Submission No 284

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

Organisation: Marsh Pty Ltd

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MARSH RISK CONSULTING

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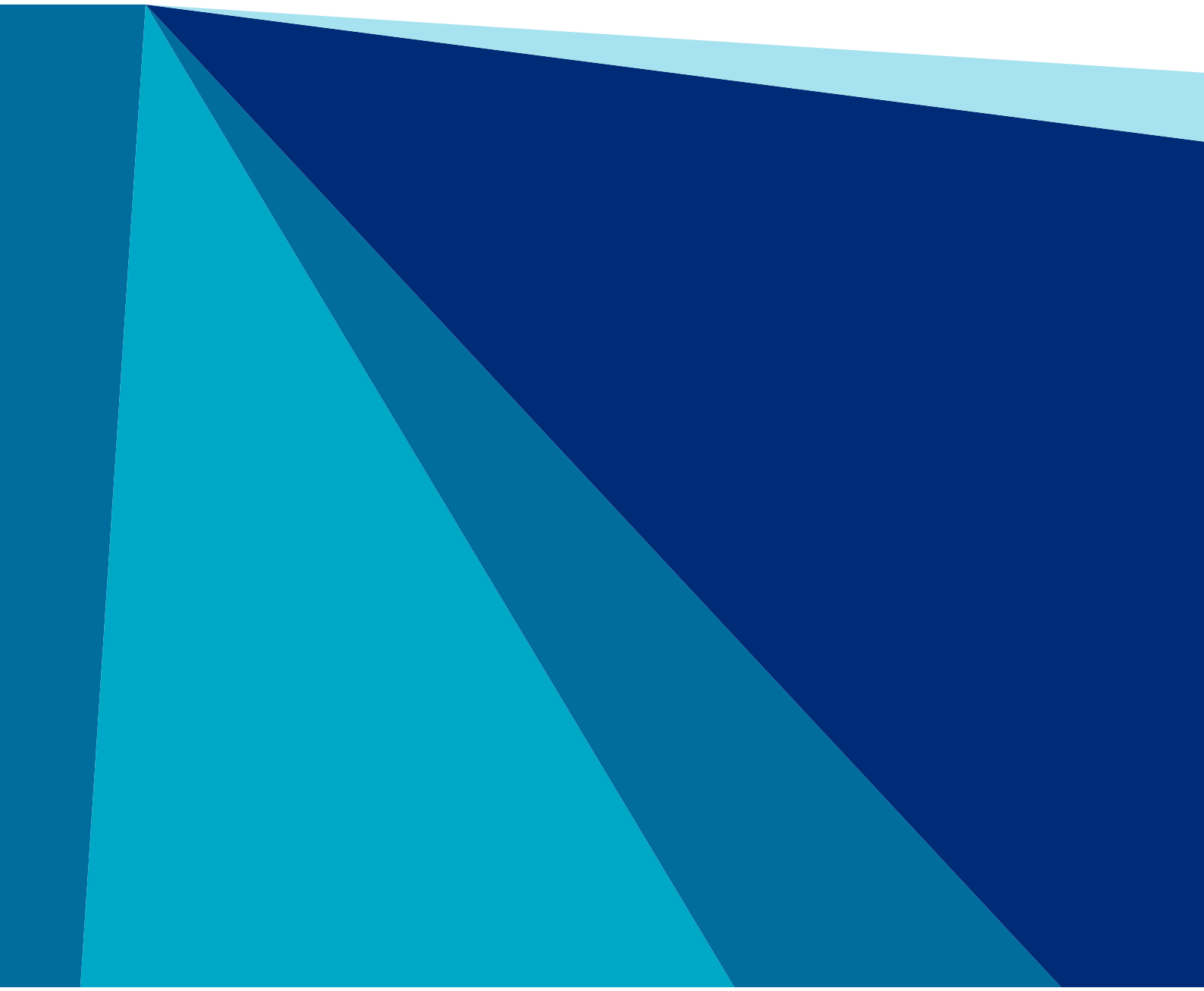
NSW WORKERS COMPENSATION SCHEME

ISSUES PAPER - RESPONSE

17 MAY 2012



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Introduction

Marsh Pty Ltd ("Marsh") welcomes the opportunity to provide our submission in relation to the NSW Workers Compensation Scheme Issues Paper.

Marsh, a global leader in insurance broking and risk management, teams with its client organisations to create innovative solutions that help them protect their future and thrive. In the area of workers compensation, in recent years focus has shifted heavily towards education and development of skills for businesses as a means to improve their injury management performance. This has been supported by stringent Occupational Health & Safety, Workers Compensation and Injury Management legislation.

In supporting our clients, Marsh has extensive experience interacting with industry stakeholders, most notably employers and insurers, but also working directly with WorkCover NSW on a range of matters, in pursuit of best practice outcomes across a range of areas of the Scheme.

We acknowledge that the Terms of Reference for the Joint Select Committee focuses on:

(a) the performance of the Scheme in the key objectives of promoting better health and return to work outcomes for injured workers,

(b) the financial sustainability of the Scheme and its impact on the New South Wales economy, and

(c) the functions and operations of WorkCover NSW.

We further acknowledge that without significant improvements, the current NSW Workers Compensation Scheme is not financially sustainable – particularly noting as at 31 December 2011, the Independent Scheme Actuary calculated the Scheme's deficit at $4.083 billion.

We have observed the document "NSW Workers Compensation Scheme Issues Paper" outlines 16 areas for proposed change and have structured our response accordingly.

We note that the current paper makes no reference to any plans to review the premium calculation methodology or the functions and performance of the Workers Compensation Commission. Our view is that there is significant scope for change in these two key areas however accept this is out of scope for the purposes of this specific review.

Confidentiality
We appreciate the opportunity to provide our formal submission. Please note this submission is provided on the basis that it may be made *public with the name with-held*. Should the Joint Committee seek further input or clarification on any matters contained herein, we would welcome the opportunity to engage directly as we consider highly effective and ongoing stakeholder consultation is a critical pillar towards successful reform.

We look forward to participation in the public hearings to be held in late May.

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Response to Options for Change

1. Severely injured workers

In principle Marsh supports an approach that distributes a higher level of benefit towards the most severely injured workers, particularly in the area of more generous lump sum compensation. This however should not increase the liabilities for lump sum compensation for the Scheme in total. We consider it appropriate to review the entry level threshold for lump sum compensation and also suggest a more robust and fairer method of assessing lump sum compensation is necessary. Whatever the methodology chosen (presently AMA5), there is still too much variability in the assessments of different practitioners despite accreditation in place. The paper suggests 30% whole person impairment may be an appropriate threshold – our experience suggests the frequency of cases satisfying this level is small and that options such as a binding Medical Panel may be appropriate to limit disputes in this area. This is an approach that exists in other state Schemes and appear to provide certainty and achieve the stated objective.

We are uncertain of the rationale behind suggesting increased income support by way of weekly benefits for seriously injured workers (using suggested definition of 30%) necessarily improves a return to work outcome. The Scheme already provides entitlement to medical and rehabilitation expense benefits which if used effectively provide ample financial support to assist with return to work.

2. Removal of journey claims

Marsh supports the removal of journey claim coverage under the workers compensation scheme – specifically as it relates to injuries arising on the way to and from an injured worker's usual place of work. Employers have very limited control over these circumstances, and we note there are many states in Australia where journey claim cover does not apply. We suggest the South Australian application around journey claims has merit in the context that cover will apply where there is evidence supporting a substantial connection to the performance of an injured worker's duties, other than simply going to or from work from one's place of residence.

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

In our view the liability for the psychological injuries to family members following serious injury or death of a worker does not fall within the objects of the legislation.

4. Simplification of the definition of pre-injury earnings and adjustment of pre-injury earnings

The high number of disputes that occur as a result of differences in interpretation regarding pre-injury and average weekly earnings tends to support that the definition does need simplification.

However we suggest caution in relation to whether aligning to actual pre-injury earnings is the most effective or fairest method (to the injured worker or the employer). A retail sector example whereby an employee is injured during a peak business period (e.g. Christmas) earning an actual pre-injury wage only ever intended to apply for a set period would create a situation where that injured worker stood to earn more in weekly benefits than his at work counterparts once the peak period is over. Similarly, this could work in reverse if the employee is injured during an off-peak period but in the event of a longer term injury would attract a reduced benefit as compared to continuing to work through the peak period. This principle applies equally to situations where industry is booming (with work and wages comparatively but not necessarily permanently, high) or where there is a business down-turn (as experienced during the Global Financial Crisis).

We see a more equitable calculation being one which looks at the earnings of comparable employees at given points in time (frequency to be determined, but perhaps quarterly could be administered reasonably efficiently). This premise might also apply for the casual workforce, simplifying the process but also providing fairness to both injured workers and employers at the same time.

5. Incapacity payments – total incapacity

NSW currently applies a step down at 26 weeks for injured workers receiving benefits for total incapacity. We strongly support a much earlier step-down and if alignment to other jurisdictions is important then the 13 week step-down applied in Victoria may be appropriate. It is our experience that only in the extreme few cases should an injury be so severe as to suggest there is NO capacity to perform any work at all. Medical treatments continue to improve each year, with recovery timeframes continuing to contract, so long periods of total incapacity simply do not align with recovery outcomes in non-compensation cases.

A phased step-down approach could create the necessary financial incentive for injured workers to upgrade and make themselves available for some form of restricted duties earlier in the life of a claim.

We propose an initial step-down at 13 weeks to (say) 80% of pre-injury earnings (under revised definition), with a further step-down at 26 weeks to (say) 60% (minimum levels to apply).
We also propose that to further simplify the administration, any 13 and 26 week step-downs ought to apply from date of first incapacity on a calendar basis, rather than a cumulative basis. Our understanding of the purpose of higher entitlements at the outset of a claim is to support the injured worker at or close to their pre-injury rate by way of income support, such that the focus can move towards mobilising the most effective treatment as early as possible, and ensure full engagement in the return to work and rehabilitation process. This is not necessarily enhanced in situations where an

injured worker is sporadically entitled to broken periods of compensation spread over an extended period.

Whilst not specifically referred in the Issues Paper – we feel the Joint Committee may seek to review the calculation of the statutory rate entitlements at whatever step-down point ultimately applied. In the context of circumstances which employers have no control – providing additional benefits for dependents mirrors in part Item 3 (Prevention of nervous shock claims …) in that these benefits could also reasonably be assessed as beyond the object of the Scheme.

6. Incapacity payments – partial incapacity

We agree that the current arrangements for partial incapacity payments do not encourage recovery and return to full employment. The current arrangements work very well in creating an additional financial incentive for injured workers to return in a restricted capacity however there is an obvious disincentive cut-off point whereby entitlements to make-up pay can have the effect of discouraging a return to full employment.

An alternative arrangement or calculation method (which is straightforward administratively) is to have a situation where partial incapacity payments apply only to the extent that the injured worker has achieved a return to work – i.e. if an injured worker returns to work for 25% of his pre-injury hours, he becomes additionally entitled to 25% of his make-up pay entitlement (even under current definition); if that increases to 50% of pre-injury hours, then 50% additional entitlement to the make-up pay component. We suggest some financial modelling could examine the appropriate minimum level that applies in these scenarios so that there is always positive benefit to returning to work on restricted hours (as part of an upgrade program) as compared to the total incapacity benefits described earlier in Item 5 – Incapacity payments – total incapacity).

7. Work capacity testing

The opportunity for effective work capacity testing exists today. Our observation is that it is either inappropriately or inadequately applied by insurers and rehabilitation providers, or as it is applied, for whatever reason a dispute arises, and the case ends up before the Workers Compensation Commission. Insurers should be encouraged to engage effective work capacity testing, so long as it is applied as part of a targeted return to work strategy. We suggest that in a high proportion of cases, where disputes arise, the weight of evidence is often overlooked by Arbitrators and even well structured work capacity testing and associated evidence is deemed ineffective by treating health providers without their own evidence upon which to base their own objection.

Whilst not specifically referenced as an opportunity area for change in the Issues Paper, we would urge the Joint Committee in its review of WorkCover NSW, to extend its review to the performance of the Workers Compensation Commission to ensure that it achieves its role as an independent body engaged to assist in preventing and resolving disputes.

8. Cap weekly payment duration

We acknowledge capping of weekly payment durations exists in other jurisdictions. We support the concept of capping serves clear notice to injured workers they need to work towards a certain level of work readiness.

In the spirit of ensuring the most severely injured workers are fairly compensated, we refer you to Item 1 (Severely Injured Workers) which suggests a definition of 30% whole person impairment might apply. This could serve as the threshold level by which capping does not apply and achieve the objective of directing strong levels of support to those most in need of it, in the Scheme.

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

We support the suggestion that incorporating this provision into lump sum payments for injuries greater than X% ("X" to be defined – we suggest 10% may be low given the comments already made in relation to assessment variability under the application of AMA5). This approach does serve to ensure a more objective measure applies in the context of physical impairment as opposed to what is today a predominantly subjective measure of the worker's "loss". There is a view that having pain & suffering entitlements incorporated into the impairment assessment above a certain threshold limits the sense of 'double-dipping' that arises when injured workers satisfy the work injury damages threshold and commence proceedings under those arrangements.

10. Only one claim can be made for whole person impairment

We support this in principle noting we have seen many examples where regular claims are made for "deterioration" without any particular catalyst and the amounts and percentage deterioration being relatively minor. However, we suggest exceptions must be found for injured workers who suffer genuine and significant complications associated with surgery (for example).

11. One assessment of impairment for statutory lump sum, commutations and work injury damages

Administratively there is benefit to this approach which we support completely. We restate that it may be in the Scheme's interest to consider a Medical Panel type approach to deal with these with a measure of consistency given the high cost nature of the claims in question.

12. Strengthen work injury damages

We support the introduction of negligence provisions such as those that exist within the Civil Liability Act to apply in work injury damages cases. There is a theme permeating the Issues Paper that appears to be recognising circumstances that sit outside the control of the employer. Contributory negligence is an important area to recognise in defending work injury damages claims and we applaud all attempts to review legislation that supports an alignment to the Civil Liability Act provisions.

13. Cap medical coverage duration

We acknowledge there are no formal caps applied on medical coverage duration although are aware of requirements on insurers to seek WorkCover NSW approval at certain junctures where benefit limits exceed certain thresholds ($50,000 for medical expenses for example). Our understanding of that expectation is it is largely administrative in nature – WorkCover NSW may seek to involve itself in terms of strategy as one way to support improved administration. Having noted that, $50,000 expenditure for the average claim is far beyond the point such intervention might take place.

It is our view that insurers already have the ability and tools to apply "limits" in the context of requiring an evidence base for approving treatment modalities on claims – this applies at any point in the claim – at early intervention stage and beyond. We have commented already that perhaps a more salient issue refers to how effective an insurer's evidence is in the context of engaging treating practitioners and supporting their treatment goals and objectives (presuming they are defined and evidence based). Often influencing these arrangements brings about a medical dispute which again if played out falls within the ambit of the Workers Compensation Commission. Insurers have often complained of a perceived unfairness in the manner these disputes are dealt with in the Commission – whilst we have no direct knowledge, again we suggest a review of that function could have high impact outcomes for the purposes of the Joint Committee's Terms of Reference.

14. Strengthen regulatory framework for health providers

Please refer to our commentary regarding Item 13 (Cap medical coverage duration). The ability to fairly apply an evidence based approach is most important here. We are wary of encouraging over-regulation and whilst we hear each year about ongoing education programs for health providers in the responsibilities, obligations and workings of the workers compensation Scheme, we are not convinced that accreditation is the answer. Health providers suggest workers compensation cases are more complex and expectations around accountability and obligations in this realm far outweigh the expectations required of them for non-workers compensation cases. It is a delicate balancing act to keep highly skilled health providers wanting to service workers compensation matters without having them consider it simply too onerous or difficult and opting not to participate in workers compensation cases at all.

Additionally, there is poor application of the provisions surrounding the application of Section 9A (Substantial Contributing Factor) both amongst health providers and insurers which colours the relationship at the outset and promotes the likelihood of disputes that could have been avoided.

We suggest there are gaps in many of the Guidelines that WorkCover NSW has implemented in this area. For example, restrictions around which medical professionals can and can't be engaged with regard to psychological injuries appears onerous and restrictive. There are skills gaps amongst Insurer staff which can lead to incorrectly applying 'evidence' as well. Ultimately, there is no one-size-fits-all solution regarding how best to drive a Scheme-wide culture where well structured and targeted evidence rules the day – this cuts across health providers but also insurer staff in terms of its understand how best to engage and positively influence health providers. Some tightening of the obligations regarding Nominated Treating Doctors would be useful but again, this can become a source of dispute, where given the absolute importance of the Nominated Treating Doctor in influencing recovery and return to work, becomes extremely sensitive to navigate. We have already commented on disputes that reach the Workers Compensation Commission.

We would encourage the Joint Committee, in its review of WorkCover NSW, to agree to publish its health provider engagement strategy for all stakeholders' interest and information. So many stakeholder groups are impacted by the manner in which health providers administer their responsibilities and it may be more useful to have related stakeholder groups contribute to the discussion, rather than deal with each segment in isolation.

15. Targeted commutation

We support the introduction of targeted commutations on a time-limited basis, also limited to particular classes of claim. Our experience is that commutations are available already on a limited basis however with WorkCover NSW having final approval we see very few applications accepted despite what we have perceived as matters which fully satisfy (on a reasonable application) each of the required eligibility criteria.

16. Exclusion of strokes/heat attack unless work a significant contributor

Our view is that this exclusion already applies via Section 9A and 11A, and not specifically to strokes and heart attacks. We are unaware that these two injury categories represented a significant component of the Scheme's liabilities. If they have become a burden on the Scheme we expect it will have been related to matters in dispute which were ultimately accepted under the existing dispute/arbitration arrangements.

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Conclusion

We appreciate the opportunity for stakeholder consultation and in particular would embrace any invitations to contribute to the ongoing dialogue to around options for the Scheme's improvement whilst at all times meeting the broader objectives of the Scheme.

As a practice, Marsh has a track record of providing constructive feedback to WorkCover NSW over many years, representing the perspectives of large and smaller employer organisations, but also bringing to the table the diverse and rich experiences of our own team of highly qualified consultants.

We wish the Joint Committee every success.

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