

**Submission
No 348**

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

Organisation: Bourke Love Lawyers

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Submissions regarding proposed changes to NSW Workers Compensation Scheme

Submissions

Severely Injured Workers

No-one meets the 30% WPI threshold - what do the statistics reveal about this?
How many workers were rated at 30% WPI or more?
This is like offering \$1M bonuses to all women over the age of 60 who have babies.
The benefits can be increased to those over 30% PROVIDED no cuts to those under 30% WPI.

Journey Claims

Agreed. Remove Journey Claims. Ensure the law still covers those who are required to travel for work.

Ensure the recent Comcare "sex in the motel" case does not get repeated here, by (e.g.) restricting work injuries whilst "in transit / away from home" to work hours / duties, so that just like leaving work on a normal day, there is no workers comp cover once work stops.

No Nervous Shock claims for relatives.

The Common Law / Civil Liability Act recognises the ability of Police Officers to claim nervous shock against the tortfeasor - why take away a widow's right to claim?

The nervous shock claim against a tortfeasor (whetehr or not they happen to be an employer) is not a right bestowed under the *Workers Compensation Act* and should not be removed by the *Workers Compensation Act*. It may be paid by the WCI scheme but it is only in their capacity as an Insurer.

The Nervous shock claim Insurance could be separated from the general W/C insurance as it only comes about in very rare cases.

It is inappropriate to disallow such claims- who **underwrites** these claims is different issue.

Imagine telling a widow whose husband and father of 4 children killed in a preventable incident, causing her injury that prevents her from ever working again, that she cannot claim for the injury caused to HER by someone just because that person happened to be her husband's Employer?

This notion of removing this claim demonstrates a fundamental misunderstanding of the scheme and the difference between the worker's rights and the family's rights.

It also misunderstands the fact that any CTR claim involves a **repayment** of the Death Benefit, preventing double recovery.

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The Scheme **DOES NOT** pay the Death Benefit **AND** the CTR claim on top. That is wrong.

I can provide a calculation showing that even claiming CTR for a deceased 30 year old spouse earning \$130,000 per year is not feasible when factoring in the Death Benefit repayment which is presently in excess of \$450,000.

The submission misunderstands that the employer is not responsible for even part of the CTR claim unless the employer has been negligent.

A journey claim does not impose liability on the employer for CTR.

If the employer has limited control the employer has limited liability.

If the employer is negligent then the employer is liable, as in every other jurisdiction in the developed world.

Pre-Injury Earnings

It should reflect actual pre-injury earnings from all sources, all contracts and all self-employment i.e. all earning capacity.

Payments should not penalise the employer and should be assessed according to an assessment of what the worker would likely have earned but for the injury replacing the current definition which is basically what the worker was capable of earning at the time of injury.

This definition presently allows a worker whose contract was coming to an end or had even been sacked, to claim payments long beyond the period they would have been working anyway, and unfairly punishes the employer.

Step-Down arrangements

A **20 week period** for complete incapacity would allow the worker to organise their affairs/mortgage payments etc.

Work Capacity Testing

Should be undertaken by appropriately qualified physiotherapists.

Not by non-skilled, biased, non-independent Psychologists with no proper training, no independence and no idea of what a (eg) nurse actually does at work.

Cap Weekly payment duration

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Only if the worker is given unrestricted access to Work Injury Damages claims.

Remove Pain and suffering as a separate category

Agreed. This is unnecessary. See suggested table incorporating changes.

Only 1 claim for WPI

The ability of fraudulent claims to meet the thresholds is absent when every claim is rigorously tested.

There is NO LINK between 2nd or subsequent claims and fraud or exaggerated claims.

This notion is badly misconceived.

The suggestion fails to understand that an injured worker may delay surgery for 5 / 10 / 15 years and should not be penalised if they do so, nor be prevented from making a claim when the injury has stabilised, and another when things change.

Most of the "increases" are occurring 8 or 9 years later.

Strengthen Work Injury Damages Claims

Agreed - change the definition of liability / negligence but give the Worker the right to claim future medical expenses and lower the threshold to 10% WPI.

Cap medical coverage duration

Attack the right areas.

Don't cut palliative physiotherapy which allows the worker respite from pain.

Don't cut access to surgery on the basis of cost.

Examine the level of the "services" provided by the Rehab Providers who provide little or no benefits and mainly serve to harass injured workers. They demonstrate little understanding of what they are doing, and try and force 60 year old truck drivers to do **Real Estate Sales Courses**.

Instead of spending \$2000 per course, 5 or 6 times over, with no result and with the added cost of overseeing the course by the Rehab Providers, allow a one-off cost of say \$5000- \$7000 to provide **PROPER** and **SENSIBLE** tuition and re-training which actually has a chance of allowing the injured worker to find employment.

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Regulatory Framework for Medical Providers

GP's hate workers comp - they would rather see them less than more.

Therapists' fees and visits could be assessed by an AMS or Deputy Registrar when a dispute arises, allowing it to be independently determined.

This works very well in practice now but the guidelines could be better expressed.

Targeted Commutation

Every experienced practitioner will agree the restricted Commutation scheme has been a total failure and the worst thing to ever happen to the scheme.

There is no disincentive for an injured worker with a difficult case to run the case if the insurer makes no offers, as there is no costs penalty against the worker.

Success in the liability determination elevates a potential \$5000 commutation to a case that will cost the scheme \$100,000 or more.

Don't fall for the notion that making commutations is going to save the scheme money. Many Work Injury Damages cases have sprung out of the Scheme's refusal to consider commutation.

Tightening the access to commutation will be a boon to injured workers and their lawyers, which is not what the scheme needs.

Exclusions of strokes and heart attacks

Agreed.

It is unfair to visit this liability on the employer. The test could be changed from "substantial contributing factor" to something like "would unlikely have occurred in the absence of the work being carried out by the worker at the time of the CVA/HA"

Death Benefits Table

The payments could be better targeted - e.g.:

Worker >20 and <30 at time of death - dependents get lesser of DB and 8 years wages

Worker >20 and <30 at time of death - dependents get lesser of DB and 7 years wages

Worker >30 and <40 at time of death - dependents get lesser of DB and 6 years wages

Worker >40 and <50 at time of death - dependents get lesser of DB and 5 years wages

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Worker >50 and <60 at time of death - dependents get lesser of DB and 4 years wages

Worker >60 and <67 at time of death - dependents get lesser of DB and 3 years wages

The potential savings to the scheme are illustrated below:

		AGE at D.O.D.		25		
wage	\$100,000	\$80,000	\$60,000	\$50,000	\$40,000	
9 Years	\$900,000	\$720,000	\$540,000	\$450,000	\$360,000	
Present D.B.	\$455,000	\$455,000	\$455,000	\$455,000	\$455,000	
New D.B.	\$455,000	\$455,000	\$455,000	\$450,000	\$360,000	
		AGE at D.O.D.		38		
wage	\$100,000	\$80,000	\$60,000	\$50,000	\$40,000	
8 Years	\$800,000	\$640,000	\$480,000	\$400,000	\$320,000	
Present D.B.	\$455,000	\$455,000	\$455,000	\$455,000	\$455,000	
New D.B.	\$455,000	\$455,000	\$455,000	\$400,000	\$320,000	
		AGE At D.O.D.		53		
wage	\$100,000	\$80,000	\$60,000	\$50,000	\$40,000	
7 Years	\$700,000	\$560,000	\$420,000	\$350,000	\$280,000	
Present D.B.	\$455,000	\$455,000	\$455,000	\$455,000	\$455,000	
New D.B.	\$455,000	\$455,000	\$420,000	\$350,000	\$280,000	
		AGE At D.O.D.		60		
wage	\$100,000	\$80,000	\$60,000	\$50,000	\$40,000	
6 Years	\$600,000	\$480,000	\$360,000	\$300,000	\$240,000	
Present D.B.	\$455,000	\$455,000	\$455,000	\$455,000	\$455,000	
New D.B.	\$455,000	\$455,000	\$360,000	\$300,000	\$240,000	

Weekly benefits - complete incapacity

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Whether step-down is at 13, 20 or 26 weeks has no bearing on rate of healing.

GP will issue Fit WMC when worker is ready, not when statutory rate changes.

Reducing weekly benefits to Award Rate is highly punitive to a small proportion of workers who:

- earn small base rate and high commissions or bonuses (e.g. Real Estate Salespersons);
- work significant overtime;
- have salary structure with small salary component and large Benefits component e.g. Mine workers who receive large non-taxable LAFH allowances and smaller salary.

Reducing benefits to average of last 12 months wages highly punitive to new workers particularly in casual industries e.g. nursing who are building up a work pattern and e.g. work 36 hours per week at time of injury but average out to 13 hours over the year.

Suggestion

For Weekly benefits whilst completely incapacitated.

Include benefits and allowances less the demonstrated cost of travel & accommodation.

Only for 20 weeks to allow injured worker to arrange affairs e.g. mortgage payments.

For non-award / salaried workers

Higher of average over last 12 months and average over last 12 weeks.

Require a WMC every 3 weeks where worker wholly incapacitated. i.e. no "complete incapacity WMC" to go for more than 3 weeks.

Change the definition of "comparable weekly earnings" from capacity to earn (which ignores expiring work contracts etc) to likely earnings; which allows the Arbitrator to look at Pre Injury earning patterns and post injury date what the worker would likely have earned had he not been injured.

This stops the Employer taking up the liability for a worker who would not likely have been earning any way -put the onus back on the work to prove what he would have earned.

If only wholly unfit for say 12 out of the maximum of 26 weeks, the worker can use the balance of the s.36 payment when he returns to work. i.e. the difference between the Pre injury Rate and the RTW rate - disincentive to RTW at the quickest pace

I Suggest:

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Once the worker RTW's the s.36 rate disappears and the rate goes straight to the old s.37 rate - the lesser of the difference and the stat max payment.

Qld limits duration of Weekly benefits but gives full unfettered access to Common Law claims for negligence for workers injured thru the employer's negligence.

NSW WID threshold of 15% WPI limits Common Law access to 10-15% of injuries

Either:-

- abolish the 15% WPI threshold for Common Law AND apply CLA Liability standards
- AND
- give the injured worker access to future medical expenses as well as Eco Loss

OR

Allow unlimited (in point of time) weekly benefits

AND

Cap the benefits at the lower of:-

1. the stat max as adjusted; and
 2. the difference between actual earnings and 80% of the Pre-Injury Earnings,
- to give the worker incentive to Return to Work.

Change the definition of "comparable weekly earnings" from capacity to earn (which ignores expiring work contracts etc) to likely earnings; which allows the Arbitrator to look at Pre Injury earning patterns and post injury date what the worker would likely have earned had he not been injured.

This stops the Employer taking up the liability for a worker who would not likely have been earning anyway – it will put the onus back on the worker to prove what he would have likely earned.

