Submission No 6

FIRST REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: NSW Bar Association

Date received: 26 September 2016

NEW SOUTH WALES BAR ASSOCIATION

SUBMISSION TO THE INQUIRY OF THE LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND JUSTICE: FIRST REVIEW OF THE WORKERS COMPENSATION SCHEME

1.0 Background

The New South Wales Bar Association is pleased to make the following submissions to the Standing Committee on Law and Justice Review of the Workers Compensation Scheme.

2.0 Executive summary of the Association's opinions and suggestions

2.1 The scheme should promptly return to a simple system whereby reasonably necessary medical expenses are payable to all injured workers - as occurred between 1929 and 2012 (Section 5).

2.2 The three different jurisdictions for dispute resolution should be unified in the Workers Compensation Commission (Section 6).

2.3 The definition of suitable employment in Section 32A should be amended to require consideration of the realistic prospect of a worker obtaining suitable employment in their particular circumstances. The individual pathways for determining a worker's rights, particularly in relation to work capacity decisions should be redesigned so as to significantly reduce the number of decision making processes. (Section 7).

2.4 Consideration should be given to the abolishing the Merit Review Service (Section 8).

2.5 Consideration should be given to improving the weekly benefits payable to injured workers to endeavour to keep them from being impoverished (Section 9).

2.6 Assessments of the degree of permanent impairment should not be used as a basis for determining whether a worker receives weekly payment or medical expenses compensation (Section 10).

2.7 The reassessment of degrees of permanent impairment should be permitted when a worker's condition deteriorates (Section 11).

2.8 Legal costs should be payable with respect to work capacity decisions and insurers should be permitted to pay additional costs for legal representation for employers (Section 12).

2.9 The previous provisions relating to the calculation of pre-injury average weekly earnings, which allowed for wage movements over time, should be restored (Section 13).

2.10 Section 38 should be redrafted so that the potential weekly benefit is not dependent on an insurer's administrative decision (Section 14).

2.11 Premiums should not be increased if claims are made (Section 15).

2.12 A broad debate should occur with respect to what should be paid for by workers compensation premiums or the general taxation revenues of Commonwealth and State Governments (Section 16).

3.0 Abbreviations

3.1 The following abbreviations are used in these submissions:

"AMA5" - American Medical Association Guides to the Evaluation of Permanent Impairment 5th Ed.
"AMS" - Approved Medical Specialists appointed by the WCC
"Insurers" - Scheme Agents, Self-Insurers and Specialised Insurers
"MRS" - The Merit Review Service operated by SIRA
"SIRA" - State Insurance Regulatory Authority
"WCA 1926" - *Workers Compensation Act 1926*
"WCA 1987" - *Workers Compensation Act 1987*
"WCC" - Workers Compensation Commission of NSW
"WCR" - Workers Compensation Regulation 2016
"WIM" - *Workplace Injury Management and Workers Compensation Act 1998*
"WIRO" - The Independent Review Officer
"WorkCover" - The body constituted under section 14 WIM prior to the division of its functions in 2015.
"WPI" - Whole person impairment assessed in accordance with the American Medical Association Guidelines for the Evaluation of Permanent Impairment (as further modified by WorkCover Guidelines)
"The 2012 amendments" - The amendments made to the WCA and the WIM by the *Workers Compensation Legislation Amendment Act 2012*
"The 2015 amendments" - The amendments made to the WCA and the WIM by the *Workers Compensation Amendment Act 2015*

4.0 Historical Observations

4.1 Compulsory workers compensation insurance for employers was introduced in NSW by the WCA 1926. This Act replaced an earlier scheme limited to certain dangerous occupations.

4.2 Initially the insurance industry was reluctant to issue policies. It was thought the business might be unprofitable. This led the then Lang Labor government to create the Government Insurance Office of NSW to ensure policies were available. As it transpired the business was attractive and various private insurers became active in the market along with the GIO.

4.3 The WCA 1926 also created a body known as the Workers' Compensation Commission of NSW ("the first WCC"). The first WCC issued licenses to suitable insurers, which authorised them to issue standard policies. It was also the body that determined disputes about worker's entitlements. It also performed other functions - such as the administration of a scheme to pay benefits when employers were uninsured.

4.4 The premium rates were set by an Insurance Premiums Committee, comprised of the Chairman of the first WCC and four individuals who variously represented insurers, government, employers and workers. The rates were a set percentage of the wages paid to workers in certain categories of employment. Clerical employees had the lowest premium rate. More dangerous pursuits had higher rates. A claim did not increase the premium payable in subsequent years. Insurers were free to charge lower premiums. At times some did.

4.5 The Insurance Premiums Committee endeavoured to ensure approximately 30% of the premiums collected were available to insurers to cover overheads and profit. The remaining 70% was devoted to claims. This scheme was relatively successful for a long time. For instance in 1976/77 the cost of claims was 71.27% of premiums collected.

4.6 The first WCC was a remarkably lean organisation. It performed its tasks with a small staff and the "members" of the Commission, including the Chairman. By 1983 there were 12 members. The members of the Commission also conducted the Commission's dispute resolution functions in a similar manner to civil proceedings in the District Court. Partly because of this the members were usually senior legal practitioners and included some senior counsel.

4.7 In the mid 80's, to avoid perceived conflicts, it was thought appropriate to separate the dispute resolution and administrative functions of the first WCC. The dispute resolution role was given to a new Compensation Court of NSW. The members of the Commission became judges of the Court. The Chairman became the Chief Judge. The administrative functions were given to a new statutory organisation, initially called the State Compensation Board of NSW.

4.8 The name of the State Compensation Board was eventually changed to the WorkCover Authority of NSW ("WorkCover"). This body also acquired certain industrial safety and regulatory roles, which had mostly previously been performed by the Department of Labour and Industry.

4.9 In the mid 1980's two licensed NSW workers compensation insurers became insolvent. Pursuant to statutory provisions that until that time had seen little use, a pool of funds was collected from the other licensed insurers to ensure the affected employers had indemnity.

4.10 In 1987 the Unsworth Labor Government replaced the WCA 1926 with the WCA 1987.

4.11 One major change in the WCA 1987 was to replace orthodox private insurance with statutory fund insurance managed by authorised “insurers” (who are more correctly called “Scheme Agents”). The premiums collected after 30 June 1987 were deposited in various statutory funds. The Scheme Agents were paid fees by WorkCover, for collecting the premiums and managing claims. The main rationale for this system was to remove the risk of an insurer becoming insolvent. The WCA 87 also introduced more complex premium calculations - which included potentially significant increases in an employer’s premium in the event of claims being made. These are called “Experience Adjustments”. The underlying system of setting premiums based on job categories continued.

4.12 Since 1987 the NSW workers compensation scheme has followed some strange paths. One illustration of its confused state involves the provisions surrounding overall lump sum ("redemption" or “commutation”) settlements. In practical terms these were abolished, reintroduced and then largely abolished again.

4.13 Over the same period the legislation has become absurdly complex. Before 1987 there was one Act with 72 sections. Currently there are two Acts with a combined total of 660 sections. Numerous provisions are now duplicated and some even contradict other legislative provisions. The situation is made even more confusing because of various recent retrospective provisions, complex transitional provisions and WorkCover's issued “Guidelines” - some of which have statutory effect.

4.14 At the same time the staff numbers of WorkCover grew significantly. For example in 2001 it had 856 staff. By 2008 it had 1,384. A 62% increase over the 7 years to 2008. (The 2014/15 Annual report now details 2,470 which reflects a 289% increase over the 14 years to 2015.)

4.15 In the late 1990’s, a plan to revert to traditional insurance, in lieu of the managed statutory fund system, was mooted and then put on indefinite hold.

4.16 By 2001, the Carr Labor government was receiving advice through WorkCover that the scheme had a large projected future deficit and that benefits and costs needed to be reduced.

4.17 In late 2001 this and other presumed concerns prompted various legislative provisions which, among other things:

(a) Changed the manner in which lump sum workers compensation benefits are assessed by implementing the WPI regime. The practical effect of these changes was to reduce the amounts recovered;

(b) Abolished a large proportion of potential common law damages claims by employees against their employers - by imposing a 15% WPI threshold; and

(c) Replaced the Compensation Court of NSW with a new Tribunal called the Workers Compensation Commission of NSW (“the current Workers Compensation Commission”).

4.18 The projected scheme deficit initially reduced fairly quickly. In 2002 the estimated deficit was $3.2B. By 2004 it was $1.65B. Given the abolition of many common law claims and the reductions in lump sum compensation, this was largely unsurprising. By June 2008 a surplus of $625M was being estimated. However as of 30 June 2009 the figure had reverted back to an estimated deficit of $1.48B.

4.19 By early 2012 a larger projected deficit prompted the O'Farrell Coalition Government to further amend workers compensation legislation. The 2012 Amendments were particularly harsh and made a large number of changes - most of which had not been canvassed in the limited and rushed debate which occurred before the Amendments were passed. The harshest of these changes involved:

(a) Giving insurers the ability to end the payment of weekly benefits to an injured worker by making a "work capacity decision". This is an administrative decision, which cannot be challenged in the WCC. Instead workers are permitted to seek a review of the work capacity decision by WorkCover (now SIRA) in its so-called Merit Review Service. Lawyers are not permitted to be paid for assisting workers present review applications to the MRS. Hence workers have to attempt to submit the forms, required evidence and written submissions on their own - whatever their literacy or educational background;

(b) Providing that most workers could also not receive any more than 130 weeks of weekly benefits (with a smaller number not been permitted to receive more than 260 weeks);

(c) Providing that most workers could not even receive medical expenses one year after they ceased to be entitled to weekly benefits. (The main exception to this was if a worker was 31% WPI or more and hence defined to be a *"seriously injured worker".)* Medical expenses were also only payable if approved in advance by an insurer - with minor exceptions such as the first 48 hours after an injury; and

(d) Providing that there can only ever be one assessment of the WPI resulting from an injury - thereby preventing the assessment from being reviewed if it deteriorates in the future.

4.20 Within a very short period of time the scheme had a large projected surplus - which of course illustrated that the 2012 amendments were unnecessarily harsh.

4.21 This led to some changes being made by retrospective regulations and the 2015 amendments, which very slightly ameliorated the harshness of the 2012 amendments by:

(a) Permitting workers to have medical expenses for a period of 2 years after their weekly benefits are stopped;

(b) Reducing the threshold for lifetime medical cover to 21% WPI;

(c) Providing cover for *"crutches, artificial members, eyes or teeth or other artificial aids or spectacles (including hearing aids and hearing aid batteries)"* but only until the worker attains the *"retiring age"* - which for most workers is now 67; and

(d) Increasing lump sum compensation for some (rarely attained) high degrees of WPI.

4.22 The 2015 amendments also implemented the Standing Committee on Law and Justice recommendation that the functions of WorkCover be divided into three separate organisations. Industrial Safety is now dealt with by "SafeWork NSW", the scheme agents are overseen by "ICare" and policy and certain other matters are now performed by "SIRA" - including the Merit Review Service.

4.23 Also of note is that in 2014 the Standing Committee on Law and Justice recommended that the Government:

> *"allow legal practitioners acting for a worker to be paid or recover fair and reasonable fees for the work undertaken in connection with a review of a work capacity decision of an insurer, subject to an analysis of its financial impact."*

4.24 Despite this recommendation having been made two years ago, no system has yet been created to permit the payment of such fair and reasonable fees.

4.25 Large numbers of injured workers, who have been unable to find alternative paid employment, have now had their weekly benefits ended by work capacity decisions they have been unable to challenge. They are now trying to subsist on Centrelink benefits and charity. A large number are also in a similar predicament because the main 130 week period has expired.

5.0 Medical Treatment

5.1 As early as 1929, section 10(1) WCA 1926 provided that where an injury was sustained by a worker and medical or hospital treatment *"thereby becomes necessary"* the employer was liable to pay the cost of the treatment.

5.2 In 1929 there were no time limits on this. There was no requirement for the worker to also be receiving weekly benefits. There were no age limits. There were no limits defined by concepts such as percentage degrees of permanent impairment. There was no need to have prior approval from an insurer.

5.3 As a result of the 2012 (and 2015) amendments, many workers can no longer obtain medical expenses, which are reasonably required to treat the effects of their workplace injuries. The reasons for this vary and include:

(a) Their initial claim with respect to the injury was made more than 2 years previously (s 59A(1) WCA);

(b) They have not been receiving weekly benefits for 2 years (s 59A(2) WCA);

(c) They do not have a degree of permanent impairment of 21% or more (s 59A(4) WCA);

(d) They have reached the Commonwealth Government's pension age (s 52 and s 59A(2) WCA); and

(e) The expenses were not approved in advance by an insurer (s 60(2A) WCA).

5.4 In other words, workers now have fewer rights under the NSW workers compensation scheme than they did 87 years ago. This is an extraordinary situation - the more so because it has arisen without any obvious financial inability of the WorkCover Scheme to fund medical expenses.

5.5 Section 3 WIM provides that the workers compensation system in NSW has *"System Objectives"* which include:

"(c) to provide …. payment for reasonable treatment and other related expenses"

5.6 The restrictions on medical expenses introduced by the 2012 (and 2015) amendments are preventing this *"System Objective"* from being attained. They should be removed as a matter of urgency.

5.7 It is also worth observing that many medical costs, which were previously paid for out of WorkCover funds, are now being funded by the injured workers being treated at NSW Public Hospitals. As such the consolidated revenue of the NSW Government is now funding much of the treatment needs of injured workers, which could be paid for out of the large reserves of the WorkCover funds. Self evidently this is preventing certain consolidated revenue funds being used for other state government obligations.

5.8 It is also worth noting that injured workers are now being placed onto public hospital waiting lists instead of being treated as workers compensation patients at private hospitals. As such the 2012 amendments are worsening the delays with surgery times at public hospitals.

5.9 The present harshness and absurdities, which arise from the 2012 amendments, are illustrated by considering the following practical examples:

<u>Example 1</u>

(a) A nurse in Sydney has suffered a rare allergic reaction to a vaccine which was administered to protect him from the risk of been infected by the tuberculosis patients he was caring for. The reaction has caused him to suffer from a potentially crippling rheumatoid arthritis condition. This condition has thus far been kept at bay through periodic specialist consultations and the use of relatively expensive pharmaceuticals.

(b) This treatment has been so successful that he has been able to remain working full-time in his profession and he has no assessable WPI. As a result of s 59A(2) the cost of this treatment is no longer covered by workers compensation. His ability to self fund the treatment is limited and his condition with imperfect treatment may soon deteriorate and require him to reduce or cease his work activities.

(c) Hence the skills of a highly deserving and dedicated injured worker may soon be lost to the NSW community and the individual concerned will face great personal and financial hardship.

Example 2

(a) A man was able to return to work as furniture removalist in the Central West because of the outcome of a lumbar disc replacement procedure performed in the early 1990's. Unfortunately the artificial disc ruptured when he was lifting a heavy item at work. He has subsequently undergone a far less successful spinal fusion procedure. His continuing pain is so severe that a morphine pump has been inserted into his abdomen. The cost of surgically implanting the pump was paid for by the WorkCover scheme. Such pumps need to be replenished with morphine several times each year.

(b) His WPI has been assessed at 15% (because of a large assessment deduction relating to the artificial disc). Due to the 130 week period limit and his age he has not been entitled to weekly benefits for over two years. As a result of this he is no longer entitled to the payment of medical expenses.

(c) As such the WorkCover scheme has paid to insert a morphine pump in the man's abdomen but farcically it will no longer pay for it to be re-filled with morphine.

Example 3

(a) In the 1990's a farm labourer lost his front teeth when he was kicked by a farm animal. About every 5 years he needs a new denture. He retired 10 years ago when he was 65 and entitled to the age pension.

(b) His denture has now broken and he has no front teeth. He cannot obtain afford a new one. He cannot get the cost of a new one covered by workers compensation as *"artificial teeth"* are only covered until *"retiring age"* by virtue of Clause 27(1) WCR 2016.

6.0 The absurdity of having three different jurisdictions

6.1 It is instructive to recall that in 1987 the Unsworth Labour Government created a second workers compensation dispute resolution tribunal called the "Workers Compensation Commissioners". It operated separately to the Compensation Court of NSW. Employers and workers were able to choose which body they commenced proceedings in. It was possible with respect to the one industrial accident for an employer to

commence proceedings before the Workers Compensation Commissioners at the same time the relevant worker had proceedings before the Compensation Court of NSW.

6.2 This system of parallel jurisdictions was not a success. After a relatively short period the incoming Greiner Coalition Government abolished the "Workers Compensation Commissioners" as a separate body. The "Commissioners" were made officers of the Compensation Court of NSW - which is how that Court came to have both Judges and Commissioners.

6.3 The fundamental problem with parallel jurisdictions is that the decision makers in the separate bodies can come to separate and inconsistent decisions. This does not assist in the timely and sensible administration of justice.

6.4 The current Workers Compensation Commission is separate from the system of approved medical specialists created by the Carr Government in 2002. As such, since 2002 there has once more been a system of parallel jurisdictions in NSW workers compensation matters. However as the approved medical specialists have a much more limited statutory function than the Workers Compensation Commissioners had, there had been less scope for inconsistent decisions.

6.5 There is however still scope for this to occur - as was recently discussed by one of the Commission's presidential members in *Jaffarie v Quality Castings Pty Ltd* [2014] NSWWCCPD 79.

6.6 The 2012 Amendments have now created a third parallel jurisdiction with respect to section 43 WCA "work capacity decisions".

6.7 The separate nature of these three jurisdictions is illustrated by considering the "appeal" mechanisms for each of them:

(a) Workers Compensation Commission

(i) Initial decision maker - Arbitrator

(ii) Intermediate appellate level - Presidential Member

(iii) Final appellate level (limited to questions of law) - NSW Court of Appeal

(b) Approved Medical Specialists

(i) Initial decision maker - Approved Medical Specialist

(ii) Initial appellate level - Medical Appeal Panel

(iii) Initial administrative law appellate level - Supreme Court of NSW

(iv) Final administrative law appellate level - NSW Court of Appeal

(c) Work Capacity Decisions

(i) Initial decision maker and internal review - Scheme Agent/Insurer

(ii) Initial merit review appeal - Merit Review Service

(iii) Final merit review procedural appeal - WorkCover Independent Review Officer

(iv) Initial administrative law appeal - Supreme Court of NSW

(v) Final administrative law appeal - NSW Court of Appeal

6.8 The 2012 amendments attempted to prevent inconsistencies arising between the Workers Compensation Commission and the work capacity decision process, by providing in section 43(3) WCA that *"the Commission is not to make a decision in respect of a dispute before the Commission that is inconsistent with a work capacity decision of an insurer"*. However in practice it has not been possible to avoid degrees of overlap and inconsistency between work capacity decisions and the tasks and decisions of the WCC. This was recently illustrated in the Court of Appeal's decision in *Subanayagam v St George Bank Ltd* [2016] NSWCA 145. During the course of the submissions in that matter Justice Sackville described the complex statutory provisions as *"spaghetti"* - which self-evidently was not a compliment.

6.9 The 2012 amendments did not even attempt to address the question of inconsistencies arising between the decisions of work capacity decision makers and approved medical specialists. How this can occur and create an absurd situation is illustrated by the following:

(a) In assessing the WPI resulting from a psychological injury, an AMS is required by Table 11.6 of The WorkCover Guides for the Evaluation of Permanent Impairment, to consider a worker's employability. The relevant psychiatrist can conclude that the individual falls within class 5 in that he or she "cannot work at all". This categorisation then forms part of the overall assessment of what the degree of WPI is;

(b) The certificate from the AMS is then conclusive evidence with respect to the degree of impairment that results from the injury;

(c) The same worker can be assessed by a scheme agent/insurer as having no incapacity for work as part of a "work capacity decision"; and

(d) As such the worker is assessed by one NSW jurisdiction as being unable to work at all and by another NSW jurisdiction as having no restrictions on their ability to work.

6.10 Rational systems of dispute resolution should not be able to produce inconsistent decisions and they should certainly not be able to produce absurd ones.

6.11 In the Association's opinion the most sensible way of avoiding inconsistent decisions from arising is to apply the same solution as was previously applied by the Greiner Government - that is to bring the various decision making functions within the one general jurisdiction. The obvious body to give this to is the Workers Compensation Commission.

6.12 However if the government's policy is to continue to let insurers make work capacity decisions and for the assessments of WPI by approved medical specialists to remain *"conclusive"* with respect to the degree of impairment present, this can still be achieved by having the tasks of the various administrative bodies coming within the appellate review of the Workers Compensation Commission - which would at least substantially reduce the scope for inconsistencies. This could be done by having the following arrangements:

(a) Approved Medical Specialists

(i) Initial decision maker - Approved Medical Specialist;

(ii) Initial appellate level - Medical Appeal Panel;

(iii) Final factual decision level - Workers Compensation Commission.

(b) Work Capacity Decisions

(i) Initial decision maker and internal review - Scheme Agent/Insurer;

(ii) Initial merit review appeal - Merit Review Service of WorkCover;

(iii) Merit review procedural appeal - WorkCover Independent Review Officer;

(iv) Final factual decision level - Workers Compensation Commission.

(c) Workers Compensation Commission

(i) Initial decision maker – Arbitrator;

(ii) Intermediate appellate level - Presidential Member;

(iii) Final appellate level (limited to questions of law) - NSW Court of Appeal.

7.0 Work Capacity Decisions And "Suitable Employment"

7.1 The fact that a work capacity decision has the potential to pass through five levels of decision making is absurd. Of course the reality is that it is utterly impracticable and probably impossible for an injured worker to prosecute their rights through those five stages. The regulator should be able to provide data which identifies the stage at which work capacity decisions are being determined. If, as we anticipate, the majority of workers who are unsuccessful at the first or second stages simply give up because the system is too difficult to negotiate, the system is failing.

7.2 Apart from the obvious barrier which a multi layered decision making process presents, the definition of suitable employment which is used to reduce or cut off a worker's benefits is unrealistic and grossly unfair. Suitable employment is approached having regard to the nature of a worker's incapacity, age education skills and work experience, any return to work planning process, any occupational rehabilitation services, is to be determined regardless of whether the work or employment is available, or is of a type or nature that is generally available in the employment market, the nature of the worker's pre-injury employment and the worker's place of residence.

7.3 The direction to disregard those matters makes the determination of suitable employment almost entirely hypothetical and provides a ready avenue for determination of the right to weekly benefits. It is the cause of significant injustice within the workers compensation scheme.

8.0 The Merit Review Service

8.1 WorkCover's (now SIRA's) Merit Review Service is worthy of particular consideration as:

(a) Its very existence is a great irony. As noted in 4.7 and 4.8 above WorkCover only came into existence in the first place because it was thought undesirable for the original Workers Compensation Commission to perform both administrative and dispute resolution functions. Despite this historical background, the 2012 amendments gave WorkCover a dispute resolution function on top of its administrative functions. SIRA now continues to do both. This is fundamentally unsound. There is a clear conflict in being both responsible for the management of an appropriate balance in the statutory funds created by the premiums collected and in being responsible for deciding whether particular workers should continue to be paid weekly compensation (and hence medical expenses) out of those funds. Workers can have no confidence in the decisions being made by SIRA's MRS because of this conflict of interest.

(b) It has never really been articulated why it was thought necessary to remove the role of deciding a worker's *"work capacity"* from the truly independent WCC and why it was thought appropriate to prevent injured workers having legal representation in the MRS. These failures only add to the concerns about the conflict of interest.

8.2 The view of the Association is that the MRS is unnecessary and its existence creates a conflict of interest that can easily be avoided. This can be done by making disputes about work capacity decisions reviewable in the same jurisdiction which other disputes are - which is the WCC.

8.3 If the government's policy is to continue to have three separate jurisdictions, the following steps should be implemented to at least provide some much needed practical fairness:

(a) As previously recommended by the Standing Committee on Law and Justice, workers should be permitted to have legal representation to assist them with appeals from work capacity decisions to the Merit Review Service and WIRO. The current provisions, which prevent legal practitioners being paid by anyone for such work, are probably without precedent in Australia and should be removed and replaced with an appropriate costs regime.

(b) Workers are unable to afford the risk of adverse cost orders being made in the Supreme Court. Hence to date they have brought virtually no administrative law appeals from work capacity decisions to the Supreme Court. If the Supreme Court remains the preferred jurisdiction for administrative law appeals from the Merit Review Service or WIRO, workers should be protected from adverse cost orders - as they traditionally have been in the Workers Compensation Commission (absent fraud etc).

9.0 The level and duration of weekly payments

9.1 Over an extended period of time the NSW workers compensation scheme provided injured workers who were unable to find suitable alternative employment with long-term weekly benefits, which were typically twice what they could obtain from Centrelink and its predecessors.

9.2 By 2012 the typical long-term weekly workers compensation benefit was about $500 pw. In contrast the usual long term Centrelink benefit was about $250 pw. $500 pw could usually sustain an acceptable albeit very modest standard of living. Workers were usually able to maintain acceptable standards of housing, diet and clothing. By way of contrast it is not possible to maintain acceptable standards on $250 pw. Housing is lost, diet becomes poor, relationships end, clothing has to be sought from charities and most individuals commence to suffer from a deterioration in their physical and mental health.

9.3 The Committee should appreciate that what typically has happened and will happen, when an insurer makes a work capacity decision is that:

(a) The worker has a continuing physical incapacity, which prevents him or her from returning to their previous employment;

(b) Efforts, including the efforts made by professional rehabilitation consultants to secure alternative physically easier employment tasks for the individual, have failed;

(c) Despite the well-established practical reality that the worker has no residual capacity to earn, the insurer will decide that they actually do have a capacity to earn as much as they used to and the weekly payments will be stopped (usually long before the main 130 week period has ended);

(d) The physically incapacitated and practically unemployable individual then has to seek benefits from Centrelink and such further support as they can obtain from charity.

9.4 In past decades the NSW workers compensation scheme has been able to provide long-term financial support for such workers. If commercially feasible, it should return to being fundamentally more generous.

10.0 The use of WPI assessments to limit statutory entitlements

10.1. The new section 39 WCA provides that virtually all injured workers cannot receive any weekly compensation after 260 weeks. Section 39(2) creates a potential exception for workers who are assessed as having a WPI of *"more than 20%"* - which means 21% or more. As such the WPI system is now also used in the legislation as a basis for determining whether an injured worker is entitled to receive weekly benefits.

10.2 The method for calculating WPI is established by WorkCover Guidelines for the Assessment of Permanent Impairment. These currently provide that the assessments are to be made in accordance with AMA5 (subject to some further minor amendments).

10.3 Chapter 1 of AMA5 specifically cautions (at page 5) that:

> *"impairment ratings are not intended for use as direct determinants of work disability"*

10.4 Chapter 1 of AMA5 explains this by giving the example that a heart condition may prevent a manual labourer from pursuing his trade but that a sedentary worker, with the same condition, may not be.

10.5 The authors of AMA5 have then repeated and further explained this caution in bold print (at page 13) as follows:

> ***"Impairment ratings should not be used as direct estimates of disability. Impairment percentages estimate the extent of the impairment on whole person function and account for basic activities of daily living. The complexity of work activities requires individual analysis."***

10.6 This warning is being ignored by the current legislative provisions, which use the percentage estimates as a basis for deciding whether a worker can obtain more than 260 weeks of weekly compensation.

10.7 A worker is now (post the 2015 amendments) regarded as having *"high needs"* if he or she has been *"assessed"* to have a degree of permanent impairment of *"more the 20%"*. As WPI assessments are rounded up or down to the nearest percentage this means the worker has to be assessed at 21% WPI or more to come within this definition.

10.8 Not that many workers are assessed at 21% or more. Given the prevalence of low back injuries the most commonly seen assessments of 21% or more relate to spinal fusion procedures which are assessed at slightly more than this figure because of relevant provisions in AMA5.

10.9 As already noted workers who now attain the 21% threshold have a statutory entitlement to reasonable medical expenses to treat the effects of the relevant injury for life.

10.10 Just as the authors of AMA5 caution that it is not appropriate to use WPI assessments as a way of assessing the payment of benefits for incapacity for work, it is the Association's view that it is not appropriate to use WPI assessments as a way of determining entitlements to medical expenses.

10.11 The practical examples discussed in 5.9 above illustrate why.

11.0 The unfairness of only permitting one WPI assessment

11.1 Section 322A WIM limits parties to *"one assessment ... of the degree of permanent impairment of an injured worker"*. The type of assessment being referred to is an assessment by an *"approved medical specialist"* ("AMS") appointed by the Registrar of the Workers Compensation Commission. Section 322A(2) then provides that only this assessment *"can be used in connection with any further or subsequent medical dispute about the degree of permanent impairment"*.

11.2 Section 326 WIM provides that the outcome of the AMS assessment is *"conclusively presumed to be correct"* as to the degree of impairment that results from the injury. As such, the one permitted AMS opinion is forever determinative of the degree of impairment - as it is conclusive and section 322A(2) prevents a second assessment from being made.

11.3 There is a drafting inconsistency with section 329 WIM, which continues to provide that the Registrar of the WCC may refer matters for assessment *"again"*.

11.4 However putting such problematic matters of drafting to one side, the Association's opinion is that the section conflicts with the section 3 WIM *"System Objectives"* of providing a *"workers compensation system"* which is *"fair"* and one which provides payment for *"permanent impairment"*.

11.5 The unfairness is illustrated by the common scenario of a worker subsequently developing a further degree of permanent impairment as a result of the injury, after an assessment has been made by an AMS. For example a worker with a lumbar spine disc protrusion might have been assessed at 12%. Some years later the disc may completely collapse and produce the need for a lumbar spinal fusion to be performed - which typically increases the WPI resulting from the injury to 24%.

11.6 The inability of the worker to have a second assessment made by an AMS means that the earlier certificate continues to conclusively determine the degree of impairment. As such, even if everyone agrees the

impairment was now 24% - the legislation continues to provide that it is only 12%. This is an absurd situation.

11.7 Under the current regime the above outcome would prevent the worker from having any entitlement to medical expenses two years after he or she ceased to be entitled to weekly compensation.

11.8 It is self-evident that the above result is not *"fair"*. It also prevents appropriate payment for the overall *"permanent impairment"* and medical expenses. As such section 322A is preventing *"System Objectives"* from being attained. It is also potentially productive of absurdity.

11.9 As such it is the Association's view that section 322A should be removed from the legislation.

12.0 Costs

12.1 The legal aid system called "ILARS" provided through WIRO appears to be generally satisfactory with respect to workers who can bring proceedings in the Workers Compensation Commission.

12.2 As noted above it would remove a great unfairness to workers if legal practitioners could actually be paid for acting for them with respect to work capacity decisions. One way of accommodating this would be for the funding to WIRO could be suitably increased to accommodate this.

12.3 Employers are now in an anomalous position as their legal costs are regulated by Schedule 6 WCR and as a practical matter they have been decreased as Schedule 6 does not provide for counsels fees as disbursements or for practical increases reasonably required for complex and longer running matters. (Schedule 6 continues to refer to increases being certified by the WCC but as section 341(2)WIM now states the WCC *"has no power"* to deal with costs it cannot actually certify the increases the WCR still refers to - which provides a useful example of the absurd inconsistencies in the Scheme's provisions.)

12.4 The unfairness to employers should be removed by making suitable changes to Schedule 6 WCR and/or permitting insurers to pay additional sums for legal representation.

13.0 The Calculation of Weekly Payments

13.1 The 2012 amendments provided for weekly compensation payments to be calculated by reference to "AWE" which is defined in section 35(1) WCA to be *"the worker's pre-injury average weekly earnings"*. This phrase is now customarily abbreviated to PIAWE.

13.2 For most workers PIAWE is calculated by reference to their *"pre-injury average weekly earnings"* over the 52 weeks before they were injured and there is a complex system whereby payments in excess of *"ordinary earnings"* are either not included or eventually disregarded.

13.3 The complexity of the provisions is fairly obviously causing a level of confusion and delay with the practical processing of claims. This is not assisted by some odd drafting. For instance, section 44E provides that *"the monetary value of non-pecuniary benefits"* is included in calculating *"ordinary earnings"* which are then used to assess PIAWE and AWE. However the weekly payment provisions then provide the value of *"non-pecuniary benefit(s)"* becomes the variable D, which is then deducted from AWE, as part of the formula for calculating how much weekly compensation is payable.

13.4 As such the provisions require the value of non-pecuniary benefits to be initially assessed and included before they are then removed again. The utility of this is obscure.

13.5 Members of the Bar Association have also reported that the 2012 amendments in this area are creating other seemingly unfair or unintended consequences illustrated by the following examples:

> (a) Some workers become incapacitated by very old injuries. If say a worker was injured in 2000 but does not become incapacitated until 2015, his or her PIAWE and AWE is calculated by reference to their pre-injury earnings. As such in 2015 they are being compensated on the basis of receiving a proportion of what they earned in 2000, without any allowance for the significant inflation and general wage movements that have occurred over the subsequent 15 years;
>
> (b) In NSW abattoirs it has long been customary for a large proportion of the workers earnings to come from shift payments, which vary in accordance with the number of animals processed. Section 44G(1) seeks to exclude these from PIAWE on the basis that they are "incentive based payments". However section 44E(a) contemplates that "piece rates", which they arguably are, should be taken into account. The resultant confusion in the industry has affected the processing of weekly benefit claims and is likely to result in a number of proceedings being commenced in the Workers Compensation Commission.

13.6 There were well understood provisions in section 43 of the WCA, before the 2012 Amendments, which defined "average weekly earnings" and which were used as the basis for assessing weekly payment benefits. The unfairness and complications referred to above did not arise under the old provisions. In the Association's opinion the new provisions are inferior and should be replaced with the old provisions.

14.0 Section 38

14.1 Some workers have a potential entitlement to weekly payments after 130 weeks have passed. Such entitlements arise from section 38 WCA but for weekly benefits to be payable the worker has to be:

> *"assessed by the insurer as having no current work capacity"*; (or)
>
> *"assessed by the insurer as having current work capacity"* (and is working for at least 15 hours per week) and the that this situation of being unable to work more *"is assessed by the insurer as being ... likely to continue indefinitely"*

14.2 As such the potential entitlement is completely contingent on the insurer making an assessment or assessments which are favourable to the worker.

14.3 The drafting of this is misconceived. An important statutory entitlement for a worker should not be contingent on the administrative whims of an insurer. Section 38 should be redrafted to make the benefit payable if the underlying factual matters exist (no or limited work capacity etc).

15.0 Helping workers find alternative lighter work

15.1 As noted in 4.11 above, an employer's premium can significantly increase if a claim is made. Employers regard workers who have a disability as being at a much higher risk of making a claim for workers compensation. As a result, it has become standard practice for job application forms in NSW to contain questions about past workers compensation claims. As such, it is near impossible for an incapacitated worker to obtain a new lighter job if they truthfully disclose their condition.

15.2 WorkCover's approach to this problem has been to periodically create schemes providing subsidies or protection against premium increases if a worker with a disability is employed. The practical experience of the Bar Association's members is that most workers employed under such schemes have been promptly dismissed once the subsidy or protection comes to an end.

15.3 A practical way of addressing the preconceptions of many employers is to completely remove "Experience Adjustments" from premium calculations. If this would result in the pool of premium income for particular industries being too low, the basic percentage tariff for that industry can be increased. Employers hate the uncertainty created by "Experience Adjustments" and it is understood they would prefer the certainty of known premium costs - which is what they had between 1926 and 1987.

15.4 The related issue of encouraging employers to have safer work places is much better achieved by prosecuting those who fail to take reasonable steps to have safe places of work. As workers compensation is a no-fault benefit many employers are currently being penalised by "Experience Adjustments" for industrial accidents they actually had no control over.

16.0 Broader policy considerations

16.1 The practical reality of the harsh 2012 amendments has been to significantly limit the medical expenses and income support payments made by NSW employers to employees - injured in carrying out their business activities.

16.2 The result is that the longer term medical expenses and income support payments are now being paid by the taxpayers of the Commonwealth (through Medicare and Centrelink payments) and the taxpayers of NSW (through public hospital payments).

16.3 Whether this is good public policy has not been debated publically.

16.4 Conservative economic theory generally espouses that the social costs of an activity should be borne by the organisations which create the costs. Hence modern western economies generally have workers compensation systems which impose the costs of caring for injured and disabled employees onto employers through compulsory insurance premiums.

16.5 In the Association's view it is important for such a debate to actually occur so that all levels of Government can endeavour to strike a sensible balance as to how the costs should be borne.

16.6 It would also be rational for such a debate to occur in the context of a medium to long term goal of endeavouring to have uniform workers compensation legislation in all the relevant jurisdictions of Australia.

19 September 2016