Submission No 166

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

Organisation: Transport Workers' Union of NSW

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Submission Addressing the Proposed Changes to the NSW Workers Compensation Scheme

Transport Workers' Union of NSW

1. The purpose and history of Workers Compensation in NSW

1.1 Section 3 of the *Workplace Injury Management and Workers Compensation Act* (NSW) 1998 (hereafter referred to as the 1998 Act) sets out the objectives of workplace injury management and workers compensation system, being:

(a) To assist in securing the health, safety and welfare of workers and in particular preventing work-related injury;

(b) To provide prompt treatment of injuries, effective and proactive management of injuries, and necessary medical and vocational rehabilitation following injuries, In order to assist injured workers and to provide their return to work as soon as possible;

(c) To provide injured workers and their dependents with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses;

(d) To be fair, affordable, and financially viable;

(e) To ensure contribution by employers are commensurate with the risks faced, taking into account strategies and performance in injury prevention, injury management, and return to work;

(f) To deliver the above objectives efficiently and effectively.

1.2 The 1998 Act and the *Workers Compensation Act* (NSW) 1987 (hereafter referred to as the 1987 Act) govern workers compensation claims.

1.3 Since the introduction of the 1987 Act, workers compensation legislation has experienced various reforms. The most substantive reforms took place on 1 January 2002 when the WorkCover scheme (the scheme) was experiencing a deficit of approximately $2 billion. There was a suite of changes which reduced benefits to lump sum entitlements, pain and suffering entitlements and severely restricted injured workers ability to access commutations. There was also a very significant reduction in common law/negligence entitlements; the common law changes were made retrospective applying from 27 November 2001. As at 27 November 2001, injured workers could no longer sue a negligent employer for non-economic loss (that is, compensation for their injuries and their pain and suffering), for past and future treatment expenses, and for past and future domestic assistance. From 27 November 2001, workers became limited to suing a negligent employer for past and future economic loss calculated up to the maximum of retirement age.

1.4 The above changes seemed to have contributed to a turnaround resulting in slight increases in lump sum entitlements by 1 January 2006.

1.5 The Government alleges that the scheme's deficit has now blown out to approximately $4.1 billion as at 31 December 2011. A report examining the scheme identified external factors such as investment returns and an

increase in compensation claims as being substantial contributing factors to the current deficit.

1.6 In a media release dated 23 April 2012, Minister Greg Pearce stated *"We want to transform the scheme to ensure injured workers get the best treatment as quickly as possible; that employers are not hit by massive premium hikes; and that our State has a solid scheme which will do its job well into the future."* The issues paper released by the Government proposes 16 changes to the current scheme. These proposed recommendations for the scheme are aimed to deliver effectively on seven reform principles being:

(i) Enhance NSW workplace safety by preventing and reducing incidents and fatalities;

(ii) Contribute to the economic and job growth;

(iii) Promote recovery and the health benefits of returning to work;

(iv) Guarantee quality long term medical and financial support for seriously injured workers;

(v) Support less seriously injured workers to recover and regain their financial independence;

(vi) Reduce the higher rehabilitation burden and make it simpler for injured workers, employers and service providers to navigate the system; and

(vii) Strongly discourage payments, treatments and services that do not contribute to recovery and return to work.

2. The Proposed Changes

Submissions with regards to the proposed changes outlined in the Issues Paper are addressed below:

2.1 Severely injured workers

The Government wishes to improve the benefits for severely injured workers, which is welcomed. The Government proposes to assist severely injured workers by improving income support, return to work assistance where feasible, and granting more generous lump sum compensation. However, the Government has suggested that the definition of a severely injured worker is a worker who suffers from a whole person impairment (WPI) of more than 30%. This effectively rules out the vast majority of injured workers.

Injured workers are assessed utilising the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (AMA 5). At the conclusion of the submission, various case studies have been highlighted to confirm that most injured workers would not be assessed as suffering from a whole person impairment of more than 30%. As is shown in the these examples, the pool of workers that will be classified as being *'severely injured'* will be extremely small.

While the Government proposes more generous lump sum compensation for severely injured workers, if these severely injured workers are injured in the course of a journey (discussed below), the Government proposes that they should not be covered at all.

The Government proposes that these severely injured workers receive improved income support. However, the Government is suggesting that payments for injured workers who are totally incapacitated stop after a certain period of time, instead of being paid while they are actually incapacitated for work.

The Government has proposed that severely injured workers be paid a more generous lump sum compensation however, they have also suggested in their proposals that pain and suffering be removed from the scheme.

This is a misguided and seriously flawed proposal by the Government which will only be available for an extremely limited class of injured workers. Even if a worker is classified as a severely injured worker, they will also experience the remainder of the Government's proposals aimed at reducing benefits.

It is submitted that if a class of 'severely injured worker' was to be created, the threshold should be 15% WPI. It is extremely difficult to obtain an assessment of 15% WPI, and this is a more accurate definition of what a 'severely injured worker' is. Further any attempt to remove the limited compensation currently available for pain and suffering would be unreasonable and unjust.

2.2 Removal of coverage for journey claims

The Government proposes to remove workers compensation coverage for workers who are injured in circumstances where they are travelling between home and work.

The object of the Act is not only to compensate workers who are injured whilst performing their duties, but to also compensate injured workers travelling to and from work. In fact, section 10(1) of the 1987 Act, states that a personal injury received by a worker on any journey to which this section applies is, for the purposes of this Act *an injury arising out of or in the course of employment, and compensation is payable accordingly*.

The Government may take comfort in the fact that a person injured in a motor vehicle accident **may** be able to pursue other entitlements (if fault can be proven against a third party) against the CTP insurer of the vehicle at fault. A person pursuing a motor vehicle accident compensation (MVA) claim is not paid weekly payments by the CTP insurer whilst the claim is being pursued. As such, if journey claims are removed, an injured worker who is unable to work or is only capable of working restricted duties will not receive income support. It should also be noted that MVA claims usually take 2-3 years to finalise.

There will be other circumstances for example where the employee has been extremely overworked over a period of days whilst performing their duties resulting in them being lethargic and losing concentration whilst driving. This results in the injured worker being involved in a motor vehicle accident. In such a circumstance, the injured worker will not, according to the Government's proposal, be able to pursue a journey claim, even though clearly work was a substantial contributing factor to the motor vehicle incident. The worker would not be able to pursue a MVA claim given the circumstances of the incident.

It is submitted that journey claims should not be removed from the scheme. In most circumstances, the scheme is entitled to pursue a recoveries action against the CTP insurer of the vehicle at fault, and as such, the net loss to the scheme is minimal. This point is discussed further in the submissions.

2.3 Prevention of nervous shock claims from relatives or dependents of deceased or injured workers

The Government wishes to remove the ability of a deceased worker's dependents and/or their family from being compensated for the death of a worker.

The Government further argues that an employer's liability for the psychological injuries to family members following the serious injury or death of a worker does not fall within the objects of the legislation and based on this, it has been suggested that such claims should no longer be allowed.

As stated above, the objects of the workers compensation system as per section 3 of the 1998 Act includes the provision to injured workers and their dependents of income support during incapacity, payment for permanent impairment or death, payment for reasonable treatment and other related expenses. Therefore, compensating families for the death of a worker is part of the objects of the legislation. How can the Government suggest that the family and dependents of a worker who becomes deceased as a result of a work related injury should not be compensated for the psychological and financial impact of the death caused by the employer? The committee should give further analysis on the impact that the removal of the nervous shock claims will have on the deficit.

2.4 Simplification of the definition of pre-injury earnings and adjustment of pre-injury earnings

The Government acknowledges that in Australia, NSW is the only State that does not take regular overtime and allowances into account when calculating a totally incapacitated worker's weekly payment. It is agreed that when calculating an injured worker's weekly payments rate, regular overtime and allowances need to be taken into account. This proposal and simplification of the Act is welcomed, as long as the proposed methodology of pre-injury earnings accurately and fairly reflects the worker's pre-injury earnings.

2.5 Incapacity payments – total incapacity

The Government proposes a step down payment method with respect to weekly payments for workers who are totally incapacitated. Currently, an injured worker receives their Award/EBA rate for the first 26 weeks of incapacity whilst being totally incapacitated. The Government is suggesting that this should be reduced to 13 weeks. The Government has stated that most injuries heal within 13 weeks and as such, an injured workers rate should drop down to the statutory rate after 13 weeks. This would effectively mean that a worker with no dependents who is totally incapacitated would currently receive $432 after 13 weeks of incapacity, despite what they were earning prior to the injury. This is not in line with the objectives of the Act which states that the workers compensation system needs to be fair.

A person who is totally incapacitated is suffering from a serious injury that requires treatment. Being reduced to $432 gross per week would place the effected injured

worker in a position of extreme financial hardship. A payment of $432 gross per week will for some workers not even cover their mortgage/rental payments. Being totally incapacitated means that a significant amount of treatment and rehabilitation is required. By virtue of the incapacity and degree of the injury, a worker who requires treatment would have difficulty in accessing (and travelling to) such treatment due to the Government's proposal of further reducing weekly benefits.

A step-down of weekly payments has not been proven to impact upon 'return-to-work' outcomes. In fact, if a worker returns to suitable duties before they are properly rehabilitated, this may re-aggravate their injury resulting in additional time off work, and additional treatment thereby increasing the cost to the scheme.

2.6 Incapacity payments – partial incapacity

The Government is of the opinion that more focus should be placed on rehabilitation and return to work and that the method of encouraging recovery is through financial disincentives to prevent long term dependency by workers. The Government assumes that injured workers do not wish to return to their pre-injury hours after an injury. The Government assumes that workers wish to receive the unsatisfactory weekly benefits that are currently available to them as an incentive to remaining 'on the drip'.

There are many circumstances when injured workers who are partially incapacitated are unable to return to work due to the employer's refusal to return them to work without a full clearance. Some employers have a mindset that by returning partially incapacitated workers to employment without a full clearance, they are exposing themselves to further liability and as such, they do not accept the return of the worker without a full clearance and only when they are capable of performing their full pre-injury employment. There are circumstances when a partially incapacitated worker returns to employment and the employer provides them with less hours than what they are capable of performing due to the unavailability of suitable duties. There are many circumstances where an employer alleges that there are no suitable duties available for a partially incapacitated worker. It is the mindset of employers which, in many cases, prevent better return to work outcomes.

The Government is suggesting that these partially incapacitated workers should not receive weekly benefits (or be in receipt of substantially reduced benefits) despite the employer refusing or being unable to provide them with suitable duties.

Presently, an employer has an obligation to provide suitable work. If an employer alleges that they are unable to provide suitable duties to a partially incapacitated worker, the worker has great difficulty contesting this particularly at ununionised work sites. It is submitted that employers should be investigated by WorkCover when there is an allegation that they are unable to provide any suitable employment, or if they are only able to provide limited suitable employment for hours less than what the worker can perform. If an investigation by WorkCover establishes that the employer can in fact return the partially incapacitated worker to suitable employment, or provide them with additional hours as per the restrictions, the employer should be penalised.

It is submitted that the above suggestion is in line with the object of the Act and in accordance with the object of chapter 3 of the 1998 Act relating to workplace injury management. Section 41 of the 1998 Act states that the object of this chapter is to establish a system that seeks to achieve optimum results in terms of the timely, safe and durable return to work for workers following workplace injuries. By ensuring that

employers readily offer suitable employment to injured workers, this will ensure that workers are returned to work quickly, are supported whilst performing suitable duties and achieve a full return to employment. Financial disincentives does not achieve this. Again, there is no support to the notion that financial disincentives result in injured workers returning to work sooner.

2.7 Work capacity testing

The Government is suggesting 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. This already exists under the current scheme. An insurer is entitled to assess an injured worker's earning capacity and deduct that from what the injured worker could be earning had they remained uninjured (see s.40A and s.40 of the 1987 Act). This involves a vocational and functional assessment of the injured worker which discusses the worker's work capacity.

There is no need to introduce amendments to what already exists in the current legislation.

At Point 7 of the Issues Paper, the Government states that *"there is a concern that continuing to pay weekly benefits for workers' many years after a workplace injury reinforces the perception that they are still 'injured'* ". They suggest that ceasing weekly benefits after a certain period for workers with a work capacity will assist the injured worker to move forward from their workplace injury to focus on their future employment prospects. Again, it is submitted that injured workers struggle to survive on the current rate of weekly benefits applicable to them. An injured worker with no dependents currently receives a maximum of $432.50 gross per week. Currently, if an injured worker has a dependent child, they receive $81.50 in addition to the $432.50 per week in weekly benefits. For many workers this would not allow them to meet expenses for food and shelter. Further, this does not take into account when an injured worker's weekly benefits is reduced in accordance with section 40 to what an insurer deems appropriate after a vocational/functional assessment (which usually reduces an injured worker's weekly benefits significantly; potentially to $0 per week). To suggest that injured workers delay their return to work whilst in receipt of meager weekly benefits is offensive.

2.8 Cap weekly payment duration

The Government suggestion that limiting weekly payments duration to a certain timeframe and thereafter ceasing payment of weekly benefits would give workers a fixed timeframe during which they know they need to work towards with respect to work readiness.

It is submitted that this is inappropriate, unjust and unfair. The Government is of the view that workers wish to remain in receipt of the insufficient weekly benefits for extended periods of time whilst suffering financial hardship. The Government is also assuming that injured workers do not wish to return to work in a timely manner, or at all.

If an injured worker is in fact not incapacitated for work, then a vocational and functional assessment will confirm this (together with medical opinion) and, in those circumstances, the weekly benefits of an injured worker will be reduced to $0 as per section 40 of the 1987 Act. Not only is the proposal draconian but it also has the

potential to place injured workers in the invidious position of potentially seeking to return to work in an unsafe manner placing themselves and their work colleagues at risk.

2.9 Remove "pain and suffering" as a separate category of compensation

The Government states that injured workers have been in receipt of pain and suffering since 1987 as a result of 'an anomaly', and as such, it should be removed.

Pain cannot be compensated by way of a lump sum as it is distinct from an injury which can be compensated. The scheme allows for injured people who suffer from a 10% whole person impairment or greater to be compensated for the pain and suffering that they have and continue to endure as a result of the injury. It compensates for actual pain, or, distress/anxiety which is suffered or likely to be suffered by the injured worker, resulting from the permanent impairment concerned or from any necessary treatment.

Firstly, the case studies discussed at the end of the submissions confirm that obtaining a whole person impairment of 10% or greater is not easily obtainable. A person who suffers from a 10% whole person impairment or greater is suffering from a significant injury. That worker has experienced a significant amount of pain and continues to experience a significant amount of pain. That worker has usually undergone a significant amount of treatment, including operative treatment. Furthermore, serious injuries can usually result in distress, depression, anxiety and a whole range of psychological sequelae. Such psychological sequelae is not considered "an injury" which can be compensated by way of a lump sum as it is deemed to be secondary to the physical injury. Pain and suffering compensates for this psychological sequelae.

The Government suggests that pain and suffering be incorporated in the lump sum awarded for injuries resulting in a whole person impairment greater than 10%. As stated above, achieving a whole person impairment of 10% is difficult. To achieve a whole person impairment of greater than 10% is even more difficult. Secondly, the Government is suggesting that the lump sum compensation be increased by an amount that takes into account the pain and suffering. It is submitted that this is unjust, unfair and unrealistic. Currently, pain and suffering is based on each individuals circumstance. The amount for pain and suffering is dependant upon such factors including the seriousness of the injury, the psychological sequelae, and the treatment undertaken. An injured worker is placed on a scale between $0-$50,000, where $50,000 is the maximum that can be awarded for an injured worker. This is reserved for the most extreme cases such as a brain injured quadriplegic. By choosing an arbitrary figure for pain and suffering and adding it to the lump sum component, the Government is assuming that every worker that suffers from the same whole person impairment figure will suffer the exact amount of pain and suffering irrespective of whether or not they have had treatment, irrespective of whether or not they have had an operation, and irrespective of whether or not they have developed a significant psychological injury as a result of the physical injury. For example, an injured worker who suffers from a serious back injury may or may not have an operation, and based on AMA 5, may end up with approximately 12%WPI. The Government is proposing that a worker who has had an operation has suffered as much as the worker who has not had an operation.

The Government suggests that by choosing an arbitrary figure for pain and suffering and building it into the lump sum component that this will reduce the administration costs associated with negotiating pain and suffering/having pain and suffering determined. Most pain and suffering compensation is negotiated and resolved quickly and efficiently. There are circumstances when the insurer does not wish to negotiate or does not accurately calculate the pain and suffering component and in these circumstances this needs to be determined by an Arbitrator of the Commission. In these circumstances, the Arbitrator is required to determine the amount of pain and suffering. The Arbitrator will peruse all the evidence at hand and determine the amount for pain and suffering. It should be noted that in most circumstances, the need to incur unnecessary legal costs with respect to pain and suffering relates to the insurer's attitude/approach/lack of training towards pain and suffering in a particular matter.

2.10 Only one claim can be made for whole person impairment

The Government alleges that injured workers can be fraudulent or exaggerate injuries in order to meet thresholds. The Government states that an injured worker being permitted to only make one lump sum claim will reduce the ability of workers to be fraudulent or exaggerate their injuries in order to meet thresholds, and that such measures ensure that workers' injuries are stabilised providing them with the appropriate compensation.

It is unclear on what basis the Government opines that certain workers exaggerate their injuries or are fraudulent in order to meet thresholds. This presumption confirms that the Government is unaware of how injuries are assessed in the workers compensation scheme. A worker who is "exaggerating" their injuries will not be able to be assessed pursuant to AMA 5. AMA 5 and the WorkCover Guidelines provide assessors/doctors with the ability to raise such issues as 'inconsistent presentations' in their assessment. Assessors are able to apply "consistency tests" which are designed to ensure reproducibility and greater accuracy. The Guidelines instruct assessors to perform this consistency tests and also use the entire range of their clinical skill and judgment when assessing whether or not the measurements or test results are plausible and consistent with the impairment being evaluated. Assessors are instructed that if, in spite of an observation or test result, the medical evidence appears insufficient to verify that an impairment of a certain magnitude exists, the assessor may modify the impairment rating accordingly and then describe and explain the reason for the modification in writing. As such, a worker who is being fraudulent or exaggerating their injuries will be discovered.

The second basis for this recommendation is that by only permitting a worker to make one lump sum claim, it may ensure that workers' injuries are stabilised providing them with appropriate compensation. Again, if the Government reviews the AMA 5 Guidelines and the WorkCover Guidelines governing the assessment of injuries, it will confirm that injuries can only be assessed once they have stabilised.

It should also be noted that "secondary injuries" develop in certain circumstances. For example, an injured worker who suffers an injury to their right arm will undoubtedly favour their right arm. As such, that worker will rely on their left arm in, for example, performing heavy or repetitive tasks. As a result, the worker may suffer an injury to their previously uninjured left arm. A worker who sustains a serious injury to their knee which results in a limp/altered gait may develop a back injury. These types of injuries do not tend to eventuate until some years after the original injury.

If this Government's proposition is enacted, then injured workers who develop secondary injuries in the future will unjustly not be compensated for these injuries. Further, if an injured workers' injury deteriorates in the future, and if this deterioration can be established objectively, then that injured worker will not be able to be compensated for their deterioration, even if this deterioration has resulted in the injured worker requiring operative treatment.

2.11 One assessment of impairment for statutory lump sum, commutations and work injury damages

The Government states that the Guidelines that govern the assessment of injuries are objective (despite alleging that injured workers can exaggerate their injuries as discussed under paragraph 2.10 above). The Government states that there is no reasonable rationale for obtaining multiple reports when addressing injured workers' lump sum claim, and/or commutations, and/or work injury damages.

This sensible proposal is welcomed. There is no reason for an insurer to request multiple reports at different stages of a worker's claim.

2.12 Strengthen work injury damages

The Government wishes to include work injury damages under the umbrella of the Civil Liability Act. However, the Government acknowledges that in no other State or Territory has this occurred.

The relationship between an employer and employee is different to that between and invitor and an invitee (which is governed by the Civil Liability Act). It is well established that an employer has a non-delegable duty of care owed to its employees. This differs from the relationship that, for example, a shopping centre owes to a shopper. The employer creates the system of work that the employee must work within. A worker still needs to establish that the employer failed in its duty to exercise reasonable care and skill, and failed to devise, institute, maintain, and ensure compliance with a safe system of work. Unless negligence can be established, an injured worker will fail in the claim for work injury damages.

There is no reason or logic to alter the relationship between an employer and employee. Hundreds of years of precedents have established this relationship. This confirms why the other States have not altered the common law with respect to workplace common law claims.

In effect, the Government is wishing to reduce the duty of care owed to workers by employers.

It should be noted that the Civil Liability Act which governs non-employer employee relationships permits injured people to claim damages for non-economic loss, past and future economic loss, past and future treatment expenses, and past and future domestic assistance. In work injury damages claims, past and future economic loss, and none of the other heads of damages have been available to injured workers since 27 November 2001 when the modified common law scheme/work injury damages was introduced.

2.13 Cap medical coverage duration

The Government proposes to place a cap on the length of time that an injured worker can receive treatment for.

In accordance with the current law, the only treatment that an employer is liable for is reasonably necessary treatment. An injured worker cannot access any and all types of treatment. An injured worker is not permitted to access treatment for extended periods of time unless they can show an improvement in their condition or show that the treatment ameliorates the effect of the injury or show that the treatment assists them in returning to work.

An exorbitant amount of money is expended on rehabilitation providers being utilised by insurance companies. Most case studies will reveal that the bulk of treatment expenses are expended to rehabilitation providers. These rehabilitation providers attempt to return injured workers to the employers' premises initially and if this is resisted by the employer or if it is not possible to return them to the employers' premises, then the rehabilitation provider attempts to place the injured worker at another employers' premises. A significant number of workers are forced to attend the premises of the rehabilitation providers to assist them in searching for alternative employment. A significant amount of time is expended on assisting workers to look for employment to satisfy the workers' obligation to search for employment.

It is submitted that the Guidelines governing the rehabilitation providers need to be reviewed to make it more beneficial. There are numerous circumstances where a worker is better served by arranging for them, for example, to improve their language or vocational skills to locate non-physical type/labour employment as opposed to simply spending months and months applying for jobs which they are not suited for. Many employees have requested that they be re-trained to assist them in locating employment. However, some rehabilitation providers tend to be tunnel visioned and prefer to meet with injured workers on numerous occasions to review their job search attempts.

2.14 Strengthen regulatory framework for health providers

The Government makes a sensible suggestion that the regulatory framework for health providers needs to be strengthened to ensure that scheme resources are directed to evidence-based treatment with proven health and return to work outcomes for injured workers rather than on treatments that maintain dependency. This strengthens the submissions made under paragraph 2.13 above.

2.15 Targeted commutation

Since 1 January 2002, it has become extremely difficult for an injured worker to commute/buy out their entitlements. Section 87EA of the 1987 Act outlines numerous preconditions that must be met in order for a worker to be eligible for a commutation. This has resulted in the current existing tail where workers are forced to remain within the workers compensation scheme for extended periods of time. This in turn increases costs.

It is submitted that the preconditions to commutations need to be relaxed to allow employees to commute their claims. The threshold of 15% (being the first pre-condition that must be met in a commutation) should be reduced to 5%, or

alternatively be removed completely. Achieving 5% WPI is not possible in all cases. However, reducing the threshold will allow insurance companies to offer commutations on a larger number of matters thereby significantly reducing the current tail. Further, it is submitted that certain groups of workers, for example workers 50 years of age and greater, should be able to commute their claims easier than younger injured workers. It is a fact that older workers (especially workers who have limited transferrable skills) have greater difficulty in locating alternative employment once an employer terminates their employment due to their inability to return to pre-injury employment. Their competitiveness on the open labor market is significantly reduced. These injured workers therefore tend to remain within the workers compensation scheme for a longer period than younger injured workers.

Relaxing the preconditions to a commutation, and creating easier access to commutations by older workers will have a significant improvement on the schemes current deficit.

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

This suggestion by the Government is unclear and unfounded. Workers who suffer strokes/heart attacks at work currently need to establish that work was a substantial contributing factor to the resulting stroke/heart attack. Simply because a worker suffers from a stroke/heart attack at work does not mean that they are automatically entitled to receive workers compensation benefits. The current legislation and the current case law makes it difficult for an injured worker to seek workers compensation benefits unless it can be shown that an unbroken chain of events resulting from work has caused the heart attack/stroke. Currently, many cases involving these types of injuries fail on this very point. It is submitted that the current state of the law sufficiently addresses these types of claims.

3. Recommendations

It is clear that the deficit of $4.1 billion needs to be addressed. However, this should not come at a cost to the worker nor is it a solution to increase premiums or push changes through quickly without proper analysis. If the objectives of the scheme are to be adhered to, then the following recommendations should be considered:

(a) **Review WorkCover** – WorkCover should be provided with additional powers to examine employers who refuse to assist an injured worker in their return to work. WorkCover should be provided with greater powers to penalise insurance companies for failure to adhere to the scheme's objectives. Administration costs and legal costs are wasted as a result of workers being forced to refer their matters to the Workers Compensation Commission due to WorkCover's inability to force insurance company to adhere to the objectives of the Act. When was the last time an insurance company was fined for breaches of the Acts or Regulations that govern workers compensation claims?

(b) **Better training and development of WorkCover employees and insurance company claims officers –** Again, many situations arise when a worker is forced to refer the matter to the Commission as a result of a claims officer not understanding their obligations. WorkCover and insurance companies should be required to attend mandatory training and development on a regular basis to improve their knowledge and skills in handling claims.

(c) **Commutations** – Commutations will significantly assist in curtailing the current tail which has resulted from the introduction of the section 87EA pre-conditions that took effect on 1 January 2002. An injured worker will no longer be entitled to be compensated for any losses after a commutation. Commutations end all future entitlements. This will end the insurer's liability to pay ongoing weekly benefits, treatment expenses, top-up lump sum claims and any other compensation.

(d) **Reviewing the frameworks** that govern health care providers to curtail wasteful spending on unnecessary treatment/rehabilitation that does not assist the scheme in achieving its objectives.

(e) **Recoveries** – More emphasis needs to be placed on recovery actions. Self-insurers proactively and regularly seek recovery in circumstances where the work related injury gives rise to a public liability or motor vehicle accident compensation claim. Scheme agents do not readily pursue recovery actions. Pursuing recovery actions will logically reduce the current and future deficit.

(f) **Work injury damages claims** – It is submitted that the Government should not consider "toughening up" work injury damages claims. In fact, the Government should consider reducing the 15% whole person impairment threshold which currently needs to be met in order to be able to pursue a work injury damages claim. As with commutations, work injury damages claims ends a worker's future workers compensation entitlements. Again, this can only serve to curtail the tail and reduce the deficit.

(g) **Subsidising employers** – In most circumstances, the use of rehabilitation providers is ineffective. An exorbitant amount of money is expended every year on rehabilitation providers without much benefit. The Government should consider utilising some of the money wasted on rehabilitation providers to subsidise employers who readily offer suitable duties to injured workers. Employers tend to resist an injured worker returning to work on suitable duties on the basis that they are not receiving "value for money" when the injured worker is not performing at full capacity. Subsidising employers in these situations will ensure that more workers are returned to suitable employment quicker and more efficiently, rather than engaging a rehabilitation provider to assist injured workers to search for jobs.

(h) **Removal of the Claims Assessment Service (CAS) arm of WorkCover** – In 1998, the then Government introduced a pilot program in an attempt to assist matters resolving without the need to refer the matter to the Compensation Court of NSW. An injured worker was required to refer their matter to the Workers Compensation Resolution Service (WCRS) before proceeding to Court. The theory was that forcing an Applicant and Respondent to confer and discuss the possibility of a resolution would decrease matters being referred to the Compensation Court. Unfortunately, most, if not all matters did not resolve. Therefore, the WCRS became a rubber stamping facility. The time and resources were wasted on referring matters to the WCRS, where they did not resolve.

Currently, an injured worker is required to refer their claim to CAS when an insurer does not respond to the claim. In theory, CAS should then assist the resolution of claims by contacting the insurer and discussing why they have not

responded to a worker's claim. In reality, the insurer simply denies the claim after being contacted by CAS. What is even more disturbing is that when CAS now contacts certain insurance companies, the insurer is simply not responding to CAS. Instead of CAS demanding an explanation for the non-response to their own queries, CAS sends the worker a letter simply stating that the insurer has not responded. At that stage, the worker is then entitled to refer their matter to the Workers Compensation Commission. It is clear that CAS is ineffective in assisting matters resolving without the need to refer the claim to the Commission. If CAS is to remain, CAS needs to be empowered/trained to issue penalties to insurance companies who unnecessarily delay the determination of claims, and who do not respond to CAS.

(i) **Permit the negotiation of lump sum claims** – Previously, when the changes were introduced on 1 January 2001, parties were able to negotiate ump sum claims. This resulted in a large amount of matters resolving without the need to refer them to the Commission so that Approved Medical Specialists can assess injured workers. Thereafter, WorkCover issued a directive preventing the negotiation of lump sum claims. This inevitably leads to matters being required to be referred to the Commission to allow Approved Medical Specialists to assess the injured worker thereby increasing further the unnecessary administration costs and deficit. There is no logic in not permitting parties to negotiate a settlement.

4. Conclusion

The driving factor for the Government's proposals as set out in the Issues Paper are centered around the Government's belief that injured workers do not wish to return to work after an injury, that injured workers wish to remain receiving the insufficient weekly benefits that they receive, and that injured workers are fraudulent and exaggerate their injuries.

Some of the reasons contributing to the current deficit is the inadequate management of WorkCover, certain financial decisions with respect to investments by WorkCover, the state of the economy, money being wasted on ineffective rehabilitation without any real benefit and confusing/unrealistic directives being issued by WorkCover. Would should address these concerns rather than blame injured workers for the schemes financial deficit.

Changes should not be made on the basis of a knee-jerk reaction. There is no 'quick fix'.

It should be noted that the Terms of Reference relating to the Issues Paper state that the committee is to enquire into the functions and operations of the WorkCover Authority. Interestingly, the Issues Paper has not discussed this issue, or proposed any recommendations relating to WorkCover. It is understood that a 'review' into WorkCover is currently being undertaken. The committee should await the outcome of the review and undertake an independant financial analysis as to the impact of the proposals emanating from the review into WorkCover on the deficit.

The above recommendations as set out in paragraph 3 above provide a way of reducing the deficit whilst improving the system fairly and justly.

5. Case Studies

5.1 Case study 1 – the impact of removing lump sums for injuries below 10%

A significant amount of injuries are assessed at below 10% whole person impairment. This includes most of industrial deafness matters. The removal of this would severely impact on the entitlements of injured workers.

Commonly, workers sustain an injury to their back or limbs at work which, although significant, does not result in an assessment of 10% or greater. For example, if a worker injures their back and sustains a disc injury which compresses on a nerve and results in a significant amount of pain and discomfort, that injured worker will be assessed as suffering from the second category of lower back injuries and this results in a whole person impairment of between 5%-8%. The injured worker can be assessed as suffering from a whole person impairment of 10%-13% (being the third category of lower back injuries) only if there are signs of radiculopathy (such as numbness and/or burning sensation) present all the time. If they experience these symptoms most of the time (but not all the time), then this does not allow them to be assessed as suffering from the third category of lower back injuries. Some people who are assessed in the second category of lower back injuries are actually candidates for surgery. However, this does not change the whole person assessment and they will only ever be entitled to be assessed as suffering from a 5%-8% whole person impairment.

Similarly, people who have undergone rotator cuff repairs/shoulder surgeries who lose approximately 25% of their range of movement of their arm/shoulder will still be assessed as suffering from a whole person impairment of below 10%.

An injured worker who suffers a serious knee injury requiring various arthroscopies may end up with a 7% whole person impairment assessment even though the arthroscopies are unsuccessful and continuing to cause a significant amount of pain and disabilities. A worker who undergoes a partial meniscectomy to their knee receives a rating of 1%. If they undergo a full meniscectomy to their knee, they receive 3%. If a worker undergoes a knee reconstruction receives a rating of 0% unless their is laxity.

In terms of dollar figures, a person who suffers from 5% whole person impairment is entitled to a lump sum of $6,875. 6% equates to $8,750. 7% equates to $9,625 and 8% equates to $11,000. These workers are not entitled to an additional lump sum for pain and suffering.

5.2 Case study 2 – When can a worker be assessed as suffering from a whole person impairment of greater than 30% (being the definition proposed by the Government for a severely injured worker)

Referring to AMA 5, below are examples of injured workers who will not reach or exceed 30% whole person impairment:

- An injured worker who sustains a serious injury to their lower back will only be assessed as suffering from a whole person impairment of between 25%-28% as an absolute maximum. This is reserved for workers who have undergone multiple fusions, or if they have sustained greater than 50% compression fractures in their lower back.

- An injured worker who sustained a serious injury to their neck resulting in a more than 50% compression fracture, who suffers from significant signs of radiculopathy such as pain and sensory loss, who has undergone fusions and who suffers from a significant loss of range of movement of the neck may be able to be assessed as suffering from a 25%-28% whole person impairment. Neck injuries can be assessed at the highest category (that is 35%-38% whole person impairment) only if they meet the above criteria but also have a total severe nerve problem virtually rendering their upper limbs non-functionable.

- In all reality, unless an injured worker suffers from an amputation type injury to a significant portion of their hand or arm, most upper limb injuries, even serious upper limb injuries will not reach a whole person impairment of near 30%.

- If an injured worker suffers from a serious shoulder/arm injury which prevents them from virtually moving their arm, an assessor can refuse to assess this injury on the basis that the worker's pain is limiting the movement of their arm.

- An injured worker who suffers a significant second-degree burn at work to their neck which results in significant scarring which is susceptible to ultraviolet light, where the worker is required to wear sun block when outdoors at all times, where the scar is easily irritated and lacks durability, where the worker is unable to wear clothes that rub their neck, where the worker experiences itchiness and burning episodes to the scar area which stops activities for 5 to 10 minutes each time, can only be assessed as suffering from a 10%-24% whole person impairment.

- A male worker who sustains an injury to their reproductive organ which results in no sexual function being possible ever can only be assessed as suffering from a maximum of 20% whole person impairment.

- An injured worker who suffers a pelvic fracture with damage to the urethra and who suffers from chronic urinary tract infections may be lucky to be assessed as suffering from 11%-20% impairment.

- A worker who has been spray painting vehicles develops asthma, is admitted into hospital with wheezing and commences medication. After two years of avoiding contact with paints, while compliantly following medicine regime of high dose inhalers continues to experience exercise-related and nocturnal coughing and wheezing can only be assessed as suffering from a whole person impairment of 10%-25%.

- A worker who suffers from a significant psychological/psychiatric injury will find it difficult to exceed the 30% whole person impairment assessment. For example, unless an injured worker is severely impaired requiring constant supervision and support throughout most of the day, they may only ever be assessed as suffering from a whole person impairment of between 11%-26%

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