Submission No 142

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

Organisation: The Australian Industry Group

Date received: 17/05/2012

THE AUSTRALIAN INDUSTRY GROUP'S

Submission to the Parliamentary Inquiry to the NSW Workers Compensation Scheme

17 MAY 2012

AUSTRALIAN INDUSTRY GROUP

TABLE OF CONTENTS

INTRODUCTION

The Australian Industry Group (**Ai Group**) has prepared this submission in response to the Parliamentary Inquiry into the NSW Workers Compensation Scheme (**Scheme**) and Issues Paper released on 23 April 2012 (**Issues Paper**). Our submission is based on consultation with member companies that employ workers in NSW and is also informed by our involvement as a registered organisation of employers for more than a century.

Ai Group represents industries with around 440,000 businesses employing around 2.4 million people nationally. Ai Group and its affiliates have approximately 60,000 members and employ in excess of 1.25 million employees in an expanding range of sectors including: manufacturing; engineering; construction; automotive; food; transport; information technology; telecommunications; call centres; labour hire; printing; defence; mining equipment and supplies; airlines; and other industries. In NSW, Ai Group directly represents about 3,000 NSW members who employ up to 400,000 employees.

Ai Group is also a member of the Alliance for a Safer and Competitive Workplace which is comprised of leading business, industry and health advocacy groups in NSW. The Alliance represents more than 15000 members and hundreds of thousands of employees across NSW.

Ai Group strongly supports a fair and sensible workers compensation scheme that provides access to care and support for the seriously injured and a speedy and effective recovery and return for all workers who have suffered an illness or injury at work. Most importantly a workers compensation scheme needs to be efficient, cost effective and fair. The current Scheme has failed to deliver on each of these important outcomes and now faces a large $4.1 billion deficit, which has accumulated quite quickly and accelerating As a result the Government has received advice that it should increase employer premiums by 28 percent unless immediate substantial reforms are made to benefits and/or claims management practices.

It is clear that the Scheme is in disarray, but it is extremely unfair and counterproductive to lump the burden of the deficit directly onto employers. The problems with the Scheme are deeply rooted in poor design and can be fixed with appropriate reform.

Our NSW members consistently identify workers compensation as a key area of business concern, but markedly more so in recent years. It is not disputed by Ai Group and its members that employers have responsibilities to their employees to provide and maintain a healthy and safe work environment. Legislative obligations in this regard flow from the *Work Health and Safety Act 2011* (NSW), which is the primary legislative vehicle for penalising employers who breach their duty of care to workers.

Further, employers accept that they have a level of responsibility to provide support and compensation to a worker if they are injured in the course of performing their work, even on a no fault basis. In return, employers expect a workers compensation scheme which is affordable, and internationally and domestically competitive, without comprising the proper level of benefit necessary to assist employees to rehabilitate and return to pre-injury duties and without any substantial leakage of funds not related to such rehabilitation and recovery, for example inflated incomes provided to service providers. The NSW Scheme over the last 3 years has moved beyond the point where employers feel that this balance exists.

Employers often report feeling alienated and disconnected from the workers compensation process once an employee lodges a claim. This feeling is exacerbated in cases where there is minimal consultation between the doctor and employer regarding an employee's capacity to return to work on light or full duties.

In this submission we propose reforms to the scheme which in our view will address the above concerns expressed by employers as well as reducing the short to medium term cost trends in the Scheme to the point that premium increases are not required to fund the Scheme's short term liabilities. However it is difficult for us to assess the financial impact of such a package and indeed it is possible a more comprehensive set of reforms is required or limits and thresholds set at different levels than discussed below.

We strongly submit that premium increases are not a fair or appropriate remedy for the Scheme's financial problems. Current premium levels should be maintained and reform must be undertaken to the extent necessary to restore financial equilibrium to the Scheme within a reasonable timeframe that would also allow for moderate premium reductions in the medium term.

Ai Group welcomes the seven reform principles announced by the Government in the Issues Paper. These principles should be the building blocks for a new system and must be reflected in the *Workers Compensation Act 1987* (NSW) and *Workplace Injury Management and Workers Compensation Act 1998* (NSW) (the **Legislation**). Further to this we strongly believe now is the time to move on from the label *workers compensation* in the legislation title. We propose that the legislative framework use the term *WorkFit*.

CONSULTATION

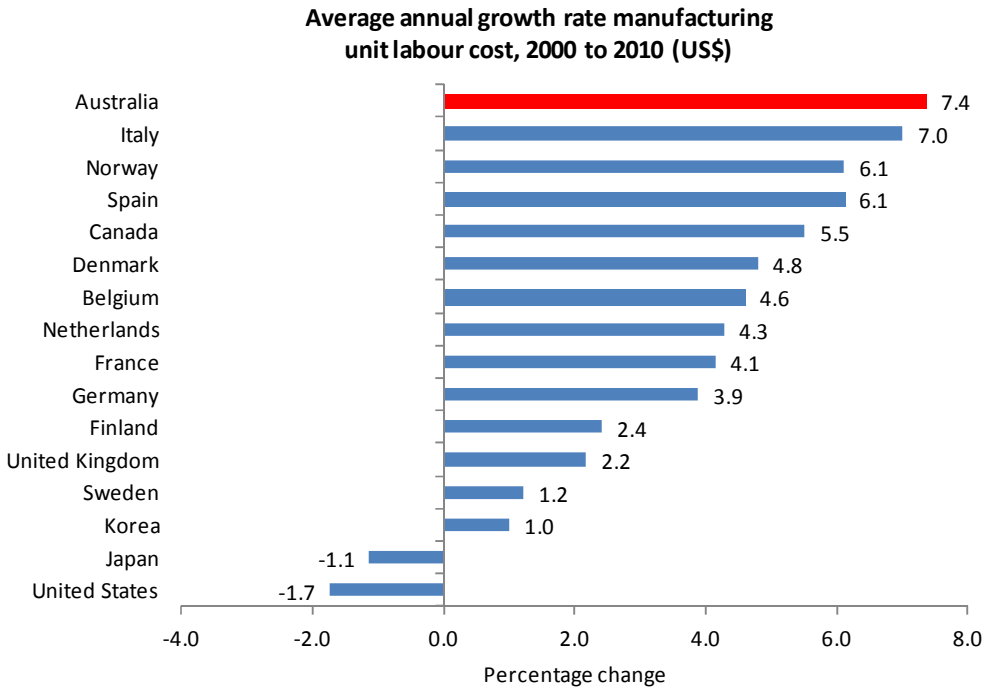
The views expressed in this submission have been developed through a number of avenues:

- The knowledge of Ai Group's OHS and Workplace Relations Advisers who have extensive experience in the practical application of the Legislation, and its interaction with industrial instruments and other legislative provisions relating to the employment relationship, across a broad range of industries;
- Views of members expressed through day-to-day contact with them as we provide advice, training and other support, including via our call centre of which a large volume of calls from members are about workers compensation;
- From the issues and concerns raised by members during consultation conducted by Ai Group related to the Government's review; and
- Through discussions with other key stakeholders in the scheme, including participation in the NSW Workers Compensation and OHS Council for the past decade.

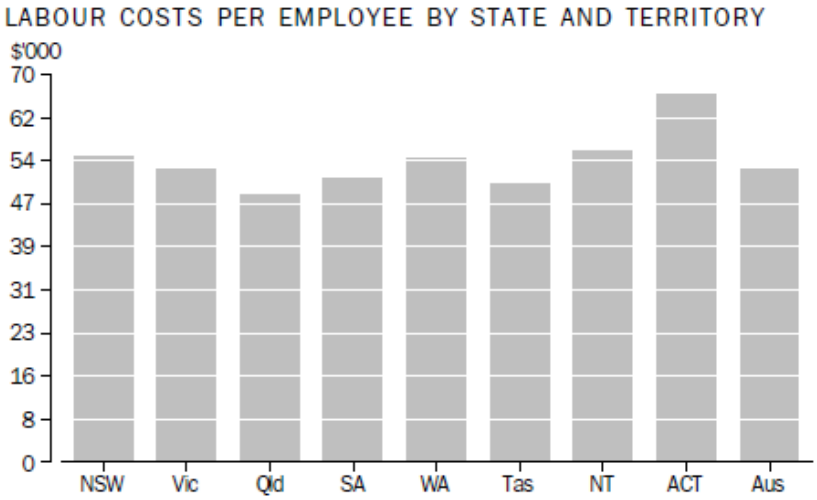
IMPACT OF A 28 PERCENT INCREASE IN PREMIUMS

> *"If premiums increase by 28 percent, we will be forced to considering manufacturing some of our products in China" Ai Group member.*

Australia is a high cost country, especially for import competing and trade exposed industries like manufacturing. See the chart below showing the relative labour cost growth in Australian manufacturing compared to that in other OECD countries (not emerging economies).

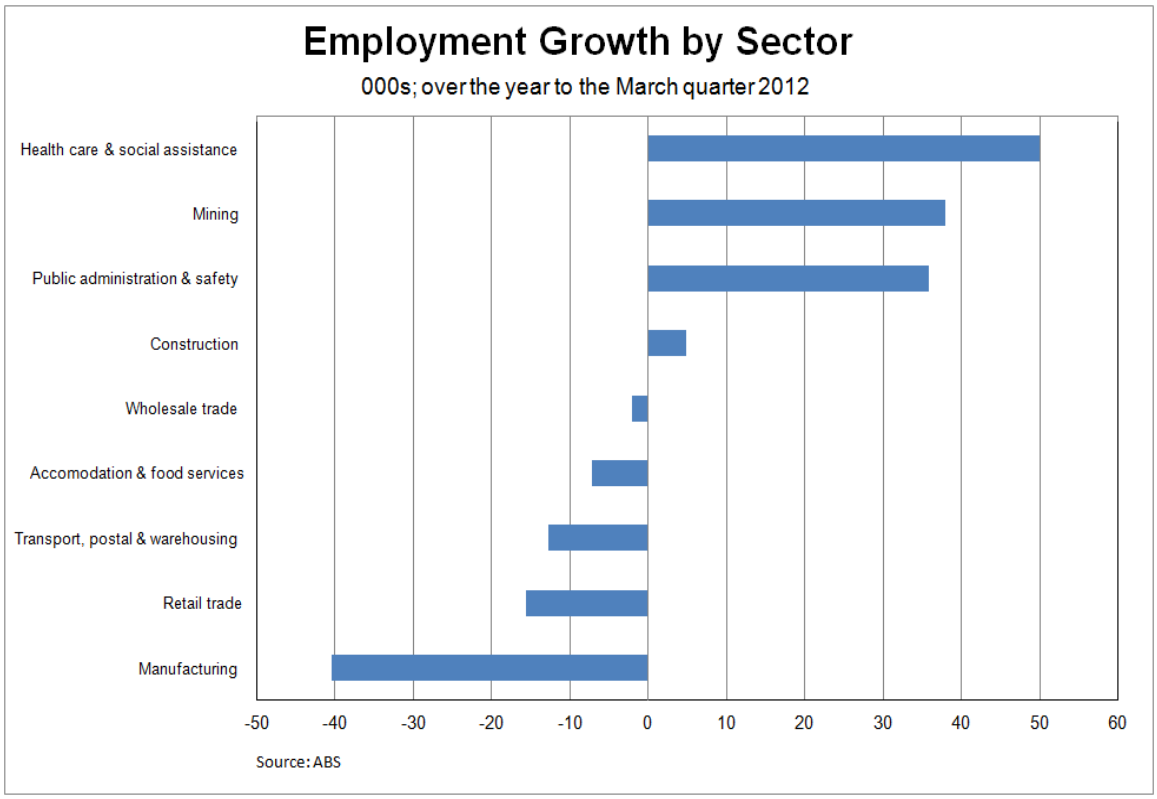


And within Australia, NSW is a high labour cost state, even when compared to the mining boom states of QLD, WA and NT. See the table below:



Source: Labour Costs 2010-11, ABS Catalogue 6348.0

Employment is under considerable stress in a number of key sectors, as shown in the chart below:



Many of those sectors facing employment losses are heavily exposed to workers compensation costs, having relatively high industry tariff rates, falling within the following ranges:

- Manufacturing typically 3 – 6 percent
- Transport, postal and warehousing typically 3 – 6 percent
- Wholesale trade 1.5 – 3.5 percent

For these sectors, a 28 percent increase in premiums could equate to an immediate increase in labour costs between 1 to 1.5 percent. In manufacturing in particular, margins are already being squeezed by a combination of high labour, energy and raw material costs and pricing pressure from the high dollar and competitive markets.

That kind of impost from a state statutory levy, not linked to productivity, and not mirrored in the costs faced by interstate or international competitors would have a dramatic effect on the competitiveness of NSW industry, and on industry's experience and perception of NSW as a place to establish a business.

Such magnitude of increase would have multiple effects on how employers would legitimately view the situation:

NSW has even less competitive premiums

The direct impact of a significant labour on-cost on the attractiveness of employing people in NSW:

This won't be the end of the bad news

If the scheme is not reformed, there will be the perception of a real risk that further premium hikes will need to be made. The PwC actuaries' report and the peer review by Ernst & Young both make the point that assumptions about future scheme trends are more likely to be optimistic than pessimistic*, in the absence of scheme reform, and in the short term possibly despite reform.*[1]

I'll continue to face a game of Russian roulette if a claim is lodged

No less importantly, a badly designed scheme presents the ongoing risk for any experience rated employer that one of their claims may blow out due to the scheme's design failures, and despite their efforts to facilitate return to work. That could lead to *additional significant premium increa*ses for that business beyond the increases in industry tariff rates, as the inflated cost of poorly managed claims feed directly into their premium for subsequent periods. An experience rated employer can face premiums increases in any year of up to 50 percent of their original premium as a result of bad claims.

NSW doesn't care about nor want my business

Finally, the cost, stability and design of the workers compensation scheme is one of the main vehicles through which a state government sends signals to business about how welcome investment and employment are in that state, and how well it is managing the balancing act that all governments must undertake to promote economic growth with a strong social safety net.

Employers expect the Scheme to provide support for injured workers, are comforted that it does, and are willing to pay premiums to a well managed scheme reflecting that objective. However they are frustrated and annoyed when a scheme cannot do so at a cost that is clearly uncompetitive with other states. Their frustration compounds when they see claim numbers falling but costs leeching out as a result of lower return to work rates, perverse

[1] PwC, *WorkCover NSW: Executive Summary: Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, 12 March 2012; and Ernest and Young, *External Peer Review of Outstanding Claims Liabilities of the Nominal Insurer as at 31 December 2011*, WorkCover Authority of NSW, 22 March 2012.

incentives, and higher transaction costs and payments to service providers unrelated to outcomes.

CURRENT SCHEME IS INEFFECTIVE

The Legislation is intended to provide for the compensation and rehabilitation of workers in respect of work related illnesses and injuries. Unfortunately, the current system does not effectively fulfil this intent.

The current Scheme is in disarray and failing workers and employers alike. In our experience and the experience of our members, the Scheme does not effectively differentiate between the seriously and less seriously injured and therefore some who have the capacity to return to work after a work related injury are not encouraged to do so by the Scheme mechanisms.

Victoria serves as a useful comparison to explain the problems in the NSW Scheme. NSW and Victoria are both hybrid schemes, combining a centrally underwritten scheme with outsourced claims management. Despite this similarity, in June 2011, the funding ratio between the two schemes differed by 23 percent. See the below table:

Jurisdiction	30 June 2011	30 June 2010
New South Wales	Assets: $13 319m. Liabilities: $15 682m. Funding Ratio: 85%.	Assets: $12 464m. Liabilities: $14 047m. Funding Ratio: 89%.
Victoria	Assets: $9662m. Liabilities: $8991m. Funding Ratio: 108%.	Assets: $8728m. Liabilities: $8768m. Funding Ratio: 100%.

Source: Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand,* April 2012, table 7.4, p 175

NSW and Victorian schemes both have similar funding structures with a mix of public and private management, and operate in similar economies. Therefore the disparity can only be explained by comparing the design, administration and perhaps culture of the two schemes.

Relevantly the actuarial reports prepared by PwC and Ernest & Young (**Actuarial Reports**) reveal that the actual number of workers compensation claims in NSW is declining but the costs of those claims already in the system is steadily increasing.[2] This signals that there is something wrong within the Scheme, that is in need of immediate rectification. Raising employer premiums is not the answer, not only because is it unfair to penalise employers for the mismanagement of the Scheme, but also it will not fix the underlying systemic problem.

[2] PwC, *WorkCover NSW: Executive Summary: Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, 12 March 2012; and Ernest and Young, *External Peer Review of Outstanding Claims Liabilities of the Nominal Insurer as at 31 December 2011*, WorkCover Authority of NSW, 22 March 2012.

Members often express to us the significant dissatisfaction with the Scheme, not simply because of premium levels, but the feeling of a lack of control employers have over the claims managed by scheme agents, but also the frustration experienced by employers in trying to encourage employees to return to work. The negative behaviour trends that our NSW members are experience is consistent with the trends identified by the Actuarial Reports.[3] They are:

- Re-emergence of a lump sum culture undermining return to work outcomes;
- Increased interest in, and ability to, access work injury damages for less serious injuries;
- Increased medical costs associated with assessment of claims;
- Increased time on weekly benefits while eligibility for lump sum benefits assessed;
- Increased disputation about work fitness and extent of injury; and
- Resistance to re-engage with the workplace whilst permanent injury claims are being pursued.

The Issues Paper outlines the key differences between the NSW Scheme and the schemes in other jurisdictions and identifies areas of the Scheme that would benefit from significant reform. Ai Group's position in respect of necessary areas of reform is explained in the following sections.

[3] Ibid

DRIVERS AND CONSEQUENCES OF LUMP SUM CULTURE

PwC's actuarial valuation of the Scheme as at 31 December 2011 refers to the *lump sum culture* within the Scheme that is driving the deterioration and suggests that this trend, if permitted to continue, could potentially lead to the further deterioration of the Scheme.[4]

It is well established that the potential to receive a lump sum payment or work injury damages (see below) can be a deterrent to workers to psychologically and physically recover from an injury for which they are receiving weekly benefits. The current Scheme allows for workers who are in pursuit of a lump sum payment or work injury damages to remain on weekly benefits until their permanent disablement reaches the necessary threshold. This process is assisted by nominated treating doctors (NTDs) and health providers who are not effectively encouraged by the Legislation to ensure a speedy and effective recovery of the worker. Also, easy access to lump sum payments and work injury damages is often encouraged by some legal advisers, who once engaged by a worker in respect of their workers compensation claim, change the nature of process from being facilitative into being dispute orientated. This is also perpetuated by access to compensation via the *Fair Work Act 2009* (Cth) under the General Protections provisions. The below example is true experience of an Ai Group member.

> Ai Group member:
>
> "*We had a worker who was receiving workers compensation weekly benefits and was receiving treatment for a long period of time. When we tried consulting with the employee and their NTD about mechanisms on how we could assist a more efficient and effective recovery and return to work for the worker, we soon received a letter from the worker's lawyer demanding that all correspondence with the worker about their claim be made through the lawyer. It has been almost 18 months since the alleged injury and the worker has still not returned to work on full duties. We suspect the worker is motivated to remain on weekly benefits until they qualify for a lump sum payment."*

Also, the *lump sum culture* overlooks the health benefits often associated with a speedy return to work following a workplace injury. Studies suggest that the longer a person is away from work because of a workplace injury, the less likely the person will return back to the workplace.[5] Long absences from work can also be psychologically damaging for a worker. This is confirmed by the Australasian Faculty of Occupational and Environmental Medicine of the Royal Australian College of Physicians' Position Statement on the Health Benefits of

[4] PwC, *WorkCover NSW: Executive Summary: Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, 12 March 2012, p 28

[5] Australasian Faculty of Occupational and Environmental Medicine of the Royal Australian College of Physicians' Position Statement on the Health Benefits of Work, released in October 2011, p 12

Work, released in October 2011. In particular, the Position Statement, at page 12, refers to research commissioned by the Victorian WorkCover Agency and completed in 2002 that found:

> *"If the person is off work for:*
>
> *20 days the chance of ever getting back to work is 70%;*
>
> *45 days the chance of ever getting back to work is 50%; and*
>
> *70 days the chance of ever getting back to work is 35%."*
>
> (Footnotes omitted)

Work injury damages (common law)

As the Issues Paper suggests, work injury damages (common law damages) awarded in respect of an injury sustained at work are not governed by the *Civil Liability Act 2002 (NSW)*, but rather the prior common law. This means that the principles governing the law of negligence do not apply to workers compensation claims for work injury damages. It is acknowledged that in late 2001 the Workers Compensation Legislation Further Amendment Bill 2001 was passed by the Parliament which legislated that a person must have whole person impairment of 15 percent or more to have access to work injury damages. At or around this time, the Productivity Commission found that:

> *"Although only a small proportion of claimants proceed to common law, payments to them can represent a significant proportion of scheme liabilities. For example, in 2000, around 1 per cent of claimants initiated common law action in New South Wales. Common law payments in that year represented over 20 per cent of scheme liabilities (PwC 2001, p. 8)."*[6]

Unfortunately this reform did not provide a sustained reduction in common law cases, and work injury damages have markedly increased in recent years. According to PwC's actuarial valuation of the Scheme as at 31 December 2011, work injury damages benefits liability had increased by $148 million in the previous six months and the liability in respect of future workplace injury damages benefits has reached $1,771 million. [7] This is a clear indication that the current approach to work injury damages under the scheme is not working.

The flow on effect of significant increases in the liability attributed to work injury damages is slower rates of psychological and psychical rehabilitation and return to work. In order to be

[6] *National Workers ' Compensation and Occupational Health and Safety Frameworks Productivity Commission Inquiry Report*, No. 27, 16 March 2004, p 219

[7] PwC, *WorkCover NSW: Executive Summary: Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, 12 March 2012, p 16

successful for work injury damages a person must demonstrate a high degree of damage suffered. This is counter to the principal intent of the Scheme itself, that is, to rehabilitate workers and assist them to return to work

The availability of negligence-based work injury damages sits uneasily with a non-fault statutory scheme with a heavy and necessary focus on rehabilitation. It has been the root cause of the Scheme's instability in all its crises over the past thirty years. The Sheahan Report conducted prior to the last major reform of the scheme a decade ago, explored this tension, and underscored why common law access, despite being superficially attractive to claimants and financially rewarding to those who represent them, needs to be significantly and effectively limited if the Scheme is to remain sustainable and provide a proper and effective range of support for all claimants. Sheahan documented the long term problems for claimants who sought common law redress, particularly the employment and psychological disadvantage that accrues from lengthy adversarial processes at the heart of common law.

A 20 percent whole person threshold was recommended by Sheahan, along with a fixed provision for pain and suffering. Ultimately a 15 percent threshold was adopted which has weakened, in practical terms, in recent years. We believe the Scheme can and should operate without common law access.

Nonetheless, if the Parliamentary Committee recommends that work injury damages should remain as part of the Scheme, then they should only be awarded in the most serious of cases, and the threshold set needs to be effective. It is important that the Parliament remains conscious to the tug of war between the intention and objectives of the Legislation and that of the common law negligence process. At the very least the 20 percent threshold, as recommended by Sheahan, should be adopted, with effective monitoring and control of the threshold.

The need for targeted commutations

Commutations are extremely problematic. In the context of an isolated claim they can make good make sense for all parties, but they generate a strong network effect if the eligibility rules are perceived as too generous.

The access to commutations should be tightly controlled and available to only those seriously injured employees. A problem with the current system is that commutations are not appropriately targeted and therefore presents a barrier for many workers to detach themselves from the workers compensation system. However, we strongly advise against making commutations available to workers with less serious injuries who have been on long term weekly benefits without permanent injury as this would feed into the *lump sum culture* and shift the focus away from recovery and rehabilitation. Where possible, workers on long

term weekly benefits need to be encouraged to make a full recovery and return back into the workforce.

Section 66 and 67 claims

The Scheme allows a worker to make claim for a lump sum payment for whole person impairment of 1 percent and enables a worker to make successive lump sum 'top up' claims. This differs from other jurisdictions such as Victoria which only permit only one claim for whole person impairment to be made. It is unfair to employers that workers are able to pursue multiple lump sum claims in respect of the same injury. Furthermore, it encourages litigation, disputation and shifts the focus away from recovery.

Litigation and disputation will also be minimised by amending the Legislation to allow only one assessment of impairment for lump sum payments, commutations and work injury damages, at an appropriate point of medical stabilisation. This will also reduce red tape and associated medical and legal costs.

The Scheme also allows injured workers to recover a lump sum payment for 'pain and suffering'. This measure predates the common law provisions and is therefore unnecessary. Ai Group supports the option for reform in the Issues Paper that 'pain and suffering' be incorporated into the lump sum payments for injuries with whole person impairment greater than 10 percent. We agree that this would reduce disputation and administration costs.

Weekly benefits structure

Under the Scheme, injured workers receive 100 per cent of the pre-injury earnings for the first 26 weeks of their total incapacity if they are paid under an award. If an employee is not paid under an award, they are entitled to receive 80 per cent of their pre-injury average weekly earnings. These weekly benefits are capped at the statutory rate[8] and are revised down after the 26th week to the statutory rate (post 26 weeks)[9], plus allowances for dependants.

The Issues Paper contemplates simplifying the definition of pre-injury earnings and adjustments of pre-injury earnings by removing the distinction between award and non award reliant employees. We would support the removal of this distinction and the adoption of a three tiered step down approach, with workers receiving 95 percent of their pre-injury average weekly earnings, including a calculation for overtime and shift penalties,

[8] The statutory rate for weekly benefits for the first 26 weeks of a workers compensation claim is $1,838.70. See WorkCover, *Workers compensation benefits guide, April 2012*

[9] The statutory rate for weekly benefits from the 27th week of a workers compensation claim is $432.50. See WorkCover, *Workers compensation benefits guide, April 2012*

for the first 13 weeks of total incapacity, a step down to 80 percent for the period between the 14th and 26th weeks and then the current statutory rate thereafter.

A step-down in weekly benefits after 13 weeks is consistent with other jurisdictions, and consistent with medical evidence that the three month timeframe is a very significant one in terms of the propensity of workers to be able to return to pre-injury employment.

The removal of the award/non-award distinction is logical given that only 16.4 percent of employees are award reliant. The level of agreement reliant employees is increasing steadily and is a common form of pay setting. Despite this, Ai Group disagrees with the assertion made in the Issues Paper that casual employment is increasing. The Australian Bureau of Statistics report on *Forms of Employment, Australia* (6359.0) released on 20 April 2012, revealed that the level of casual employment between 2007 and 2011 has reduced from 21 percent to 19 percent.

There is a further significant problem in the benefit structure for partially incapacitated workers. A worker that has a partial incapacity and is performing light duties or looking for work is entitled to a weekly benefit up to the amount of the benefit the worker would have received if the worker was receiving benefits for total incapacity as well as the actual earnings from their employment. This means that in some instances a worker could be receiving more in weekly benefits than they would receive if they return to work on full duties. This is because a worker's average weekly earnings would factor in overtime worked immediately prior to injury, which may not otherwise be available to the worker (because, for example, the workplace has since ceased offering overtime) if he or she would return to full time duties. This is demonstrated in the following experience by an Ai Group member.

> Ai Group member:
>
> "One of our workers *sustained a genuine injury to his hand. A return to work plan was initiated and the worker return to work on suitable duties with reduced hours of work. We are trying to encourage the worker to recover and return to work on upgraded or full duties however this is difficult because the worker is currently receiving weekly benefits which when added with his actual earnings total over $2,000 per week."*

Current weekly benefits for partial incapacity can operate as a disincentive to return to full duties and must be addressed as part of the reform. Ai Group supports the approach taken in Victoria, which builds in an incentive to ramp up alternative duties by providing gradual increases in total pay as hours or work capacity are restored.

Duration of weekly benefits

As there is no limit on the duration of weekly benefits under the Scheme, workers with little to no permanent impairment are able to receive weekly benefits up until 66 years of age. Ai Group supports a cap on the duration weekly payments of 2 years. This will encourage the worker to recover and return to work, rather than rely on weekly benefits.

Those workers who have suffered a more severe injury and subsequent have high levels of a permanent impairment would have access to statutory lump sum payments or such work injury damages access as remains in the scheme.

Medical costs

In comparable jurisdictions like Victoria the cost of medical and related treatments are capped. This is not the case under the NSW Scheme and, in our view, is a significant factor in the cost blow out of the system. Realistically, if a worker has not responded to particular treatment after undergoing that treatment for a considerable period, it would be safe to assume that the treatment is not working and other treatments need to be considered, or the issue may no longer be medical. Further, the ongoing provision of medical treatment without a cap on costs or duration at times can be misused by some service providers who may propagate a slow recovery and return to work. This leads to a loss of trust in the system, and rehabilitation mechanisms, by employers. For example, the Ai Group member in the example below, has reported to us that numerous employees who have been receiving weekly benefits for over a year have been receiving the same treatment for the entire period of their claim but yet no improvement has been reported by the NTD or other health providers.

> Ai Group member:
>
> "*We have numerous workers that have been on workers compensation and receiving treatment for sprains and strains for more than a year. These employees, who have the same NTD, are not yet certified for full duties and are working full hours on light duties. You would have thought that after a year the NTD would know whether a particular treatment is working or not*"

Work capacity testing

Work capacity testing of injured workers could be very useful to assist workers on long term weekly benefits to rehabilitate and return to work, however this process will only be effective if conducted by an independent third party nominated and managed by the WorkCover agency. It is important that capacity testing is not conducted by employee or employer nominated treating doctors as this will only perpetuate perceived bias and result in a lack of confidence in the system.

Under the current scheme Nominated Treating Doctors (NTD) make determinations as to the worker's capacity to perform work, whether that be light duties or full duties. However, employers often express frustration with some NTDs not understanding, and not seeking to understand, the work performed by the worker, failing to consult the employer on what type of work is available for the worker or deeming an employee unfit for work when they have capacity to return to work on light duties. Below is an experience of an Ai Group member:

> Ai Group member:
>
> "*One of our employees was provided a certificate from an NTD stating that the employee was totally unfit for work because of an alleged incident which was said to have occurred weeks prior. The employee failed to report the alleged incident at the time and attended and performed work up until their visit to the doctor, without any apparent injury."*

Such cases may have legitimate explanations about the medical decisions made, but employers are routinely excluded from assessments which are essentially not medical, but are about the conditions in their workplaces.

Strengthen regulatory framework for health providers and agents

It is essential that the regulatory framework and incentive mechanisms for health providers and agents are strengthened to better align their input with scheme objectives. Employers often express their frustration with the management (or mismanagement) of workers compensation claims by scheme agents and health providers, including NTDs.

In particular Ai Group members have expressed concern with the lack of consultation with scheme agents in the acceptance of claims and NTDs and health providers with the treatment of illness and injuries and the management of the return to work process.

Another Ai Group member has experienced difficulty in getting workers to return to work because of the inhibiting role played by health providers:

> Ai Group member:
>
> "*One of our workers, when cleared by her NTD to return to work on full duties, she nominated a new treating doctor who deemed her unfit for work."*

We urge the Parliamentary Committee to recommend amendments to the Legislation requiring scheme agents to consult with employers before accepting a claim (even provisionally) and that NTDs not give workers more than a set period (less than one week)

off work or on light duties without actively seeking to consult with the employer about the type of work performed by the employee and what type of light duties are available at the workplace.

On the issue of medical costs and practice in workers compensation we strongly believe there is much scope to explore new initiatives based on the latest research on issues such as occupational medicine and pain management. Employers end up paying for less than optimal outcomes in these areas, particularly in the important areas of upfront care and management of medium to long term claims where psycho-social factors emerge to influence the duration and manifestation of what are originally physical injuries. We commend the work and submission of the Pain Management Research Institute to this Committee and the work of the Faculty of Occupational and Environmental Medicine on the importance of work to recovery.

OTHER DESIGN ISSUES

Journey claims

Journey claims are frustrating for employers and problematic for the Scheme.

Our members routinely question why they should pay for injuries incurred in circumstances well beyond their managerial control, and even beyond the most generous concept of their influence. This reality is recognised within the scheme by excluding journey claims from the assessment of an individual employer's claims experience for the purposes of premium calculation, however the costs do accrue to employers through base industry rates. This remedy in itself creates the problem of accountability, and the costs of journey claims are probably higher than they otherwise would be because of the weaker incentive for employers to minimise claims costs by facilitating an early return to work.

To address this, one could attempt to think through a scheme whereby the nominal projected cost of any given journey claim was assessed up front, and the individual employer shared all or part of the savings to the scheme if the final cost was lower, but we suspect that would heavily compromise the premium assessment calculations and not sit easily with the graduated effect of claims experience on employers of different sizes. The scheme could not afford to reward small employers in this way, as the savings generated by a single claim could be many times larger than their annual premium.

It also avoids the main problem of journey claims which is the alignment of liability with control of risk.

The only sustainable and sensible solution is to exclude journey claims from scheme coverage, and leave them to the substantial and more appropriately funded alternative protection offered by a combination of the Motor Accidents Scheme, public liability, personal income insurance and the proposed National Disability Insurance Scheme.

Travel coverage should be defined as it is by the terms of Clause 83(1)(b) and 83(2)(b) and (c) of the Victorian legislation. Normal journeys to and from work should be excluded from the scheme, and journeys should otherwise be subject to a work relatedness test.

In suggesting this, we note that no other area of law teats fixed journeys to and from work as a work related issue. Normal journeys to work are not treated as work related for the purposes of an expense deduction under the Income Tax Assessment Act, nor would an employer normally be liable for costs, loss or damage arising on such journeys under other employment legislation, including equal opportunity and anti-discrimination. Daily travel and fares allowances in awards and agreements are justified on the grounds of flexibility and mobility, not for journeys to and from a fixed workplace.

More tellingly, the nexus between liability and control of risk which underpins workers compensation completely breaks down in journey claims. It is highly unlikely that an

employer could successfully defend an unfair dismissal claim where they had terminated an employee's employment after repeated warnings about reckless driving in their own vehicle to and from work, foolishly running down stairs to catch a train or bus, or jaywalking across a road. Such a dismissal would be vigorously opposed on the basis that it had nothing to do with work or the employer's business.

Employees join a company in full knowledge of the journey they need to undertake to get to the workplace. If they subsequently move home that is their choice. If their workplace is relocated, employees can, and do, seek redress on the grounds of constructive termination or redundancy caused by substantial and unreasonable changes to their journey to and from work.

In essence the extension of workers compensation coverage to journeys to and from work is a *de facto* extension of the welfare system, funded directly by employers. They are compelled to pay for insurance for a risk they can't control. This is demonstrated in the below member experience.

> Ai Group member:
>
> *"One of our workers was unfortunately killed on his way home from work in a motor vehicle accident. The worker was found to have been the at fault driver in the accident. We were required to pay the worker's estate (he had no dependants) a lump sum compensation"*

Exclusion of strokes/heart attack unless work is a significant contributor

The causes of stroke and heart attack are multifaceted and are heavily influenced by genetics and lifestyle factors. While the circumstances of stroke and heart attack are tragic wherever they occur, while at work or otherwise, in most cases the relationship between the work performed and the condition suffered by the work is not related. In these circumstances it is unfair for employers to assume the full liability of the condition merely because the condition materialised while the person was at work. A more sensible approach would be for the condition to be assessed as to whether work was a significant contributor to its manifestation. This approach is used in Victoria.[10]

Nervous shock claims from relatives or dependants of deceased or injured workers

We recognise the argument that the Scheme is not designed to impose liability on the employer for psychological injuries, such as nervous shock, to the relatives or dependants flowing from deceased or injured workers and we agree that a closer connection between

[10] See section 82(2B) of the *Accident Compensation Act 1985* (Vic)

work, health and safety responsible and workers compensation is necessary for the Scheme to operate effectively and it is unfair to impose liability on employers over circumstances which they have limited to no control.

Hearing loss claims

The principle of liability lying with the last noisy employer is the Scheme's current resolution of ongoing difficulties with apportioning liability and cost for gradual onset diseases like hearing loss.

It assumes that costs will fall randomly, but in the long run fairly, within a pool of employers covered by the Scheme whose combined workplaces represent the original sources of the hearing loss. That model breaks down where there is high labour mobility between states, and now even more so with significant skilled immigration levels, including from many countries with noisy workplaces and poor or non-existent workers compensation support.

We suggest that hearing loss be reviewed to take into account the inappropriateness of NSW employers providing compensation for loss incurred outside Australia.

PREMIUM ISSUES

Premium rates in NSW are higher in comparison with Victoria, Queensland and Western Australia and NSW employers currently pay premiums that are as much as 60 percent higher than competitor states.[11] This disparity will only widen in July when Victorian premiums fall by 3 percent and if NSW premiums rise by an average 28 percent[12], thereby making NSW a far less attractive for option for investment.

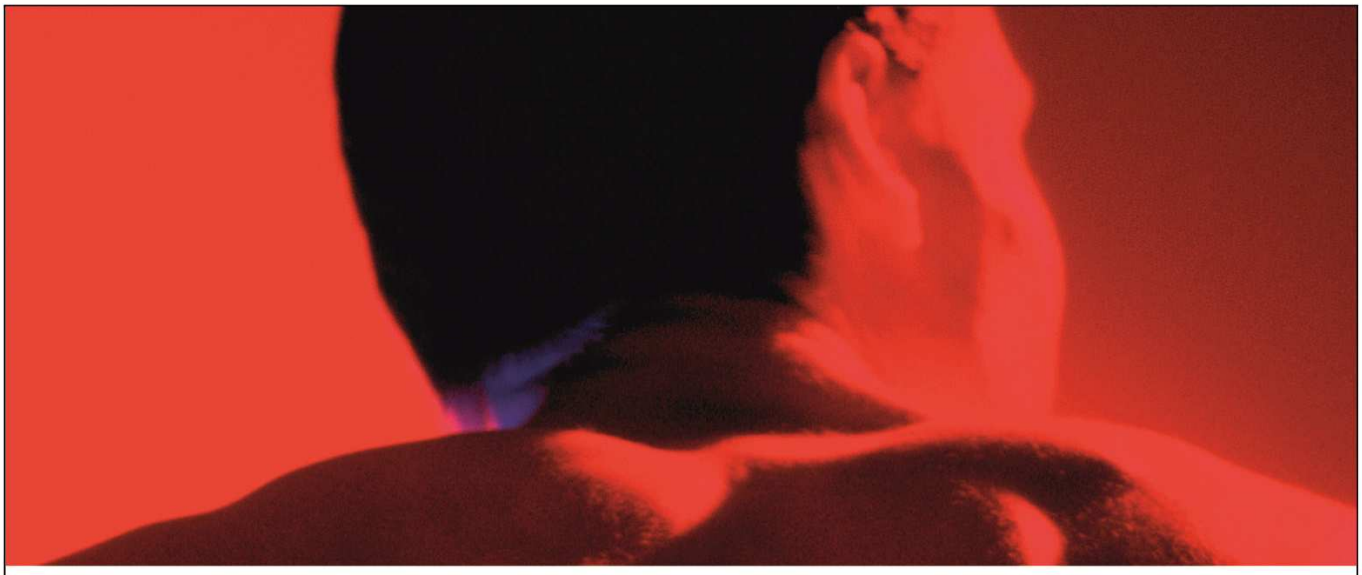
Premium rates in NSW are generally pooled across similar risk profile groups, usually determined by industry type (Tariff Rate).[13] Premium rates are then further affected by the size and claims experience by employers.[14]

When compared with the Tariff Rates for particular industries in other jurisdictions, NSW stands out as having on average the highest or second highest premiums across industry types.[15]

The process of determining the Tariff Rate by industry type must be sensitive to changes within the industry, such as technological changes impacting the way which work is done. If the Scheme ignores these changes, it risks employers being lumped into the wrong industry group and undermines the overall creditability of the Scheme, which is essential to employer engagement. The experience of an Ai Group member, extracted below, is an example of how industries are always evolving.

> Ai Group member:
>
> "*We operate a hydroponic vegetable/fruit growing business employing around 40 people. We do not operate heavy machinery and within 12 years of operation no major workplace accidents have occurred and no workers compensation claims have been made against the company. Nonetheless we pay almost $50,000 in premiums every year because we are grouped as operating within the agricultural industry."*

[11] *NSW Workers Compensation Scheme Issues Paper*, pp 2, 4
[12] Victorian Department of Treasury and Finance, *Victorian Budget 2012-13*, Budget Overview, p 3
[13] *NSW Workers Compensation Scheme Issues Paper*, p 14
[14] Ibid
[15] Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand,* April 2012, pp 178-180



METROPOLITAN OFFICES

SYDNEY

51 Walker Street
North Sydney
NSW 2060
PO Box 289
North Sydney
NSW 2059

Tel: 02 9466 5566
Fax: 02 9466 5599

MELBOURNE

20 Queens Road
Melbourne VIC 3004
PO Box 7622
Melbourne VIC 8004

Tel: 03 9867 0111
Fax: 03 9867 0199

BRISBANE

202 Boundary Street
Spring Hill QLD 4004
PO Box 128
Spring Hill QLD 4004

Tel: 07 3244 1777
Fax: 07 3244 1799

CANBERRA

44 Sydney Avenue
Forrest ACT 2603
PO Box 4986
Kingston ACT 2604

Tel: 02 6233 0700
Fax: 02 6233 0799

ADELAIDE

Enterprise House
136 Greenhill Road
Unley SA 5061

Tel: 08 8300 0133
Fax: 08 8300 0134

REGIONAL OFFICES

ALBURY/WODONGA

560 David Street
Albury NSW 2640
PO Box 1183
Albury NSW 2640

Tel: 02 6021 5722
Fax: 02 6021 5117

BALLARAT

1021 Sturt Street
Ballarat VIC 3350
PO Box 640
Ballarat VIC 3353

Tel: 03 5331 7688
Fax: 03 5332 3858

BENDIGO

87 Wills Street
Bendigo VIC 3550

Tel: 03 5443 4810
Fax: 03 5444 5940

NEWCASTLE

Suite 1, "Nautilos"
265 Wharf Road
Newcastle 2300
PO Box 811
Newcastle NSW 2300

Tel: 02 4929 7899
Fax: 02 4929 3429

WOLLONGONG

Level 1
166 Keira Street
Wollongong NSW 2500
PO Box 891
Wollongong East
NSW 2520

Tel: 02 4228 7266
Fax: 02 4228 1898

AFFILLIATE

PERTH

Chamber of Commerce & Industry
Western Australia
180 Hay Street
East Perth WA 6004
PO Box 6209
East Perth WA 6892

Tel: 08 9365 7555
Fax: 08 9365 7550

AUSTRALIAN INDUSTRY GROUP **www.aigroup.com.au**

AIG11502