

**Submission
No 151**

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

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SUBMISSION BY THE
Housing Industry Association

to the
**Joint Select Committee on the NSW Worker
Compensation Scheme**

on the
NSW Workers Compensation Scheme

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HIA ::

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HIA is the leading industry association in the Australian residential building sector, supporting the businesses and interests of over 43,000 builders, contractors, manufacturers, suppliers, building professionals and business partners.

HIA members include businesses of all sizes, ranging from individuals working as independent contractors and home based small businesses, to large publicly listed companies. 85% of all new home building work in Australia is performed by HIA members.



1 Executive Summary

The Housing Industry Association Limited (**HIA**) welcomes the opportunity to comment on the Joint Select Committee's Inquiry into the NSW Workers Compensation Scheme (**Inquiry**).

1.1 Terms of Reference

HIA notes that the Terms of Reference to the Inquiry outline the following as the focus of the review:

- The performance of the Scheme in the key objectives of promoting better health outcomes and return to work outcomes for injured workers.
- 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.
- The functions and operations of the WorkCover Authority.
- That, in conducting the Inquiry, the committee 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.

Although an Issues Paper was released by the NSW Government to further inform stakeholders as to the aspects of the Scheme under consideration, HIA understands that this Inquiry is intended to be broad and stakeholders have been encouraged to raise other matters of concern in relation the NSW Workers Compensation Scheme (**Scheme**).

In this regard 2 additional issues of concern for the NSW residential building industry include the provisional liability provisions and the deeming provisions of the *Workplace Injury Management and Workers Compensation Act 1998* (**1998 Act**).

HIA's submissions will focus on these areas as well as the key options for reform as outlined in the Issues Paper and the Terms of Reference.

1.2 About HIA

HIA is the peak body for residential builders in Australia with nearly 13,000 members in NSW. HIA members include builders, contractors, manufacturers, suppliers, building professionals and business partners. Members' businesses range from self-employed independent contractors and home based small businesses, to large publicly listed companies and as such are uniquely placed to comment on the performance of the Scheme.

1.3 The NSW Worker Compensation Scheme

HIA supports the Government's review of the Scheme.

HIA is opposed to any increase in Workers Compensation premiums as a solution to the Scheme's unfavorable financial situation.



Workers' compensation premiums are already a significant on-cost for businesses in the residential construction industry, discouraging employment and eroding profitability. Urgent policy changes are required to ease the cost pressures on employers and to restore the incentive to employ and grow.

The current Scheme was established in 1987 and over this time whilst premiums have continued to increase, the costs incurred by scheme far exceed the premiums earned leading to a significant unfunded deficit.

The Scheme has been reviewed several times over the years, including in 1997 by Richard Grellman who published a report for the WorkCover Authority that identified several weaknesses in the scheme including deficiencies in the premium system, a flawed benefit structure and complex and disjointed legislation. Grellman recommended that private underwriting be introduced along with a reduction of common law claims.

These key recommendations were ignored and the underlying deficit has worsened. For instance with common law claims, although thresholds must be overcome, and negligence has to be proven there are relatively few limits on workers making such claims. Damages granted may be unlimited.

As identified in the Issues Paper the Scheme now has a deficit of \$4.083 billion and premiums in NSW are already estimated to be between 20 and 60 per cent higher than other jurisdictions.

In fact the Victorian Government has just announced a major cut of three percent to WorkCover premiums. The Premier Ted Baillieu has said the reduction forms part of the Government's aim to support businesses in 'challenging economic times'.

It is vital to note that NSW has not escaped these challenges that the Victorian Premier has referred to. The NSW Government needs to ensure that businesses are resilient during these economic times.

Of particular concern to HIA is that for a residential construction company the current premium (5.04% or \$12,600 based on annual wages of \$250,000) is nearly 5 times the Victorian rate (1.03%) and twice the Queensland rate (2.79). Actuaries have estimated that if the Scheme is to remain as it is this year premiums will need to increase to 6.45%. HIA would strongly argue that this is an untenable situation.

1.4 Concerns with the Inquiry

Although HIA supports the Inquiry, HIA has concerns with the limited timeframes given to provide submissions.

The Terms and Reference and Issues Paper outline the need for substantial reform and it is of concern that such significant changes will not go through an adequate consultation process.

HIA would strongly recommend that any proposed changes to the Scheme undergo extensive consultation with interested stakeholders and as such, more expansive timeframes be established in order to ensure a robust review of the Scheme.



2 The NSW Residential Construction Industry

The residential construction industry is one of the most heavily regulated industries in NSW. Those in the industry must manage a complex web of national, state and local laws, regulations and codes ranging from planning, design, environment, health and safety, to local authority inspection and certification and a multitude of building, electrical, mechanical and plumbing processes.

Those in the industry must also comply with a legislative framework that spans a multitude of issues including licensing, owner-builders, dispute resolution, builders warranty obligations and contractual requirements.

To add to this plethora of issues the industry is further complicated by a spectrum of business sizes and structures, from large project home builders, to small family run operations, from companies and partnerships to sole traders. In addition, the industry is supported by a multitude of trade contractors who provide the 'hands on the ground' and support the industry as a whole.

Most of those entities outlined above will have contact with workers compensation, whether it is due to the engagement of employees or through the engagement of a contractor who is 'deemed' to be a worker and so falls within the Scheme.

HIA would like to ensure that the unique characteristics of the residential building industry are taken into consideration during this Inquiry. Businesses in the industry already bear significant costs, any further costs increases will only have undesirable consequences.

3 Premiums

HIA submits that the Inquiry's priority and focus should be on lower premiums.

HIA opposes any increase in Workers Compensation premiums and would strongly advocate the need for a reduction in premiums.

It is foreseeable that any increase to premiums would have a detrimental effect on the financial viability of those in the residential building industry and would also have a negative impact on housing affordability across NSW.

HIA would broadly support a Scheme that:

- aims to reduce premiums; and
- *'provide(s) 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'*¹.

To that end, HIA would broadly support reforms that include:

- The removal of coverage for journey claims.
- Prevention of nervous shock claims from relatives or dependents of deceased or injured workers.

¹ Issues Paper pg. 23



- The introduction of 'step-downs' on weekly payments and work capacity testing for both partial and total incapacity.
- Placing caps on weekly payments and medical coverage duration.
- Exclusion of strokes/ heart attack unless work a significant contributor.
- A reconsideration of access to common law claims including the examination of:
 - The removal of "pain and suffering" as a separate category of compensation.
 - Applying the provisions of the Civil Liability Act to work injury damages claims.

HIA also supports broad reforms aimed at improving competition in the sector. A competitive market will reward businesses for successful management. If a business has a strong OH&S history with limited WorkCover claims, its premium should be discounted. If a business has a poor claims history, its premium should reflect this historical level of risk.

HIA would also suggest that consideration be given to the treatment of apprentice and trainee remuneration in relation to the calculation of WorkCover premiums.

HIA understands that employers who engage an apprentice or trainee apprentice in a recognised trade vocations as designated by the Commissioner for Vocational Training under the *Apprenticeship and Traineeship Act 2001* are exempt from paying workers compensation premium on those wages paid. However, those wages will still need to be included/declared on the estimate and actual wage declarations supplied to the Scheme Agent and the premium saved will vary depending on the number of apprentices employed, the apprentice's wage rate and the employers WorkCover Industry Classification.

While the provision of an Apprentice Incentive Scheme is a positive step HIA is lobbying States and Territories to follow the Victorian example, which excludes wages and related payments made to apprentices or trainee apprentices in the calculation of the WorkCover premiums. Such moves would encourage employers to invest in the next generation of tradespeople. This incentive could be funded in a competitive market through a number of arrangements, similar to the community service obligations applying to telecommunications.

HIA would however ask that caution be exercised when considering the following:

- *Changes to the definition of pre-injury earnings*

The Issues Papers suggests that the current arrangements for determining weekly benefits are *'overly complex, anachronistic and fail to deliver consistent outcomes for injured workers'*².

It is also suggested in the Issues Paper that regular overtime and allowances be taken into account when calculating a totally incapacitated workers weekly payment.

² Issues Paper pg. 24



Neither the WorkCover NSW Actuarial Valuation report or the external peer review of that report recommend any changes in this regard, as such the impact of any such changes on the Scheme is unknown.

HIA would strongly recommend that a full analysis of this be undertaken prior to any changes being made.

- *Improving benefits for severely injured workers*

HIA recognises the need to provide long term income support and treatment for severely injured workers and understands that this is an essential feature of any workers compensation scheme.

HIA would ask that given the current state of the Scheme the Committee take a conservative approach to any increases in benefits. Any changes should only be as a result of amendments to the current benefits provided to severely injured workers.

3.1 Provisional Liability

HIA members have raised concerns around the payment of provisional liability.

Part 3 of Chapter 7 of the 1998 Act set out an insurer's duty to accept provisional liability and commence weekly payments to an injured worker prior to the WorkCover Authority or self-insurer making a decision on liability. Those payments must commence within 7 days of the initial notification of the injury.

Provisional payments can continue for up to 12 weeks. The period for an insurer to make an assessment and decision is also 12 weeks.

It is HIA's understanding that should a claim be made and the worker later determined to have no entitlement to workers compensation any provisional payments paid are not clearly recoverable by the Scheme.

HIA understands that these provisions were originally introduced to address concerns around administrative obstacles and slow decision making by insurers.

HIA recognises that the intention of these provisions is to make sure that there are processes in place that ensure the needs of injured workers are met including the payment of provisional amounts for injuries sustained while at work.

While such provisions may have overcome the obstacles previously mentioned it is the experience of HIA members that claims are automatically accepted without the necessary reviews, or applying provisions that enable an insurer to reject a claim based on a *reasonable excuse*³.

³ Section 268 1998 Act



Not only does the current operation of provisional liability create a perception that all claims will be accepted, there is a lack of clarity around:

- the consequences of fraudulent claims; and
- the impact of these improper payments on premiums and the Scheme in general.

Consequently, HIA would suggest that the impact of provisional liability on the Scheme be investigated.

3.2 Deeming Provisions

The 1998 Act currently provides for deeming of contractors as workers, through Schedule 1.

HIA understands that the aim of these provisions is to ensure that employers and contractors do not establish relationships which artificially put them outside the Scheme either for coverage or premiums.

While the definition of a 'worker' and the factors considered in making that determination have come under review in the past, it is generally accepted that the common law test is to be applied.

While making this assertion, it is the experience of HIA members that the application of the common law test can be problematic and is a source of continuing uncertainty and concern to HIA.

As has been previously mentioned, the use of subcontractors and contracting arrangements is the backbone of the residential building industry. Those in the industry are often faced with many tough decisions in relation to the labour they engage, including the decision as to whether an individual would be 'deemed' a worker for the purposes of paying the workers compensation premium and also in relation to the payment of workers compensation claims. These decisions can have a significant impact on the costs faced by a business in the industry.

The lack of clarity around how the common law test is applied is a constant source of frustration for the industry and results in inconsistent decision making by the WorkCover Authority.

In addition HIA members have raised concerns in relation to:

- Situations in which the contractor is a company and deeming is applied, there is the potential for double-dipping of premiums; whilst the principal is required to pay a premium for the monies paid to the contractor, the contractor will be required to pay a premium in relation to any salaries paid by the company.
- A lack of clarity around the ability to challenge a decision in which a contractor has been deemed a worker.



HIA would request that the Committee examine ways that the notion of procedural fairness can be demonstrated through the deeming provisions including ways in which:

- the common law test can be consistently applied in order to promote certainty for the industry; and
- those affected by a deeming decision are given recourse to challenge that decision.

4 Return to Work

HIA notes that the Issues Paper places a heavy emphasis on promoting the recovery of injured workers and the health benefits of returning to work, as stated at page 6 of the Issues Paper '*recovery and return to work should be the key objective of any workers compensation system*'.

Under section 52 of the 1998 Act an employer must establish a return-to-work program for an injured worker, while section 54 makes legislative provision for a Job Cover placement program which is a system designed to encourage the employment of injured workers by the provision of financial incentives to their employers in connection with insurance liabilities arising from further injuries to the workers.

There are also a number of non-legislated return-to-work programs including the work-trial program, the provision of funding for retraining and the provision of funding for equipment and/or workplace modifications.

While the Issues Paper does not outline specific options for change in relation to return-to-work, HIA is conscious of the fact that a stabilisation of premiums could be coupled with changes to the regulations around return-to-work and injury management programs.

HIA would like to stress that if there are to be any significant changes to the 1998 Act or any provisions in relation to the operation of the return-to-work system extensive consultation would be necessary.

While return-to-work programs are an important component of any workers compensation scheme, the impact on businesses within the residential construction industry must not be underestimated.

Of note, HIA members have general concerns around the inability of being able to provide suitable alternative duties for injured workers and have also expressed concern around the potential for a return-to-work to exacerbate the compensable injury.

Section 49 of the 1998 Act and s43A of the *Workers Compensation Act 1987* provide a requirement that an employer must provide suitable duties (where appropriate) subject to certain exemptions. It is of note that the considerations around the suitability of employment, do not overtly take the needs of the business into consideration.

HIA would request, that in order to meet the objectives as outlined in the Issues Paper and to create a balanced system, the needs of a business should be clearly taken into



account when determining the availability of suitable duties for an injured worker on a return-to-work program.

In addition, the desire to *promote recovery and the health benefits of returning to work*⁴ should be evenly weighed against the safety of the injured worker and others at the workplace. It is the experience of HIA members that given the nature of the duties involved in the construction industry, injured workers are prone to further exacerbate an injury if they return-to-work too soon, as such the importance of appropriate rehabilitation must not be overlooked.

5 Conclusion

HIA would agree that the NSW Workers Compensation Scheme is broken.

NSW Workers Compensations premiums are at untenable levels and significant changes need to be made in order to address this.

While HIA supports a number of the key options outlined in the Issues Paper ultimately HIA's view is that further consultation is needed given the expansive nature of the Inquiry. HIA is concerned that the limited time frames imposed around the Inquiry will impede a full and comprehensive review of the Scheme.

HIA would also advance the position that the issues of provisional liability and 'deeming' require further investigation in order to truly address the impact of these provisions on the residential construction industry and the Scheme in general.

HIA would also like to alert the Committee that despite an emphasis within the Issues Paper on the need for effective return-to-work programs there lacks corresponding options for change. HIA would further like to emphasis that if any changes to the provisions around return-to-work programs are contemplated by the Committee, such recommendations should undergo extensive stakeholder consultation.

⁴ Issues Paper pg. 5