Submission No 170

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

Organisation: Civil Contractors Federation (NSW)

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Civil Contractors Federation NSW Submission

NSW Workers Compensation System

"Constructing Australia's Infrastructure"

Executive Summary

The Government released on 23rd April 2012 the "NSW Workers Compensation Scheme Issues Paper" (hereafter termed the Issues Paper) wherein it canvassed a number of suggested solutions and options for change.

The Civil Contractors Federation NSW wholeheartedly supports the seven reform principles stated in the Issues Paper. Furthermore, we support most of the options for change raised in the Issues Paper. We have however, also included additional suggestions for reform in our Submission.

The Issues Paper was not accompanied by any actuarial information or advice as to their impact on workers, employers or the Scheme, and so the relative merits of change options remain, to an extent, somewhat open. It should be noted that the recommendations provided in CCF NSW's submission are similarly not supported by actuarial advice, but rather a based on their expected impact on the Scheme. However, whilst the Scheme is an extremely complicated system, it is not so much so that the consequence on outcome of a mooted change in the input conditions or operating system itself will not be known. We thus feel confident that the recommendations are sound.

In drafting our Submission we took great stock in framing our points around the Terms of Reference of the Committee. Many of the points and recommendations naturally impact on more than one dimension of the Terms, and so we have not attempted to lock specific points into specific sections.

The primary points the Civil Contractors Federation NSW presents in our submission are:

- The current Scheme has destroyed the fabric of confidence and trust that is so essential to an effective and efficient Scheme. Its inefficiencies and poor management have let down all parties, and created a culture of defensiveness. Increasingly, this culture is manifesting as

money being the measure of the Scheme, rather than health outcomes and return to work outcomes. Money does not suffice for the lost dignity and sense of helplessness that so often is engendered in claimants within this Scheme;

- The fundamental legislative and regulatory inadequacies of the Scheme must be fixed before any increase in premiums should be considered. To do else would be to squander the economic viability and future of the State;

- Responsibility for management of Scheme claim performance ultimately rests with WorkCover. Transparency however must be provided into individual Agent's performance. Those that perform should be rewarded, and those that are not meeting Scheme objectives need to be managed strongly;

- Early return to work outcomes and early intervention to do so must be improved. To this end, additional motivators for workers to return to work must be introduced. However, this must be underpinned by more timely support, and accurate assessment of their capacity in the early phases of their injury;

- The support must not become itself part of the problem – it must be evidence based and be based on accurate work capacity assessments that are undertaken by parties separate to treatment delivery, and be undertaken throughout a claim at key points in the life of the claim; and

- Finally, innovative insurance opportunities need to be reconsidered for niche, high risk industries, particularly when involved in government servicing where the premium cost returns to the taxpayer.

Introduction

The Civil Contractors Federation NSW is the leading voice of the civil construction industry in NSW. With over 500 employers ranging from Tier 1 ASX listed firms to single person businesses, 45% of which are located in regional and rural NSW, we represent a diverse membership all bound by a common interest in building the infrastructure this State so desperately needs.

As a not-for-profit employer member organisation focused only on the civil construction industry we see with unfettered clarity the issues impacting not only on the business community, but on the tax and rate payers who pay for our services. We have a vested interest in ensuring the NSW economy is strong and the NSW taxpayer is receiving value for money across all lines of Government expenditure.

The Civil Contractors Federation NSW also has a unique perspective in that, as part of a national Federation with Branches in every State and mainland Territory in Australia representing some 2,000 employers across the nation, we are able to assess jurisdictional competitiveness and regulatory efficiency.

As an industry, civil construction is an inherently dangerous one. The nature of the work, the environment we are in, and the machinery we use means that people can get very badly hurt in our workplaces. These are horrible events that are never accepted and tear the fabric of our small

industry, but on each instance these events force us to strive even harder to make our workplaces safer.

We must do more to keep people safe at work. Our Members employ the full spectrum of society, from labourers to civil engineers. In smaller firms and in regional areas they are often whole of family operations, with women increasingly becoming involved in not just the back office activities, but also on the machines. These people, and the people they employ, knit together through the fabric of their communities. Our industry knows all too well why will always need to do more to keep people safe at work.

As we undertake the building of the roads, tunnels and bridges that our community relies on, we expect that our Government will build a workplace injury management scheme that supports adequately the people who are hurt at work, and does so in an efficient and effective manner.

That support must see through the trite concept that such a scheme is all about money. It is not. On reading the System Objectives defined in s3 of the *Workplace Injury Management and Workers Compensation Act 1998* we see that such a system is much more about providing support when and where it is needed, and ensuring the dignity of our injured workers is retained *by* enabling their return to safe and durable work as quickly as possible. Feelings of empathy for the injured and fear that it might be us one day are natural. However, they are easily played on by those who want the current debate over the workers compensation system to focus on money when it should be about support, safe return to work, dignity and trust. In very real terms those shallow arguments tear further apart that which we most need to do.

The NSW workers compensation scheme is broken. It lets everyone down – workers, employers and taxpayer alike. This can no longer be tolerated. Due to the inherent structural weaknesses of the Scheme and due to its poor administration over many years, the system grinds down all who become involved in it. In a response akin to learned helplessness, the parties who have most to lose, workers and employers, ultimately form a defensive posture when claims occur. Trust has long since departed.

The time has come for leadership from our elected officials in Parliament. The workers, employers and taxpayers of this State have a right to expect such leadership.

BODY OF THE SUBMISSION

1. **In order to achieve the objectives of promoting better health outcomes and retuturn to work outcomes, the word "Compensation" should be removed from the title of relevant legislation and regulation.**

The title of legislation and regulation currently implies that 'compensation' is the driver of the Scheme. From the very outset the title bestows an expectation too focused on the wrong message: injury = compensation (and people associate this with money). Rather, a title should be developed to reinforce a focus on rehabilitation and return to work outcomes.

We respectfully recommend that all relevant legislation and Regulation should thus be renamed the 'Workplace Injury Management Act/Regulation', 'Return to Work Act/Regulation' or some other term that focuses, from the outset, on the desired outcome following a workplace injury.

2. **A premium increase of any amount will not remedy the underlying problems facing the NSW Scheme and so will neither ensure its financial sustainability nor promote Scheme objectives. Indeed, an average 28% increase for five only years is not guaranteed to be enough to inoculate the Scheme from further deterioration. Rather than premium increases, reform of the legislation/ regulation/ guidelines and the service provider performance management processes must occur.**

Is 28% for five years enough?

Average increases of 28% are mooted based on the deficit determined by the PwC Actuarial Valuation of Outstanding Claims Report dated 12th March 2012 (hereafter termed the Actuarial Report). We note from page 6 of the Ernst & Young Peer 22nd March 2012 Review of the Actuarial Report (hereafter termed the Peer Review) that it is very possible the deficit estimate of $4b is underestimated by $500m. We further note that the Peer Review suggests at page 4 the claim situation may be in decline for at least another two years. Furthermore, the Actuarial Report makes no allowance for changes to the WHS Act 2011 which mandated from 1st Jan 2012 ongoing hearing testing for all workers exposed to high levels of noise – an activity that will significantly increase claim numbers in coming years.

At current rates of decline the potential deficit could be many billions of dollars higher than the $4b estimated as at 31st December 2011. To our knowledge increasing premiums is not presented by any party as an answer to the structural problems of the Scheme - it is merely a means of paying for this deficit. The underlying premise that the scheme structure is appropriate has been tested and found wanting. **There is no guarantee that average 28% increases for five years will be enough to**

recover the Scheme – without systemic change either larger increases or a longer duration of these inflated levels will very likely be required.

Impact on Economy and Jobs in NSW

The impact of ANY premium increase will have a significant impact on business profitability and so employment and wages. Employers in NSW are, as the Government has reported, already paying premiums significantly higher than our neighbours. We understand recently released employment data shows NSW is also already now lagging other States in employment generation, and has worsening unemployment rates. This is not an economic environment into which any increase in the cost of employing people will be received without a direct impact on employment and wages.

From an industry perspective, our Members typically pay a base tariff premium in the order of five percent of their wages – some pay as high as nearly 12 percent. As we are a high risk sector, any premium increase for our industry will likely be much higher than the "average" scheme increase. **We estimate for our industry it will be in excess of 30%.** Any increase in premiums will thus have a higher impact on us, a critical infrastructure sector.

In the Issues Paper it was stated that NSW employers can be paying 20-60% more than our major competitor jurisdictions. In the high risk industries such as civil construction this is exacerbated, as will be illustrated in the Wilde Civil case below.

There is another impact of premium increases that has been overlooked by most commentators. In a survey of our civil contractor Members in July 2011, we found that nearly **half** of all respondent revenue was sourced directly from federal, state and local governments. 77% of this revenue came

directly from NSW state government contracts. Increasing the costs of running any business (such as increasing premiums) will result in these costs will be passed onto customers where they can. **In the civil industry this will mean premium increases result in the taxpayers and ratepayers of NSW either paying more for civil works OR receiving less infrastructure from the dollars the Government has**.

Where prices to customers cannot be put up, profitability will drop, employer's costs will need to be reduced, or businesses will be wound up. CCF NSW has this month surveyed our Members and 73% of respondents reported that an average increase of 28% in premiums would lead to job losses in their firms.

One Moree based CCF NSW Member, Wilde Civil, has been in operation for 40 years, employs 27 people, and undertakes civil construction work in both Queensland and NSW. They have advised us **they already pay a premium 105% more in NSW than in QLD** (in NSW 4.777% of wages and in QLD 2.324%) – **an increase of 30% will mean they will be paying in nearly three times more in NSW than in QLD**. Wilde Civil have advised us they would likely be forced to move operations from NSW completely should premiums rise further.

We respectfully recommend that rather than implementing ANY premium increases (increases which will do nothing to fix the Scheme problems but will decrease taxpayer value for money, increase unemployment and exert downward pressure on wages) the focus should be solely on reform of both the Scheme and the performance management processes that exist within the Scheme.

The remainder of our submission focuses on providing comments on these points.

3. **The Scheme is too complex and as a result the objectives of achieving better health outcomes and return to work outcomes becomes lost. Financial sustainability of the Scheme will only be assured if leadership is provided by Government to simplify the legislation, regulation and management/operational processes that achieve improved health and return to work outcomes.**

There are two relevant Acts. The two Acts total some 578 pages. The relevant Regulation is 154 pages. There are some 500 Guideline documents totalling approximately 5,000 pages. Much of this documentation is repetitious, poorly worded and conflicting. With no intent to be facetious, we have widely asked of stakeholders the following questions: Is this volume of information capable of being understood by the parties to the Scheme? Is this structure an effective system that aids efficient Scheme application? We are uniformly met with a "No" response to both questions.

We caution however, whilst legislative reform is critical, it is equally as important that strong leadership from Government occur to drive home regulatory and operation process reform within and by WorkCover. Reforms in performance management of the Scheme are essential, and without strong leadership, the reform will be superficial and the gains limited.

We understand WorkCover has recently established a very small Taskforce to review and rationalise the Scheme Guideline documents. Changes to these documents are, from a practical perspective, arguably the most important changes foreshadowed. In workers compensation these documents stretch further into business operations than many other business regulatory lines and are the primary interface service providers and employers have with the Scheme. The formation of a Taskforce to review these documents is thus to be commended. However, we understand the bulk

of the Taskforce is made up of Agent and insurer personnel. We believe other stakeholders should be directly included within the membership of the Taskforce in order to ensure the documentation developed is fully informed and balanced. Reference Groups brought in to review draft documents are never as efficient or effective as getting the draft right in the first instance. In any account, we certainly expect to see the Taskforce transparently operating, operating solely within the direction the Government has for reform, and operating within the principles of the Scheme overall. A balanced outcome capturing the views of all stakeholders should thus be expected to ensue.

We respectfully recommend that the Government take a strong leadership position to drive through reforms which will simplify the legislation and regulation framing the Scheme, and that the Government closely monitor the outcome of the Guideline Working Group to ensure a balanced set of operational documents result that satisfy Scheme objectives.

4. **The Scheme is too complex for most employers and employees to manage effectively and efficiently. This contributes to the creation of a distrustful, defensive relationship between employers and employees, with a consequential negative impact on the financial sustainability of the Scheme.**

As identified in our Recommendation 3 above, the Scheme is too voluminous, intricate, and repetitive. This complexity manifests in a moribund system of operational processes, and generates a feeling of learned helplessness once employees and employers alike become involved in it via a claim.

CCF NSW agrees strongly with the view that, on first occurrence of an injury at work, all but the smallest percentage of employees want to return to work as soon as possible – most do not set out to defraud the system or to damage employers.

Similarly, all but the smallest percentage of employers do not intend to do anything other than support their injured workers get back to work safely and quickly. Furthermore, employers come to appreciate all too well that the cost of an injured worker being away from work is far higher than just the direct claim cost. The expense of finding an alternative short term resource is higher than normal labour, the productivity loss is considerable during the search and training period, the opportunity cost is high, and the internal administrative burden of managing the claim is high.

Moreover, in both the case of employer and employee alike, the system grinds them down. The absence of information, the tick and flick approach to capacity assessments, the lack of direction and personal content and involvement, the bureaucracy that leads to infernal delays, and the slow response to get a third party involved to facilitate a plan to move ahead, all create an environment wherein the parties most at risk in this system, employers and employees, start looking at each other as the cause of their frustration. The two parties that most need to work together begin to distrust each other.

We know from our Member's experiences that not only does this mistrust lead to a very difficult workers compensation case but further, as emotions increase, an industrial relations matter also often arises. Workers feel they are being 'tossed aside' by their employer, and employers feel they are being 'ripped off' by their workers. Once this happens, word spreads on both sides, and a culture of distrust is generated within the firm. The next time an injury occurs, people on both sides immediately move into a defensive position. Then, people amongst different firms start talking and

comparing their negative stories, and suddenly we have a culture across an entire State of distrust. This is exactly what we now have in NSW.

We respectfully recommend that a meaningful and strong set of legislative and regulatory reforms, such as those contained in this Submission, be immediately implemented. These will rebuild employer and worker confidence in the Scheme's ability to achieve its key objectives by focusing on reducing red tape such that early intervention and return to work outcomes are the driving factors of the Scheme.

5. **In order to achieve better health outcomes and return to work outcomes and to improve the financial sustainability of the Scheme there must be more focus on early intervention and getting people back to work safely and quickly – at the moment there is not enough support of injured workers in the early period of a claim.**

We are aware that International and Australian research results overwhelmingly support the view that early intervention in an injury improves return to work rates and that a safe, early return to work is holistically the best solution from both a physical and psycho-social perspective for the employee. CCF NSW is in no position to comment technically on this research however our experience over many years working with our Members on claim issues supports this argument wholeheartedly.

The *Workplace Injury Management & Workers Compensation Act 1998* (hereafter termed WIM & WC Act) Chapter 3 "Workplace Injury Management", s45 provides for the development of an Injury Management Plan when a worker has a significant injury. The WorkCover Guidelines determine that this must be completed within 20 days of the injury. Most workers with a significant injury return to

work on a graduated plan and thus, under the Guidelines, a Return to Work (RTW) Plan must be written. The RTW Plan can be written by a RTW Coordinator within the employer but in the vast majority of claims responsibility for this activity rests with a WorkCover approved Workplace Rehabilitation Provider. This framework is supported fully by CCF NSW.

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

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

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

We respectfully recommend that WorkCover determine why Agents are not following the Act and Guidelines in terms of referral of RTW Plan development, and how much this is costing the Scheme and the employers of NSW.

6. **Agent performance is intimately linked to the financial sustainability of the Scheme, and the Scheme is currently unsustainable and has been trending that way for some time. WorkCover needs to more effectively manage the performance of Agents to achieve better health outcomes and return to work outcomes.**

The previous point raised has indicated a keystone question in relation to Scheme performance - if early intervention is so critical to RTW; if the Casey Report, WorkCover data and our Members are correct that early intervention by Rehabilitation Providers is not being actioned by Agents in a timely fashion; and if the Scheme is in deficit largely due to claims extending and weekly benefits and medical costs; then why has WorkCover not identified and managed this before now?

Both the Actuarial Report and the Peer Review stated that the RTW performance of the Scheme overall had plateaued compared to the previous year, and that the performance of some Agents "...continues to deteriorate" (page 6). The Peer Review further stated on page 8 "WorkCover should take steps to improve the claims management in the scheme especially in relation to the two largest Agents...". Significantly, Peer Reviewed identified clearly that the size of Tail Claims is increasing. this is synonymous with a Scheme wherein the objectives of return to work are not being drive home by WorkCover into its primary service providers – the Agents.

As the definition of "large" in the reports is not clear, CCF NSW has attempted to identify the worst performing Agents. From the last WorkCover Agent performance report dated 30 Jun 2011 it is not

clear who the worst two performing large Agents in terms of RTW outcomes are, however it appears reasonable from the report to say that the performance of Xchanging, Gallagher Bassett and QBE are clearly the worst three. However, as CTX and GB are not "large" Agents, we presume the Actuarial Report and Peer Review thus refers to the second large Agent as being either Allianz or CGU.

We have sought from WorkCover an explanation as to who exactly are the two "large" Agents, and what the Scheme deficit would be if these two Agents had performed at the median of the well performing Agents. We have been advised by WorkCover that the two largest Scheme Agents are QBE and Allianz, but WorkCover have declined to confirm they are the Agents that are referred to in the Actuarial and Peer Review reports.

We have also asked WorkCover what the underperformance of these Agents is costing the Scheme and ultimately the employers and taxpayers of NSW. We received the following response from WorkCover on 16th May 2012:

> *"In respect of Question 3 (b), WorkCover and its seven Agents operate in accordance with the contractual terms and conditions outlined in the 2010 Scheme Agent Deed, which includes protecting confidential information. Performance data is specifically defined as confidential information in the Deed between WorkCover NSW and its agents, and therefore the information you request cannot be released at this time"*

We find this response completely unacceptable. Employers across the State are facing a significant increase in premiums on the back of the underperformance of Agents, and the Government authority responsible for managing their performance is failing to provide employers with performance information so essential to the conduct of a fair an accurate assessment of the

Scheme. The performance of all Agents needs to be made clear – the best should be rewarded and the worst managed. The underperforming Agents need to be identified and the reasons they and are underperforming need to be made clear. Transparency and accountability are essential for confidence.

In an effort to understand the performance picture, we sought advice and comment from the Australian Rehabilitation Providers Association (NSW) about how Workplace Rehabilitation Providers were remunerated in NSW, and if there were any Agents that charged significantly differently from others for such services. We received the following response on 9th May 2012:

> "The current range of WRP fees vary from $143-$200 per hour (plus GST). The most consistent fee applied by agents at the present time is $160 (plus GST).
> CGU applies the lowest rate of $143 for those who have signed their panel agreement. The other outlier is QBE who pay on a fixed fee model for their panel providers.
> It is ARPA's position that QBE's model does conflict with the goals of the scheme as it is a one size fits all model and doesn't address the individual needs of injured workers nor employers. Also as it is fixed fee and fixed program it has the opportunity to undermine the needs of the employer."

We have sought comment from QBE as to whether this situation is correct, however they have not responded. We would be extremely surprised that any Agent would implement a fixed fee and performance based model in such a complex physical and psycho-social problem as management of a workplace injury. In our world fixed price contracts are for well scoped, low risk projects that do not change from activity to activity, and performance fees are paid in an environment wherein the

supplier has considerable control of the activity inputs. This does not appear to reflect the description of a workplace injury.

It is widely accepted that the Scheme's focus must be on early intervention and a safe and timely RTW. We know from the Actuarial Report and the Peer Review that the length of claims, tail claims and claim cost are spiralling out of control. As such, CCF NSW is concerned that QBE's pricing model promotes the "parking" of claims. That is, the Rehabilitation Provider will be commercially driven to, on being sent a 'hard' referral in which the level of effort will be high and the chance of RTW low, not expend support resources on such a claimant but rather focus on the 'easier' claims. It is our understanding that the Rehabilitation Provider has influence but no control over Doctors, Agents, Work Capacity Assessors etc...so how can a fixed price / performance based model commercially work? General commercial contracting principles indicate to us that such a model will keep initial claim costs down but increase total claim cost as more claims move into the tail – this is exactly the situation we are now seeing in the Scheme.

From an *industry* perspective of generic Agent performance, CCF NSW recently conducted a survey of our Members to which **47% of respondents who had had a workers compensation claim believed the claim management process did not adequately address civil construction industry issues**. Whilst we understand that not every claim will be managed by someone familiar with the particular industry of the employer, we would expect Agents could establish some operational processes to ensure the particular needs of an industry are accommodated in the claim management process – surely this would improve RTW outcomes?

From WorkCover Agent Performance Reports and from both the Actuarial Report and Peer Review there clearly appear significant issues with the performance of at least four of the seven Agents in

achieving required RTW outcomes. Why is this the case? The previous point in this submission raised the issue of the timing of referral following injury to Rehabilitation Providers - is this a primary factor for poor performance? Have Agents slipped into an operational behaviour pattern of simply not using the tools the Scheme has already established for early intervention? The pricing model of at least one Agent has been put in question – are the Agent's developing models that unwittingly commercially encourage long claim durations and so attack the foundation of the Scheme? Every worker, every premium paying employer in NSW, ever taxpayer in NSW, has a right to ask and be answered – what has WorkCover been doing about this, and why has it taken a Joint Parliamentary Inquiry to get real action happening?

We respectfully recommend that WorkCover be compelled to make available all performance data of all seven Agents.

We respectfully recommend the Committee require WorkCover to have the following questions answered:

1. Does WorkCover have enough legislative and contractual power to control and performance manage Scheme Agents?
2. Does WorkCover have the resources to skilfully manage the Agents? We note on page 5 of the Peer Review the comment, "The cost of additional highly qualified resources is very small compared to the financial impact the adverse experience is having on the scheme's financial position".
3. How much is the poor performance of the worst performing Agents costing the Scheme? Why are they performing so poorly?
4. Are Agent's operational procedures in terms of pricing models and referral arrangements failing to encourage early intervention and faster RTW?

5. Why has WorkCover not acted on these issues before now? We understand some steps have been taken by WorkCover to address the management issues, but why have they not been taken earlier? We must also ensure that the steps that have been taken are enough by addressing **all** the issues that have been raised. We must learn from our all our mistakes.

7. In order to have a financially sustainable system, normal commercial competitive pressure needs to be brought to bear on Agents. Employers need clarity on performance of Agents so they can select the best provider. WorkCover must release more Agent performance data and in a timely fashion.

The refusal by WorkCover to provide Agent performance data (see Point 6) above illustrates the dire situation employers in NSW have. How can they make informed decisions about which Agent to work with if WorkCover is refusing to provide detail on the performance of their suppliers?

Every six months a summary report of all Agent's performance is released by WorkCover. The most recent release, dated 30 June 2011, was released eight months after the period closed. Furthermore, understanding the document takes some experience and even then is not definitive given the relative merits of each metric.

The report however does not make it clear why the performance of Agents is as it is. Information such as the remuneration model of Service Providers is important for employers to consider, along with the industry portfolio make up of the particular Agent.

We respectfully recommend that WorkCover be compelled to make available all performance data of all seven Agents on a six monthly basis. The data should be no older than three months, and be presented in an "employer-friendly" format.

WORK CAPACITY ASSESSMENT

The process of conducting work capacity assessments is, in our opinion, one of the keystone elements of an efficient workers compensation scheme. We believe there are structural problems with the way this activity is currently undertaken in the NSW Scheme. In this regards we support the thrust of the Issues Paper, however we have some additional concerns and suggestions.

8. **In order to meet Scheme objectives by improving health outcomes and return to work outcomes, the conduct of Work Capacity Assessment should be separated from Injury Treatment.**

We recognise that the principle of timely treatment of an injury cannot be interfered with...this is where the GP forms the vital triage support under TREATMENT. However, one of the major concerns with the current system is that the assessor and the treating party are one in the same entity. This is counter to WorkCover's existing policy that 'other' service providers in the Scheme cannot also deliver treatment.

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

The above approach is supported by Dr Doron Samuell, the Medical Practitioners' representative on the *Workers Compensation and Work Health Safety Advisory Council of NSW*.

A model for this recommendation is presented below to illuminate how our suggestion might operate. We hope in doing so it stimulates discussion on how such a framework might be applied:

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

- Work Capacity Assessments would continue through the entire period of the Claim, with maximum periods set and Assessments undertaken at specific periods in the claim, such as benefits step downs and claim estimates.

9. **In order to meet Scheme objectives by improving health outcomes and return to work outcomes, there must be more structure in the work capacity assessment management process. Clear lines of authority are required to ensure the focus remains on a timely return to work.**

In our Recommendation 8 we have outlined a very practical model for capacity assessment and treatment. The current situation where an NTD can set the capacity and treatment plan largely without dispute is a large part of the inefficiency of the Scheme. If our recommendation 8 is not accepted we respectfully recommend that the Independent Medical Examiner should be given the power to make binding decisions over work capacity, effectively overruling the NTD's assessment.

10. **In order to meet scheme objectives by improving health outcomes and return to work outcomes, the injured worker's exclusive right to select their NTD to do assessments and treatment should be removed.**

In our Recommendation 8 above we have outlined a very practical model for capacity assessment and treatment. The current situation where an NTD can set the capacity and treatment plan largely without dispute is a large part of the inefficiency of the Scheme. If the recommendation is not accepted we respectfully recommend that the Agent have the power to select an NTD, and to thus override an injured worker's selection. This trigger for such a change could, for example, be an IME having a conflicting view of the capacity assessment or treatment plan.

11. In order to meet scheme objectives by improving health outcomes and return to work outcomes, Work Capacity Assessments must be undertaken at key benefit trigger points, and at regular periods throughout the life of a claim.

We respectfully recommend that Work Capacity Assessments continue through the entire period of the Claim, with maximum periods set, and Assessments undertaken at specific periods in the claim, such as benefits step downs and claim estimates.

BENEFITS

12. Benefits for the severely injured to be reviewed.

Whilst we are concerned with the negative consequences to injured workers of long term absences from employment, CCF NSW wholeheartedly supports financial and medical support for the long term seriously injured. We do not consider that the Scheme adequately does this now.

We respectfully recommend that an increase of benefits for the severely injured workers (typically 30% WPI as has been suggested) occur.

13. Total Incapacity: A focus of the Scheme must be to support and encourage recovery and a safe and quick return to work – at the moment there is not enough motivation for injured workers to go back to work quickly.

The *NSW Workers Compensation Issues Paper* released by the Government identifies that the NSW Scheme has no step down provisions in the first 26 weeks of a claim. The experiences anecdotally reported to us by our Members, seemingly widely supported by research, is that the early intervention is key to getting people quickly back to safe and durable work.

CCF NSW considers the current benefits structure wherein a totally incapacitated injured worker receives 100% of pre-injury average wage is thus a significant failing of the system. We have already stated elsewhere in our paper that Work Capacity Assessments need to be undertaken more thoroughly, be separated from the Treatment provider, and be timed to occur at key points in a claims timeline. Furthermore, we have also raised serious concerns about the tardy referral by Agents to Workplace Rehabilitation Providers – this equates to poor support in the early phase of a claim and must be remedied. Our following comments are made with these corrections to the system in mind.

We respectfully recommend that a reduction in benefits occurs at 6 weeks (95%), a further step down at 13 weeks (90%), and a further step down at 26 weeks (80%).

14. Partial Incapacity: A focus of the Scheme must be to support and encourage recovery and a safe and quick return to work – at the moment there is not enough motivation for injured workers to go back to work quickly

As with Total Incapacity, our strong view is that the current scheme for partial incapacity does not motivate workers to return to work to maximum capacity employment. Change should occur that encourages people to return to work, at least in some capacity.

We have already stated elsewhere in our paper that Work Capacity Assessments need to be undertaken more thoroughly, be separated from Treatment provider, and be timed to occur at key points in a claims timeline. Furthermore, we have also raised serious concerns about the tardy referral by Agents to Workplace Rehabilitation Providers – this equates to poor support in the early

phase of a claim and must be remedied. Our following comments are made with these corrections to the system in mind.

We respectfully recommend a reduction in benefits occurs at 6 weeks (95%), a further step down at 13 weeks (90%), and a further step down at 26 weeks (80%). We would recommend consideration also be given to a form of incentive to achieve substantial partial capacity work rather no capacity. If partial capacity gives the same benefits as no capacity, then it could be argued that there is no incentive to gradually return to work. It might be that the steps only apply wherein work capacity is less than a certain percentage, and extended time periods apply as the capacity percentage increases.

15. Medical Benefits: The focus of the Scheme must be to get people back to work safely and quickly – at the moment there is not enough motivation for injured workers to go back to work quickly

We are aware from our Members of cases were treatment seems to proceed unchecked. No-one wins in this scenario except the treatment provider.

Our concerns with respect to medical services include that:

- the provision of treatment without discernable benefit occurs – treatment must be evidence based;
- they be delivered by parties not involved in assessing work capacity;
- the Scheme's current structure generates a culture of dependence upon treatment providers; and
- currently, when there are disputes over medical treatment, the process of resolution is slow and it becomes one of "duelling Doctors". Some treating parties do not have

the expertise or inclination to treat some injuries with a RTW goal in mind. Independent Medical Examiners have little power if they consider treatment is incorrect of excessive. Independent Medical Consultants are ultimately brought in at the dispute management stage – we need to avoid disputes by having a powerful review authority the Agent's can rely upon; and

- Unlimited medical expenses does not motivate workers to return to work

We respectfully recommend that:

a) Decisions on medical treatment be evidence based;

b) Treatment should be supplied by providers who are not involved in the work capacity assessment;

c) The role of Independent Medical Examiner should become one with authority to cease or alter treatment – this would necessarily require a change to permit the Agent to have the power to remove an NTD or treating party from a claim.

d) Medical benefits are capped by both duration and cost except where total WPI exceeds a set level (for example, 30%).

16. Lump Sum Benefits are accessible at too low a level, and create a culture focusing on "compensation" rather than return to work:

In principle, we support the assertion in the Issues Paper that Lump Sum Benefits are too readily accessible. Our support revolves primarily around our belief that the Scheme needs to focus off a culture of compensation.

We respectfully recommend that the level of accessibility be increased in line with other competing jurisdictions.

17. Nervous Shock Claims for Relatives of Deceased or Injured Workers

Our sympathy for the family and loved ones of an injured worker is profound. However, the very human emotion of empathy does not ameliorate the view that employers are not able to control the extent of the impact of an injury on relatives, and we thus believe it inappropriate that they pay for this cost.

We respectfully recommend that benefits for Nervous Shock Claims for Relatives of Deceased or Injured Workers be removed from the Scheme.

18. Exclusion of Strokes and Heart Attack Unless work is a Significant Contributor

An underlying principle of the Scheme must be to provide support to RTW only where there is a sufficient nexus between work and the injury. We do not support the inclusion of non-work related injuries which drain the resources available within the Scheme for work related injuries

We respectfully recommend that benefits for Strokes and Heart Attack be removed from the Scheme unless work is a Significant Contributor

19. Multiple claims for whole person impairment

We respectfully recommend that the number of top up claims not be limited but rather that, as in the Comcare scheme, there be a minimum limit of deterioration upon which the top up can become available.

20. Definition of Pre-injury earnings and adjustment of pre-injury earnings

This is a matter of considerable angst among many employers and employees. We understand it is likely the change might add slightly to Scheme costs however some tension will be removed and the system simplified across jurisdictions.

We respectfully recommend that a single measure be established for pre-injury earnings.

21. To give confidence and build trust in the Scheme to operate equitably, there must be sufficient power for WorkCover and Agents to investigate both fraudulent claims, exaggerated claims, and personal injury aggravation of claims.

Most employees do not have false claims and do not attempt to defraud the system by not declaring personal injuries. However, due to the bureaucracy of the system, there is a perception amongst both employers and employees that the system is prone to these types of fraud. There is a widely held perception by employers in our Membership that there is a reluctance on the part of Agents and WorkCover to pursue and actively investigate claims where the employer believes the claim to be false.

To be clear on the purpose of raising this point – it is not because we believe fraud is a major cost to the Scheme or that most claims are false. Far from it. Rather, our concern is that in the absence of what is perceived to be a robust policing process, trust evaporates. It is the loss of trust which generates the major cost to the Scheme... employers and employees commence a claim management process not trusting each other.

By way of example, we have a case from a Member where a casual employee was terminated by a Sydney based civil contractor. The worker then lodged a claim directly with the Agent the day after his termination. The employer did not receive a notice as the worker was no longer employed with them - as such they were not able to enjoy the early notice of wage excess waiver. Moreover, by the

time the employer was told of the matter the claim had been accepted by the Agent. The employer attempted to argue against the claim's validity, providing witnesses that said the ex-employee had stated widely to colleagues that the claim was false. In our opinion the processing that followed was poorly handled by the system over a period of 15 months, and the matter is ongoing. **Whether the claim was false or not is not the point of this example** – the point is that trust has evaporated, and as a result:

1. The employer in question now has such a negative view of the Scheme they will likely treat the next claimant extremely bullishly; and
2. Employees in the firm have witnessed the tension, and will no doubt be steeling themselves should they ever have to put in a claim.

The inherent weakness in the Scheme for Agents and WorkCover to move fast and with strength to investigate claims well (we would argue at the moment it is a scant assessment) diminishes the confidence employers and employees have in the Scheme to be policed. With a breakdown in trust, all parties naturally move to a more defensive position, and **all** claims become far more difficult to manage quickly.

An operational system that is seen to move quickly and effectively to investigate questionable claims well will improve confidence in the system and improve the level of trust in the system. All genuine claims and claimants will benefit from this.

We respectfully recommend that the legislation, regulation and Guidelines be modified to give Agents the necessary power and authority to move faster and with more effectiveness to investigate suspect claims.

22. In order to meet Scheme objectives and have a financially sustainable Scheme, there must be more power for WorkCover and Agents to enforce timely compliance of a worker to an agreed injury management plan.

Most employees do not set out to breach the intent of the Scheme, however, some do and they can lead to significant scheme expense. It is for this reason that the WIM & WC Act (s57)(1) provides "*If a worker fails unreasonably to comply with a requirement of this Chapter after being requested to do so by the insurer, the worker has no entitlement to weekly payments of compensation during any period that the failure continue...*". This sounds strong, however in practice it is a largely ineffectual provision.

We have been given many examples where a recalcitrant employee can avoid this section being applied, and in so doing extend their claim whilst receiving benefits. Furthermore, repeat occurrences can occur within the one claim with no legislative support to consider prior behaviour. In just one example before us, we have a case where an injured worker had meetings booked with their Rehabilitation Provider in order to review and participate in their agreed RTW Plan (the employee had not been undertaking job seeking as was agreed in the Plan) but they failed to show for four interviews. When the Agent finally intervened, some four weeks after the first meeting was planned, and threatened to send a notice pursuant to s57(2) of the Act, the worker attended a meeting, thereby achieving 'compliance'. However, the injured worker then went on to repeat the behaviour through a subsequent set of three sets of meetings – each time achieving compliance just prior to benefits being withdrawn. This process extended the claim by an estimated six months.

We respectfully recommend that the s57 of the WIM & WC Act, the Regulation and all relevant Guidelines be altered such that:

1. The process of reporting the first observance by service providers of non-compliant like behaviour and the Agent's suspension of benefits without reasonable cause be streamlined such that the process can be actioned in a matter of days, rather than weeks and even months; and
2. A party that repeats non-compliant behaviour, whether they actually have had suspension of benefits in the past or not, moves to an escalated level of management with a faster cut off of benefits.

23. In order to promote the objectives of the Scheme and to ensure the financial viability of the Scheme Journey Claims should be excluded from the Scheme.

Data provided by WorkCover 16th May 2012 to CCF NSW is that Journey Claims in the 2010/2011 year represent ten (10) percent of Scheme claim liability and eight (8) percent of claim numbers. This has been relatively stable across five years. It is disappointing however that WorkCover are unable to provide to us the RTW rates for Journey Claims compared to other claim types, as this might provide considerable insight into the nexus between this type of benefit and cost, injury type and return to work outcomes.

Other jurisdictions have understood that employers have little ability to control the environment of a worker moving to and from work, and employees have little interest in being controlled during this time.

Journey Claims are quite open to dispute given their timing and location when compared to an 'at work' environment. As such they are a claim line that creates significant tension both between employers and the injured party, and between the injured party and other employees.

They further support a compensation orientated culture rather than an injury management culture.

It is our view that it is manifestly inappropriate that a Workers Compensation Scheme should carry the burden of these claims.

We respectfully recommend that the Journey Claims be removed as a provision from the Scheme completely.

24. In order to meet Scheme objectives by improving health outcomes and return to work outcomes and of achieving a financially sustainable Scheme, Pain and Suffering should be removed as a separate category of compensation

This is clearly an anomaly in the Scheme and should be removed. It promotes the culture of "compensation = money" that we believe should be avoided, in favour of one based on rehabilitation and return to work, is a result.

We respectfully recommend that pain and suffering be removed as a separate category of compensation

25. In order to meet scheme objectives by improving health outcomes and return to work outcomes and of achieving a financially sustainable Scheme, Work Injury Damages reform must occur.

The Actuarial Report has drawn close attention to the cost to the Scheme of an increase in work injury damages. Aside the obvious direct Scheme cost issues CCF NSW's great concern is by the separation of the Civil Liability Act's negligence provisions from work injury damages, the culture of "compensation = money" (that we believe should be avoided, in favour of one based on rehabilitation and return to work) is furthered. Such a culture we believe is ultimately far more expensive for the Scheme to manage than just the direct cost of the work injury damage claims before the Scheme today.

We respectfully recommend that the Civil Liability Act provisions dealing with the law of negligence be applied to work injury damages claims.

26. In order to meet Scheme objectives by improving health outcomes and return to work outcomes and of achieving a financially sustainable Scheme, other innovative insurance models need to be considered.

Specialised Insurance has been a closed avenue in NSW for some years now, yet existing Specialised Insurance schemes perform very well and in doing so induce no liability toward the main NSW Scheme. They perform well in no small part because they create a very clear nexus between safety and claim management performance and the size of premium paid, all whilst retaining worker protections provided for under the Act. This is most beneficial to the Scheme in high risk industries.

Specialised insurance cannot of course be privatisation by stealth. The main Scheme must be protected, however to achieve a financially sustainable Scheme and economically competitive State, innovation needs to be encouraged.

We respectfully recommend that specialised insurance arrangements be reopened and that arrangements be made to make them more commercially accessible for niche, high risk industries, particularly when involved in government servicing where the premium cost returns to the taxpayer.

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

Due to the complexity of the issues involved in this Option for Change (11), CCF NSW considers providing recommendations for legislative change to be outside the scope of our expertise. However, we would provide the following comment. The participant's of the Scheme must understand it – it must be either simple or, if complex, fundamental correct. It is our view that the current arrangements are neither.

28. Targeted Commutation.

Due to their complexity of the issues involved in this Option for Change (12), CCF NSW considers providing recommendations for legislative change to be outside the scope of our expertise.