

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

**Organisation:** Australian National Retailers Association

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*The voice of Australia's leading retailers*

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# NSW Workers Compensation Scheme



**Australian National  
Retailers Association**

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## About ANRA

The Australian National Retailers' Association ("ANRA") was established in 2006 to represent the interests of Australia's leading national retailers.

Members of ANRA are:

Best & Less	Harvey Norman
Bunnings	Just Group Portmans   Peter Alexander   Dotti   Smiggle   Just Jeans   Jay Jays
Coles	Luxottica OPSM   Laubman & Pank   Budget Eyewear   Bright Eyes   Sunglass Hut
Costco	Oroton Group
David Jones	Reece Plumbing
Dymocks	Super Retail Group Super Cheap Auto   Rays Outdoors   BCF   Goldcross Cycles   REBEL
Forty Winks	Woolworths Supermarkets   Big W   Dick Smith

The turnover of these major Australian companies exceeds \$100 billion of the \$248 billion turnover across the retail industry, equivalent to around seven percent of Gross Domestic Product.<sup>1</sup>

The members of ANRA employ over 450,000 Australians – almost 40% of the retail workforce and over 4% of the Australian workforce. Approximately 100,000 of these employees are located in regional and rural Australia. Over 750,000 Australians hold shares in members of ANRA.

Members lead the Australian retail industry across all types of retail, goods and services. The spectrum of their businesses, their scale and their contribution to all Australian communities means that the development of robust policies that do not impede this sector, and protect the interests of retail businesses and consumers is critical.

A key objective for ANRA is to ensure that governments and the community understand the vast contribution the retail industry makes to the national economy. ANRA develops and endorses public policies which will enhance the capacity of the sector to meet consumer needs.

ANRA recognises that retailers rely on all Australians, and must competitively deliver to consumer needs. The industry and members of ANRA in particular, are leading employers, contribute to the community and regional development, and strongly interrelate with other Australian industries, not the least of which is the agricultural industry. ANRA's food and grocery retailers overwhelmingly supply Australian produce.

The Australian National Retailers Association (ANRA) appreciates the opportunity to provide comment on the Issues Paper on the NSW Worker's Compensation Scheme.

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<sup>1</sup> Australian Bureau of Statistics (2012), *Retail Trade by Industry Group*, Table 850101 and *Australian National Accounts*, Table 520601

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## **1. Overview**

- 1.1. The best workers compensation schemes have their foundations established in supporting employees that are injured in the workplace. This is best done by ensuring they get proper treatment in a timely fashion; which enables an injured employee to return to work as soon as (and if) possible.
- 1.2. Any workers compensation scheme should also include a sustainable but fair safety-net for those employees that have an injury which prevents them returning to any paid work of any kind. These objectives must be provided by an efficient, sustainable scheme that allows NSW employers to face premiums that are similar to those in other states.
- 1.3. The current NSW workers compensation scheme is falling well short of this.
- 1.4. ANRA welcomes the NSW Government's decision to review the workers compensation scheme and is broadly supportive of the recommend changes put forward by the Issues Paper.
- 1.5. By their nature, ANRA members operate in multiple states and can attest first-hand that the NSW scheme is currently inferior to other states. This can be seen in both the return-to-work outcomes achieved and the higher premiums facing NSW employers.
- 1.6. Multi-state employers must also deal with different schemes in different states. Ideally, the workers compensation system should eventually follow the same path as workplace safety laws and become a national scheme. Until then, however, any measures that can improve harmonisation of the scheme with other states would be welcome by Australia's major employers.
- 1.7. This submission provides a response to each of the recommendations put forward by the Issues Paper and also puts forward an additional suggestion from ANRA members.

## 2. Response to Issues Paper Recommendations

- 2.1. ANRA is broadly supportive of the suggestions put forward in the Issues Paper around how to improve the outcomes, operation and sustainability of the NSW workers compensation scheme.

### Severely injured employees

- 2.2. Employees who are severely injured in the workplace (more than 30% impairment) and are unable to return to work in any capacity need to have their long-term income support more reflective of lost earning potential, rather than the current statutory rate weekly payment. This makes sense given that the premiums paid by employers are linked to the payroll of the business.
- 2.3. Lump-sum settlements from the scheme, which can be converted into an income stream via standard financial products (such as an annuity), should also form a greater part of the scheme; especially for seriously injured employees who may be able to return to an alternative form of work in the future.
- 2.4. This outcome would have the added psychological benefit of moving people from living off workers compensation scheme payments to living off an income stream generated by their investments. As pointed out in the Issues Paper:

*'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'.<sup>2</sup>*

- 2.5. Increased use of lump-sum settlements would help overcome the psychological impact of a workplace injury; especially for those who could not return to their previous roles but may be able to perform alternative duties.

### Removal of coverage of journey claims

- 2.6. ANRA supports the suggestion that journeys to work should be excluded from the scheme. Some exceptional circumstances may be warranted, but the scheme is fundamentally about providing support for employees who are injured in the workplace. That is, in an area or setting that the employer has some form of control over.
- 2.7. ANRA contends that travelling to work injuries would be more appropriately covered by other insurance schemes – such as the third party 'green slip' motor vehicle insurance schemes and the soon to be launched National Disability Insurance Scheme, in extreme cases of injury.

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<sup>2</sup> Issues Paper, pg 25

### **Prevention of nervous shock claims from relatives or dependants of deceased or injured workers**

- 2.8. ANRA recognises the significant negative impact that a workplace injury or death of an employee has on their family and friends. However, in similar fashion to journey to work claims, this impact is largely outside the control of the employer and so should not be covered by the workers compensation scheme.
- 2.9. ANRA agrees that psychological injuries to family and friends following serious injury or death does not fall within the scope of the legislation. Perhaps this is more appropriately dealt with as a civil liability.
- 2.10. The current death benefits within the workers compensation scheme ensure the remaining family is provided for; especially when coupled with life insurance that is either privately obtained or linked to superannuation funds.

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

- 2.11. ANRA does not support any earnings calculation process that unnecessarily discriminates between those employees on an award and those who are covered by other industrial agreements, such as an enterprise agreement (as many ANRA member employees are). The current approach also discriminates against those employees who earn a significant portion of their salary through commission and regular overtime on top of a base salary.
- 2.12. A simpler way to calculate pre-injury earnings would be to take an average of an employee's wages over a set time period – such as the last three months, six months or twelve months. Importantly, it should be the same time period for all employees. This would ensure that the benefits paid were more closely linked to the actual pre-injury earnings of the employee.

### **Incapacity payments-total incapacity**

- 2.13. ANRA supports the suggestion in the Issues Paper that the step-down in weekly payments should occur at 13 weeks, subject to capacity testing. This reflects the observation that many workplace injuries are starting to heal by this time and would also align NSW with Victoria, South Australia and Western Australia.
- 2.14. It is important that injured workers' recovery is monitored and they are provided with sufficient incentive to return to work (not necessarily to the pre-injury role) as soon as practicable.

### **Incapacity payments-partial incapacity**

- 2.15. There needs to be significant changes to the payments made to employees in NSW that are likely to have the capacity to return to some sort of work, including their previous role.

- 2.16. NSW should consider adopting the Victorian model outlined in the Issues Paper; which progressively encourages employees with a partial incapacity to increase the hours they work and indeed stops any payments after 130 weeks (approx. 2.5 years) – unless the person is working 15 hours a week and earning more than \$166 per week from paid work.

- 2.17. ANRA agrees that, in the words of the Issues Paper:

*'That this would put into practical effect the objective of the workers compensation legislation of rehabilitation and return to work.'*

### **Work Capacity Testing**

- 2.18. The NSW scheme needs to incorporate more work capacity testing, especially for those who have been on a benefit for some time.
- 2.19. This testing should also incorporate working with health professionals, such as physiotherapists, to ensure employees are given the best treatment possible to increase their chances of returning to work.
- 2.20. ANRA agrees that such testing would reinforce the idea that the scheme is focused on returning employees to work, including work that may be performed over fewer hours or is less physically demanding than their pre-injury role(s).

### **Cap weekly payment duration**

- 2.21. NSW should introduce a cap on weekly benefits, similar to the 130 weeks used in other jurisdictions. Together with work capacity testing and increased use of lump sum payments, this would help reinforce the return-to-work aims of the scheme and reinforce to injured employees that a workplace injury does not prevent all types of work in the future.

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

- 2.22. ANRA sees no reason for specific lump sum payments for pain and suffering to be retained in the scheme if employees can still pursue this type of compensation under common law. Avoiding unnecessary disputation and legal costs would be an additional desirable outcome.

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

- 2.23. ANRA supports this recommendation in-principal, based on the understanding that employees should not have their claim finalised until their injuries are stabilised. However, ANRA acknowledges that some injuries sustained in a retail environment, such as a back injury, may not be simple to assess as being ‘stable’ and so some flexibility within this may be needed. The South Australian allowance for a top-up claim if the deterioration is more than 10% is one possible solution.



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

- 2.24. ANRA supports this recommendation, in conjunction with additional work capacity testing. Multiple testing within a short time-frame for different types of claims can be distressing to the injured worker, and possibly unnecessary and quite costly.
- 2.25. This is particularly the case for employees located in regional areas who may have to travel long distances and arrange accommodation for multiple tests over several days.

### **Strengthen work injury damages**

- 2.26. ANRA is supportive of the recommendation that workers compensation-related negligence claims must be underpinned by the same provisions and principals as other civil negligence matters under the Civil Liability Act.

### **Cap medical coverage duration and strengthen regulatory framework for health providers**

- 2.27. These two recommendations, when combined, should improve the medical treatment outcomes within the workers compensation scheme.
- 2.28. The scheme should only be funding evidence-based treatments that are proven to contribute to returning employees to work. The scheme should have the ability to refuse a medical expense claim that is not directly related to returning the person to work.
- 2.29. This, in turn, makes a cap on the duration of medical coverage more logical. If the injured employee is unlikely to return to work of any kind then the scheme should not be covering the medical expenses. Any on-going medical costs that may be incurred to maintain a person's quality of life would be covered by a statutory or work injury damages lump-sum payment.

### **Exclusion of strokes/ heart attack unless work a significant contributor**

- 2.30. This reform is similar in nature to the removal of travelling to work coverage. The workers compensation scheme should only cover workplace injuries that the employer has at least some control over. Injuries should only be covered by the scheme if the workplace was a factor in the injury.
- 2.31. It is important to distinguish between having an illness or condition at the workplace, and suffering an injury or illness that is directly attributable to or made significantly worse by the workplace.

### **3. Additional Reform Suggestion**

- 3.1. Apart from supporting most of the recommendations of the Issues Paper, ANRA members have an additional suggestion for consideration in the review.

#### **Cessation of benefits if an employee is dismissed for serious misconduct**

- 3.2. Selected ANRA members have reported instances where employees placed on reduced duties (and receiving workers compensation payments in lieu of lower earnings capacity) have subsequently been dismissed for serious misconduct (predominately theft, fraud or assault), but yet continue to receive workers compensation payments after their dismissal.
- 3.3. ANRA contends that the income-maintenance component of workers compensation payments should cease if the employee behaves in such a manner. If an employee is summarily dismissed for serious misconduct, then in ANRA's opinion that person also forfeits the right to potential future income generated by their employment; and therefore should not continue to receive the income-maintenance component of any workers compensation payment.
- 3.4. Consideration should be given to including the definition of serious misconduct contained within the Workplace Fair Work Regulations 2009 to ensure consistency.