

**Submission  
No 97**

## **INQUIRY INTO NSW WORKERS COMPENSATION SCHEME**

**Organisation:** StateCover Mutual Limited

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# Submission

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## Issues Paper NSW Workers Compensation Scheme

A submission by StateCover Mutual Limited

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## Introduction

StateCover Mutual Limited ("StateCover") is an APRA approved and regulated general insurer operating under a NSW Workers Compensation Specialised Insurer Licence. StateCover provides Workers Compensation insurance and related services to 90% of the available NSW local government market.

StateCover was granted a specialised insurer licence in 2001 and carries the risk and liabilities for 140 local government entities. Over the past 10 years of operation, StateCover has managed in excess of 25,000 claims and currently manages in excess of \$190M undiscounted claims reserves, while consistently meeting APRA's minimum capital requirements and WorkCover's financial security requirements.

As a mutual, StateCover operates on a non-profit basis with surplus funds returned to members in the form of premium discounts, performance improvement incentives and/or the delivery of injury prevention services.

StateCover understands the need for reform and appreciates the challenges for the Government in achieving a fair, affordable, competitive and sustainable scheme that will help injured workers return to work. StateCover's experience in prudently managing members' premiums, claims and consequent liabilities within the framework of the NSW Workers Compensation Scheme, make it well placed to provide comment on the Options for Change as outlined in the NSW Workers Compensation Issues Paper ("Issues Paper").

StateCover takes this opportunity to highlight that any amendment that increases claim costs, in relation to injuries which have already occurred, is a key financial risk for StateCover. Accordingly the Board of StateCover respectfully requests the Government has regard for our concerns and avoids any direct or unintended impacts of this nature.

## Executive Summary

StateCover believes the scheme is generally meeting its objective of promoting better health and return to work outcomes for injured workers. However, as evidenced by the current scheme deficit, StateCover believes there are opportunities for improvement that will contribute to containing scheme costs and to financial sustainability in the longer term.

Many of these opportunities are discussed in the Workers Compensation Scheme Issues Paper under Part 2 Options for Change. StateCover's submission is in response to these options for change with alternate solutions offered where appropriate.

StateCover supports in principle the majority of the options and believe, that in the main, they are consistent with the NSW Government's seven reform principles and reform goals.

StateCover believes that Options 5, 9 and 15 - benefit related changes, will have a direct and material impact on improving the overall financial performance of the scheme in the short term and, depending upon the effective date of such changes, contribute to an improvement in current liabilities.

We are of the view that the combined impact of Options 5 to 8 and 14 - relating to benefit structure and other costs will assist in returning a degree of balance to the scheme. We expect an increased focus on recovery and capacity for work, rather than incapacity and compensation, will contribute to a cultural shift leading to a sustainable change over the longer term.

We believe Options 2 and 16 - work relatedness, has merit however doesn't go far enough. It is StateCover's observation that NSW employers are increasingly funding the costs associated with injuries/diseases that have primarily, and in some cases solely, been caused by lifestyle or age related factors. This situation has the potential to undermine the efforts or motivation of employers to prevent and reduce incidents, a key reform principle. In addition, it has the potential to neutralise the financial benefits of the Government's reform. StateCover strongly urges the Government to consider strengthening the existing provisions of the 1987 and 1998 Acts that deal with work relatedness and deductions for pre-existing conditions.

## Responses to Options for Change

StateCover's response has been developed in the context of the seven reform principles<sup>1</sup> and against the 16 Options for Change<sup>2</sup> as outlined in the Issues Paper and noting the Ministers concerns regarding the financial viability of the scheme. Where StateCover has suggestions for alternate options, these have been noted.

### **1. Improved benefits for severely injured workers**

StateCover supports fair and proper compensation for all injured workers and agree that benefits should be directed to the most seriously injured. However, as noted in the Issues Paper on page 11, NSW Workers Compensation system is one of the most generous benefit systems in the nation.

It is noted that the scheme as it currently operates, provides generous lump sum benefits for non-economic loss including pain and suffering, scaled according to the level of impairment. Further, the scheme provides for extensive medical and hospital expenses, intensive rehabilitation assistance and, where negligence can be established, access to work injury damages.

However, StateCover is of the view that seriously injured workers should not be disadvantaged by any amendments that are introduced to improve scheme performance.

### **2. Removal of Journey Claims**

StateCover agrees with this recommendation on the basis of the reasons outlined in the Issues Paper. We note however, that in StateCover's experience, journey claims are not a significant driver of scheme costs and removal of such would not have a material impact on its financial performance unless expanded to include recess claims (for the same reasons outlined in the Issues Paper).

### **3. Prevention of nervous shock claims from relatives or other dependents of deceased or injured workers**

StateCover agrees that such claims do not fall within the objectives of the legislation and should therefore not be an employer's liability.

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<sup>1</sup> NSW Workers Compensation Issues Paper – Pages 2-3

<sup>2</sup> NSW Workers Compensation Issues Paper – Pages 22-29

Of equal concern to StateCover, is the 2008 extension of statutory lump sum death benefits<sup>3</sup> to a deceased worker's estate regardless of whether there are any dependents (or even family members). We believe this amendment is inconsistent with the guiding principles with such compensation being directed to parties without a financial dependency on the deceased worker.

We note NSW is unique in this circumstance. In all other Australian jurisdictions a pre-condition to eligibility for lump sum death benefits is financial dependency.

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

In StateCover's experience, relying on the award rate as the basis for calculating total incapacity is straight-forward and avoids disputes as to what should or should not be included in pre-injury earnings calculation. This provides certainty for all and is administratively simple.

Should the Government proceed to introduce a single measure for pre-injury earnings, StateCover strongly recommends the Government consider the associated cost to the scheme and any unintended consequences.

To avoid increased disputation, uncertainty and complexity, the Act should provide clear guidance as to:

- what payments should be included or excluded from the pre-injury earnings calculation;
- seasonality and situations where any overtime was only intended to be available for a finite period.

StateCover would like the opportunity to comment further on any proposals in respect of this option.

#### **5. Incapacity payments – total incapacity**

StateCover supports amendments that provide an increased incentive to return to work. StateCover would recommend the Government undertake modelling to determine the most effective and fair approach.

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<sup>3</sup> \$481,950 @ 4/2012

## **6. Incapacity payments – partial incapacity**

In StateCover's experience, the current partial incapacity provisions can act as a disincentive for partially incapacitated workers to upgrade to pre-injury hours and duties. Further, the provision of suitable duties to support a prolonged graduated return to work is a challenge for most employers (particularly SME). Any amendment that encourages a prompt and safe return to work is supported by StateCover.

## **7. Work capacity testing**

StateCover believes work capacity testing to be an effective injury management tool and when combined with a well-designed benefits structure, can create an environment where recovery and return to work outcomes are optimised. Work capacity testing is currently used within the scheme, to a limited degree; however the outcomes are not always optimum and the process can be costly and time consuming. In addition, their value as evidence of a capacity to work is frequently dismissed by the Workers Compensation Commission.

StateCover would like to see further detail on this Option to provide a fully considered response.

## **8. Cap weekly payment duration**

StateCover acknowledges that a cap on weekly payment duration would bring about a tangible and direct reduction in scheme costs; however, we would like to see further detail on this Option to provide a fully considered response. We believe there are opportunities to reinforce expectations around work readiness by strengthening the effectiveness of S52A (1987 Act) and the application of S40 (1987 Act) as intended (capable of earning rather than actually earning).

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

StateCover supports this Option for Change for all but serious injuries (to be defined).

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

StateCover supports this Option however would need further information on how it would work in practice. Anecdotal evidence is that the whole person impairment "top up" claims are a consequence of the original assessment being undertaken before maximum medical

improvement is achieved and/or deterioration in the compensable condition driven by the aging process and lifestyle related factors.

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

StateCover supports this Option for Change, although it's not clear how this would work in practice given such payments are claimed/made over a number of years and impairment levels may improve/deteriorate. However, we expect this could be overcome by Option 10 above.

### **12. Strengthen work injury damages**

StateCover believes this Option would have no practical effect in the way the judiciary views negligence under a work injury damages claim, compared to for example, a public liability action.

We note the Civil Liability Act provides an expanded "heads of damages" remedy compared to a work injury damages claim, potentially driving an increase in the average cost of such claims.

StateCover does not support this Option for Change.

### **13. Cap medical coverage duration**

It is StateCover's observation that the comparatively high cost of "services to workers" is typically as a consequence of the long term nature of benefits in NSW when compared to most other jurisdictions. Age and lifestyle factors compound work injuries over time, clouding the relationship between symptoms and their work relatedness, driving an increase in medical spend.

StateCover does not believe that capping benefits is the solution as it has the potential to disadvantage the more seriously injured. StateCover believes the combined effect of Options 14 and 15 would be far more effective in controlling medical costs.



## **14. Strengthen regulatory framework for health providers**

StateCover supports the use of evidence based treatment and would encourage the Government to consider regulations that provide a foundation for this approach. We note that the ACT jurisdiction introduced legislative amendments in 2002 to support the use of clinically relevant research or guidelines in the management of injuries. A critical element to the success of this approach is the alignment of the Workers Compensation Commission in giving the evidence appropriate consideration and weight in their determination of disputes.

## **15. Targeted commutation**

StateCover believes that negotiated commutations can be an effective tool in controlling scheme costs; noting that commutations are successfully used, in one form or another, in all privately underwritten jurisdictions.

StateCover strongly supports the broadening of access to commutations on a continuing basis for specific classes of injury/claims. These would include long term medical only claims, claims where it can be demonstrated that return to work options have been exhausted, claims where a workers location and/or age restricts ability to source suitable employment and psychological injury claims where it's in the worker's best interest to exit the scheme.

We note the Scheme Actuary's reservation in respect of broadening access to commutations and we would like to understand the basis of these reservations.

If there are concerns in relation to a potential return to a "lump sum culture" we believe this has largely been mitigated by the strong injury management and return to work culture that prevails in the NSW system today.

Commutations for specific injury classes, combined with the existing injury management practices, would return a level of balance to the scheme and assist to reduce overall scheme costs while allowing workers to have greater control over the management of their injury.

## **16. Exclusion of Strokes / heart attack unless work a significant contributor**

We believe that this Option has merit however it does not go far enough and should be extended to all injuries/diseases where there is not a close connection to employment.

StateCover's observation is that NSW employers are funding the costs associated with injuries/diseases that have primarily, and in some cases solely, been caused by lifestyle or age related factors. This situation has the potential to undermine the efforts or motivation of employers to prevent and reduce incidents, a key reform principle.

For example, degenerative conditions such as osteoarthritis are outside the control of employers yet a minor aggravation (which could occur in the normal course of day to day living) may result in the employer/scheme being fully liable for all associated costs. These costs may be significant in circumstances where a total joint replacement is required, as is often the case.

There is a large body of evidence which confirms skin cancer is caused by a lifetime of exposure to sun. However, NSW employers are liable for 100% of the cost of such conditions where the worker is *deemed to be in employment to the nature of which the disease is due*, despite the application of best practice health and safety. Such costs can be substantial and have the potential to be a key driver of future scheme costs.

To overcome this inequity, StateCover strongly recommends the following:

1. Strengthen section 9A (1987 Act) to achieve a closer connection to employment rather than the injury simply being “incidental” to work; which seems to be the judicial interpretation of “a” contributing factor. The obvious alternatives would be:

No compensation is payable under this Act in respect of an injury unless the employment concerned was the substantial contributing factor to the injury; or

No compensation is payable under this Act in respect of an injury unless the employment concerned was the primary cause of the injury.

2. Extend the current 12 month contribution period under sections 15 & 16 (1987 Act) for diseases to encompass all relevant prior employment;
3. Extend the current 5 year contribution period under section 17 (1987 Act) for industrial deafness to encompass all relevant prior employment;
4. Strengthen section 323 (1998 Act) to support a realistic deduction for pre-existing conditions when calculating whole person impairment entitlements, rather than the nominal 10% which has evolved as common practice.