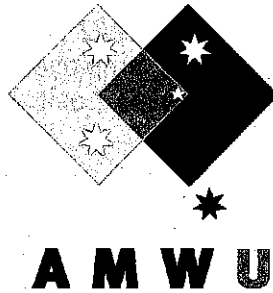


**Submission
No 146**

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

Organisation: Australian Manufacturing Workers Union
Date received: 21/05/2012

AUSTRALIAN MANUFACTURING WORKERS' UNION



**AMWU Submission to the NSW Parliamentary Enquiry into the Workers
Compensation Scheme**

May 2012

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Organisation: Australian Manufacturing Workers' Union

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Introduction

1. The Australian Manufacturing Workers' Union (AMWU) welcomes the opportunity to make a submission with respect to the current review of the NSW Workers Compensation System.
2. The full name of the AMWU is the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union. The AMWU NSW Branch has a membership of 25,000 workers. Our members are employed in the private and the public sectors, in blue collar and white collar positions, and in a diverse range of industries, vocations and locations.
3. Given the complexity of workers' compensation and the time constraints placed upon interested parties to make submissions, the AMWU submission will attempt to address issues raised in the issues paper but reserves its right to make further submissions as it may see fit beyond the May 17 deadline.
4. A fundamental objective of any workers compensation systems needs to be an equitable, fair and just system of income protection, access to medical treatment for workers with work related injuries or illnesses, and a mechanism to aid injured workers back to work. The workers compensation scheme should seek to return injured workers back to the maximum medical recovery achievable and the highest quality of life.
5. Workers compensation legislation is beneficial legislation targeted at injured and ill workers. Any amendments to the legislation must be made with this in mind. The legislation was not established to benefit employers or to be a driver of the economy. It is legislation that should ensure that just payment is made for loss, be that physical, mental, quality of life, out of pocket expenses or earnings.
6. The AMWU has a proud history of advocating on behalf of members to Governments across Australia of all political persuasions concerning the rights of working people. The premise upon which AMWU policy position and inline with that, this submission, is based, is that a worker who's quality of life is detrimentally altered as a result of their employment must have a right to redress, with an expectation that all will be done to minimise any adverse impact on their lives.
7. It is noted that manufacturing in NSW injures more workers than any other industry, is the most expensive industry for the scheme with respect to payments (20% of total scheme costs) and has an incident rate at double the States average.

8. In the 2008/09 Statistical Bulletin (latest publically available) within New South Wales the average incident rate was 14.2 for employment injuries. NSW Manufacturing experienced 6,563 major employment injuries (16.0% of all major employment injuries); total major employment injuries 42,858, representing the greatest number for high risk industries (some 900 more injuries than second on listed industry) and the third highest incident rate of 26.9. The NSW manufacturing sector recorded the highest level of lost time injuries / diseases of 10,208 (16.0% of all lost time injuries); total lost time injuries / diseases for NSW in 2008/09 was 63,990. Manufacturing experienced the greatest Lost Time Claim Frequency Rate by industry of 21.5 when the adverage NSW frequency rate is 12.6. Manufacturing industry represented \$438 million (20%) of total payments made under the NSW Workers Compensation Scheme. For the period 1997/98 to 2006/07 Manufacturing has consistently represented the largest portion of total payments for injury and disease.

9. Any changes to the Workers Compensation Scheme that would deny access to compensation or remove it at an artificial threshold will place a greater burden on manufacturing workers than any other industry.

Executive Summary

10. The AMWU does not dispute there is an actuarial short fall in the scheme being fully funded, but believes the approach taken to rectify this problem should be done based on the current literature that exists and best practice and should not in the process harm injured workers or their families. In an effort to achieve these dual purposes the AMWU provides the following recommendations.

Recommendation 1: That the return to surplus should be achieved, in part, by a modest increase in premiums with an expected return to full funding over a longer period of time.

Recommendation 2: That the mechanisms by which scheme agents are remunerated be tabled at the NSW Workers Compensation and Work Health and Safety Council.

Recommendation 3: That WorkCover provide the NSW Workers Compensation and Work Health and Safety Council with an annual compliance report, reported against key performance indicators, in relation to the scheme agents' contracts.

- Recommendation 4:** That WorkCover conduct an audit on every scheme agent prior to the expiry of their contracts and provide the NSW Workers Compensation and Work Health and Safety Council with the result of such audits.
- Recommendation 5:** That WorkCover conduct an audit on every self-insurer prior to the expiry of their license and provide the NSW Workers Compensation and Work Health and Safety Council with the result of such audits.
- Recommendation 6:** There should not be any further artificial thresholds put in place for severely injured workers.
- Recommendation 7:** There should be a review to establish an appropriate level of benefits for injured workers who are deemed unfit for work.
- Recommendation 8:** Journey claims should remain a feature of the NSW Workers Compensation Scheme
- Recommendation 9:** Nervous Shock should remain a feature of the NSW Workers Compensation Scheme
- Recommendation 10:** There should be a simplification of the definition of pre-injury earnings to reflect changes in employment arrangements which would align with the workers actual pre-injury earnings.
- Recommendation 11:** That any definition of pre-injury earnings should take into account overtime, shift penalties, payments for special expenses and penalty rates and superannuation.
- Recommendation 12:** That a new section be entered into the Act allowing annual leave to be accrued and taken whilst on workers compensation.
- Recommendation 13:** That there are no 'step downs' to injured workers who are medically diagnosed to have a total incapacity.
- Recommendation 14:** That there are no 'step downs' for workers who are suffering a partial incapacity where they are compliant with the injury management plan.
- Recommendation 15:** That NSW establishes with the Workers Compensation Division of WorkCover NSW Return to

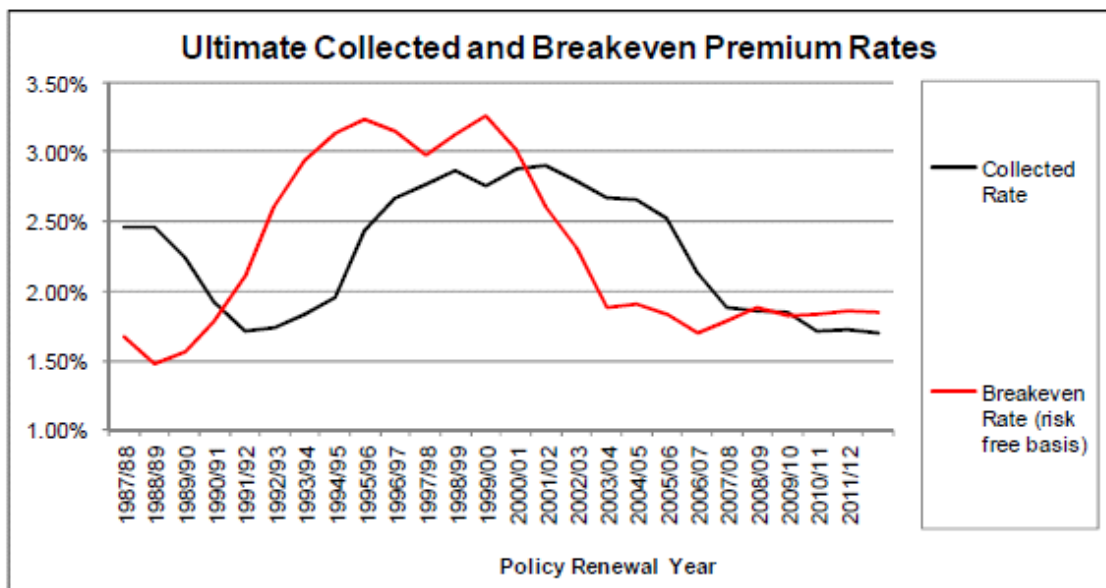
Work Inspectors who would be empowered to enter a workplace and satisfy themselves that employers are complying with their obligations under the legislation. Should following been provided with advice an employer not follow this advice, the Act should empower the Authority to bring charges against the employer.

- Recommendation 16:** That the NSW Workers Compensation and Work Health and Safety Council be requested by the Minister to consider how rehabilitation services might be expedited without encroaching on the parties' rights. Following a set time the Council should report its findings back to the Minister.
- Recommendation 17:** That 'capacity testing' is removed as a feature of the legislation.
- Recommendation 18:** That there should be a requirement for all injury management plans to be reviewed by all parties every 12 weeks built into the contracts with the scheme agents and licences of specialised and self-insurer.
- Recommendation 19:** That in the case of scheme agents and licences of specialised and self-insurers contracts should have a requirement that case conferences are conducted every 26 weeks unless to do so would serve no purpose based on the current medical information.
- Recommendation 20:** That there should be no cap more onerous than that currently in place (based on retirement age) introduced into the NSW legislation.
- Recommendation 21:** That pain and suffering may be merged on the basis that injured workers receive no less.
- Recommendation 22:** That the statutory payment for permanent impairment be indexed in line with the indexation of other statutory payments.
- Recommendation 23:** That there should not be an artificial barrier put in place which would restrict injured workers from making more than one claim for whole person impairment should they suffer an aggravation or deterioration of a workplace injury.

- Recommendation 24:** That the principals applying to determining negligence in workers compensation common law matters remain unchanged.
- Recommendation 25:** That there should not be a cap placed on the period of medical coverage.
- Recommendation 26:** That the NSW Workers Compensation and Work Health and Safety Council be requested by the Minister to oversee a review by WorkCover of the regulatory framework established for health providers
- Recommendation 27:** That WorkCover should develop a proposal paper in relation to targeted commutations and commence consultation with the key stakeholders
- Recommendation 28:** That strokes or heart attacks should be treated in the same way as all other conditions which workers may suffer.
- Recommendation 29:** That prior to commencing employment as a claims manager, or in any other role with responsibility for the management of claims, (whether for a scheme agent or insurer), there a mandatory training course provided by WorkCover should be completed. Such a course should provide a practical understanding of the role and associated legislative expectations.
- Recommendation 30:** That any Guides or Regulations which have not been through the legislated process involving the NSW Workers Compensation and Work Health and Safety Council be withdrawn.
- Recommendation 31:** That any Guides that have been through the legislated process involving the NSW Workers Compensation and Work Health and Safety Council be gazetted and posted.
- Recommendation 32:** That section 61 (3), (4), (4A), (5), (6), (7), (8), (9) be repealed from the *NSW Workers Compensation Act 1987*.
- Recommendation 33:** That section 248 of the *NSW Workers Compensation Act 1987* be amended to include a requirement that current injury management plans must state that the return to work goal is different job/different employer.

Issues of Concern in the NSW Workers Compensation Issues Paper

11. **The need to reform the scheme** – There is no disagreement between the parties bound by the NSW workers compensation scheme that there is need for reform, but this reform needs to be done as indicated in the issues paper in a manner that will *produce good outcomes for injured workers*. The issues paper seeks to start by stating that *premiums paid by NSW employers are estimated to be between 20 to 60 per cent higher than equivalent employer in our competitor States*. The paper then cherry picks a number of Workplace Industry Codes (WICs) to support the assertion. This exercise is disingenuous and unbalanced as it fails to highlight WICs which are lower than other States in an attempt to create the illusion that all WICs are more expensive.
12. The current difference between States should be assessed as an average premium. To cherry pick individual WICs does not take into consideration the claims experience of those industries, or their size within the State's economy. It also fails to consider factors such as the numbers of contractors in a particular industry and whether these are independent or dependant contractors and workers. For example it is noted that residential construction in Victoria is almost completely made up of independent contractors who do not have a capacity to make a claim, whilst the NSW scheme has more dependant contractors and workers. This has a significant impact on the claims rates and by virtue the premium rates. It is clear that the scheme has failed to collect adequate premiums since 2010 to secure the scheme as demonstrated in the below chart.



13. When looking at the cost of workers compensation it is important not to lose sight of the nexus between the rate of injuries and their corresponding costs. It is alarming that NSW has significantly more serious injury claims which makes up a greater component of all claims than any other jurisdiction as per the table below extracted from the Comparative Performance Monitoring Report Thirteenth Edition October 2011. Yet the issues paper in trying to tackle the issue of claims costs fails to identify the key driver being the level of serious injuries. Premiums must reflect degree of harm done or risk losing an important driving factor for employers to provide a safe and health workplace.

Summary of key jurisdictional data, 2009–10

Jurisdiction	Serious claims	% of claims	Employees	% of employees	Hours ('000)	% of hours
New South Wales	43 950	34.5	3 089 100	30.5	5 201 294 000	30.9
Victoria	23 990	18.8	2 535 200	25.1	4 142 433 000	24.6
Queensland	29 380	23.0	1 892 100	18.7	3 115 369 000	18.5
Western Australia	12 330	9.7	1 070 500	10.6	1 821 529 000	10.8
South Australia	8 850	6.9	710 400	7.0	1 134 274 000	6.7
Tasmania	3 160	2.5	205 300	2.0	318 203 000	1.9
Northern Territory	1 340	1.1	112 900	1.1	198 732 000	1.2
Australian Capital Territory	1 710	1.3	130 600	1.3	231 734 000	1.2
Australian Government	2 720	2.1	364 400	3.6	652 131 000	3.9
Seacare	190	0.1	4 500	0.0	20 240 000	0.1
Australian Total	127 620	100.0	10 115 100	100.0	16 810 366 000	100.0

14. The current strategy which has been adopted by the regulator since 2007 to focus on educating employers at the expense of enforcement resulting in better safety outcomes, has proven to be flawed. This is best demonstrated when comparisons

of prosecution data is aligned with injury rate data. As can be clearly seen there is a definite J curve in the injury statistics starting in the year that the current policy was adopted.

		NSW
Number of legal proceedings finalised	2005–06	°348
	2006–07	°303
	2007–08	°185
	2008–09	°98
	2009–10	°81

Employment Injuries WorkCover Statistical Bulletin 2008/09

Year	Total
2001/02	54,674
2002/03	51,000
2003/04	51,551
2004/05	49,749
2005/06	44,013
2006/07	41,231
2007/08	42,277
2008/09	42,858

15. The pretext for reducing premiums is that NSW loses its competitive edge as a result of higher premiums. Whilst this is an expected catch cry of the business community who are prepared to increase their profits with the money that should have supported injured workers, it cannot be supported by any credible research. In fact the this hypothetical theory has been disproved in researched in the peer reviewed report titled “Provisions of Fair and Competitive Workers’ Compensation Legislation” by Dr. Kevin Purse where the following is stated:

“In many respects, workers’ compensation policy in Australia can be characterised as the product of periodic bidding wars between the states. Implicitly, or otherwise, state governments have depicted cut price workers’ compensation arrangements, and the associated reductions in premium rates, as necessary to attract, or retain business, in their respective jurisdictions. Evidence in support of the ‘competitive premiums’ doctrine though remains conspicuous by its absence. This is hardly surprising as differences in average premium rates between the states are generally less than 1%, and rarely in excess of 1.5%, of payroll. In South Australia, for example, the average premium rate during the 10 year period to 2007 varied between 2.46% to 3% -

the highest of all the states - while in Queensland - at the opposite end of the premium spectrum - the average rate fluctuated between 2.15% and 1.2% (ASCC 2007: 20). Despite this differential there has, as indicated earlier, been no evidence presented to suggest it resulted in an exodus of businesses and jobs from South Australia to Queensland or anywhere else. In practice, business relocation decisions tend to be based not on workers' compensation premium differentials of this magnitude but rather on total labour and operating costs as well as a range of other strategic considerations.

The same conclusion has been reached in the United States where the catch cry of 'competitive' premiums has also figured prominently in the discourse surrounding workers' entitlements in the United States. When subjected to scrutiny by the National Commission on State Workmen's Compensation Laws in the early 1970s it was found, as in Australia, that premium rate differentials between the states for the average employer were relatively small. The National Commission's assessment was that "Surely no rational employer will move his business to avoid costs of this magnitude. For most employers, the costs are relatively insignificant compared to other differences among States, such as wage differentials or access to markets or materials" (NCSWCL 1972: 124).

The Industry Commission too, in its 1994 review of Australia's workers' compensation arrangements, was highly critical of the 'competitive' premiums doctrine arguing that 'competition' that reduced workers' entitlements in order to lower premiums was 'invidious' competition (IC 1994: xxxi). By contrast 'beneficial' competition was characterised in terms of initiatives that sought to improve occupational health and safety, claims management, rehabilitation and return to work outcomes (Ibid: xxxii).

The inevitable by-product of the 'competitive' premiums doctrine is cost shifting. Although cost shifting can sometimes be a two way process, the Commission had no hesitation in concluding that in net terms cost shifting occurred on a large scale, and to this effect cited evidence which suggested that in 1991 alone cost shifting may have been in the order of \$1 billion (Ibid: 170-172). This assessment highlights the fact that state based workers' compensation schemes act as a transmission belt for the externalisation of work-related injury costs from employers to the broader community, particularly injured workers and the taxpayer funded social security system. In effect, employers are subsidised for work-related-injury costs by the community, although the extent to which this occurs can vary significantly between jurisdictions. This in turn, it was argued by the Commission, can undermine the motivation for employers to prevent work-related injury and that of employers and insurers in facilitating early intervention and rehabilitation for injured workers (Ibid: xxxi-xxxii).

Similar concerns to those raised by the Industry Commission also featured in the findings of the National Commission of Audit, which reported on the issue to the Howard government in 1996 (NCA 1996: 79-80), and, more recently, those of the

Productivity Commission in its 2004 inquiry (PC 2004: 268-272). Additionally, all three Commissions acknowledged the need for policy responses to tackle cost shifting. This was most clearly articulated in recommendations put forward by the Industry Commission which called for a more adequate compensation package for injured workers within a range of 2.5% - 3.0% of payroll (IC 1994: xxxvi), or failing this a concerted effort by the federal government to estimate the full extent of cost shifting and determine the best means by which these costs could be transferred back to the states (IC 1994: 172-73).

16. In a step out of line with the rest of the issues paper support a statement that NSW premiums are higher than Western Australia as a State we are in competition with. This is not correct with NSW target collection rate for 2011/12 1.68% whilst Western Australia have revised their collection rate to 1.69%. Notwithstanding this it is important that the historical costs of the scheme be considered with an average premium rate over life of scheme, 2.28%, median 1.89% and mode 1.78%. It is clear that the current rate is not sustainable when the working people of NSW demand compensation which will give them dignity.

“WA WorkCover chair Greg Joyce has reported the average recommended premium rate will increase to 1.691% of total wages for 2012-13, up from 1.569% of total wages for 2011-12.” While recommended premium rates have fallen significantly over the last decade, the challenging economic environment and improvements to worker entitlements have led to modest increases in recommended rates in the past two years,” he said. Joyce said the 2012-2013 increase was attributed to a moderate increase in claim numbers, removal of age limits on workers’ compensation and improved protection for workers employed by uninsured employers. “Reductions in real rates of return have also placed upward pressure on premium rates, offset to some extent by continued wages growth in WA,” he said. The increase would not be applied uniformly across all 480 premium rating classifications, Joyce said.”

17. The issues paper also states that *the health benefits of returning to work are not effectively promoted as there are perverse financial incentives for workers to remain off work and there is no work capacity testing.* Whilst it could be argued that the health benefits of returning to work are not effectively promoted, there is no evidence to support the allegation that injured workers are choosing not to return to work when medically fit to do so. As is demonstrated in the case study (appendix 1) of this submission, the barriers to return to work in the manufacturing sector in many cases are created by the employer and in others due to the inactivity and incompetence of the Insurers/Scheme Agents.
18. The concept that to pay an injured worker compensation for income lost is a perverse financial incentive is both subjective and unsupported by the research. Again in Dr. Purses research the point is made;

A more appropriate approach might be to realign compensation on the principle that injured workers should receive weekly payments no more but no less than

their pre-injury earnings. As a former South Australian Minister of Labour and Industry once expressed it, the main purpose of workers' compensation laws should be to ensure workers "do not suffer financially because they have been injured in the course of employment" (SAPD 1971: 4131). Depending on their circumstances, this principle already applies to many - if not the majority of - workers in most jurisdictions able to return to work before the operation of step-downs comes into play. Consequently, the adoption, or rather the extension, of this principle would treat, predominantly, seriously injured workers – those most in need - on the same basis as those with less serious injuries, and in the process eliminate the economic hardship occasioned by the imposition of step-downs.

There are at least four essential elements required to give effect to this approach. First, weekly payments need to be as closely aligned as possible with pre-injury weekly earnings. This entails the inclusion of payments for shift work, regular overtime and other allowances that normally comprise part of a workers' wages or salary. Second, caps on the maximum amount of weekly payments need to be reviewed, although in practice the current cap in some jurisdictions, such as South Australia and Victoria, of twice that of average weekly earnings (SWA 2010: 165, WSV 2010: 2) would probably suffice since the overwhelming majority of injured workers earn less than this amount. Third, weekly payments need to be paid on a timely basis consistent with the pre-injury payment of the workers' wages or salary. Fourth, payments need to be suitably indexed on a regular basis.

19. The statement that there is no effective capacity testing is incorrect as there is capacity testing under section 40 of the NSW Workers Compensation Act 1987 (WCA 1987). Unfortunately this provision has only been used by a tool to disadvantage injured workers by reducing their weekly benefits. Work capacity testing in most cases is conducted in a vacuum, with no direct consultation with the treating practitioners and no reflection of the injury management plan (IMP) to date. Quite often workers are assessed based on criteria which has no relevance to their abilities or skills and never takes into consideration that no training or education has been provided under the IMP. In NSW the Insurer has never had to meet an onus of proof when assessing work capacity.
20. It is reported in the Workers Compensation Report 875, that recently in South Australia where capacity testing is used as weapon against injured workers that the supreme court has unanimously supported that the insurer bears the onus of proof, this same standard must be adopted in NSW if this subjective and bias test is to remain as a feature in NSW.

"SA Supreme Full Court judges have unanimously agreed SA WorkCover through workers' compensation claims agent Employers Mutual Ltd (EML) bears the onus of proving workers have current work capacities. Justice Richard White, with whom Chief Justice John Doyle and Justice Tim Anderson agreed, said EML

considered some change in its assessment of injured worker Roy Martin's capacity was "appropriate", so in effect it bore the onus of proving he had a current work capacity."

21. Research does not support the use of capacity testing as it is recognised that they are fundamentally unfair. The unfairness involved with these provisions has both procedural and substantive dimensions.

"Work capacity review provisions are an essential component of several Australian schemes – notably those of Victoria, New South Wales and South Australia – that enable scheme administrators to terminate weekly payments to injured workers after a specified period of incapacity on a presumption that they can obtain 'suitable employment'. Suitable employment refers to a range of factors including the nature of their incapacity, pre-injury employment, age, skills, education and work experience required to be taken into account by scheme administrators when making a determination. Work capacity review provisions usually come into play after 104 weeks of incapacity in New South Wales under section 40 of that state's legislation, and 130 weeks in Victoria and South Australia.

The fundamental purpose of these provisions is to limit scheme liabilities and, hence, premium costs for employers.

There is no obligation to ensure that such employment is actually, or reasonably, available to an injured worker. This is most explicitly expressed in the Victorian legislation where the determination of suitable employment is required to be undertaken:

"regardless of whether -

- (i) the work or employment is available; and*
- (ii) the work or employment is of a type or nature of that is generally available in the employment market (ACA 1985: s. 5)."*

Due to their inherent unfairness work capacity reviews provisions are highly contentious. The unfairness involved with these provisions has both procedural and substantive dimensions.

At a substantive level, getting injured workers back to suitable, durable and safe work, wherever possible, should be the centrepiece of workers' compensation schemes. More particularly, the rehabilitation and return to employment of the overwhelming majority of injured workers, either with their pre-injury employers or new employers, should be capable of being achieved within a period of 104 to 130 weeks. If workers haven't been rehabilitated within these timeframes it suggests that either their injuries are sufficiently incapacitating as to prevent a meaningful return to work or that there have been systemic failures in the provision of rehabilitation services, including a lack of retraining, to enable them to do so. Work capacity reviews are part of this systemic failure and are symptomatic of a deeper malaise which has seen the rehabilitation of injured workers subverted by a

claims management culture more focused on claims discontinuance than with return to work outcomes.”

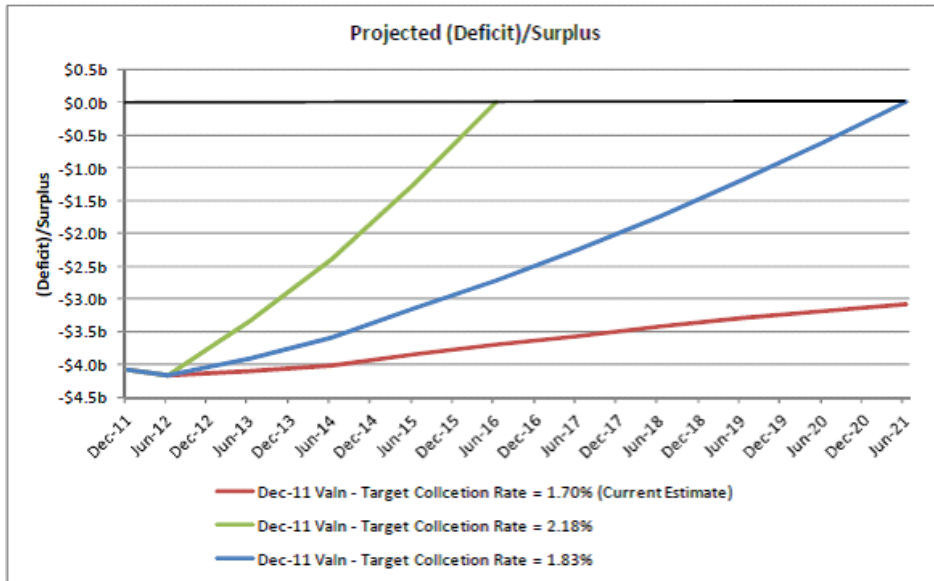
22. The issues paper also suggests that WorkCover has limited power to strongly discourage payments, treatments and services that do not contribute to recovery and return to work. This point is contested by the union and would direct the reader to section 60 of the WCA 1987:

60 Compensation for cost of medical or hospital treatment and rehabilitation etc

(1) If, as a result of an injury received by a worker, it is reasonably necessary that:

- (a) any medical or related treatment (other than domestic assistance) be given, or*
- (b) any hospital treatment be given, or*
- (c) any ambulance service be provided, or*
- (d) any workplace rehabilitation service be provided, the worker’s employer is liable to pay, in addition to any other compensation under this Act, the cost of that treatment or service and the related travel expenses specified in subsection (2).*

23. This section sets out a test of reasonable necessary. Further, WorkCover should not be given an unfettered right to contest the medical judgement of the nominated treating doctors or specialists. The AMWU supports appropriate action being taken to manage those who circumvent and/or operate outside of the boundaries of reasonable necessary treatment. However, injured workers should not be harmed in achieving that outcome.
24. The sole premise for allowing payment for medical expenses cannot be that it has to relate to return to work. This is both unrealistic and inhumane. Should the scheme follow this narrow path it would be foreseeable that in the future pain management will be disallowed, in many cases this is provided to improve quality of life of seriously injured workers and has little if any impact on their capacity to return to work.
25. The issues paper makes an assumption that the scheme needs to come back to 100% fully funded within 5 years. Given that the current loss is an actuarial loss and not a current deficit the scheme has the ability to smooth out the effects of this loss over a longer period. It is noted that a return to fully funded in 5 years will require a 28% increase in premiums while a return over 10 years will only require an 8% increase with no change at all to the benefits. Despite this modest increase if the actuarial deficit was to be recovered over 10 years the issue paper is silent on this proposal?



The projections indicate that (with no other changes) aspiring to return to full funding by:

- 5years would require a premium rate increase of the order of 28%
- 10years would require a premium rate increase of the order of 8%.

Recommendation 1: That the return to surplus should be achieved, in part, by a modest increase in premiums with an expected return to full funding over a longer period of time.

26. To claim that the short term variance in return to work rates demonstrates is a primal cause of the problems facing the scheme is a failing with the issues paper. It is the failure to collect the appropriate premium, direct and manage the scheme that is the failing. Utilising the consequences of that failure to argue that workers and their families should bear the burden of reform is not reasonable it is capricious. The regulator must shoulder a significant share of focus from this enquiry. As was highlighted by Ernst & Young in the external peer review paper there has been a failure by WorkCover NSW to manage the scheme agents and insurers. This is highlighted with their advices on page 8 which states, “We recommend WorkCover review its overall approach to management of the Scheme and in particular the management of agents (including their remuneration).” This concern has been echoed for years by some at the NSW Workers Compensation and Work Health and Safety Council, but issues of ‘commercial- in- confidence’ and similar excuses were used to block any genuine attempt to achieve transparency by the regulator.

- Recommendation 2:** That the mechanisms by which scheme agents are remunerated be tabled at the NSW Workers Compensation and Work Health and Safety Council.
- Recommendation 3:** That WorkCover provide the NSW Workers Compensation and Work Health and Safety Council with an annual compliance report, reported against key performance indicators, in relation to the scheme agents' contracts.
- Recommendation 4:** That WorkCover conduct an audit on every scheme agent prior to the expiry of their contracts and provide the NSW Workers Compensation and Work Health and Safety Council with the result of such audits.
- Recommendation 5:** That WorkCover conduct an audit on every self-insurer prior to the expiry of their license and provide the NSW Workers Compensation and Work Health and Safety Council with the result of such audits.

Options for Change

- 27. Severely Injured Workers** – the issues paper suggests that a severely injured worker would be assessed as a worker suffering more than 30% whole person impairment. Based on the figures set out in the below chart this would equate to less than 1.1% of all workers who suffer a permanent impairment.

Section 66 payments by severity band

The following table shows the distribution of the number of section 66 payments by severity band from 2003-2007.

Severity (% WPI)	Percentage of payments in range
1-4	31.0%
5-9	41.3%
10-14	18.0%
15-19	5.4%
20-24	2.3%

25-29	0.9%
30-34	0.4%
35-39	0.2%
40-44	0.1%
45-49	0.1%
50-54	0.1%
55-56	0.1%
60-64	0.0%
65-69	0.0%
70-74	0.0%
75-79	0.1%
80-84	0.0%
85-89	0.0%
90-94	0.0%
95-99	0.0%
100	0.0%
Total	100.0%

28. This unrealistic threshold would mean, according to the *American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment 5th Edition* an injured worker who suffers an injury requiring the routine use of a cane, crutch or short leg brace or a posterolateral disc herniation with radiculopathy and severe disc degeneration leading to back and thigh pain at rest and persistent numbness along the lateral side of the foot 1 year after onset of the

symptoms, pain and numbness prevents the injured worker from maintaining a constant position, prolonged standing or walking or performing their prior occupation, recreational and household activities' would not be classed as a severely injured worker. Moreover, under this definition, it would be almost impossible for an injured worker suffering psychological injury to ever reach the 30% threshold despite their total incapacity to work or even function in society.

29. The union does not support the concept of 'classes' of injured workers. **All** workers should be entitled to compensation and assistance for any period of loss suffered.

Recommendation 6: There should not be any further artificial thresholds put in place for severely injured workers.

Recommendation 7: There should be a review to establish an appropriate level of benefits for injured workers who are deemed 'unfit for work'.

30. **Removal of Coverage for 'Journey Claims'** – This proposition suggests that employers have limited control and that a journey to work is not considered to be done in the course of a worker's employment. Research however suggests that

"The principal argument in support of coverage is that journeys to and from work are essential to give effect to the employment relationship. As this activity is of benefit to employers and would not otherwise be undertaken workers should, as a general principle, be covered in the event of injury while travelling to or from work. As against this, it is often contended that employers should only be held accountable for risks which they can control. And since injuries associated with commuting to and from work attributable to negligence by employers is rare, they should not, according to the 'controllable risk' doctrine, have to bear responsibility for the costs involved with this type of injury.

The main limitation with this line of reasoning, as indicated earlier, is that it implies that employers should only be held accountable for injuries which they can be expected to prevent. This may make sense in the context of a tort based compensation scheme, but as applied to workers' compensation it serves to undermine the no-fault principle that underpins compensation for work-related injury.

In practical terms it is also worth noting that much of the cost for journey injuries is recoverable from motor accident compensation schemes, thereby reducing their financial impact on overall workers' compensation scheme costs." You need to cite the reference for this research.

31. The AMWU also argues that many journey claims where the worker is at fault and not covered by CTP insurance are as a result of impairment caused by the effects of fatigue, exposure to chemicals, heat, stress or noise. This is the reality of working life in the manufacturing industry.

32. It is also worth noting that some jurisdictions do not have provisions for journey claims in the workers compensation legislation but cover both 'at fault' and 'not at fault' drivers under CTP insurance, unlike NSW. Whilst this would cover most journey claims in NSW it fails to cover pedestrians.

Recommendation 8: Journey claims should remain a feature of the NSW Workers Compensation Scheme

33. **Prevention of Nervous Shock Claims from Relatives or Dependants of Deceased or Injured Workers** – The AMWU strongly opposes any argument that an employer does not have control where a worker is killed in the workplace and negligence has been proven
34. The issues paper proposes the abolition of these claims. It is important to realise that as the law currently stands, these claims can only be successful where it is demonstrated that both conditions are met::
- The death or serious injury to the worker has been caused by the negligence or fault of the employer, and
 - The relative of the worker suffers from more than just a normal grief reaction - he / she must suffer from a diagnosable psychiatric condition (which often leads to substantial time off work and substantial medical treatment).
35. If the proposal of the issues paper was to proceed, relatives of deceased or injured workers would be placed in a disadvantageous position, compared with relatives of persons deceased or injured due to the negligence of someone other than an employer. The proposed position would be totally at odds with the compensation provided under both the Civil Liability Act and the Motor Accidents Compensation Act.
36. The proposal argues that there are now substantial lump sums paid (pursuant to section 25 of the Workers Compensation Act) to the dependants or estate of a deceased worker. These lump sums however do not take into account the psychological effects of a worker's death upon his / her relatives. The lump sums have traditionally only been paid if financial dependency upon the deceased worker can be established.
37. Although section 32 of the Act now provides that the lump sums are to be paid to the estate of the deceased worker if he / she leaves no dependants, this will only assist his / her relatives with psychological injuries based upon their position as beneficiaries of the estate. Put simply, there is no correlation between the amount of the lump sum that would be received and the extent of the psychiatric condition.
38. The proposal also argues that an employer's liability for psychological injuries to family members following the death or serious injury of a worker does not fall

within the objects of the Act. This is a poor argument as the Act has always been considered to be beneficial legislation, as the argument fails to acknowledge that the only reason for the employer's liability is the fact that the employer has been negligent (generally grossly negligent) in causing the death or serious injury of the worker.

39. The proposal further argues that it would eliminate "workers compensation costs arising in circumstances over which employers have limited control". This is an even more poor argument, for if an employer has no control over the death or serious injury of one of its workers, it will not be found to be negligent in causing that death or serious injury, and no claim would arise for psychological injuries suffered by relatives. To succeed in a claim for those injuries, the employer will be found to have unreasonably done something or NOT done something (within their control) to cause the worker's death or serious injury.
40. Claims for nervous shock regularly occur because of the need to establish not just the negligence of an employer, but more importantly that the relatives of the deceased or injured worker have suffered more than just a normal grief reaction.
41. As example of our argument, we refer to our union member, Jeffrey Cleary. Mr Cleary died during the course of his employment with Kellogg's on 22 March 1983, when due to its gross negligence, he suffered fatal burns in one of its ovens. He came from a very close family, and as a result of his death, his parents and siblings needed substantial psychiatric treatment, and suffered varying periods of economic loss.

Recommendation 9: Nervous Shock should remain a feature of the NSW Workers Compensation Scheme

42. **Simplification of the Definition of Pre-injury Earnings and Adjustment of Pre Injury Earnings** – The AMWU supports the principle of simplifying the definition of pre-earnings. Weekly benefits should be paid to injured workers based the worker being no worse and no better off than had they not suffered the injury. This point is well illustrated in paragraph 18.

Recommendation 10: There should be a simplification of the definition of pre-injury earnings to reflect changes in employment arrangements which would align with the workers actual pre-injury earnings.

Recommendation 11: That any definition of pre-injury earnings should take into account overtime, shift penalties, payments for special expenses and penalty rates and superannuation.

Recommendation 12: That a new section be entered into the Act allowing annual leave to be accrued and taken whilst on workers compensation.

- 43. Incapacity Payments – Total Incapacity** – The concept that ‘step down’ arrangements with respect to weekly benefits acts as an incentive to return to work is flawed and not supported by any credible peer reviewed research. Where a worker is deemed unfit for work this is a medical diagnosis which should not be challenged by those who are not medically qualified and directly involved in the treatment on the injured worker. A NTD will put the interest of their patient first which is appropriate, consideration with respect to return to work are secondary to the best treatment of an injury or illness though in many cases forms part of the workers rehabilitation.

The rationale used to support step-downs in weekly payments is that they provide a necessary incentive for motivating injured workers to return to work. Despite this claim there has been no systematic Australian research that demonstrates this to be the case. What evidence there is has been drawn from North American studies and, on closer consideration, it is apparent that the moral hazard arguments and econometric modelling on which these studies are based are flawed. It is also apparent that the return to work process is not the exclusive responsibility of injured workers but rather a joint responsibility that includes employers and scheme administrators. The real function of step-downs is not so much one of facilitating return to work but rather that of shifting costs for work-related injury.

Recommendation 13: That there is no ‘step downs’ to injured workers who are medically diagnosed to have a total incapacity.

- 44. Incapacity Payments – Partial Incapacity** – It has been suggested that injured workers linger on workers compensation due to the supposed generosity of the current scheme. This false presumption is not supported with any evidence, but flies in the face of workers returning to pre-injury duties on the basis of their NTD assessing that they are fit to do so. Treating doctors do not as a habit, falsify WorkCover medical certificates so their patients don’t return to their pre-injury duties but normally apply supportive pressure to return to work as part of the injured workers rehabilitation.
- 45.** The greatest barrier for injured workers is their employer not providing suitable duties enabling them to progress towards their pre-injury duties. The greatest damage (apart from the injury itself for an injured worker is when their employer terminates their employment due to the very injury they suffered in the workplace. See case study (appendix 1). 16% of NSW employers sacked their injured workers according to the *Australia & New Zealand Return to Work Monitor 2010/11* Prepared for Heads of Workers’ Compensation Authorities. In addition to this injustice there is substantial anecdotal and other research demonstrating an active

bias against employing injured workers or anyone who has been on workers compensation as employers fear aggravating the initial injury and being liable.

46. A possible solution to this behaviour would be to provide for Return to Work Inspectors to act to ensure that employers are complying with their obligations.

The primary role of a Return to Work Inspector would be to ensure that employers comply with their return to work obligations under the *Accident Compensation Act 1985* (the Act). They would do this by providing advice and information to assist employers meet their obligations and enforcing the law. Return to Work Inspectors are appointed as inspectors under the Act. Return to Work Inspectors also have a role in ensuring that hosts comply with their return to work obligations under the Act. Hosts engage workers through labour hire employers.

47. Another barrier faced by injured workers is the latency in time before approved workplace rehabilitation providers are engaged. On average in New South Wales it is 12 weeks post a workplace accident before rehab services are provided. This clearly highlights a failure of the insurers/scheme agents to manage these injured workers cases and a failure to implement an appropriate injury management plan.

48. It is suggested that by providing a less generous system (making it impossible for the injured worker to survive financially), that return to work rates would improve. To make this case the issues paper draws a comparison with the system in Victoria. Statistical information does not support this case. When looking at the durable return to rate figures in the latest *Australia & New Zealand Return to Work Monitor 2010/11* Prepared for Heads of Workers' Compensation Authorities, 78% of NSW injured workers had achieved a durable return to work vs. 76% of Victorian injured workers achieving the same. This measure shows not just that *starving workers back to work* is not an effective tool, but that it could in fact play a role in poorer outcomes.

Recommendation 14: That there is no step downs for workers who are suffering a partial incapacity where they are compliant with the injury management plan.

Recommendation 15: That NSW establishes with the Workers Compensation Division of WorkCover NSW Return to Work Inspectors who would be empowered to enter a workplace and satisfy themselves that employers are complying with their obligations under the legislation. Should following been provided with advice an employer not follow this advice, the Act should empower the Authority to bring charges against the employer.

Recommendation 16: That the NSW Workers Compensation and Work Health and Safety Council be requested by the Minister to consider how rehabilitation services might

be expedited without encroaching on the parties rights. Following a set time the Council should report its findings back to the Minister.

- 49. Work Capacity Testing** – As stated earlier work capacity testing has always been a feature of the NSW scheme. The reason it has never been effective is because it was used a tool to strip benefits from injured workers as oppose to a mechanism by which to facilitate a return to work. It is the view of the AMWU that if injury management plans are regularly reviewed and updated in concert with regular case conferences that work capacity testing would not be a requirement of the system. Effectively the need for work capacity testing is an indicator of the failure of the system to facilities a return to work by the parties. Principally this means the failure of the insurer/scheme agent to have managed the case and provided direction.

Recommendation 17: That capacity testing is removed as a feature of the legislation.

Recommendation 18: That built into the contracts with the scheme agents and licences of specialised and self-insurers a requirement for all injury management plans to be reviewed by all parties every 12 weeks.

Recommendation 19: That built into the contracts with the scheme agents and licences of specialised and self-insurers a requirement that case conferences should be conducted every 26 weeks unless to do so would serve no purpose based on the current medical information.

- 50. Cap weekly Payment duration** – The issues paper asserts that “...paying weekly benefits many years after a worker’s workplace injury, reinforces the perception that the worker is still injured”. This assertion is not supported by research or statistical information and on this basis the union does not recognise it.

- 51.** To cap weekly payments is a mechanism by which to transfer the cost of a workplace injury onto an injured worker and their families. This point is demonstrated in the Safe Work Australia paper titled, The Cost of Work-related Injury and Illness for Australian Employers, Workers and the Community: 2008-09 January 2012. This paper an update on two earlier papers states “In terms of the burden to economic agents, 5 per cent of the total cost is borne by employers, 74 per cent by workers and 21 per cent by the community. The trends over the three iterations of this report are for an increasing proportion of costs borne by workers and a decreasing proportion of costs borne by the community. This difference is mainly accounted for by the growth in average weekly earnings and the effect this has on human capital costs and the distribution between worker and community”.

It should be workers demanding a reduction in their workers compensation costs not employers.

Recommendation 20: That a cap more onerous than is currently in place based on retirement ages should not be introduced into the NSW legislation.

- 52. Remove Pain and Suffering as a Separate Category of Compensation** – Whilst the AMWU does not agree with the rationale that statutory lump sum compensation should align with an objective measure of a workers physical impairment rather than a workers loss. The statement does not account for mental impairment and there is no recognition of pain and suffering anywhere else. It is acknowledged that a merger of s66 and s67 would provide a considerable administrative saving to the scheme. The AMWU would only support such a merge should it ensure no loss to injured workers. It is also noted that s66 and s67 have not been indexed and as such represents a decreasing real value to permanently injured workers
- 53.** In 2007 this very question was subject to consideration, though the outcome never adopted. It was tabled at the time that to merge s66 and s67 would provide a saving of \$11 million in the first year and \$15 million every year thereafter. Given the reported increase in recent time of severely maimed workers accessing work injury damages claims suffering from injuries assessed above the 15% whole person impairment threshold, it is reasonable to assume that the value of these savings would far outstrip the projections from 2007. The outcomes of those deliberations were:

Proposed permanent impairment structure

The proposed changes to lump sum compensation for permanent impairment and pain and suffering will:

- replace the dual entitlement arrangements with a single lump sum payment for permanent impairment and pain and suffering*
- increase the amount of compensation paid to workers;*
- make the maximum payment amount available to more workers;*
- index the permanent impairment lump sum according to changes in the average wage over time.*

Single lump sum for permanent impairment and pain and suffering

It is proposed that the existing section 66 and section 67 payments for permanent impairment be combined into a single lump sum payment for permanent impairment, which would provide lump sum compensation for the non-economic

loss suffered as a result of a permanent injury (including from the impairment and the pain and suffering arising from it).

A single lump sum payment for permanent impairment would be achieved by:

- increasing the amount of compensation payable under section 66 of the Workers Compensation Act 1987 to compensate for pain and suffering; and*
- removing section 67 of the Act, under which a separate payment for pain and suffering can currently be made for a limited number of claims.*

The new single lump sum payment would:

- be calculated on the basis of the medically assessed level of whole person impairment;*
- be weighted so that more serious injuries receive a higher payment;*
- increase the amount payable for all levels of impairment (not just the minority that currently receive a separate payment under section 67). Approximately 70 per cent of workers sustaining a permanent impairment between 2003 and 2007 did not meet the ten per cent threshold and consequently received no additional compensation for the pain and suffering arising from their permanent impairment;*
- retain the current section 66 thresholds (15 per cent whole person impairment for psychological injury and six per cent binaural hearing loss).*

Increasing the amount of lump sum compensation for permanent impairment

The amount of money a worker receives would be based on the medically assessed level of whole person impairment. The amount paid will be:

- \$2,200 per percentage of whole person impairment for the first ten per cent; plus*
- \$5,000 per percentage of whole person impairment for each per cent between 11 and 49;*
- a maximum of \$390,000 for injured workers with a whole person impairment of 50 per cent or more.*

For example, a worker with an 11 per cent whole person impairment would receive a payment of \$27,000 (10x\$2,200 + 1x\$5,000).

In comparison with the permanent impairment amounts currently being paid, this would mean:

- an increase of between 52 and 60 per cent in the amount paid to workers sustaining an impairment of between one and nine per cent whole person*

impairment (around 70 per cent of permanently impaired workers fall into this category);

- an increase of between 39 and 152 per cent for the most severely injured workers (impairments of between 50 and 100 per cent whole person impairment);
- an average increase of 40 per cent for levels of whole person impairment of between 10 and 49 percent.

The proposed new amount payable for each level of whole person impairment is set out in the table below. Also displayed are the amounts being paid currently.

Current and proposed new permanent impairment lump sum payment amounts

Degree of Whole Person Impairment	Current section 66 and section 67 payments			Proposed new Permanent Impairment Payment (impairment, and pain and suffering)
	Section 66 (permanent impairment)		Average section 67 (pain and suffering)	
	Non-back injuries	Back injuries		
0%	\$0	\$0	\$0	\$0
1%	\$1,375	\$1,444	\$0	\$2,200
2%	\$2,750	\$2,888	\$0	\$4,400
3%	\$4,125	\$4,331	\$0	\$6,600
4%	\$5,500	\$5,775	\$0	\$8,800
5%	\$6,875	\$7,219	\$0	\$11,000
6%	\$8,250	\$8,663	\$0	\$13,200
7%	\$9,625	\$10,106	\$0	\$15,400
8%	\$11,000	\$11,550	\$0	\$17,600
9%	\$12,375	\$12,994	\$0	\$19,800
10%	\$13,750	\$14,438	\$8,250	\$22,000

Degree of Whole Person Impairment	Current section 66 and section 67 payments			Proposed new Permanent Impairment Payment
	Section 66 (permanent impairment)		Average section 67 (pain and suffering)	
	Non-back injuries	Back injuries		(impairment, and pain and suffering)
11%	\$15,400	\$16,170	\$9,240	\$27,000
12%	\$17,050	\$17,903	\$10,230	\$32,000
13%	\$18,700	\$19,635	\$11,220	\$37,000
14%	\$20,350	\$21,368	\$12,210	\$42,000
15%	\$22,000	\$23,100	\$13,200	\$47,000
16%	\$23,650	\$24,833	\$13,954	\$52,000
17%	\$25,300	\$26,565	\$14,674	\$57,000
18%	\$26,950	\$28,298	\$15,362	\$62,000
19%	\$28,600	\$30,030	\$16,016	\$67,000
20%	\$30,250	\$31,763	\$16,638	\$72,000
21%	\$33,000	\$34,650	\$17,820	\$77,000
22%	\$35,750	\$37,538	\$18,948	\$82,000
23%	\$38,500	\$40,425	\$20,020	\$87,000
24%	\$41,250	\$43,313	\$21,038	\$92,000
25%	\$44,000	\$46,200	\$22,000	\$97,000
26%	\$46,750	\$49,088	\$22,908	\$102,000
27%	\$49,500	\$51,975	\$23,760	\$107,000
28%	\$52,250	\$54,863	\$24,558	\$112,000
29%	\$55,000	\$57,750	\$25,300	\$117,000

Degree of Whole Person Impairment	Current section 66 and section 67 payments			Proposed new Permanent Impairment Payment
	Section 66 (permanent impairment)		Average section 67 (pain and suffering)	
	Non-back injuries	Back injuries		(impairment, and pain and suffering)
30%	\$57,750	\$60,638	\$25,988	\$122,000
31%	\$60,500	\$63,525	\$26,620	\$127,000
32%	\$63,250	\$66,413	\$27,198	\$132,000
33%	\$66,000	\$69,300	\$27,720	\$137,000
34%	\$68,750	\$72,188	\$28,188	\$142,000
35%	\$71,500	\$75,075	\$28,600	\$147,000
36%	\$74,250	\$77,963	\$28,958	\$152,000
37%	\$77,000	\$80,850	\$29,260	\$157,000
38%	\$79,750	\$83,738	\$29,508	\$162,000
39%	\$82,500	\$86,625	\$29,700	\$167,000
40%	\$85,250	\$89,513	\$29,838	\$172,000
41%	\$89,100	\$93,555	\$30,294	\$177,000
42%	\$92,950	\$97,598	\$30,674	\$182,000
43%	\$96,800	\$101,640	\$30,976	\$187,000
44%	\$100,650	\$105,683	\$31,202	\$192,000
45%	\$104,500	\$109,725	\$31,350	\$197,000
46%	\$108,350	\$113,768	\$31,422	\$202,000
47%	\$112,200	\$117,810	\$31,416	\$207,000
48%	\$116,050	\$121,853	\$31,334	\$212,000

Degree of Whole Person Impairment	Current section 66 and section 67 payments			Proposed new Permanent Impairment Payment
	Section 66 (permanent impairment)		Average section 67 (pain and suffering)	
	Non-back injuries	Back injuries		(impairment, and pain and suffering)
49%	\$119,900	\$125,895	\$31,174	\$217,000
50%	\$123,750	\$129,938	\$30,938	\$390,000
51%	\$127,600	\$133,980	\$31,900	\$390,000
52%	\$131,450	\$138,023	\$32,863	\$390,000
53%	\$135,300	\$142,065	\$33,825	\$390,000
54%	\$139,150	\$146,108	\$34,788	\$390,000
55%	\$143,000	\$150,150	\$35,750	\$390,000
56%	\$146,850	\$154,193	\$36,712	\$390,000
57%	\$150,700	\$158,235	\$37,675	\$390,000
58%	\$154,550	\$162,278	\$38,637	\$390,000
59%	\$158,400	\$166,320	\$39,600	\$390,000
60%	\$162,250	\$170,363	\$40,562	\$390,000
61%	\$166,100	\$174,405	\$41,525	\$390,000
62%	\$169,950	\$178,448	\$42,487	\$390,000
63%	\$173,800	\$182,490	\$43,450	\$390,000
64%	\$177,650	\$186,533	\$44,412	\$390,000
65%	\$181,500	\$190,575	\$45,375	\$390,000
66%	\$185,350	\$194,618	\$46,337	\$390,000
67%	\$189,200	\$198,660	\$47,300	\$390,000

Degree of Whole Person Impairment	Current section 66 and section 67 payments			Proposed new Permanent Impairment Payment
	Section 66 (permanent impairment)		Average section 67	
	Non-back injuries	Back injuries	(pain and suffering)	(impairment, and pain and suffering)
68%	\$193,050	\$202,703	\$48,262	\$390,000
69%	\$196,900	\$206,745	\$49,225	\$390,000
70%	\$200,750	\$210,788	\$50,000	\$390,000
71%	\$204,600	\$214,830	\$50,000	\$390,000
72%	\$208,450	\$218,873	\$50,000	\$390,000
73%	\$212,300	\$222,915	\$50,000	\$390,000
74%	\$216,150	\$226,958	\$50,000	\$390,000
75% plus	\$220,000	\$231,000	\$50,000	\$390,000

Maximum permanent impairment lump sum for injured workers with a whole person impairment of 50 per cent or more

Currently, only a small number of permanently impaired workers qualify for the maximum lump sum payment for permanent impairment (i.e. those sustaining a 75 per cent whole person impairment or greater).

The proposed reform will allow a larger number of severely injured workers to receive the maximum payment (i.e. those sustaining a whole person impairment above 50 per cent).

Between 2003 and 2007, 0.3 per cent of workers sustaining a compensable permanent injury received whole person impairment above 50 per cent. In the same period, 0.1 per cent of workers with a compensable permanent impairment received whole person impairment of 75 per cent or above.

While this remains a relatively small proportion, reducing the level at which the maximum amount of compensation is paid more appropriately recognises that suffering a 50 per cent whole person impairment represents a catastrophic impact on the health and wellbeing of the injured worker.

Indexation of statutory lump sum for permanent impairment

It is proposed that the new lump sum permanent impairment payment be indexed in line with changes in the average wage.

Example of possible indexation

Under the proposed permanent impairment structure an injured worker with a 25 per cent whole person impairment would be entitled to a lump sum of \$97,000 for permanent impairment and pain and suffering. Over a three year period (assuming an annual indexation increase of 3.8 per cent), the lump sum would increase by \$3,700 in the first year, \$3,800 in the second year, and \$3,050 in the third year.

Over a three-year period, due to indexation, the lump sum payable would increase by \$11,450 to a total of \$108,450.

The table below describes similar scenarios.

Impact of indexation on proposed lump sum payments

Level of Whole Person Impairment	Proposed amount payable March 2008	Year 1 increase based on annual indexed rate of 3.8%	Year 2 increase based on annual indexed rate of 3.8%	Year 3 increase based on annual indexed rate of 3.8%	Total increase over 3 year period	New total amount payable after three years
10%	\$22,000	\$850	\$850	\$900	\$2,600	\$24,600
15%	\$47,000	\$1,800	\$1,850	\$1,900	\$5,550	\$52,550
30%	\$122,000	\$4,650	\$4,800	\$4,950	\$14,400	\$136,400
50%	\$390,000	\$14,800	\$15,350	\$15,900	\$46,050	\$436,050

The table above demonstrates that indexation will deliver compounding increases in the size of permanent impairment payments over time. If the permanent impairment reforms are not introduced, a worker receiving the current maximum combined lump sum payment of \$281,000 four years from now would see the real value of their payment decline by around \$33,000.

Recommendation 21: That pain and suffering may be merged on the basis that injured workers receive no less.

Recommendation 22: That the statutory payment for permanent impairment be indexed in line with the indexation of other statutory payments.

54. **Only One Claim Can be Made for Whole Person Impairment** – This proposal must be rejected as it does not take into consideration the effects of deterioration which may occur at the site of an injury over time. The issues paper seeks to demonise workers who dare to seek to make more than one claim for their injury without recognising the lingering effects a workplace injury can have.
55. To remove the right to seek redress for deterioration or an aggravation of a workplace injury would be to remove just compensation. This proposal also fails to recognise that a workers ongoing exposure to a hazard in the workplace can lead to further deterioration. A common example of this in the manufacturing sector is hearing loss, where injured workers make claims at various periods of their working life and quiet often continue to suffer a reduction in their hearing until they leave work. To deny workers the opportunity to make more than one claim would be to deny workers compensation as the injury materialises and to deny injured workers the assistance of such things a hearing aids as workers either make a claim earlier on which does not require aids and thus cannot claim into the future when their hearing further deteriorates or they make a claim at the end of their working lives meaning they have foregone for years the assistance of the aids which would have improved their quality of life and productivity.

Recommendation 23: That there should not be an artificial barrier put in place which would restrict injured workers from making more than one claim for whole person impairment should they suffer an aggravation or deterioration of a workplace injury.

56. **Strengthen Work Injury Damages** – The law concerning work injury damages claims in New South Wales radically changed in 2002 with the enactment of legislation which restricted the availability of common law remedies to circumstances where the workers injury resulted in only either the workers death or an injury where the whole person impairment was greater than 15%.
57. In an effort to balance the implementation of those restrictions, the system was modified by provisions in the *Workers Compensation Act* and *Workplace Injury Management and Workers Compensation Act*. Claims for damages arising out of work injuries are made and paid subject to these two pieces of legislation. The Common Law established principles of negligence are still very applicable however and an injured worker is required to establish breach of duty of care by his employer under those common law principles.
58. One of the fundamental principles behind the system as it currently stands is that an injured worker is entitled to bring a work injury damages claim against an employer for an act or omission which resulted in injury, loss and damage where

that act or omission was negligent. The threshold definition of negligence and is as has been developed by the common law and which is applicable in all areas where someone's breach of duty of care has resulted in someone else's personal injury.

59. The High Court has considered the employer's duty of care in the matter of *Czatyрко -v- Edith Cowan University* (2005) 214 ALR 349, and accepted as matters of general principle that:

An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury. If there is a real risk of an injury to an employee in the performing of a task in a workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards. The employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness.....

60. The test of foreseeability and the definition of real risk was defined in the matter of *Wyang Shire Council -v- Shirt* [1980] HCA12. In that matter, the High Court determine that a real risk is one that is '*not far-fetched or fanciful*'.

61. This is the common law test for foreseeability and is in any sense in line with the codified general principles established by the Civil Liability Act in 2002 (section 5B).

Under section 5B, the CLA provides:

A person is not negligent in failing to take precautions against a risk of harm unless:

The risk was foreseeable (that is, it is a risk of which the person knew or ought to have known);

The risk of not insignificant; and

In the circumstances, a reasonable person in the person's position would have taken those precautions.

62. In determining whether a reasonable person would have taken precautions against a risk of harm, the Court is to consider the following (amongst other relevant things):

The probability that the harm would occur if care was not taken;

The likely seriousness of the harm;

The burden of taking precautions to avoid the risk of harm; and

The social utility of the activity that creates the risk of harm.

- 63.** These are all principles which an injured worker must address in a work injury damages claim. The CLA however goes a step further and at section 5C, the CLA provides other principles. It holds, in proceedings relating to liability for negligence:

The burden of taking precautions to avoid a risk of harm includes the burden of take precautions to avoid similar risks of harm for which the person may be responsible, and

The fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and

The subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk. Section 5 C CLA in fact justifies a lowering of the standard of care in workplaces. The direct result will be to encourage employers taking short cuts to save on costs.

- 64.** These additional principles are obviously onerous and in a sense protect employers from potential claims from employees injured in circumstances which could potentially have been prevented by a prudent employer.
- 65.** Ultimately these additional principles in the CLA are there because the circumstances of personal injury outside of the workplace should be subject to higher thresholds of negligence. It is not unreasonable to require a person injured in a slip and fall in a supermarket to have to establish that the owner or occupier of that supermarket failed in their duty by reference to the principles in 5C of the CLA. Subjecting an injured worker to that requirement would retract from the principles that an employer's duty of care to its employees is far greater. It therefore follows that an employee should not be faced with the same onerous hurdles when bringing a negligence claim.
- 66.** Should the CLA be applied in workplace injuries in NSW, the system will effectively be diverging from decades of common law principle evolution - something which will greatly prejudice injured workers.
- 67.** The issues paper has not identified or produced any evidence which suggests that it is in fact any easier for an injured worker to establish liability for negligence on the part of his/her employer as compared to claims brought under the CLA. The system is not so simple that any worker with an injury of 15% will have an entitlement to common law damages. The breach of duty must be established.
- 68.** In order to do that in the most part expert medical and liability evidence must be provided. The injured worker, as distinct from other plaintiffs, is more so burdened in that they are limited to material relied up in his/her pre-filing

statement. That is, the injured worker must have served sufficient evidence to prove the case in negligence prior to filing proceedings in Court – something which other plaintiffs are not restricted to. Fresh evidence on the question of liability in a WID claim is inadmissible in the absence of specific court order.

69. The other important factor not considered by the Issues Paper is that injured workers common law entitlements are still governed by the workers compensation legislation. The entitlement to damages is dictated by s151D of the WIM Act. That section states:

(1) *The only damages that may be awarded are:*

(a) *damages for past economic loss due to loss of earnings, and*

(b) *damages for future economic loss due to the deprivation or impairment of earning capacity.*

70. Under the CLA an injured plaintiff has access to damages for past and future economic loss, non-economic loss (general damages), past and future gratuitous and commercial attendant care services, past and future medical and related treatment expenses, and various other heads which are not provided for in a work injury damages claim.

71. If the issues raised in the proposal were to proceed, not only would the injured worker be required to adhere to the principles codified in the CLA they would still only have recourse to the limited damages for economic loss (which are themselves still subject to the statutory caps applied by section 35 of the *Workers Compensation Act*).

72. If the amendments to the legislation are to include changes to work injury damages which would require an injured worker to bring claims under the *Workers Compensation Legislation* as well as a *Civil Liability Act*, it would rightly follow that the injured worker should have available to them damages under the additional heads afforded by Part 2 of the *Civil Liability Act*.

Recommendation 24: That the principals that apply to determining negligence in workers compensation common law matter remain unchanged.

73. **Cap Medical Coverage Duration** – None of the points raised in the issues paper provide a basis to remove medical coverage. This proposal is about cost shifting from employers onto workers and their families and community. Many manufacturing workers endure lifelong conditions as a result of their injuries and require medical coverage. A clear example of this relates to the provision of hearing aids for the retired. There is a requirement from time to time to upgrade hearing aids as the life of an existing device comes to an end. Some conditions suffered by workers require lifelong treatments and the costs should be borne by those who hold the liability.

Recommendation 25: There should not be a cap placed on the period of medical coverage.

- 74. Strengthen Regulatory Framework for Health Providers** –As here is no detail provided this is impossible to assess or comment upon. However, we note that almost all aspects of the legislation relating to health providers are already governed by a strict regulatory framework.
- 75.** Not withstanding this there are ways to manage some costs related to the scheme. One need only look at the NSW Workers Compensation (Dust Diseases) Board (DDB) as an example of where prudent management of costs has delivered stability even in the face of the GFC. The DDB has been able to maintain quality services in what is effectively a long tail scheme in part by negotiating service agreements with providers and using its position in the market as a lever. At the date of writing this submission the DDB was 100% fully funded based on the financial funding report (April 2012) as provided to the May 17 Board meeting.
- 76.** An attempt in 2011 to regulate the fees of Approved Workplace Rehabilitation Providers by WorkCover failed completely as a result of there being no genuine consultation with the industry or the workers representatives, who ultimately are their clients. It is sensible that a fee structure should be established with all service providers given the size of the scheme, however this should be done in a professional manner that will deliver value for the scheme whilst not disadvantaging service providers or compromising their services.
- 77.** The AMWU supports appropriate reviews of regulation and as a stakeholder has participated through in those reviews.

Recommendation 26: That the NSW Workers Compensation and Work Health and Safety Council be requested by the Minister to oversee a review by WorkCover of the regulatory framework as set for health providers

- 78. Targeted Commutation** – The AMWU cautiously has no opposition to this proposal, but notes the lack of detail provided in the issues paper. The union would want more details and a proper opportunity to comment, before this option was implemented.

Recommendation 27: WorkCover to develop a proposal paper in relation to targeted commutations and commence consultation with the key stakeholders

- 79. Exclusion of Strokes/Heart Attack Unless Work is a Significant Contributor** –This option is insufficiently detailed or discussed and so we are unable to properly respond. We note that strokes/heart attacks are currently only compensable where work is a contributing factor as is clearly expressed under section 9A of the NSW Workers Compensation Act 1987.

“9A No compensation payable unless employment substantial contributing factor to injury

- (1) *No compensation is payable under this Act in respect of an injury unless the employment concerned was a substantial contributing factor to the injury.*
- (2) *The following are examples of matters to be taken into account for the purposes of determining whether a worker’s employment was a substantial contributing factor to an injury (but this subsection does not limit the kinds of matters that can be taken into account for the purposes of such a determination):*
 - (a) *the time and place of the injury,*
 - (b) *the nature of the work performed and the particular tasks of that work,*
 - (c) *the duration of the employment,*
 - (d) *the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker’s life, if he or she had not been at work or had not worked in that employment,*
 - (e) *the worker’s state of health before the injury and the existence of any hereditary risks,*
 - (f) *the worker’s lifestyle and his or her activities outside the workplace.*
- (3) *A worker’s employment is not to be regarded as a substantial contributing factor to a worker’s injury merely because of either or both of the following:*
 - (a) *the injury arose out of or in the course of, or arose both out of and in the course of, the worker’s employment,*
 - (b) *the worker’s incapacity for work, loss as referred to in Division 4 of Part 3, need for medical or related treatment, hospital treatment, ambulance service or workplace rehabilitation service as referred to in Division 3 of Part 3, or the worker’s death, resulted from the injury.*
- (4) *This section does not apply in respect of an injury to which section 10, 11 or 12 applies.”*

80. The discussion around ‘**option for change**’ is very unclear and so we are unable to properly respond to this option

Recommendation 28: That strokes or heart attacks should be treated in the same light as all other conditions which workers may suffer.

Areas Not Targeted

81. The Government response should address the three primary actions recommended by their actuary. We particularly note the two very important recommendations, to “Increase premiums, and/or...” “Improving claim management outcomes”. It is clear that the insurers/scheme agents are failing to deliver in many instances yet are still being rewarded through premium payments. It is noted in the actuarial papers that the two largest scheme agents continue to have downturns in durable return to work rates and managing the work set in their contracts.

Recommendation 29: That all people who work under the scheme in the capacity of a claims manager or have responsibility for the management of claims, be it for a scheme agent or insurer, should undergo minimum training in relation to the role and the legislative expectations in a course developed and delivered by WorkCover prior to commencing in that role.

82. Another area which needs to be addressed immediately is the lack of transparency and accountability, by WorkCover. We note for example that WorkCover has posted a revised gazetted Independent Medical Examinations and Reports Guideline which has been signed off by the acting CEO. Under section 30(1A) **Functions of Council** under the *NSW Workplace Injury Management and Workers Compensation Act 1998* it states, “Before a WorkCover Guideline is published in the Gazette or a regulation (whether made under this Act or the 1987 Act) is published on the NSW legislation website, a copy of the Guideline or the regulation must be provided to the Council”.
83. This guide was not brought before the Workers Compensation and Work Health and Safety Council (Council) for consideration or even brought to the committee’s attention; which is a clear contravention of the Act. Further when amendments were first tabled in December 2011 by a senior manager of the Workers Compensation Division, the Council expressed concern at the logic being applied as it flew in the face of the cost savings which were at the heart of the then current guide.
84. It would appear based on these events that rather than dealing with the legitimate issues tabled by the Council in an open manner as was done when the guide was first being developed, WorkCover has sidelined the Council, reflecting a total lack of respect for the role of the Council. It is unacceptable that we can have a regulator, who it would appear is prepared to contravene the very legislation they are there to uphold. Who regulates the regulator?
85. At a time when the Council has been waiting to see a new guide developed and finalised for more than 12 months, for the protection of vulnerable workers and minimisation of unnecessary cost to the scheme in relation to factual investigation, barriers to improving the Scheme imposed by WorkCover itself must be removed.

Recommendation 30: That any Guides or Regulations which have not been through the legislated process involving the NSW Workers Compensation and Work Health and Safety Council be withdrawn.

Recommendation 31: That any Guides that have been through the legislated process involving the NSW Workers Compensation and Work Health and Safety Council be gazetted and posted.

86. An out-dated and unrealistic cap of \$50,000 applied to medical and related treatment continues to hinder the appropriate and timely treatment of injured workers. This cap has never been indexed and now causes regular problems both for the workers compensation scheme and the dust diseases scheme.
87. At the Dust Disease Board there were 57 cases which exceeded the \$50k cap from 2009-2011 and the rate of matters brought before the board for its consideration has accelerating in the 12 month to date.
88. In the past month a member of the AMWU who sustained injuries to his jaw and teeth following a fall from an unprotected ledge is still awaiting surgery because the initial quote for medical services including replacing teeth topped the \$50,000 cap. This worker is in continual pain and will be until the required surgery is completed and he has had an opportunity to recover. It is ironic that the very delays which are known to lead to poorer return to work outcomes are built into the legislation.

Recommendation 32: That section 61 (3), (4), (4A), (5), (6), (7), (8), (9) be repealed from the *NSW Workers Compensation Act 1987*.

89. It is clear from the example above and the statistical data in relation to the termination of injured workers that the protections legislated with regards to injured workers employment as established under section 248 of the *NSW Workers Compensation Act 1987* is insufficient. Anecdotal and other research demonstrates that some of Australia's most profitable and respected companies terminate their injured workers, even when it is likely they would have returned to pre-injury duties. In these circumstances, it is difficult to see what opportunities there are for workers to preserve their employment.
90. Consideration should be given to amending section 248 to include that the injury management plan must also identify the goal as different job different employer prior to a termination being effected.

Recommendation 32: That section 248 of the *NSW Workers Compensation Act 1987* be amended that, a current injury management plan must set as the return to work goal

different job/different employer before any decision with respect to the termination of an injured employee can be made.

Common Workers Compensation Terms

Injured Worker means a worker who has received a workplace injury.

Workplace Injury means an injury to a worker in respect of which compensation is or may be payable under the Act.

Injury Management means the process that comprises activities and procedures that are undertaken or established for the purpose of achieving a timely, safe and durable return to work.

Injury Management Plan means a plan for a co-ordinated and managed program that integrates all aspects of injury management that concern the treatment, rehabilitation and retraining of an injured worker, for the purpose of achieving a timely, safe and durable return to work by the worker.

Injury Management Program means a co-ordinated and managed program that integrates all aspects of injury management (including treatment, rehabilitation, retraining, claims management and employee management practices) for the purpose of achieving optimum results in terms of a timely, safe and durable return to work for injured workers.

Injury Management Consultant (IMC) is a registered medical practitioner experienced in occupational injury and workplace-based rehabilitation. Injury Management Consultants are facilitators who will assist insurers, employers, workers and treating doctors find solutions to the problems in complex return to work plans and injury management. Injury Management Consultants are not involved in the treatment of an injured worker, nor do they provide any opinion on the current treatment regime to the referrer. They assess the nature of the problem and attempt to mediate a solution through discussions with the nominated treating doctor.

Prior to any referral to an Injury Management Consultant there must be a specific return to work or injury management problem. Efforts should have been previously made to rectify the area(s) of concern without success. Following this, an insurer or employer may refer to an Injury Management Consultant when there is:

- confused goals,
- complexity of injury or workplace environment;
- poor communication between insurer/ employer and nominated treating doctor;
- perceived conflict between the nominated treating doctor's recommendations and the workplace requirements including unexplained changes in medical certification;
- disagreement about the suitability of duties offered to an injured worker

- a worker not upgrading duties at work.

Where a nominated treating doctor identifies the need for an Injury Management Consultant for any of the reasons stated above, they may contact the insurer to organise the referral on their behalf.

Independent Medical Examinations (IME) is an impartial assessment based on the best available evidence that is requested by a worker, a worker's solicitor or employer/insurer and undertaken by an appropriately qualified and experienced medical practitioner (who is not in a treating relationship with the worker) for the purposes of providing information to assist with workers compensation injury and claims management.

A referral for an independent medical examination is only appropriate when information from the treating medical practitioner(s) is inadequate, unavailable or inconsistent and where the referrer has been unable to resolve the issues related to the problem directly with the practitioners.

Nominated Treating Doctor means the treating doctor nominated from time to time by the worker for the purposes of an injury management plan for the worker.

Significant Injury means a workplace injury that is likely to result in the worker being incapacitated for a continuous period of more than 7 days, whether or not any of those days are work days and whether or not the incapacity is total or partial or a combination of both.

Return to Work Program is a program established by an employer with respect to policies and procedures for the rehabilitation (and if necessary the vocational training) of an injured worker. It must be consistent with the injury management program of the employer's insurer and must comply with WorkCover guidelines.

Return to Work Plan is written for an individual injured worker to outline details about suitable duties, restrictions and hours and days of return to work. It can be written by the employer/rehabilitation co-ordinator or by an accredited rehabilitation provider.

Return to Work Coordinator is a trained employee who has attended the 2-day accredited WorkCover course. The role of the Return to Work Coordinator is to coordinate and liaise with all parties to assist in returning injured workers to work.

HSRs are Health and Safety Representatives established inline with Part 5, Division 3 of the NSW Work Health and safety Act 2011.

Health and Safety Committee is a committee established inline with Part 5, Division 4 of the NSW Work Health and safety Act 2011.

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Appendix A

Case Study - The True Story of an Injured Manufacturing Worker

Mr. W was an employee of a multi-national print, paper and cardboard manufacturer. He is a 46 year old man that sustained a lower back injury diagnosed as L5/S1 and L4/5 broad disc protrusion, whilst performing his normal duties as a general hand/stacker on 28 September 2009. Since then, there were a number of trials to return to work, however they were unsuccessful. In September 2010 Mr. W developed severe psychological injury secondary to his physical injury.

Mr. W's injury occurred when there was an electrical fault affecting the conveyer belt which doubles as a work platform on the TEXO3 machine. When the machine is opened there is an automatic cut off which should normally isolate the conveyer belt and stop any movement, however on the day of the incident there had been an electrical failure at the workplace which undermined the effectiveness of the cut out device. Mr. W is not aware of whether there had ever been a risk assessment in relation to the operation of this safety device. On a corresponding machine there is a designated work platform.

In an effort to progress Mr. W's case and incorporate suitable duties, the scheme agents Case Manager called a case conference which was held on the 9th December. At the start of the case conference the Nominated Treating Doctor stated it was his intention to allow Mr. W to participate in a return to work plan and would make him fit for suitable duties. During the deliberations of the case conference an action plan was established which would have, subject to it being followed, led to Mr. W returning to suitable duties in January 2012 with a goal of pre-injury duties in the first week of March 2012. Nearing the conclusion of the case conference the employer representative stated she did not have the authority to make decisions and would have to take the outcomes of the meeting back to her superiors. A timeframe of 2 weeks was set by the scheme agent's Case Manager for the employer to confirm or reject the outcome which was agreed to. To date the remaining parties still await a response.

Despite Mr. W having the benefit of one of the scheme agents most experienced Case Managers working his case, a new injury management plan was not drafted following the case conference. Notwithstanding this the return to work goal remained the same to return to pre-injury duties. The distance between Mr. W's injury management plans is almost annual with the last plan done on 16th April 2012 and the one before on the 22nd June 2011. In this case it was due to the work load of the senior Case Manager.

Despite the silence from his employer Mr. W engaged an approved rehabilitation provider who did an initial assessment on the 16th January 2012 and a functional assessment on the 28th February. He also participated in treatment with an Exercise Physiologist. The approved rehabilitation provider attempted to gain access to the workplace to do a workplace assessment. Despite a number of attempts the employer refused entry to the approved rehabilitation provider, sitting that in its view there were no suitable duties. To date the requested evidence of how the employer gained this view has never been provided to any of the parties.

On the 13th April 2012 Mr. W received a letter from his employer requesting any information that he believed was relevant (including medical information) that would clarify his ability to return to work in the context that they were reviewing his ongoing employment. The letter clearly stated that **there had not been a decision made** and he was provided until the 27 April 2012 to respond.

In accordance with the request Mr. W wrote to his employer and drew to their attention that his absence from work was as a result of a workplace injury and that they were entitled to request a report from his treating doctors as he had already provided them with an information consent form. He also expressed his desire to return to work and that it was as a result of the employer not providing suitable duties that he could not return to work and progress to pre-injury duties. The letter also alerted his employer that he had given instruction to his union to notify an injury management dispute in the NSW Workers Compensation Commission but would be happy to withdraw this action if the employer would provide suitable duties.

In an effort to resolve the escalating events adversely affecting Mr. W's case, his union made contact with the employers National Workers Compensation Manager in the hope that the influence of a senior professional officer of the employer would set a pathway for the resolution of the matters and assist in facilitating Mr. W's return to work. In response to this outreach some days later, the national Workers Compensation Manager apologetically explained that the decision making authority in relation to these matters remained at the workplace and despite his best attempts the course was set.

Following Mr. W's letter the employer did not exercise its right to request information or a report from Mr. W's treating doctors, approved rehabilitation provider or the scheme agent. On the 27th April 2012 Mr. W's union lodged an injury management dispute application with the NSW Workers Compensation Commission in an attempt to have the employer allow Mr. W's approved rehabilitation provider onto the site to conduct a workplace assessment believing that there would be suitable duties available which would facilitate Mr. W's return to work. Evidence that suitable duties existed had been provided by other workers at the workplace and that Mr. W was of an opinion that he could return to his pre-injury duties but for a restriction of 5 hours a day 5 days a week working towards pre-injury hours.

On the 7th May 2012 Mr. W's received advice from his employer via letter dated 4th May 2012 that a decision had been made to terminate his employment on the basis that they had no information that he would recover to his pre-injury duties. It was not acknowledged within the letter that no attempt had been made by the employer to obtain this medical information or that at that date of the notice he was still under a progress WorkCover medical certificate indicative that he had not reach his maximum medical improvement. The letter also conveyed that the employer had made a decision to pay Mr. W 5 weeks in lieu of the notice period required under the award Mr. W was employed under. The termination was in contravention of the injury management plan which had a stated return to work goal of same job/same employer.

The effect of this termination severing the employment relationship and extinguishing the notice period, has removed the ability of the NSW Workers Compensation

Commission to enforce a decision in relation to the injury management dispute and exercises its discretion with respect to the approved rehabilitation provider or to appoint an Injury Management Consultant to facilitate a resolution. This point was well laboured by the employer lawyers, when on the 16th May 2012 the parties participated in a teleconference in response to Mr.W's application to the Workers Compensation Commission.

Despite the Workers Compensation Commission finding in favor of Mr. W his former employer has made it clear that as they are no longer his employer they have no responsibilities and that they have no intention of reinstating him.

Mr. W has since leaving school always worked in semi-skilled manual type work to which he is not suited any more as a result of his injury. Without modification to the type of duties he would be expected to perform or the equipment he is use to working on, it is unlikely he will be able to return to this type of work. Since the onset of his injury the Injury Management Plan has always stated the long term goal being to return to pre-injury duties, as a result there has been no investment in Mr. W gaining new skills, leaving him ill equipped to seek employment elsewhere.

The actions of Mr. W's employer to terminate his employment are contrary to the Injury Management Plan to which they are theoretically bound. It is only theoretical as there is no mechanism by which to compel the employer to comply whilst at the same time should Mr. W fail to comply with an Injury Management Plan he would have been sanctioned with the loss of his weekly benefits.

Mr.W's income has dropped from 80K to \$22K which has result in Mr. W having to sell of his assets to continue to pay his mortgage. His wife has had to increase her hours of work to 4 days a week to assist in paying the bills. He has tried to sell his car to raise funds but could not get a reasonable price. Mr.W was renovating the house prior to the injury; renovations have ceased since the date of the injury and are unlikely to be completed.

In December 2010 Mr. W made an attempt on his life as a result of anxiety and depression resulting from a depressive state due to his injury and being subjected to the workers compensation scheme. He has expressed feeling out of control with nothing going right. Whilst he was in Hospital he was treated for alcohol dependence which was created from self-medicating to alleviate pain. In September 2011 Mr. W had his gall bladder removed.

In his own words Mr. W has stated ***"This injury has adversely affected every plan I had for the future. No aspect of my life has been untouched."***

Is this an isolated case?

At the same employer another worker who had also suffered a work related back injury many years before resulting in a permanent impairment, but had been afforded employment as a supervisor until 2011 in a role where he was not required to do heavy manual handling, was moved without notice into job where he would be at risk of

aggravating his back injury. Despite the concerns raised by this worker in relation to his medical condition the move was affected.

Shortly following the move the worker developed a severe case of anxiety and depression resulting from his concerns in relation to his safety, he was consequently certified as fully unfit. In an effort to manage this workers case there were 3 attempts to have an approved rehabilitation provider access the site for the purpose of assessing safe work, every attempt was stopped or not affected by the employer. When the scheme agent would call case conferences the employer would send representatives without the delegated authority to answer questions or give undertakings resulting in outcomes which were shortly undone.

In the last week of April 2012 the employer terminated the workers services despite this action conflicting with the Injury Management Plan. As a result of this action the workers injury suffered an aggravation and in the first week of May his psychiatrist had him admitted into full time medical care. At this stage it is unclear when he will be at a stage to be released home.

END