. These developments were further illustrated by the 2008 legislation, championed by the Rann Labor Government in South Australia as well as the 1992 legislative package enacted by the Kennett Liberal-National Government. Both state governments called for a 'low cost-low entitlement'[7] workers compensation scheme. The factors underlying the rollback process varied from jurisdiction to jurisdiction. The federalist nature of workers compensation was in itself a considerable factor, as whenever one jurisdiction wound back workers' entitlements in order to reduce employer premiums other jurisdictions sought to follow suit. This measure has invariably been justified on the grounds that a failure to do so would undermine a state's 'competitive' position thereby resulting in a loss of investment and jobs[8].

The call for 'competitive premiums' has been taken up by the current NSW Government that states in the *NSW Workers Compensation Scheme Issues Paper*:

> *The premiums paid by New South Wales employers are estimated to be between 20 and 60 percent higher than equivalent employers in our competitor states and the scheme actuary projects that the continued deterioration in the scheme deficit will require an eventual increase of up to 28 percent in premium rates if no changes are made to the scheme... An increase of this size would impact current and future jobs in NSW flowing through to reduced state revenues such as payroll tax and would further exacerbate the State's lack of competitiveness as compared to our most comparable competitor States (Victoria and Queensland)...*[9]

The FSU refutes the 'competitive premium' rhetoric, viewing it as a thinly veiled attempt to attack injured workers' compensation entitlements. The FSU believes this argument to be a fundamental economic misconception, for the reasons outlined below.

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[7] Purse, K. 2011, 'Winding Back Workers Compensation Entitlements in Australia', 24 *Australian Journal of Labour Law* 1.
[8] Purse, K. 2011, 'Winding Back Workers Compensation Entitlements in Australia', 24 *Australian Journal of Labour Law* 1.
[9] *Issues Paper*, page 2.

NSW WorkCover Finances

The NSW Government argues that the current Workers Compensation fund is unable to meet its liabilities because its assets are depleted and therefore benefits need to be cut back. However, this argument made by the state government requires further evaluation. The values of the assets of the scheme fluctuate based on the performance of fund managers. Just as superannuation funds have been hit by the global economic downturn, so too has the WorkCover fund. It is just as likely that when global markets recover, so will the value of the WorkCover fund.

Prior to the global financial crisis, the performance of fund managers was used as justification for reductions in employer insurance premiums. Between 2002 and 2009 there was a decline of almost 40 percent in the average workers' compensation premium rate in NSW (from 2.59 percent to 1.88 percent)[10]. Therefore, it would seem reasonable for poor investment performance to require a possible increase in premiums. The Government however, refuses to consider increases of any size on the basis of competitiveness with Victoria and Queensland. It has stated resolutely in the issues paper that increasing premiums was "not an acceptable resolution"[11]. Therefore, the FSU believes it is unreasonable that the only action the Government is willing to undertake as a result of lower investment performance is to require reduced protection for injured workers.

Past valuations of the scheme show that the scheme deficit increased between 1997 and 2003 from -$789 million to -$2,982 million, before improving and moving into surplus between 2006 and 2008 to +$85 million and +$625 million respectively. Since 2008 however, the scheme has been in deficit. The most recent actuarial valuation of the scheme was completed in March 2012. The report estimated a deficit of $4.1 billion as at 31 December 2011. The deterioration in the scheme since 2008

[10] NSW Parliamentary E-brief, page 7.
[11] *Issues Paper*, page 6.

has been explained due to two main contributing factors - external influences impacting investment returns and deterioration in claims management experience[12].

Further to this, the workers' compensation liability estimates are crucially dependent on the economic assumptions used. Even minor changes can result in dramatic variations in the bottom line[13]. The issues paper released by the state government is based on a number of assumptions. It reports the Scheme's estimated balance sheet position over the next 10 years. The projections showed that the Scheme would not return to surplus over this time period. However, it did show that the Scheme's deficit was likely to reduce to less than $2 billion[14].

In addition to this, an independent report commissioned by the State Government, and undertaken by Price Waterhouse Coopers (PWC), estimated that to return the Scheme to full funding in five years it would require an increase in average premium rates of the order of 28 percent, while a return to full funding in 10 years would only require a premium rate increase of around 8 percent[15].

The key recommendations of the PWC report to WorkCover outlined the need to:

1. Make a decision as to the importance of returning the scheme to full funding and over what time frame that would occur.
2. If there is a desire to return to full funding over the medium term such a strategy would ultimately come down to three fundamental choices:
    - *Increase premiums, and/or*
    - *Reduce benefits, and/ or*
    - *Improve claim management outcomes*[16]

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[12] NSW Parliamentary E-brief, page 8.
[13] SA Unions 2007, Submission prepared by Kevin Purse re: proposed changes to South Australian Government Workers Compensation Scheme, South Australia, viewed 11 May 2012, < www.saunions.org.au/SAUnions(Rev).pdf> ('*SA Unions Submission 2007*')
[14] NSW Parliamentary E-brief, page 8.
[15] NSW Parliamentary E-brief, page 8.
[16] Price Waterhouse Coopers, 2012, *WorkCover NSW Actual valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer at 31 December 2011*, PWC, New South Wales, viewed 11 May 2012, <www.parliament.nsw.gov.au/.../e-brief.workers+compensation.pdf>.

It appears that the government has chosen to ignore the option of increasing premiums and has failed to consider the administratively challenging option of improving claim management outcomes.

The FSU notes that the Government appears to have ignored various public comments asserting that deliberate under-insurance in certain industries creates a significant burden for both the properly insured employers and the Scheme itself.

The FSU is deeply concerned by the view that the financial position of the Scheme can only be improved by blaming and punishing the injured worker and that the employers' push for a reduction in their workers compensation costs and premium reduction will be done at the expense of injured workers and their full recovery.

The FSU submits that it is in the interest of all NSW workers to want a well-managed fund that is financially viable. However, workers should be able to return to work and the community in a safe and sustainable manner.

The FSU believes that the NSW workers compensation performance is attributable to management by WorkCover and its claim agents rather than the level of entitlements available to injured workers. Attempts to blame injured workers for the scheme's shortcomings are unfair and unwarranted.

The FSU calls on the NSW government to achieve substantial improvements in the scheme's performance without resorting to cuts in workers payments. For this to occur Work Cover and the NSW government need to focus on investing their time and energy on developing innovative strategies that will act to substantially improve the scheme's operational and financial performance.

'Competitive Premiums'

The FSU believes the state government is peddling a superficial economic rationale to justify cuts to workers compensation entitlements.

The claim that there will be an exodus of firms and jobs from the offending jurisdiction unless competitive premiums prevail is both misleading and false. It has been historically noted that the threat of a flight of capital is frequently used to play one jurisdiction off against one another. For example, in the 1990's this behaviour was exhibited by state and territory governments competing with each other to see who could reduce workers' entitlements the most. These actions were described by the Industry Commission as 'invidious competition'[17] that only acted to hurt one of the most vulnerable groups in society - injured workers.

The FSU believes that there is a lack of evidence that supports the competitive premiums argument. The reason for this lack of evidence is noted by Dr Kevin Purse who notes that 'the difference in average premium rates between states and territories in Australia is rarely more than 1.5 percent of payroll'[18].

Furthermore, in South Australia the average premium rate during a 10-year period to 2007 varied between 2.46 percent to 3 percent, the highest of all states at that time. In Queensland, at the opposite end of the premium spectrum, the average rate fluctuated between 2.15 percent and 1.2 percent. Despite this differential there has been no evidence presented to suggest it resulted in an exodus of business or jobs from South Australia to Queensland or anywhere else[19].

It seems unlikely that this small premium percentage would be a sufficient reason for the relocation of business from one jurisdiction to the other. Instead, more significant factors such as labour market characteristics, infrastructure, taxation regimes,

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[17] SA Unions Submission 2007
[18] SA Unions Submission 2007
[19] Purse, K. 2011, 'Winding Back Workers Compensation Entitlements in Australia', 24 *Australian Journal of Labour Law* 1.

technology, utilities and rent are more likely to determine a location decision for an employer rather than marginal differences in workers compensation premiums.

The marginal differences in worker compensation premiums is further demonstrated by a Safe Work Australia report that presents standardised average premium rates for the schemes in all Australian jurisdictions[20]. The standardised average premium rates in 2009/2010 for the five mainland states were:

Five mainland states	**Average premium percent (%) of payroll**
Queensland	1.12
Western Australia	1.22
Victoria	1.39
New South Wales	1.82
South Australia	2.76

According to the Safe Work Australia report NSW did not have the highest premium for 2009/2010, which was South Australia with an average premium of 2.7 percent and Queensland and Victoria only had marginally lower premiums compared to NSW with a difference of 0.7 percent and 0.43 percent respectively. This analysis of the average premium rates in the 5 mainland states further demonstrates the lack of evidence to support the competitive premiums argument the Government has adopted to push for significant change to the current Workers Compensation Scheme in NSW.

[20] NSW Parliamentary E-brief, page 13.

Cost Shifting

The inevitable by–product of the 'competitive premiums' doctrine is cost shifting. The Industry Commission in its 1994 review of Workers Compensation arrangements in Australia found that, in net terms, cost shifting occurs on a large scale and cited evidence that suggested in 1991 alone cost shifting may have been in the order of $1 billion[21]. The Industry Commissions' assessment highlights the fact that state based workers' compensation schemes act as a transmission belt for the externalisation of work-related injury costs from employers to injured workers and the broader community, particularly the taxpayer funded social security system. This system of cost shifting means that the community ends up subsidising employers for work-related injury costs, although the extent to which this occurs varies between jurisdictions. This cost shifting approach can act to undermine the motivation for employers to prevent work-related injury and that of employers and insurers in facilitating intervention and rehabilitation[22].

It is the FSU's belief that reductions in employer premiums should be based on improvements in scheme performance. However, this requires better workplace health and safety performance and improved return to work outcomes, as opposed to specious claims about competitiveness made by governments and employer groups.

The FSU calls on the government to invest in initiatives to improve occupational health and safety, claims management, rehabilitation and return to work outcomes and abandon the 'competitive premium' doctrine that favours the requests of some employers at the expense of injured workers.

[21] Purse, K. 2011, 'Winding Back Workers Compensation Entitlements in Australia', 24 *Australian Journal of Labour Law* 1.
[22] Purse, K. 2011, 'Winding Back Workers Compensation Entitlements in Australia', 24 *Australian Journal of Labour Law* 1.

Proposed reforms

The NSW issues paper states that the NSW Workers Compensation Scheme is 'a broken system that does not produce good outcomes for injured workers and without significant improvements it is not financially sustainable'[23]. As a result, the Government has developed a suite of options for comment including 16 areas for potential reform. The options were developed after examining the NSW Scheme and Schemes in other Australian jurisdictions. Unfortunately, it appears that the Government is trending towards a 'low cost - low entitlement'[24] workers compensation scheme.

The FSU disagrees with the premise that the current system requires adjustment to ensure that premiums remain low and NSW remains competitive with other states, namely Victoria and Queensland. The FSU believes that artificial reductions in premiums reduce the economic imperative placed on employers to improve health and safety. It stands to reason that 'competitive premiums' doctrine imposes a dangerous policy rationale that considers the financial interests of the Government and employers at the expense of injured workers. Nevertheless, the FSU believes it is in all stakeholders' interests to have a scheme that seeks to balance the interests of employers and injured workers within a financially viable system.

The FSU believes that the guiding principles for the NSW Workers Compensation Scheme should be:

- Enhancing NSW workplace safety by preventing and reducing incidents and fatalities;
- Promote recovery and health benefits of returning to work by improving the claims management, rehabilitation and return to work process;
- Guarantee quality medical and financial support for injured workers;
- Making it easier for injured workers, employers and service providers to navigate the system.

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[23] Issues Paper, page 4.
[24] Purse, K. 2011, 'Winding Back Workers Compensation Entitlements in Australia', 24 *Australian Journal of Labour Law* 1.

The FSU has considered the 16 proposed reforms by the Government outlined in the issues paper. While one of the options is to increase benefits payable to severely injured workers, several other options would restrict the coverage of the Scheme and reduce workers' entitlements.

In addition, the Government may deem it appropriate to adopt certain features of schemes in other jurisdictions. However, the FSU believes it is necessary to consider the schemes in all elements and that cherry picking workers compensation policy from other states can have dangerous consequences for injured workers. Please find the FSU's specific comments and recommendations on the proposed reforms below.

1. Severely Injured Workers

The Government states in the issues paper that a key plank of any reforms should be to improve the benefits for severely injured workers. The paper then goes on to state that it is considering reforms to severely injured workers who have an assessed level of whole person impairment (WPI) of more than 30 percent to receive improved income support, return to work assistance where feasible, and more generous lump sum compensation[25]. The issues paper does not advise of what the improvement to income support would be, how return to work assistance, (where feasible) would be enacted or outline how lump sum compensation would become more 'generous'.

Recommendation One:

Although the details of how this outcome is to be achieved are not contained in the issues paper, the FSU, in principle supports the improvement of income support, return to work assistance, (where feasible) and more generous lump sum compensation for severely injured workers who have a permanent impairment greater than 30 percent.

[25] Issues Paper, page 22.

2. Removal of Coverage of Journey Claims

In order to provide a closer connection between health and safety responsibilities and workers compensation premiums, the Government wishes to eliminate workers compensation costs arising in circumstances where employers have limited control.

The Government is seeking to remove the coverage of journey claims from the Workers Compensation Scheme as it believes the object of the workers compensation legislation is to provide income support and medical assistance and rehabilitation support for workers injured during the course of their employment.

Under the current system, a worker may be able to make a claim for injuries suffered in the course of most journeys (without significant interruption or diversion) to and from their:

- home (place of abode) and place of employment
- home, place of employment and educational institution if it is required for the worker's employment
- home, place of employment and any other place the worker is required to attend for work-related reasons.

A worker is not able to receive compensation for a journey claim if there is 'serious and wilful misconduct' by the worker[26].

The FSU believes that the proposed reform that seeks to remove journey claims is a blatant cost cutting measure by the Government to preclude workers who are injured on their journey to or from work. By removing journey claims from coverage, the government succeeds in narrowing the range of workplace injuries that WorkCover is liable for; it will not narrow the range of workplace injuries that occur, it will simply mean that those that are injured on their journey to or from work will no longer fall within coverage.

[26] NSW Government WorkCover Authority 2012, *Journey and Work Break Claims*, viewed 11 Mat 2012, <http://www.workcover.nsw.gov.au/injuriesclaims/makingaclaim/Pages/Journeyandworkbreakclaims.aspx>.

The FSU believes the proposed exclusion of journey claims from the current scheme is a deliberate shift costing exercise to move those who would currently fall under the Workers' Compensation scheme to the broader welfare or taxpayer-supported system. At the same time, those injured workers who might have recourse to other schemes such as the motor accidents compensation scheme would be seriously disadvantaged, especially in the short term given the differences between those schemes and the workers compensation scheme which provides earlier and more comprehensive support in the areas of early income support and rehabilitation.

Below is a case study of an FSU member who suffered an injury on her way to work and subsequently made a journey claim (appears as Appendix A). This case study illustrates how the proposed change to remove the coverage of journey claims from the NSW workers compensation scheme will detrimentally impact injured workers like Mrs Lesley Lovell.

Mrs Lesley Lovell, 53 years old.

Mrs Lovell sustained injuries while travelling to work for NRMA Insurance, on a bus, in November 2010. The injuries were to her head, neck, back and right shoulder.

Mrs Lovell is still being treated for the injuries by a neurologist and a pain management specialist. She has taken substantial time off work because of the injuries, and only returned to performing her normal duties in March 2012. Medical specialists believe it is highly likely that Mrs Lovells' injuries will not fully stabilise until at least 2 years from her date of injury in November 2010, and it is also highly likely that she will be left with an assessable whole person impairment (WPI) from the injuries that will interfere with her ongoing work performance. To date there have been no liability issues raised in relation to her injuries, and all her time off work and medical expenses have been met so far.

Under the proposed changes, Mrs Lovell would not be entitled to any workers compensation payments as her injuries occurred while she was travelling on her journey to work. Mrs Lovell has also made a claim under the Motor Accidents Compensation Act regarding her injuries, but that claim comes with its own restrictions, particularly the fact that economic loss payments are not paid while the economic loss is being suffered, but are only paid in one lump sum when the claim is eventually resolved. There is also a significant threshold to overcome before any compensation for non-economic loss is payable in the claim under the Motor Accidents Compensation Act.

Mrs Lovell suffered these injuries on her journey to work and believes that workers like her should continue to be covered for journey claims under the Workers Compensation Scheme.

Recommendation two:

The FSU rejects the proposed change to remove journey claims from the existing scheme and recommends that injuries sustained by employees to and from work remain within the coverage of the Scheme. In addition, although the issues paper did not mention the removal of recess or work break claims the FSU wishes to state that it believes work break claims should not be removed from the Scheme.

3. Prevention of nervous shock claims from relatives or dependents of deceased or injured workers

The Government seeks to prevent the relatives or dependents of deceased or injured workers from making common law claims for nervous shock following the serious injury or death of a worker.

The rationale for abolishing these claims is that an employer's liability for the psychological injuries to family members following the serious injury or death of a worker 'does not fall within the objects of the legislation'[27] and that such claims should no longer be allowed. It is suggested that the prevention of these claims would act to provide a closer connection between work, health and safety responsibilities and workers compensation premiums by eliminating workers compensation costs arising in circumstances over which employers have limited control.

The issues paper then clarifies that although the dependents and relatives of the dead or injured worker will not have access to the common law claims for nervous shock under the proposed change, that the workers who witness the workplace death of a colleague and suffer psychological injury would still be entitled to make a claim under the legislation.

The FSU notes that one of the objectives of the Workers Compensation legislation is to adequately compensate employees for injuries suffered in the course of their employment. Accordingly, it would clearly fit within that objective of the legislation to allow recovery for psychological injuries that arise as a result of a workplace

[27] Issues Paper, page 23.

injury. The law has recognised that employers owe a duty of care to their employees and their close family members including relatives and dependents[28]. The relevant common law principles in this area still require the claimant to establish sufficient connection between the employer's obligations and the damages suffered by the close family members of the killed or injured worker[29].

As the law currently stands these type of claims are only successful if the death or serious injury to the worker has been caused by the negligence or fault of the employer and the relative of the worker suffers from more than just a normal grief reaction. In order for the claim to be successful the relative or dependent must suffer from a diagnosable psychiatric condition, which can often lead to substantial medical treatment and a sustained period away from work.

The FSU believes that if the proposal to prevent nervous shock claims by relatives of killed or injured workers was to succeed that it would result in the relatives of deceased or injured workers being subject to unfair differentiation to relatives of persons deceased or injured due to the negligence of someone other than the person's employer. If this proposal were to be enacted it would be in contrast to the compensation position outlined in the current *Civil Liability Act* (2002) and the *Motor Accidents Compensation Act* (1979).

In addition, the proposal argues that under the current system the dependents or estate of a deceased workers is already entitled to lump sum payments pursuant to section 25 of the Workers Compensation Act 1987. However, the proposal fails to consider that lump sum payments have historically only been paid if the relative claiming nervous shock had a relationship of financial dependency with deceased worker.

The issues paper argues that the premise for removing the provision for nervous shock claims for relatives of killed or injured workers is that an employer's liability for psychological injuries to family members following the death or serious injury of a

[28] *Civil Liability Act* 2002 (NSW) s 30. See, for example, *Gifford v Strang Patrick Stevedoring* (2003) 214 CLR 269.
[29] *Civil Liability Act 2002 (NSW)* s 30. See, for example, *Anthony v Native Landscapes Pty Ltd* (2008) NSWDC 109.

worker does not fall within the objects of the Act. The FSU refutes this claim. It is our understanding that the Act has always been considered beneficial legislation. Further, the issues paper fails to note that the reason for the employer's liability is due to the fact that the employer has been negligent in causing the death or serious injury of a worker.

Recommendation three:

The FSU believes the proposal to prevent nervous shock claims from relatives or dependants of deceased or injured workers is a deliberate measure by the Government to reduce costs on the scheme and keep premiums at an artificial level. The FSU rejects the proposed change to prevent nervous shock claims by relatives of killed and injured workers and recommends that relatives and dependants of deceased or injured workers continue to have access to making common law claims for nervous shock.

4. Simplify the definition of 'Pre-injury earnings'

The Government states in the issues paper that it wishes to create a single measure for pre-injury earnings. It argues that this change is beneficial as it seeks to remove the existing disparity between the benefits paid to award and non-award workers. It also advises that the simplification of the definition of 'pre-injury earnings' would act to simplify the administration of the benefit arrangements and result in reduced disputes. In addition, the issues paper notes that NSW is the only state that does not take regular overtime and other allowances into account when calculating a totally incapacitated worker's weekly payment[30].

Under the current scheme workers employed on awards and other industrial instruments have pre-injury earnings calculated differently to those injured workers who do not fall under an award or industrial instrument.

Most, if not all finance sector workers fall under the modern *Banking Finance and Insurance Award* that came into being in January 2010. Further, most of the major

[30] Issues Paper, page 24.

finance employers have an FSU negotiated collective bargaining industrial instrument that may contain additional provisions regarding make up pay and other workers compensation provisions.

Currently finance sector workers that fall under the *Banking Finance and Insurance Award (2010)* or an industrial agreement, receive 100 percent of their current weekly wage rate during the first 26 weeks of incapacity. However, workers who do not fall under an award or industrial agreement receive only 80 percent of their average weekly earnings (including regular over time and allowances). Both award and non-award workers may not receive more than $1838.70 per week.

The FSU believes injured workers that fall under an award or industrial agreement who receive 100% of their weekly wage rate (although they are not entitled to receive overtime or allowances) are better off than injured workers that do not fall under an award and whom only receive 80% of their *average* weekly earnings (however, this calculation does include regular overtime and allowances). The FSU believes the current scheme that entitles an injured worker in the Finance Sector to receive 100 % of their weekly wage for the first 26 weeks of incapacity as appropriate. However, the FSU is not opposed to the creation of additional provisions that would also include payments to workers that would recognise any usual overtime or allowance(s) the injured worker was usually entitled to, if not incapacitated on the basis that this is aimed at restoring the financial position of injured workers and her/ his family to the pre-injury levels.

Recommendation four:

The FSU is not adverse to the simplification of the definition of pre-injury earnings. However, it is adverse to any reductions in the current entitlements that finance sector workers are able to access under the current scheme. The FSU would recommend that the current scheme that entitles an injured worker to receive 100 percent of their weekly wage for the first 26 weeks of incapacity as generally sufficient. However, the FSU is not opposed to the Government creating additional provisions that would also include payments to workers that would recognise any usual over time or allowance(s) the injured worker was usually

entitled to, if not incapacitated, on the basis that this is aimed at restoring the financial position of injured workers and her/ his family to the pre-injury levels.

5. Incapacity Payments and Total Incapacity

The Government is considering aligning the NSW workers compensation step-down model more closely with other jurisdictions. It wishes to establish a step-down in weekly payments for workers with total incapacity prior to the current step-down of 26 weeks. The rationale behind the step-down is that it wishes to more closely align the step-down period with clinical recovery patterns, citing that most fractures heal within 6 weeks and many other injuries have a healing period within 13 weeks. In addition it also states that a step-down creates a financial incentive to return to work. The issues paper also identifies that an earlier step down would harmonise NSW arrangements with other states. In NSW the first step down commences at the 26th week of incapacity compared with Victoria and South Australia (commencing the first step down at week 13)[31].

In NSW, at the 26th week of incapacity, weekly payments revert to the NSW statutory rate of benefits of $432.50 per week for a single person (with further allowances are made for dependents). The FSU notes that the term 'step-down' is actually code for cuts in compensation payments, which are invariably described as too generous. One of the most perverse features of step-downs is that they generally act to penalise workers with the most severe injuries. The FSU believes that step-downs do not act to reduce work-related industry costs, but instead simply shift the cost from the states workers' compensation fund to the social security system.

Advocates of step-downs argue that longer periods off work are evidence of malingering by injured workers. However, the more plausible explanation is that higher payments enable workers to recover more fully before returning to work. Conversely, substantial cuts in payments create economic pressures forcing injured workers into returning to work before they have recovered which often increases the

[31] Issues Paper, page 25.

risk of aggravation or recurrence of their initial injury[32]. This approach of blaming the victim is anathema to a society that prides itself in defending the most vulnerable as a measure of its social and cultural maturity.

Further to this, the issues paper cites a 13-week period as being ideal as many physical injuries heal within this timeframe. The FSU is unconvinced of the veracity of this claim by the Government, however wishes to point out that the workers compensation scheme also provides for injured workers who have sustained psychological injury, which the issues paper fails to consider. Too many FSU members have suffered the trauma of violent armed hold ups at work and while only a few of these traumas end in long term debilitating psychological injuries, those that do are certainly serious and genuine. It would be wrong to force these victims of criminal activity back to work prematurely and it is highly likely that to do so would either force their permanent withdrawal from the workforce or intensification of their psychological injuries, or both.

A report by the Australian Bankers' Association (ABA) shows that finance sector workers, particularly bank workers, are disproportionately exposed to levels of crime and violence in their workplace, as compared to other industries. The ABA report found that NSW bank workers experienced just under half of all armed attack incidents in Australia over a 10 year period from 1998 to 2007. Furthermore, through out this period NSW bank workers also sustained the highest average number of staff that were menaced during an armed attack incident, being 3.63 staff menaced per incident[33]. The FSU believes injured workers, particularly injured workers that sustain an injury as they are victims of criminal activity, should be afforded protection through a supportive and viable workers compensation scheme.

Below is a case study of an FSU member (appears as Appendix B). A finance sector worker who worked for a major bank and during her employment was subject to a violent armed robbery. The worker suffered psychical and psychological injuries due

[32] SA Unions Submission 2007
[33] Australian Bankers' Association 2008, Analysis of Survey of Armed Attacks: 1998-2007 Ten Year Summary, ABA Report Unpublished.

to being a victim of crime at the workplace. This members case study illustrates how the Governments proposed changes to reduce total incapacity payments from 26 to 13 weeks and cease payments after a certain period for workers will detrimentally impact injured workers like Amy*.

Amy*, 52 years old.

Amy was injured during an armed robbery while she was working for a major Bank in 2002.

Amy made various attempts to return to work, but she was eventually certified as being unfit for work from 2005.

Her employment with the Bank was soon after terminated.

Amy suffered both physical and psychological injuries during the armed robbery. The physical injuries were assessed at 6 percent whole person impairment and the psychological injuries were assessed at 14 percent whole person impairment.

Amy has since settled her compensation entitlements in an unconventional manner. However, under the proposed changes, although Amy has accepted levels of significant whole person impairment, she would not be entitled to payment of weekly compensation after her employment ended with the Bank.

Amy is still unable to work due to the injuries she suffered, and if she had not settled her entitlements, under the proposed changes, she would currently not be entitled to any workers compensation payments whatsoever.

** Amy is not the real name of the finance sector worker. The name and details of the member have been changed in order to ensure their privacy.*

In addition, below is a case study of another FSU member who suffered an injury on his way to work and subsequently made a workers compensation claim (appears as Appendix C). This case study further illustrates how the Governments proposed changes to reduce payments to reduce total incapacity payments from 26 to 13 weeks and cease payments after a certain period will detrimentally impact injured workers like Mr Bruce Taylor.

Bruce Taylor, 62 years old.

Mr Taylor was injured in a motor vehicle accident during the course of his employment with Australian Super in August 2008. As a result of the significant back injuries that he suffered in that accident, he has not worked since. He is no longer fit for his employment duties as a relationship manager with Australian Super, or his previous employment duties as a maintenance fitter. He is unlikely to work again, having regard to his injury.

Under the current law, Mr Taylor is entitled to be paid weekly payments of compensation until his 66th birthday and his ongoing medical expenses. Under the proposed changes, he would only be entitled to weekly payments of compensation for a specific period, and he would then be forced to rely upon his savings or Centrelink benefits.

Mr Taylor suffered these injuries during his employment and believes that workers like him should continue to be covered by full incapacity payments. As well as receiving continued access to ongoing medical costs under the Workers Compensation Scheme.

Recommendation five:

The FSU rejects the Governments proposal to cut total incapacity payments from 26 to 13 weeks and recommends that injured workers continue to be able to receive the current benefit of pre-injury earnings up to 26 weeks before reverting to the statutory rate.

6. Incapacity payments- partial incapacity

The Government claims that current payments for partial incapacity do not encourage recovery and return to full employment. It is proposing to reform benefits for workers who have a partial incapacity under the premise of encouraging recovery and return to

full employment. The issues paper also notes that Victoria and South Australia use financial disincentives to prevent long-term dependency[34].

The FSU believes the Government's proposal to use financial disincentives to prevent dependency fails to consider the fact that injured workers overwhelmingly want to return to work, as it is through work that most people define themselves. The notion that injured workers require cuts in payments to return to work is in part based on studies which show that return to work outcomes involving compensation recipients are lower than for non compensation recipients. However, the critical flaw in these studies is that the workers compensation scheme is much more adversarial and can give rise to anti-therapeutic effects which can hinder the return to work process. Comparing compensation recipients and non-compensation recipients is like comparing apples with oranges[35]. The FSU notes that some economic literature suggests that higher weekly payments result in increased claim duration. Although there is a statistical connection between the two it is much more modest than often claimed[36].

The FSU believes that the level of income replacement is not a key determinant in driving return to work performance. In contrast, there are a number of other factors which do significantly influence a scheme's return to work rate. Apart from the nature and severity of injury, these include the size of the employing organisation, the attitude of its management towards injured workers, the organisation's workplace culture along with the rehabilitation process and its administration.

Below is a case study of an FSU member who suffered an injury through the course of her employment (appears as Appendix D). This case study illustrates how the Governments proposed changes to reduce payments to partially incapacitated workers and increase benefits as working hours increase will detrimentally impact injured workers like Mrs Rosemary Davies.

[34] Issues Paper, page 25.
[35] SA Unions Submission 2007
[36] SA Unions Submission 2007

Rosemary Davies, 58 years old.

Mrs Davies was injured due to the nature of her employment duties (using her right arm repeatedly to operate a keyboard and lift large amounts of coinage) with Westpac Banking Corporation. She was first employed by Westpac in February 1989, and she continued to work for Westpac until July 2009.

Westpac paid for Mrs Davies time off work because of her injuries and for her medical expenses, until 10 July 2009. She has been assessed as having 12% whole person impairment because of her injuries, having had significant right shoulder surgery on 11 December 2008. Mrs Davies now also suffers a similar injury to her left shoulder due to using it more to compensate for loss of use in her right shoulder.

Under the current law, she is entitled to weekly incapacity payments on a continued basis from the date when she last worked for Westpac, and had to find other suitable employment. She is also entitled to lump sum compensation for not only the level of her impairment, but also for her pain and suffering.

Under the proposed changes, it is expected that Mrs Davies would not be entitled to receive weekly incapacity payments on an ongoing basis, even though since leaving Westpac, after 20 years with the organisation, Mrs Davies has rehabilitated herself into suitable employment that caters for her injury, unfortunately her new role does not pay as well as Westpac did. Under the proposed changes, Mrs Davies would be precluded from accessing partial incapacity payments as currently outlined in section 40 of the Workers Compensation Act 1987 and she would also not be entitled to any lump sum compensation for her pain and suffering.

Mrs Davies suffered these injuries due to her employment and believes that workers like her should continue to be covered for partial incapacity payments and lump sum compensation for pain and suffering under the Workers Compensation Scheme.

Recommendation six:

The FSU rejects the Government's proposal to reduce payments to partially incapacitated workers and increase benefits as working hours increase. Instead the FSU calls on the government to invest in initiatives to improve occupational health and safety, claims management, rehabilitation and return to work outcomes so as to

provide genuine support to injured workers so that they may return to work and the community in a safe and sustainable manner.

7. Work Capacity Testing

The Government is seeking to establish work capacity testing at specific points to assist injured workers on long-term weekly benefits in transitioning back into paid employment. The issues paper notes that in the lead up to a test, workers would need to be supported by appropriate rehabilitation. In addition, the issues paper states that continuing to pay weekly benefits for workers' many years after a work place injury reinforces the perception that they are still 'injured'. The rationale for this proposed reform is that it could act to reduce weekly benefit liabilities of the scheme and therefore improve the overall performance of the scheme[37].

The FSU is deeply concerned by the rationale of the Government and the weight given to the idea that continued financial support reinforces a perception of injury. The FSU would suggest that if the injured worker is still receiving payment many years after a workplace injury has occurred, this is due to the fact that the injured worker actually remains injured.

The FSU is also concerned about the proposal to implement a work capacity test in order to transition injured workers back to paid employment. Currently, injured workers are advised by their treating doctor and specialists, who are trained medical professionals and are able to assess the injured workers ability to return to work or otherwise. It is unclear in the issues paper who would be performing the work capacity test. However, the FSU would raise concerns if the work capacity tests were to be carried out by anyone other than the injured worker's treating doctor, who under the current scheme is the sole party that is able to determine when an injured worker should return to work. The right of citizens (including injured workers) to choose their own treating doctors is a fundamental tenet of the Australian health care system. This represents good clinical practice, given that treating doctors have full access to

[37] Issues Paper, page 26.

medical history and are typically more familiar with the patient's needs in the context of relevant local factors.

The FSU maintains that treating doctors and other medical professionals are best placed to determine when a worker is able to return to work and should remain the sole party to advise on this matter. Further to this, if the work capacity tests were to be carried out by insurers or agents of insurers a conflict of interest would potentially arise for the insurer or insurers' agents, when considering returning an injured worker to work, given the interests of the insurers in minimising their costs.

Recommendation seven:

The FSU rejects the Governments proposal to implement work capacity tests and believes that only treating medical professionals of the injured worker should be able to determine when an injured worker is fit to return to work. However, the FSU strongly supports sincere initiatives to improve occupational health and safety, claims management, rehabilitation and return to work processes, so long as it provides genuine support to injured workers so that they may return to work and the community in a safe and sustainable manner.

8. Cap Weekly Payment Duration

The Government is considering capping weekly payments to a certain timeframe for workers with a lower level of permanent impairment. The issues paper states that this measure would act to give workers a fixed timeframe during which they know they need to work toward a certain level of work readiness and reiterates its concern that paying weekly benefits many years after a workers' workplace injury reinforces the perception that the worker is still injured[38].

It appears the Government is looking to impose further 'step down' measures in order to cut injured workers off from receiving benefits from the NSW Workers Compensation Scheme that they would otherwise be entitled to. The current time limits on weekly payments in New South Wales for total incapacity extend to

[38] Issues Paper, page 26.

retirement age plus 52 weeks and 104 weeks for partial incapacity (if the injured worker has not sought suitable employment or if the injured worker has failed to obtain employment due to labour market conditions).

Again, the FSU expresses deep concern with the issue papers claim that an injured worker that continues to receive benefits years after a workplace injury has the notion that they are injured reinforced by receiving the weekly payment. This is counterintuitive. Instead, the FSU believes that the correct interpretation of the phenomenon of injured workers continuing to receive payments years after the time of initial injury was sustained is due to the fact that the injured worker continues to be injured. We reject a one sided notion of cutting off all long term injured workers from ongoing income support as a means to dealing with isolated anecdotes of alleged malingering without recourse to adequate and sufficient lump sum settlement options.

The FSU believes that one of the most perverse features of step-downs is that they generally act to penalise workers with the most severe injuries and they simply shift the cost from the state's workers' compensation fund to the injured worker and the social security system.

Recommendation eight:

The FSU rejects the Governments proposal to cease payments after a certain period for workers with a lower level of impairment and instead recommends that the Government maintain the current model where total incapacity payments extend to retirement age plus 52 weeks and 104 weeks for partial incapacity.

9. Remove 'pain and suffering' as a separate category of compensation

The Government is seeking to remove pain and suffering as a separate category for lump sum payments. The rationale for this is that the category of benefits is an anomaly arising from changes in the late 1980s and that it creates significant disputation and legal costs. The paper also suggests that by removing pain and

suffering as a separate category, it would result in a more objective measure of the worker's physical impairment[39].

The FSU believes that workers should be able to receive payments for pain and suffering caused by the negligence of their employer. Removing this category of compensation (up to $50,000 for pain and suffering, only payable if the injured worker has at least 10 percent impairment) unduly eases the burden on employers to provide a safe work place and denies recognition of the pain and suffering caused by workplace injuries.

The amount of compensation payable for pain and suffering claims is determined by reference to a percentage of a most extreme case. The definition of 'a most extreme case' includes such injuries as brain damage and quadriplegia. As it stands, a most extreme case would attract the amount of $50,000. However, the payment of the full amount is rarely seen and the amount has remained unchanged since 2002.

The FSU believes that an entitlement to graduated pain and suffering compensation serves to acknowledge the seriousness of a particular injured worker's injuries by recognising different levels of actual pain and suffering. Further, the pain and suffering of an injured worker may arise from two or more different injuries, which may be assessed as the same level of whole person impairment. Although the current system does not provide a formula to determine pain and suffering, it is our experience that this does not necessarily cause disputation.

The issues paper argues that the removal of lump sum payments for pain and suffering will assist in reducing disputation. The FSU considers this argument to be misleading and in fact believes that the removal of this provision from the current system could lead to increased disputation as injured workers may choose to dispute their whole person impairment percentage more often, if they are to be precluded from receiving any lump sum compensation for pain and suffering. The FSU believes that the costs associated with increased disputation in the system would far outweigh

[39] Issues Paper, page 26.

the alleged reduction in administrative cost attached to claims made for pain and suffering.

Below is a case study of an FSU member who suffered an injury through the course of her employment (appears as Appendix E). This case study illustrates how the proposed changes to stop lump sum payments for pain and suffering will detrimentally impact injured workers like Ms Rachel Grierson.

Rachel Grierson, 38 years old.

Ms Grierson has suffered significant neck, left shoulder and right side nerve injuries as a result of the nature of her employment with Suncorp Metway from 2002. In March 2010, she eventually under went surgery. She has been assessed as having 24% whole person impairment. Mrs Grierson is considering bringing a work injury damages claim, due to the fact that her employment duties required her to perform keyboard work on a repetitive basis with insufficient breaks. As yet, no liability issues have been raised in relation to her injuries.

Under the current law, should Ms Grierson proceed with a work injury damages claim, it is likely that she would expect to be successful, and receive a substantial settlement to compensate her for the probability that (with the level of her impairment and considering her age) she is going to suffer substantial future economic loss. However, even if she did not decide to proceed with a claim for work injury damages, under the current law, she would be entitled to lump sum compensation for her impairment and for her pain and suffering, as well as ongoing weekly payments of compensation and medical treatment expenses, which considering her age, she is likely to need in the future.

Under the proposed changes, should Ms Grierson decide not to proceed with the work injury damages claim, she would only be entitled to lump sum compensation in relation to her impairment (and not her pain and suffering), and would only be entitled to weekly payments of compensation for a further short period (if at all). She would also not be covered for any future medical treatment.

Recommendation nine:

The FSU rejects the proposal by the Government to remove lump sum payments for pain and suffering and recommends that the Government maintain the provision for lump sum payments when pain and suffering has been caused by a workplace injury. The FSU believes the removal of this category unfairly reduces the economic imperative on employers to improve health and safety in the workplace.

10. Only one claim can be made for whole person impairment and only allow one assessment of impairment for statutory lump sum, WID and commutation

The Government's issues paper identifies the option of having one assessment of whole person impairment for statutory lump sum, commutations and work injury damages. The issues paper notes that there is no reasonable rationale for obtaining multiple reports and it can be distressing for injured workers. It also notes that having one assessment may reduce medical, legal and red tape costs.

The issues paper even goes as far to suggest that by only allowing one claim for whole person impairment it may act to reduce the ability of fraudulent or exaggerated injuries to meet thresholds[40].

The permanent impairment eligibility threshold is set at 1 percent in NSW, except for binaural hearing loss (6 percent) and primary psychological injury (15 percent). Whole Person Impairment threshold is set at 15 percent. Most other jurisdictions carry higher thresholds.

The FSU rejects the Government's claim that only one claim is to be made for whole person impairment (WPI). This practice would preclude injured workers from making further 'top-up' claims if their injury was to worsen or become exacerbated. In addition, the call for only one claim to be made when assessing WPI, WID and commutations is harsh and unreasonable. We are concerned that if a "one claim" model was adopted this would lead to the practice of delaying claims in order to ensure the full extent of the injuries are known beforehand. The consequences of this

[40] *Issues Paper*, page 27.

approach will include injured workers unnecessarily suffering financially and the system dealing with claims many years after the incident in question. These cases will be more complicated and more costly.

The FSU rejects the Government's notion that there is no rationale to obtaining multiple reports when assessing WPI or WID. It is not uncommon for there to be disputes about the level of impairment an injured worker has suffered and it is only fair and reasonable that more than one assessment take place by the insurer's specialist and an independent specialist in order to understand the full nature of the claim and the level of impairment sustained. The FSU is saddened to see that in order for the Government to justify its rationale it must call on extremes such as fraudulent or exaggerated injury. Medical professionals conduct assessments and fraudulent or exaggerated injuries would appear to be the exception, not the norm.

Recommendation ten:

The FSU rejects the proposal to only allow one claim for whole person impairment and only one assessment of impairment for statutory lump sum, WID and commutation. The FSU believes these proposed reforms would only act to punish more severely injured workers or workers who continue to suffer from a deteriorating impairment.

11. Strengthen Work Injury Damages

The Government's issues paper seeks to apply the *Civil Liability Act 2002* provisions on the law of negligence to claims by workers for common law damages. The issues paper puts forward the suggestion that there is no reason to exclude these common law claims from the principles of negligence that apply to other damages claims[41].

Common law claims for workers compensation are already determined under the law of negligence. It is unclear how the Government proposes to align these claims with the *Civil Liability Act 2002* and whether the no fault system would be abolished, which is a central tenet of the current scheme. Other potential issues with this reform

[41] Issues Paper, page 27.

would include contributory negligence making the system more adversarial and potentially increasing legal fees, medical costs and 'red tape' for the injured worker.

The central principles behind the system as it currently stands, is that an injured worker is entitled to bring a work injury damages claim against an employer for an act or omission which results in injury, loss and damage where that act or omission was negligent. The established common law principles of negligence still apply. When bringing a claim for work injury damages an injured worker is required to establish breach of duty of care by his employer under the common law principles.

To apply the *Civil Liability Act 2002* to WID claims would enforce more onerous tests on the injured worker and may act to protect negligent employers from claims for injuries that could have been prevented.

Subjecting an injured worker to the additional tests of the *Civil Liability Act 2002* would go against the principles that an employer's duty of care is far greater than is the case generally and therefore an employee should not have the same onerous hurdles when bringing a negligence claim that apply in general circumstances. Should the *Civil Liability Act 2002* be applied to workplace injuries in NSW, the system would be diverging from decades of common law principle.

Furthermore, an additional factor not considered by the issues paper is that an injured workers' common law entitlements are still governed by the workers compensation legislation. Conversely, under the *Civil Liability Act 2002* an injured plaintiff has access to damages for past and future economic loss, non economic loss (general damages), past and future gratuitous and commercial attendant care services, past and future medical and related treatment expenses, and various other aspects , all of which are not provided for in a work injury damages claim.

Recommendation eleven:

The FSU rejects the proposal to apply the test for negligence from the Civil Liability Act 2002 to work injury damages (WID). The FSU continues to endorse the current no fault system that exists within the Scheme and believes by moving away from the no fault model this could potentially act to exacerbate the already adversarial process and increase legal fees, medical costs and 'red tape' for the injured worker.

12. Cap Medical Coverage Duration

The Government seeks to propose a time limit on claims for medical benefits. There is currently no cap on benefits for medical and related treatment. The issues paper states that many workers have access to medical treatment many years after their injury, and as a result NSW has higher expenditure in this area than all other States[42].

The FSU believes that injured workers should be able to receive payments for ongoing medical costs sustained through a work injury. Removing this provision unfairly passes on the potential ongoing medical costs to the injured worker, Medicare and the social security system.

The core aim of this proposed reform is not to care for and assist injured workers but to reduce injured workers entitlements so as to 'improve' the NSW workers compensation scheme financials. The FSU is concerned by this proposal and notes that the artificial reductions in premiums act to reduce the economic imperative on employers to improve health and safety. This proposal could act to deny injured workers access to ongoing medical and related treatments. This proposal is harsh and unjust.

Below is a case study of an FSU member who suffered an injury through the course of her employment (appears as Appendix F). This case study illustrates how the Government's proposed changes to cap medical benefits will detrimentally impact injured workers like Ms Madeline Garside.

[42] Issues Paper, page 28.

Madeline Garside, 45 years old.

Ms Garside was employed by Westpac as a teller in 1997. In about 2008 she began to notice pain in her right elbow that was caused by counting money and lifting bags of coins. She reported her injury. She saw her general practitioner in February 2009 and was advised she had symptoms of lateral epicondylitis with some nerve involvement. She was prescribed anti-inflammatories, she had nerve conduction studies and an ultrasound was carried out.

Having been certified as unfit for work for two weeks she returned to work as a greeter at first on a full time basis. She could not manage full time work and she had two more weeks off. She then returned to work with her hours gradually increasing to 5 hours a day, 4 days a week.

Ms Garside had blood, cortisone and steroid injections and then had surgery in April 2010. She had four weeks away from work to recover. Surgery helped Ms Gardside but she continued to have pain in her right arm as well as in her neck. She returned to work for 4 hours a day for 4 days a week increasing to 5 hours a day, 4 days a week. She then began to develop problems with her left elbow and after an ultrasound and MRI she was told she had a partial tear in her left elbow.

Westpac wrote to her to advise her that suitable duties were no longer available and she stopped working for them in January 2011. Her general practitioner issued a WorkCover Medical certificate in November 2011 for permanently modified duties including for 25 hours a week. Ms Garside is now working on a casual part time basis as a medical receptionist. She continues to receive weekly payments of compensation for her partial incapacity for work as a result of her injuries.

If the proposed changes are introduced Ms Garside would no longer be entitled to receive weekly payments because her injury dates from 2008 and she would also be precluded from accessing ongoing medical treatments for her injury sustained as a result of her employment.

Ms Garside suffered these injuries during her employment and believes that workers like her should continue to be covered by partial incapacity payments, and access to ongoing medical costs under the Workers Compensation Scheme.

Recommendation twelve:

The FSU believes the Governments proposal to cap medical benefits unfairly prevents injured workers accessing benefits and is a deliberate measure by the Government to reduce costs of the scheme at the expense of injured workers. The FSU rejects this proposed reform and recommends that the current policy be maintained, whereby no caps are placed on benefits for medical and related treatment for injured workers.

13. Strengthen regulatory framework for health providers

The Government seeks to strengthen the regulatory framework for health providers to ensure that Scheme resources are directed to 'evidence-based treatment' with proven outcomes rather than on treatments that maintain dependency[43].

The FSU maintains that the workers compensation system is very rigorous with regular independent medical checks and closely supervised rehabilitation programs for injured workers. As stated previously, the FSU believes that injured workers should be able to receive ongoing benefits for medical and related treatment. The treatment received by the injured worker should aim to assist the injured worker in returning to work, however, regardless of whether this end is achieved, the injured worker, who sustained an injury in their employment should have access to uncapped benefits for medical and related treatment with the focus on treating doctors having proper scope to determine therapeutical approaches in the best interests of their patients. Removing this provision unfairly passes on the potential ongoing medical costs to the injured worker and the social security system.

Recommendation thirteen:

The FSU believes that any unreasonable 'strengthening' of the regulatory framework for health providers may act to unfairly prevent injured workers accessing medical benefits and is a deliberate measure by the Government to reduce costs of the scheme at the expense of injured workers. The FSU rejects the proposed

[43] Issues Paper, page 28.

reform and recommends that the current policy continue, whereby, no caps are placed on the benefits for medical and related treatment received by injured workers.

14. Targeted Commutations

The Government's issues paper calls for targeted commutation. It seeks to allow current commutation thresholds to be relaxed for specific classes of claim on a limited time basis. However, it fails to identify which category of claim or time period is to be exercised. The paper notes that the Scheme Actuary and industry experts have advised against the broadening access to commutations stating that such measures would need to be limited to very specific classes or injury and/or claim[44].

In order to satisfy current requirements to be considered eligible for commutation, an injured worker must have sustained:

- A Whole Person Impairment (WPI) of 15 percent; and,
- Have exhausted return to work options; and,
- Both parties must agree to the commutation (the injured worker and insurer).

The FSU is not adverse to the use of commutations. It acknowledges that for some injured workers it can provide a sense of closure and it finalises liability for the insurer as the injured worker is bought out of future payment schemes.

Nevertheless, the FSU does not condone excessive reliance on commutations, particularly if it is only used as a means of discontinuance to the exclusion of rehabilitation and return to work.

Recommendation fourteen:

The FSU acknowledges that commutations are successful if selectively targeted, but should generally be avoided where a successful return to work is a realistic option.

[44] Issues Paper, page 28.

15. Exclusion of strokes heart attack unless work is a significant contributor

The Government proposes to exclude claims arising from strokes or heart attacks unless work was a significant contributing factor. The paper notes the rationale for this proposal is to eliminate workers compensation costs arising in circumstances over which employers have limited control[45]. Under the current system, a worker may be able to make a claim for a stroke or heart attack during their employment. The FSU believes that the proposed reform that seeks to exclude claims arising from strokes or heart attacks, unless work was a significant contributing factor, is a blatant cost cutting measure by the Government to preclude injured workers from being able to access the scheme.

It can be extremely difficult to identify the significant contributing factor of a stroke or heart attack and what proportion or correlation the workplace contributed to the injury sustained. Medical science is not advanced enough to be able to make such an accurate analysis and therefore by excluding claims arising from strokes or heart attacks 'unless work was a significant contributing factor' the government succeeds in narrowing the range of workplace injuries that WorkCover is liable for. Given the current limitations of medical science, the legal system has adopted a workable approach to determining when heart attacks and strokes are sufficiently connected to work to bring these conditions within the scope of the workers compensation system. The government's approach will simply lift the bar above the level determined by case law and medical science; it will not reduce the number of heart attacks or strokes. On the contrary, increasing the liability threshold for heart attacks and strokes in the modern economy where work intensification, precarious employment and performance benchmarks are critical determinants of work practices and workplace culture risks increasing the likelihood of these injuries. The proposed measure will not narrow the range of workplace injuries that occur, it will simply mean that many injured workers that suffer a hear attack or stroke at work will no longer fall within coverage of the scheme.

[45] Issues Paper, page 28.

Recommendation fifteen:

The FSU believes the proposal to exclude claims arising from strokes or heart attacks, 'unless work was a significant contributing factor', from the current scheme, is a deliberate shift costing exercise to move those who would currently fall under the workers compensation scheme to the broader welfare or taxpayer supported system. The FSU rejects the proposed change to exclude strokes and heart attacks, unless work was a significant contributing factor and instead recommends that injured workers that suffer strokes and heart attacks in their employment continue to fall under the coverage of the scheme.

Conclusion

It is with sincere concern that the FSU notes that the protection of injured workers appears to be increasingly subordinated by the narrow and short term financial interests of employers and Governments. These developments have been illustrated in recent years by the 2008 legislation championed by the Rann Labor Government in South Australia as well as the 1992 legislative package enacted by the Kennett Liberal-National Government. It would appear that the NSW Government is looking to continue the trend towards a 'low cost - low entitlement'[46] workers compensation scheme. The FSU calls on the Government to reverse this policy trajectory and to refrain from reducing the entitlements of injured workers in NSW.

The FSU calls on the Government to favour workers' welfare and security as being in the common good, and move from advocating cost cutting and administrative simplicity to investing in protective, innovative and preventative measures for the benefit of all NSW workers.

The issues paper released by the Government contains a number of options for reform. While one of the options is to increase benefits payable to severely injured workers, most of the other options would restrict the coverage of the Scheme and reduce workers' entitlements.

We are disappointed that the Government has based the issues paper on:

1. The dangerous and false premise that corporations will decide to invest in or divest jobs in NSW because of minute variations in workers compensation premiums; and,
2. The regressive view that it is a legitimate option for injured workers to be starved back to work before they are medically fit to reduce the costs of the system.

[46] Purse, K. 2011, 'Winding Back Workers Compensation Entitlements in Australia', *Australian Journal of Labour Law*, vol.24, pp. 1-16.

The first of these is demonstrably false as investment decisions will be made on much more substantial differences as outlined above in this submission.

The second element is a blame-laden perspective that has its genesis in bygone days when the unemployed, the disadvantaged, the injured and the poor were considered to be personally responsible for their own plights because they lacked a work ethic or were morally wanting.

The Government may deem it appropriate to adopt certain features of schemes in other jurisdictions. However, the FSU does not. We believe it is necessary to consider the schemes in all elements and that cherry picking workers compensation policy from other states can have dangerous consequences for injured workers.

The FSU believes that if the Government feels that the NSW workers compensation system needs to be reformed then we should have the debate using the facts. The FSU calls on the Government to lead a NSW workers compensation debate where all options are on the table, including national harmonisation systems so that States do not undercut each other and there is a balanced approach between long term benefits and common law rights.

Instead the people of NSW have been subjected to a 'competitive premiums' doctrine, which is being is used by the Government in order to facilitate artificial reductions in worker's compensation costs for employers. This reduction propels the externalisation of work-related injury costs to injured workers and taxpayers via the social security system.

The FSU submits that the core reforms proposed in the paper give little consideration for the plight of injured workers and their needs and it appears the reforms, if enacted, will no doubt launch a race to the bottom, to the detriment of injured workers in NSW and potentially throughout Australia.

Appendices

Appendix A: Mrs Lesley Lovell, 53 years old.

Mrs Lovell sustained injuries while travelling to work for NRMA Insurance, on a bus, in November 2010. The injuries were to her head, neck, back and right shoulder.

Mrs Lovell is still being treated for the injuries by a neurologist and a pain management specialist. She has taken substantial time off work because of the injuries, and only returned to performing her normal duties in March 2012. Medical specialists believe it is highly likely that Mrs Lovells' injuries will not fully stabilise until at least 2 years from her date of injury in November 2010, and it is also highly likely that she will be left with an assessable whole person impairment (WPI) from the injuries that will interfere with her ongoing work performance. To date there have been no liability issues raised in relation to her injuries, and all her time off work and medical expenses have been met so far.

Under the proposed changes, Mrs Lovell would not be entitled to any workers compensation payments as her injuries occurred while she was travelling on her journey to work. Mrs Lovell has also made a claim under the Motor Accidents Compensation Act regarding her injuries, but that claim comes with its own restrictions, particularly the fact that economic loss payments are not paid while the economic loss is being suffered, but are only paid in one lump sum when the claim is eventually resolved. There is also a significant threshold to overcome before any compensation for non-economic loss is payable in the claim under the Motor Accidents Compensation Act.

Mrs Lovell suffered these injuries on her journey to work and believes that workers like her should continue to be covered for journey claims under the Workers Compensation Scheme.

Appendix B: Amy* 52 years old.

Amy was injured during an armed robbery while she was working for a major Bank in 2002.

Amy made various attempts to return to work, but she was eventually certified as being unfit for work from 2005.

Her employment with the Bank was soon after terminated.

Amy suffered both physical and psychological injuries during the armed robbery. The physical injuries were assessed at 6 percent whole person impairment and the psychological injuries were assessed at 14 percent whole person impairment.

Amy has since settled her compensation entitlements in an unconventional manner. However, under the proposed changes, although Amy has accepted levels of significant whole person impairment, she would not be entitled to payment of weekly compensation after her employment ended with the Bank.

Amy is still unable to work due to the injuries she suffered, and if she had not settled her entitlements, under the proposed changes, she would currently not be entitled to any workers compensation payments whatsoever.

(Amy is not the real name of the finance sector worker. The name and details of the member have been changed in order to ensure their privacy.)*

Appendix C: Bruce Taylor, 62 years old.

Mr Taylor was injured in a motor vehicle accident during the course of his employment with Australian Super in August 2008. As a result of the significant back injuries that he suffered in that accident, he has not worked since. He is no longer fit for his employment duties as a relationship manager with Australian Super, or his previous employment duties as a maintenance fitter. He is unlikely to work again, having regard to his injury.

Under the current law, Mr Taylor is entitled to be paid weekly payments of compensation until his 66th birthday and his ongoing medical expenses.

Under the proposed changes, he would only be entitled to weekly payments of compensation for a specific period, and he would then be forced to rely upon his savings or Centrelink benefits.

Mr Taylor suffered these injuries during his employment and believes that workers like him should continue to be covered by full incapacity payments and access to ongoing medical costs under the Workers Compensation Scheme.

Appendix D: Rosemary Davies, 58 years old.

Mrs Davies was injured due to the nature of her employment duties (using her right arm repeatedly to operate a keyboard and lift large amounts of coinage) with Westpac Banking Corporation. She was first employed by Westpac in February 1989, and she continued to work for Westpac until July 2009.

Westpac paid for Mrs Davies time off work because of her injuries and for her medical expenses, until 10 July 2009. She has been assessed as having 12% whole person impairment because of her injuries, having had significant right shoulder surgery on 11 December 2008. Mrs Davies now also suffers a similar injury to her left shoulder due to using it more to compensate for loss of use in her right shoulder.

Under the current law, she is entitled to weekly incapacity payments on a continued basis from the date when she last worked for Westpac, and had to find other suitable employment. She is also entitled to lump sum compensation for not only the level of her impairment, but also for her pain and suffering.

Under the proposed changes, it is expected that Mrs Davies would not be entitled to receive weekly incapacity payments on an ongoing basis, even though since leaving Westpac, after 20 years with the organisation, Mrs Davies has rehabilitated herself into suitable employment that caters for her injury, unfortunately her new role does not pay as well as Westpac did. Under the proposed changes, Mrs Davies would be precluded from accessing partial incapacity payments as currently outline in section 40 of the Workers Compensation Act 1987 and she would also not be entitled to any lump sum compensation for her pain and suffering.

Mrs Davies suffered these injuries due to her employment and believes that workers like her should continue to be covered for partial incapacity payments and lump sum compensation for pain and suffering under the Workers Compensation Scheme.

Appendix E: Rachel Grierson, 38 years old.

Ms Grierson has suffered significant neck, left shoulder and right side nerve injuries as a result of the nature of her employment with Suncorp Metway from 2002. In March 2010, she eventually under went surgery. She has been assessed as having 24% whole person impairment. Mrs Grierson is considering bringing a work injury damages claim, due to the fact that her employment duties required her to perform keyboard work on a repetitive basis with insufficient breaks. As yet, no liability issues have been raised in relation to her injuries.

Under the current law, should Ms Grierson proceed with a work injury damages claim, it is likely that she would expect to be successful, and receive a substantial settlement to compensate her for the probability that (with the level of her impairment and considering her age) she is going to suffer substantial future economic loss. However, even if she did not decide to proceed with a claim for work injury damages, under the current law, she would be entitled to lump sum compensation for her impairment and for her pain and suffering, as well as ongoing weekly payments of compensation and medical treatment expenses, which considering her age, she is likely to need in the future.

Under the proposed changes, should Ms Grierson decide not to proceed with the work injury damages claim, she would only be entitled to lump sum compensation in relation to her impairment (and not her pain and suffering), and would only be entitled to weekly payments of compensation for a further short period (if at all). She would also

Appendix F: Madeline Garside, 45 years old.

Ms Garside was employed by Westpac as a teller in 1997. In about 2008 she began to notice pain in her right elbow that was caused by counting money and lifting bags of coins. She reported her injury. She saw her general practitioner in February 2009 and was advised she had symptoms of lateral epicondylitis with some nerve

involvement. She was prescribed anti-inflammatories, she had nerve conduction studies and an ultrasound was carried out.

Having been certified as unfit for work for two weeks she returned to work as a greeter at first on a full time basis. She could not manage full time work and she had two more weeks off. She then returned to work with her hours gradually increasing to 5 hours a day, 4 days a week.

Ms Garside had blood, cortisone and steroid injections and then had surgery in April 2010. She had four weeks away from work to recover. Surgery helped Ms Gardside but she continued to have pain in her right arm as well as in her neck. She returned to work for 4 hours a day for 4 days a week increasing to 5 hours a day, 4 days a week. She then began to develop problems with her left elbow and after an ultrasound and MRI she was told she had a partial tear in her left elbow.

Westpac wrote to her to advise her that suitable duties were no longer available and she stopped working for them in January 2011. Her general practitioner issued a WorkCover Medical certificate in November 2011 for permanently modified duties including for 25 hours a week. Ms Garside is now working on a casual part time basis as a medical receptionist. She continues to receive weekly payments of compensation for her partial incapacity for work as a result of her injuries.

If the proposed changes are introduced Ms Garside would no longer be entitled to receive weekly payments because her injury dates from 2008 and she would also be precluded from accessing ongoing medical treatments for her injury sustained as a result of her employment.

Ms Garside suffered these injuries during her employment and believes that workers like her should continue to be covered by partial incapacity payments, and access to ongoing medical costs under the Workers Compensation Scheme.