

**Submission
No 145**

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

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Inquiry into the NSW Workers Compensation Scheme

**Submission by Insurance Council of Australia to
the Joint Select Committee**

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INTRODUCTION

The Insurance Council of Australia (ICA) is pleased to provide the following submission to the Joint Select Committee on the NSW Workers Compensation Scheme regarding its inquiry into the NSW Workers Compensation Scheme (inquiry).

The NSW Workers Compensation Scheme (Scheme) operates as a hybrid scheme where WorkCover is responsible for underwriting, funds management and premium setting.¹ The ICA's licensed insurer scheme agents are appointed by WorkCover to:

- issue workers compensation insurance policies;
- determine and collect insurance premiums;
- manage workers compensation claims;
- provide support for injured workers, including rehabilitation;
- pay workers compensation benefits to injured workers; and
- manage any third party service providers (eg medical or rehabilitation services).²

At the outset, the ICA acknowledges that a framework to comprehensively address the deteriorating performance of the Scheme will require fundamental scheme reforms and will need to address a wide range of complex underlying factors.

However, given the very specific role of ICA members in the NSW Scheme as scheme agents, this submission is particularly focused on options for change raised in the NSW Government's recently released Issues Paper on the NSW Workers Compensation Scheme (Issues Paper). The matters addressed are those which involve the particular expertise of our members as scheme agents. These matters are:

- measures to improve Return to Work rates;
- the important role of independent medical assessment;
- specific injuries and work related damages; and
- work capacity assessments.

The ICA's submission is therefore principally concerned with the section (a) of the inquiry's Terms of Reference concerning the performance of the scheme in the key objectives of promoting better health outcomes and return to work outcomes for injured workers.

The ICA strongly believes that an effective workers compensation scheme must be designed with a focus on incentives for injury prevention and appropriate care for injured workers. *Effective* return to work incentives for injured workers must be a central feature of a scheme, as well as a clear focus on treatment and rehabilitation, rather than lump sum compensation.

An effective scheme must also ensure that fair benefits are available to all injured workers, with greater support provided for the most seriously injured.

Our licensed insurer scheme agent members strongly support initiatives that will streamline the settlement process and minimise friction costs. Injured people need timely access to injury management, and compensation targeted at optimal health and return to work outcomes.

¹ Comparison of Workers' Compensation Arrangements Australia and New Zealand 2010, p70

² www.workcover.nsw.gov.au

The NSW Scheme Actuaries, Pricewaterhouse Coopers (PwC) has estimated the deficit of the Nominal Insurer to be \$4,083 million, including a risk margin of 12% on the net outstanding claims liability.³

WorkCover commissioned a report by Ernst & Young titled *External Peer Review of Outstanding Claims Liabilities* (EY Report) as an external peer review of the NSW Scheme Actuaries Report. Both The EY Report and the Issues Paper identify the major areas of deterioration in claims experience during the last 6 months as: work injury damages; lump sums; weekly payments; and medical expenses.⁴

The ICA strongly considers that the underlying drivers of the deterioration in scheme liabilities are linked primarily to the current legislation and its application. If this framework is strengthened, as proposed in the Issues Paper, then the licensed insurer scheme agents will be better equipped with the legislative tools required to contain scheme costs and drive better scheme outcomes.

The ICA supports the proposed options for change outlined in the Issues Paper. The options recognise the intention to achieve a reasonable balance between the statutory benefits and protection of injured workers whilst ensuring affordability of premiums for employers.

As noted above, this submission addresses specific options raised in the Issues Paper in the following areas:

- measures to improve return to work (RTW rates) such as step downs and maximum benefits to better incentivise injured workers to return to work;
- centralised independent medical assessment which will provide consistent determination of injuries and work capacity;
- measures to refine the scope of work related injuries and work injury damages; and
- Work Capacity assessments which will ensure long term benefits remain payable to the seriously injured with significant ongoing incapacity.

MEASURES TO IMPROVE RETURN TO WORK RATES

Option 5 - Step-downs for total incapacity payments (Issues paper, p 24)

Option 6 - Financial disincentives for partial incapacity to prevent long term dependency (Issues Paper, p 25)

Option 8 - Cap weekly payment duration (Issues Paper, p 26)

The EY Report states that one of the reasons for the increase in the scheme deficit is an increase in weekly payments over the last six months of \$48million due to higher continuance rates.⁵

³ WorkCover NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer at 31 December 2011, p 262.

⁴ The report of the External Peer Review of Outstanding Claims Liabilities prepared by Ernst & Young, p3

⁵ The report of the External Peer Review of Outstanding Claims Liabilities prepared by Ernst & Young 22 March 2012, p4

The ICA submits that measures to improve return to work rates are one of the levers which may be used to limit such increases. Shortening the time period of weekly benefit payments at the higher rate will, in our view, assist this. The Issues Paper notes that this would be in line with research which indicates that the longer a worker is away from work; the less likely they are to return.⁶ In addition, commencing step downs at 13 weeks will be more consistent with the step down of payments in other jurisdictions.⁷

The ICA submits that this proposed option for change is supported by the Rutherford Review Report into the Tasmanian workers compensation scheme in 2004 which supported the first step-down which reduced the weekly payments to 85% of normal weekly earnings. In fact there was general acceptance among stakeholders that it served as an important incentive for injured workers to return to work.⁸

The ICA supports proposed amendments to the calculation of partial incapacity payments to improve the financial incentive for a partially incapacitated worker to return to pre-injury employment.⁹

The ICA supports option 4 to simplify the definition of pre-injury earnings. This will assist the harmonisation process with other schemes across Australia and thereby support the competitiveness of NSW businesses.

INDEPENDENT MEDICAL ASSESSMENT

Option 1 - Severely injured workers – Whole Person Impairment Threshold of 30% (Issues Paper, p 22)

Option 9 - Remove section 67 “pain and suffering” compensation and incorporate appropriate lump sum benefits for injuries with a greater than 10% WPI (Issues Paper, p 26)

Option 10 - Single claim for WPI compensation (Issues Paper, p 26)

Option 11 - Single assessment of WPI for lump sums, commutations, and work injury damages (Issues Paper, p 27)

Option 13 – Cap medical coverage duration (Issues Paper, p 27)

Option 14 – Strengthen regulatory framework for health providers (Issues Paper, p 28)

The ICA supports the Whole Person Impairment (WPI) thresholds of 30% for serious injuries and this will ensure that the full resources of the scheme can be available to those who need the assistance the most.

⁶ NSW Workers Compensation Scheme Issues Paper (Issues Paper), p 15

⁷ Such as the schemes in Victoria, South Australia and Tasmania.

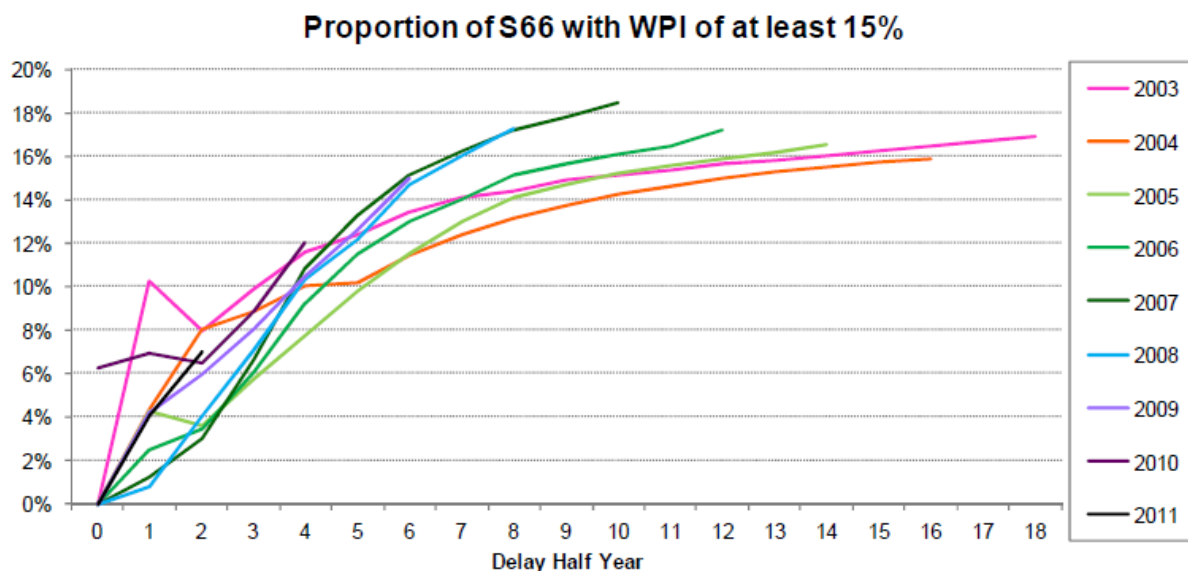
⁸ Rutherford Report on the review of Workers' compensation In Tasmania, February 2004, p2

⁹ Issues Paper, p 17

The figure below shows an increasing percentage of claimants who have a WPI assessment at 15% or higher from 2006 to date.

Since 2006 changes to the procedures which required the use of a single medical assessment in many cases has, in our members' experience, driven this increase.

Our licensed insurer scheme agents have also experienced an increase in claims being reopened following the original claim for lump sum benefits. The new claim is then made using a different assessment which our members believe is used to either "top up" their original claim and/or to support a claim for work injury damages.



Source: PWC – Actuarial Valuation of Outstanding Claims Liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011.

The ICA submits that the assessment of impairment based on objective medical criteria for the purpose of accessing appropriate lump sum compensation, commutations and work injury damages for all claims will ensure friction costs are minimised and more of the compensation premium is paid directly to injured workers.

The independent binding WPI assessment would allow for consistency in the awarding of compensation based on the level of objective impairment suffered by the injured person irrespective of their injury or particular circumstance.

It is our view that this should take place once the injured worker has reached the maximum medical improvement based on suitable guidelines consistent with independent medical research into particular injury types. The entitlements of claimants would not be reduced, but this approach would ensure that applicants do not make multiple claims in this regard.

Further the option to incorporate pain and suffering allowances into WPI tables would also significantly reduce administration and friction costs.

There are different ways in which this can be achieved including the Medical Assessment Service (MAS) currently in operation in the NSW CTP scheme. The ICA supports initiatives which streamline the assessment and settlement process to enable injured workers simpler access to rehabilitation and compensation.

Although those workers who exceed the 30% WPI threshold would have access to the full range of treatment available, we submit that appropriate cost containment measures be put in place such as those employed in the Victorian and Western Australian schemes for the majority of injured workers with less serious injuries. In Victoria medical expenses cease 12 months after the last payment of weekly compensation in addition to payment thresholds and specific benefit arrangements. In Western Australia monetary limits are in place with scope to extend these in special circumstances.¹⁰

As noted above, the ICA's licensed insurer scheme agents have experienced an increase in the number of pre 2002 claims which are re-opened at a rate significantly higher than the rate in which such matters are closed. The single medical assessment process suggested in option 10 may help resolve this issue. Any reactivated claim which relates to a frank injury as opposed to disease related claim should demonstrate that the current claim relates directly to the original injury. Consideration should be given to requiring such exemptions be subject to an independent objective medical assessment before a further claim is made.

SPECIFIC INJURIES AND WORK RELATED DAMAGES

Option 2 – Removal of Journey Claims (Issues Paper, p 22)

Option 3 – Prevention of nervous shock claims (Issues Paper, p 22)

Option 12 - Strengthen Work Injury Damages (Issues Paper, p 27)

Many of the workers compensation schemes across Australia do not provide coverage for journey claims or do so to a limited extent.¹¹ It is also noted in the Issues Paper that the employer does not have any real control over the circumstances of the worker's journey and therefore is restrained from implementing the type of risk management measures which they are able to institute within the workplace.¹²

Some schemes such as Victoria and Northern Territory ensure that any journey claim on the way to and from work which occurs in a motor vehicle accident is purely dealt with under the relevant motor accidents legislation in that state. We submit that an analysis of the likely costs involved be undertaken to ascertain whether the duplication of processes involved in motor vehicle related journey claims and the friction costs involved in having two claims open would be alleviated by ensuring that these types of claims are solely dealt with under the *Motor Accidents Compensation Act 1999 (NSW)*.

For similar reasons in relation to employer control we also support the option to prevent nervous shock claims under the scheme.

The ICA also supports the option to align work injury damages with the provisions of the *Civil Liability Act 2002* in relation to the principles of common law negligence.

Consideration should also be given to amending the stage at which the notification of the work injury damages claim (intimation) should be made. To ensure that such claims are made only

¹⁰ Safe Work Australia Comparative Performance Monitoring Report 13th Edition, p57.

¹¹ Issues Paper, p15

¹² Issues Paper, p22

when there is an identifiable cause of negligence we submit that the timing of the intimation should coincide with the filing of the Statement of Claim and not when the pre-filing of the claim is made. While our licensed insurer scheme agents are committed to the early resolution of such claims, they have experienced a number of matters where the intimation appears to have been lodged without supporting evidence of negligence in the expectation of obtaining a commercial settlement. We submit that this is one of the drivers of the deterioration of the scheme in this area.

WORK CAPACITY ASSESSMENTS

Option 7 – Work Capacity Testing (Issues Paper, p 25)

Option 15 – Targeted Commutation (Issues Paper, p 28)

The ICA strongly supports the implementation of work capacity testing to mitigate the longevity of less significant claims. In addition, the introduction of work capacity testing will bring harmonisation with other schemes such as Victoria and South Australia. NSW has the largest tail liability of all Australian workers compensation schemes as there is no effective mechanism to reduce long term payments to those who may be able to return to the workforce.

The Issues Paper refers to the work capacity testing undertaken in different jurisdictions. In Victoria workers undergo work capacity tests at specified points throughout the claim, and at least once every 2 years. After week 130, workers receive benefits for total incapacity only if they have no work capacity and are likely to have no work capacity for an indefinite period.¹³ South Australia has similar work capacity tests; once workers have passed or are approaching 130 weeks of benefits. Workers are subject to annual reviews to assess their work capacity.¹⁴

In line with our comments above, the application of objective and binding criteria for work capacity assessments at specified points throughout the worker's recovery process will largely address with the continued deterioration in the level of weekly payments highlighted in the EY Report which have been impacted by longer payment periods.¹⁵

Further, binding assessments could significantly reduce friction costs and support return to work outcomes. One such model in current operation is the Victorian scheme where binding medical panels determine a range of disputes.

Option 15 suggests ways in which the level of ongoing payments may be reduced. While the ICA supports measures which aid the appropriate rehabilitation of injured workers back into the workforce, we support targeted commutation through appropriate actuarial analysis as suggested.

¹³ Issues Paper, p16.

¹⁴ *ibid*

¹⁵ EY Report, p 4

CONCLUSION

The Issues Paper has identified a range of measures to achieve a reasonable balance in terms of the statutory benefits and protection provided to injured workers, and affordable premiums.

The ICA and our licensed insurer scheme agents are keen to continue working with the NSW Government and WorkCover to enhance the operation of the workers compensation scheme in the NSW, and to ensure the successful implementation and operation of the proposed options for reform.