

**Submission
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INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

Organisation: Media, Entertainment and Arts Alliance

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media, entertainment & arts alliance
the people who inform and entertain

Media, Entertainment & Arts Alliance

submission to the

**Joint Select Committee on the NSW Workers
Compensation Scheme**

NSW Workers Compensation Inquiry

May 2012

The Media, Entertainment & Arts Alliance

The Media, Entertainment & Arts Alliance (Alliance) is the industrial and professional organisation representing the people who work in Australia's media and entertainment industries. Its membership includes journalists, artists, photographers, performers, dancers, symphony orchestra musicians, freelance musicians and film, television and performing arts technicians.

Introduction

The Media, Entertainment & Arts Alliance (“the Alliance”) welcomes the opportunity to provide comment to the Joint Select Committee’s Inquiry into Workers Compensation

The Alliance notes the Inquiry’s terms of reference:

- a) the performance of the Scheme in the key objectives of promoting better health outcomes and return to work outcomes for injured workers.*
- b) the financial sustainability of the Scheme and its impact on the New South Wales economy, current and future jobs in New South Wales and the State’s competitiveness; and*
- c) the functions and operations of the WorkCover Authority.*

The Inquiry must also note and examine the WorkCover NSW actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011, and the External peer review of outstanding claims liabilities of the Nominal Insurer as at 31 December 2011.

At the outset the Alliance wishes to record its concern with the limited timeframe for submissions and provision of a report to the NSW Government. If it is open to the Inquiry’s Members, the present period of Inquiry should be extended so that evidence can be heard from more interested parties, some of whom will have been unable to adhere to the present restricted timeframes.

The NSW Government has released an issues paper, extracts of which are discussed below. In summary, the Government’s intention is that it will move to:

- Remove workers compensation coverage for trips to and from work;
- Reduce weekly payments to injured workers after 13 weeks;
- Stop weekly payments for most injured workers after 2 ½ years;
- Stop medical payments for most injured workers after 2 ½ years;
- Stop partners of those killed at work from claiming for nervous shock;
- Stop lump sum payments for pain and suffering; and
- Make it harder to prove employer negligence in lump sum claims.¹

It is of course prudent for Government to maintain sound oversight of workers’ compensation arrangements and to review apparent costs from time to time. The Alliance submits, however, that the documentation underpinning this Inquiry process² (and which is presumably illustrative of the Government’s intentions), is devoted principally to cost imperatives at the expense of the welfare of compensation scheme participants.

¹ UnionsNSW advisory materials

² PricewaterhouseCoopers (PwC) Actuarial valuation of outstanding claims liability for the NSW Workers compensation Nominal Insurer as at 31 December 2011, Executive Summary /Ernst and Young Peer Review of PwC valuation.

The discussion paper displays an obsessive attention to scheme costs rather than benefits and encourages cherry-picking of more 'streamlined' arrangements in other jurisdictions. This is evidenced in the reform options section of the paper, where only passing comment is made about the need to maintain the dignity of workers injured in the course of their employment.

Scheme Administration

Before addressing several of the discussion paper's reform options, the Alliance encourages Inquiry members to examine the administrative costs of maintaining the current scheme. In this respect we refer Members to data provided by the NSW Law Society in March 2012 that:

- the number of litigated major injuries has halved since 1996
- the number of disputes by scheme agents is one-third the 1996 rate
- payments to scheme agents have risen from approximately \$70m per annum to over \$630m per annum in 2010³
- the total cost to the scheme of managing a dispute has risen sixteen-fold in the past decade⁴

As the Law Society noted, 'the poor performance of the scheme's fund managers' is a key factor driving the current scheme's deficits.

The Alliance has reviewed PricewaterhouseCoopers (PwC) 'Actuarial valuation of outstanding claims liability for the NSW Workers compensation Nominal Insurer as at 31 December 2011' and notes the following observations contained in the Executive Summary of that report.

PwC has noted the scheme was in surplus (of \$625 million) in June 2008. PwC stated that "approximately 50%' of the scheme's financial deterioration was due to "external influences impacting investment returns achieved ..." p2 In other words, the scheme's performance has fallen in line with the onset of the global financial crisis.

Moreover, PwC has remarked of the request to provide balance sheet estimates (to which the NSW Government asserted continuing cost escalations) for the next ten years that: "It is important to appreciate that this projection is inherently uncertain. It is likely that actual investment income and claims experience which emerges in the future will differ from the central estimates projection, perhaps significantly".⁵

³ The PwC actuarial valuation also notes that "the performance of some WorkCover agents has been deteriorating", pg 29

⁴ Letter from Justin Dowd, NSW Law Society President, to the Hon Greg Pearce, Minister for Finance and Services, 22 March 2012

⁵ PricewaterhouseCoopers (PwC) 'Actuarial valuation of outstanding claims liability for the NSW Workers compensation Nominal Insurer as at 31 December 2011,' p11

Caution should therefore be exercised in adhering to the ten year forecast submitted by PwC and peer reviewed by Ernst and Young.

Medical Expenditure

The Alliance also takes issue with some of the concerns with increased medical expenditure associated with the scheme, especially during the three quarters leading to December 2011. PwC has cited medical expenses as one of the drivers of the other 50% of the deterioration in 'claims management experience' since June 2008.⁶

While the Alliance does not challenge the need for efficient delivery of medical services, two points bear attention: Firstly, medical costs increase year to year in terms significantly higher than other industry/service sectors. They exceed so-called normal economic inflation levels. Secondly, the scheme's medical costs have not inexorably tracked upwards year to year even in the last four years of the scheme's operation.

These Scheme's medical costs need to be assessed over time. There is an ebb and flow of costs, some of which are episodic. Further analysis of medical cost drivers should be conducted before crude assumptions about unjustified medical expenditure are endorsed. The Alliance therefore supports PwC's recommendation that "WorkCover undertake further analysis in order to holistically understand the drivers, identify any possible issues and implement strategies to control this escalation".⁷

There is an inevitability of rising medical treatment costs reflected across the health sector. To insist that these expenses should be capped to meet an overall economic objective would seriously compromise the scheme's performance in terms of delivering quality health outcomes for injured workers.

Specific Reform Proposals

The Alliance now turns to particular scheme reform options being promoted by the NSW Government and its economic advisers.

Severely injured workers

"A key plank of any reforms should to improve the benefits for severely injured workers. It has been suggested that reforms should provide for severely injured workers, who have an assessed level of whole person impairment of more than 30%, to receive improved income support, return to work assistance where feasible, and more generous lump sum compensation.

⁶ PricewaterhouseCoopers (PwC) 'Actuarial valuation of outstanding claims liability for the NSW Workers compensation Nominal Insurer as at 31 December 2011,' p2

⁷ PricewaterhouseCoopers (PwC) 'Actuarial valuation of outstanding claims liability for the NSW Workers compensation Nominal Insurer as at 31 December 2011,' p28

The Alliance supports strengthening of benefits and treatment for severely injured workers.

Removal of coverage for journey claims

It has been suggested this would provide a closer connection between work, health and safety responsibilities and workers compensation premiums through eliminating workers compensation costs arising in circumstances over which employers have limited control.

“The object of the workers compensation legislation is to provide income support, medical assistance and rehabilitation support for workers injured during the course of their employment.”

As the discussion paper notes, NSW workers are covered for injuries which occur on their journey between home and work. Three other jurisdictions also permit journey claims to be made.

The ability to make journey claims is vitally important to Alliance members. The very nature of the work undertaken by the Alliance membership is such that travel to and from work and between engagements makes up a significantly high proportion of their working lives – in many cases a higher proportion than many other workers. Work as a performer, film and television crew member or a journalist involves significant casual and freelance engagements that can involve unconventional and disparate working arrangements, locations and time periods. Work locations can alter hourly or on a daily basis and can involve varying and significant distances. This is very different to working nine to five in a single office. The work of the Alliance’s performer membership too is one that fundamentally involves a greater deal of physicality than many other professions. Therefore any injuries sustained will have a greater impact on their ability to return to work. This means any changes to these provisions will disproportionately impact upon Alliance members.

As a general principle the Alliance believes that all workers would not be undertaking travel to and from their employment but for the employment arrangement itself. It is therefore a matter of basic fairness that workers should be covered for workers compensation on their way to and from work.

It is important to note that without such coverage this would place a significant burden upon the Government and the public purse. If a worker is not able to claim workers compensation for an injury sustained in a journey to or from work, they will have to discontinue work temporarily or on a more permanent basis. Without any financial support these workers will have no choice but to seek financial support from the Government via the social security system. In other words, if the business community and employers do not shoulder the insurance burden of assisting workers injured in the process of providing their labour to those employers, the Government and taxpayers will have to shoulder those costs. Furthermore, without

any structured return to work programs injured workers will find it increasingly difficult to return to employment.

Simplification of definition of pre-injury earnings & adjustment of pre-injury earnings.

“It has been suggested the current arrangements should be updated to more closely reflect changes in employment arrangements in NSW. Stakeholders have argued the existing arrangements for determining weekly benefits are overly complex, anachronistic and fail to deliver consistent outcomes for injured workers.

“The current system was designed in an era where employment was characterised by permanency and regulated via industrial instruments, while such arrangements still exist there are an increasing number of workers who are employed under more flexible arrangements. Casualisation is increasing, in 2009 around 20 per cent of the workforce in Australia was employed under casual arrangements; this had increased from 17% in 1992.

“By creating a single measure for pre-injury earnings, the existing disparity between benefits paid to award and non-award workers would be removed and administration of benefit arrangements would be simplified.

“Changes to weekly benefits would remove the difficult and confusing provisions that currently exist to determine the amount of weekly benefits that an injured worker would receive and thereby reduce disputation over ‘weekly benefits. A new simplified measure more closely aligned to workers actual pre-injury earnings would be welcomed.

The Alliance supports a single rate of benefit calculation as a means of improving Scheme administration. The Alliance would not, however, support a reduction in employee entitlements in a person’s Scheme entitlements.

Incapacity payments-total incapacity

Step downs feature in all workers compensation jurisdictions in Australia. Currently in the NSW model the first step down occurs at 26 weeks. It has been suggested that consideration be given to aligning weekly benefit payments more closely with other jurisdictions and to an earlier step down with capacity testing would align with clinical recovery patterns. This may create more appropriate and effective point for a financial return to work incentive to commence. For example, most fractures have a healing period of within six weeks and the many other injuries have a healing period within 13 weeks.

An earlier step down would harmonise NSW arrangements with Victoria, South Australia and Western Australia.

The Alliance opposes any step-down to thirteen weeks for employees classified as being totally incapacitated. These are the most vulnerable of Scheme participants. It is notable that efforts to 'harmonise' laws are directed at jurisdictions with lesser entitlements than NSW instead of jurisdictions where step-downs are not in place.

Incapacity payments - partial incapacity

"It has been suggested that the NSW arrangements for incapacity payments for partial incapacity do not encourage recovery and return to full employment. In other jurisdictions, including Victoria and South Australia, financial disincentives are utilised to prevent long-term dependency.

"This benefit arrangement for partially incapacitated workers would put into practical effect the object of the workers compensation legislation of rehabilitation and return to work. By increasing benefits as workers increase their hours of work, all participants; workers, employers and treatment providers have a clear and simple objective."

Work Capacity Testing

"It has been suggested that work capacity testing at specific points could assist injured workers on long term weekly benefits in transitioning from weekly benefits back into paid employment. In the lead up to undertaking a work capacity test, injured workers would need to be supported by appropriate rehabilitation to make them as work ready as possible.

"There is a concern that continuing to pay weekly benefits for workers many years after a work place injury reinforces the perception that they are still injured. Ceasing weekly benefits after a certain period for workers with a work capacity would assist injured workers to move forward from their workplace injury to focus on their future employment prospects.

"Such a reform as well as the changes to weekly benefits could act together in reducing weekly benefit liabilities of the scheme in therefore improve the overall performance of the scheme. Such changes may be more consistent with the objects and principles of the workers compensation legislation in that they support a workers return to work and rehabilitation."

The Alliance believes that cutting benefits to partially incapacitated Scheme participants as an 'incentive' to return to work is logically and practically perilous. Employees who are not ready to return to work but who feel compelled to do so to secure higher earnings may well aggravate (and worsen) their condition. Closer examination of the Victorian, South Australian and Tasmanian schemes' operations

is necessary before any decision to cap or reduce benefits for partially incapacitated persons is made. The Alliance does not accept the (disingenuous) view in the Issues Paper that ‘pay[ing] weekly benefits for workers many years after a workplace injury reinforces the perception that they are still injured’.

The Alliance is not opposed to improved work capacity testing at reasonable intervals.

Cap weekly payment duration

“There is a concern that paying weekly benefits many years after a worker’s workplace injury, for those workers a lower level of permanent impairment, reinforces the perception that the worker is still injured. It has been suggested that capping weekly payment duration to within a certain timeframe and thereafter ceasing payment of weekly benefits would give workers a fixed timeframe during which they know they need to work toward a certain level of work readiness.”

The Alliance understands that after six months, most injured workers without work receive a modest benefit of \$432.50 a week before tax. Injured workers who unreasonably refuse to return to work can already have their payments terminated.

Remove “pain and suffering” as a separate category of compensation

“The lump sum payment for pain and suffering was a subjective measure of the financial impact of a worker’s injury and was originally inserted to replace common law provisions in the 1987 Act. While common law provisions were restored and modified in 1989, the lump sum payment for pain and suffering was not removed. It has been argued that this is an anomaly within the statutory scheme and one that creates significant disputation and legal costs.

“It has been suggested that the incorporation of this provision into lump sum payments for injuries with Whole Person Impairment greater than 10% would reduce disputation and reduce administration costs.

“Such changes would also ensure that statutory lump sum compensation aligns with an objective measure of the worker’s physical impairment following a workplace injury rather than a subjective measure of the worker’s “loss”.”

The Alliance does not support the removal of pain and suffering as a category of compensation.

Cap medical coverage duration

“There would be the potential for capping medical benefits as they do in other States. There is currently no cap on benefits for medical and related treatment and many workers have access to medical treatment many years after their date of injury.”

The Alliance knows that many injured workers need follow-up operations or medication for years following their injury. It is artificial and arbitrary to link the payment of medical costs to the length of payment of other benefits. It is currently the case that all medical expenses must be certified as reasonably necessary. To cut or reduce medical support will simply transfer these costs to the injured person and/or their families.

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

It has been suggested this would provide a closer connection between work, health and safety responsibilities and workers compensation premiums through eliminating workers compensation costs arising in circumstances over which employers have limited control. Covering liability for strokes and heart attacks is arguably inconsistent with the principles of the workers compensation legislation as the principles of the legislation are to provide income support, medical assistance for workers injured as a result of a workplace injury. Whilst tragic for all concerned, causation of strokes and heart attacks are not normally associated with workplace injuries and the factors that impact on rehabilitation and return to work are not typically workplace issues.

The Alliance does not support the proposed reform.