

## **INQUIRY INTO 2022 REVIEW OF THE WORKERS COMPENSATION SCHEME**

**Organisation:** Australian Industry Group (Ai Group)

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Australian Industry Group

# New South Wales 2022 Review of the Workers Compensation scheme

Submission to  
Standing Committee on  
Law and Justice

**JULY 2022**



**NEW SOUTH WALES**  
**2022 REVIEW OF THE WORKERS COMPENSATION SCHEME**  
**SUBMISSION TO STANDING COMMITTEE ON LAW AND JUSTICE**

**INTRODUCTION**

The Australian Industry Group (Ai Group) is a peak industry association and has been acting for business for more than 140 years. Along with our affiliates, we represent the interests of businesses employing more than one million staff. Our longstanding involvement with diverse industry sectors including manufacturing, construction, transport, labour hire, mining services, defence, airlines and ICT means we are genuinely representative of Australian industry.

Our vision is for *thriving industry and a prosperous community*.

We have ongoing contact and engagement with employers across Australia on the broad range of issues related to the operation of their businesses, informing them of regulatory changes, discussing proposed regulatory change, discussing industry experiences and practices and providing advice, consulting and training services.

Ai Group is a member of Safe Work Australia (SWA) which has two major subgroups:

- Strategic Issues Group – Workers Compensation which aims to improve return to work outcomes for ill or injured workers and their employers through collaborative engagement across jurisdictions. Refer to the [National Return to Work Strategy 2020–2030](#).
- Strategic Issues Group – Work Health and Safety which had oversight of the development of the Model Work Health and Safety (WHS) Laws and continues to oversight developments in WHS including the recent development of WHS regulations addressing Psychological Risk.

We are also actively involved in consultative forums with state and territory regulators and scheme operators in relation to the application of WHS and workers' compensation legislation.

In New South Wales we participate in a tripartite forum with SIRA (the State Insurance Regulatory Authority) and have membership on NIAC (Nominal Insurance Advisory Committee). We also provided significant input into the development of the [NSW Code of Practice: Managing psychosocial hazards at work](#) and will soon participate in consultation on the development of a NSW Healthy Work Strategy.

### **THIS REVIEW – A FOCUS ON PSYCHOLOGICAL CLAIMS**

We note that the Committee has resolved to focus this review on the increase in psychological claims. It is Ai Group's view that whilst this is appropriate, the increase in psychological claims is a topic that traverses workers' compensation, WHS and public health strategies. It is our understanding that there is a general view amongst regulators of workers compensation and WHS that claim lodgement will continue to increase, at least in the medium term, as awareness grows and the stigma attached to mental health issues decreases, regardless of underlying trends in workplace mental health.

Within the scope of this Committee Ai Group hopes that the review will include a focus on:

- education and other support for employers in how to better handle claims at workplace level to increase chances of early RTW outcomes
- how liability decisions are made about these claims;
- timeframes and processes for making liability decisions that do not work against RTW;
- early intervention to resolve barriers to returning to work with the original employer;
- provision of appropriate treatment and other supports to aid recovery;
- timely identification of situations when a return to the original employer is unlikely, with interventions to support new employment opportunities; and
- Consideration of how current WPI and WID assessments are made on these claims.

## NOMINAL INSURER FINANCIAL PERFORMANCE

Ai Group is concerned, on behalf of members, about the financial performance of icare as the NSW Workers Compensation Nominal Insurer (NI). Increasing costs will most likely translate into increased premiums, unless the current trends can be reversed.

Figure 1 illustrates the movement in the valuation of outstanding claims liabilities of the NI. In the 2016 to 2019 years, we have only utilised the December valuations. However, with specific reference being made to psychological claims in the 2020 and 2021 valuations, we have included both the June and December valuations for those years.

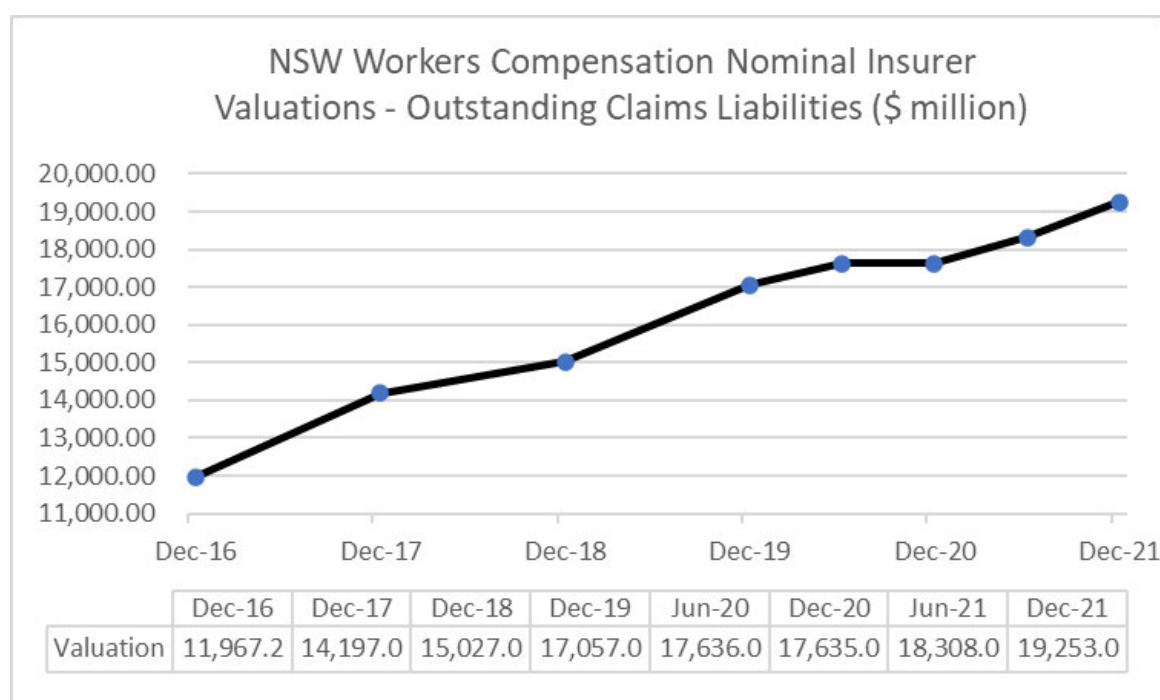


Figure 1: Nominal Insurer Valuations 2016 to 2021

Source: Liability Valuation reports accessible [here](#).

Key statements explaining the movement in valuations during the 2020 and 2021 years are as follows:

- Movement in outstanding claims liability 31 December 2019 to 30 June 2020  
*A \$126m increase to allow for higher numbers of psychological injury claims with higher WPI.*

- Movement in outstanding claims liability 31 December 2020 to 30 June 2021  
*A \$90m increase due to a higher number of psychological claims expected to reach higher WPI bands which are gateways to Work Injury Damages (WID) or longer weekly and medical benefits. This relates to the 2018 to 2021 calendar years.*
- Movement in outstanding claims liability 30 June 2021 to 31 December 2021  
*A \$134m increase due to a higher Work Injury Damages (WID) average sizes for psychological claims.*  
*A \$50m increase due to a higher number of psychological claims expected to reach WPI band 15%+, which are gateways to Work Injury Damages (WID) or longer weekly and medical benefits.*

There was no mention of movement (increase or decrease) directly related to psychological claims in the December 2021 valuation. Across the three valuations where psychological injury claims are expressly identified, there has been an increase in outstanding liabilities related to those claims of \$400m, in the space of two years.

This is a disturbing trend, as a subset of the ongoing increase in outstanding liabilities in the scheme which were \$11,967.2m at 31 December 2016 and at 31 December 2021 had increased to \$19,253m. An increase of 61% in 6 years.

The December 2020 and December 2021 valuations both identify psychological claims as an uncertainty. The December 2021 valuation describes the uncertainty as:

*There has been an increase in psychological injury claims (stress claims) over the past few years, although numbers have recently stabilised. These claims have significantly longer durations and higher costs associated. The extent to which psychological claims remain steady or grow in future remains uncertain. There is also uncertainty over how many psychological claims will have a WPI over 15%, and this proportion has been increasing.*

We note that the increased valuation for psychological injuries relates to:

- an increase in the number of claims for psychological injury;
- higher whole person impairment (WPI) assessments (at or above 15%) which increase access to payments, particularly if they are assessed with a WPI of more than 20%; and
- higher average payments from Work Injury Damages provisions (common law negligence actions).

It is not clear from this data what is driving the higher WPI assessments and higher average WID payments. It would be helpful to better understand whether this is due to more extreme initial occurrences of injuries, delays in return to work that exacerbate the level of psychological impairment, or simply a more generous assessment of WPI by the medical specialists.

## **PREVENTION OF PSYCHOLOGICAL INJURY/ILLNESS AND CLAIMS**

Significant work is currently underway at a national level and within individual jurisdictions to identify how to best address the management of psychological risks in workplaces. Some psychological risks are well understood with generally accepted strategies to reduce that risk (e.g. bullying and sexual harassment). Other psychological risks are less clearly defined and more difficult to manage (e.g. creating the right balance of work to effectively minimise the risks of high job demand and low job demand).

Ai Group recognises that psychological health and wellbeing is an ever-increasing focus across the Australian community. It was recognised as a significant issue before COVID-19 came to our shores. However, the uncertainty and change that has occurred in workplaces and society as a whole since the COVID-19 pandemic began has heightened awareness and concern.

Ai Group and our members recognise that managing the risks to psychological health that emanate from work is a clear work health and safety issue.

We also agree that employers need assistance to understand and manage what can often be complex issues that create psychosocial risk that manifests in the workplace. Of course, many employers are simultaneously encouraged and keen to provide support for workers whose struggles with psychosocial stress come from personal circumstances and causes outside work. This only adds to the complexity of the task and suggests that a thoughtful and innovative approach is required when engaging with employers about their work health and safety responsibilities for psychosocial risk.

Ai Group is a member of the Mentally Healthy Workplace Alliance which aims to improve access to high quality, reliable and robust guidance on how to address the range of issues that may arise from all causes of mental ill health.

Within this context, we support any activity which we believe will further aid employers to understand the psychosocial risks in their business and to implement effective control measures.

Improved WHS approaches should impact ultimately reduce the level of workers' compensation claims that are lodged. However, as awareness increases there is a risk that there will be an increase in claims before improved WHS practices have their intended impact on reducing risk and subsequently claims.

## **RECENT ICARE CHANGES AND COMMITMENTS**

Ai Group acknowledges that icare is currently going through a change process, including the appointment of new Agents, as outlined in the [15 February 2022 announcement](#), which states:

*"We're looking for enhanced performance of case managers, specialised claims service providers and we're targeting performance incentives to drive better outcomes," he said.*

*In addition, icare has already taken the following actions to improve the NSW workers compensation scheme:*



- *Accepted in full the 49 recommendations of the McDougall Review*
- *Allocation of dedicated case managers for those injured workers, who have had or were expected to have ongoing time loss for more than a week*
- *Supported the hiring of an additional 80 case managers and 15 mobile claims managers throughout 2021 to enable lower caseloads and to help drive improvement*
- *Piloted an early intervention program, which has increased the targeted use of vocational rehabilitation providers – with a 44 per cent increase since May 2021*
- *Launched a Professional Standards Framework late last year across the Nominal Insurer and Treasury Managed Fund that provides case managers with learning and career pathways in order to rebuild industry-wide capability, expertise and capacity*
- *Initiated monthly governance and performance meetings with all claims service providers, focused on return to work and other performance indicators.*

It is important that the outcomes of the Committee’s review enhance and build on these changes, rather than distracting icare from important improvements that should benefit injured workers, employers and improve the financial position of the scheme.

## **MANAGING CLAIMS FOR PSYCHOLOGICAL INJURY/ILLNESS**

When a claim for psychological injury/illness is lodged, employers often feel that they have no control over the subsequent processes and decisions. The initial Certificate of Capacity (CoC) generally provides time off work and often restricts the ability of the employer to effectively engage with worker with a statement included on the CoC that the “worker is not to have any contact with the workplace/employer”.

When a claim arises from management action such as discipline or performance appraisal (claims that can be rejected under section 11A of the 1987 Act if the action is reasonable), employers do not generally feel that the objective circumstances of that action are taken into account when determining whether a workers’ compensation claim will be accepted or rejected.

Employers are seeking greater transparency about the way psychological injuries are determined, the information that is used to make a decision, and how the 12-week provisional liability period is effectively utilised to access relevant information to make an appropriate decision.

### **Education and other support for employers in how to better handle claims at workplace level to increase chances of early RTW outcomes**

The role of the employer in responding to and managing the early days of a psychological injury is crucial. The employer may become aware of an issue even before a claim is lodged. Providing access to education about how to best manage pre-claim and claim responses is crucial. This will mostly be accessed by larger employers in preparation to respond to such claims. Ai Group members have recently participated in an education session on psychological injuries delivered by icare that has very well received.

Smaller employers need assistance and support once they become aware of a psychological injury. Easy access to helpful information and someone within the Agent to talk to, even before a claim is lodged, would be extremely helpful in minimising the damage that can be done if the employer (including frontline supervisors) do not respond appropriately.

### **How liability decisions are made about psychological injury claims and, in particular claims that may be the subject of a section 11A exclusion.**

At the initiation of NIAC Members (employer and union representatives) NIAC is currently discussing this issue with a view to provide further information to scheme participants about the way in which such a claim should be determined.

It is hoped that this will result in greater clarity for employers about key decision points in the following clauses of the 1987 Act, supported by relevant decisions of the Courts and the Personal Injury Commission of New South Wales (PIC).

#### **4 Definition of “injury”**

*In this Act—*

*injury—*

- (a) means personal injury arising out of or in the course of employment,*
- (b) includes a disease injury, which means—*
  - (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and*
  - (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and*
- (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the Workers’ Compensation (Dust Diseases) Act 1942, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined.*

#### **9A No compensation payable unless employment substantial contributing factor to injury**

*(1) No compensation is payable under this Act in respect of an injury (other than a disease injury) unless the employment concerned was a substantial contributing factor to the injury.*

*Note—*

*In the case of a disease injury, the worker’s employment must be the main contributing factor. See section 4.*

*(2) The following are examples of matters to be taken into account for the purposes of determining whether a worker’s employment was a substantial contributing factor to an injury (but this subsection does not limit the kinds of matters that can be taken into account for the purposes of such a determination)—*

- (a) the time and place of the injury,*
- (b) the nature of the work performed and the particular tasks of that work,*
- (c) the duration of the employment,*
- (d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker’s life, if he or she had not been at work or had not worked in that employment,*
- (e) the worker’s state of health before the injury and the existence of any hereditary risks,*
- (f) the worker’s lifestyle and his or her activities outside the workplace.*

*(3) A worker's employment is not to be regarded as a substantial contributing factor to a worker's injury merely because of either or both of the following—*

*(a) the injury arose out of or in the course of, or arose both out of and in the course of, the worker's employment,*

*(b) the worker's incapacity for work, loss as referred to in Division 4 of Part 3, need for medical or related treatment, hospital treatment, ambulance service or workplace rehabilitation service as referred to in Division 3 of Part 3, or the worker's death, resulted from the injury.*

*(4) This section does not apply in respect of an injury to which section 10, 11 or 12 applies.*

**11A No compensation for psychological injury caused by reasonable actions of employer**

*(1) No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.*

*(3) A psychological injury is an injury (as defined in section 4) that is a psychological or psychiatric disorder. The term extends to include the physiological effect of such a disorder on the nervous system.*

*(4) This section does not affect any entitlement to compensation under this Act for an injury of a physical nature even if the injury is a physical symptom or effect of a psychological injury, so long as the injury is not merely a physiological effect on the nervous system.*

*(5) (Repealed)*

*(6) This section does not extend the definition of injury in section 4. In particular, this section does not affect the requirement in section 4 that a disease is not an injury unless it is contracted by the worker in the course of employment.*

*This section does not affect section 9A (No compensation payable unless employment substantial contributing factor to injury).*

*(7) In the case of a claim for weekly payments of compensation in respect of incapacity for work resulting from psychological injury, the medical certificate required to accompany the claim must (in addition to complying with the requirements of section 65 of the 1998 Act) use, for the purpose of describing the worker's condition, accepted medical terminology and not only terminology such as "stress" or "stress condition".*

*(8) If a claim is deficient because subsection (7) has not been complied with and the insurer or self-insurer concerned notifies the worker in writing of the deficiency (including details of what is required to comply with that subsection) as soon as practicable after receiving the deficient claim then (unless the insurer or self-insurer waives that requirement)—*

- (a) the claim is not considered to have been duly made for the purposes of section 93 of the 1998 Act until subsection (7) is complied with, and*
- (b) proceedings before the Commission cannot be commenced in respect of the claim until subsection (7) is complied with.*

We regularly receive feedback from employers that it is their view that the information they provided about the circumstances of the injury and claim has not been taken into account. This view is heightened when a claim is accepted, and the employer is not provided with an explanation as to why that decision was made.

This is particularly problematic in situations where the employer genuinely believes that the injury was “wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.”

The ramifications of these claims being accepted can have a long-term impact in the workplace and may lead to future claims by workers who are the subject of disciplinary action. It may also create psychological risk, and potential claims, for the person or people responsible for the action and other workers who perceive the claim acceptance to be inconsistent with organisational justice.

If a claim being considered for a s.11A exclusion is accepted the employer should be advised on what grounds the claim is being accepted; either because the action is judged to be “not reasonable” or the injury is not wholly or predominantly caused by that action.

The information should be provided in writing to the employer to enable them to appropriately communicate the message to the business and put in place corrective actions if necessary.

In situations where s.11A is not in consideration, it can still be highly beneficial for employers to receive an objective assessment of the circumstances of the injury, in writing, in order to improve the control of psychological risks in the workplace.

## **Timeframes and processes for making liability decisions that do not work against RTW**

Psychological injury claims are the most difficult claims for employers to manage, particularly if they involve real or perceived interpersonal conflict. These difficulties are exacerbated if the liability decisions are not made within a timely period.

Over recent years we have received feedback from employers about difficulties in following the process undertaken during the provisional liability period which, for psychological injuries, is most likely to be the maximum allowable of 12 weeks. In some cases, whilst the 12 weeks should be actively used to investigate claims, employers have been told well into that period of time that nothing has been done on that claim as yet, and “we will get to it soon”.

Meanwhile both the employer and injured worker remain in limbo.

Ai Group supports the thorough investigation of psychological injury claims. However, we believe that there should be more focus on meeting particular milestones in the liability decision process, with regular feedback to claimants and employers about progress.

Further, we have received anecdotal feedback that some employers have not been advised of the final determination of the claim at the completion of the 12-week provisional liability period, creating further confusion for the employer about ongoing entitlements and liability.

Agents should be required to establish transparent processes and procedures that outline how they will manage the provisional liability process and claim determination for psychological injuries.

## **Early intervention to resolve barriers to returning to work with the original employer**

As outlined above managing psychological claims is a difficult process for employers, especially if the claim is being investigated. It is Ai Group’s view that targeted interventions that support the employer to engage with injured workers, with a view to resolving areas of conflict and facilitating return to work, would be a good investment of icare resources.

This should occur as soon as the claim is received by the Agent, to minimise the amount of time in which there is opportunity for further animosity to develop between the worker and employer.

### **Provision of appropriate treatment and other supports to aid recovery**

The scheme allows for up to \$10,000 of medical expenses to be paid on the basis of the provisional acceptance of liability.

In relation to psychological injuries there should be stronger oversight of the types of treatment and supports being provided to workers during this time. Agents should be making targeted referrals for treatment if there seems to be only passive responses (e.g. time off work with no specific treatment) to address the psychological injury and support recovery.

### **Timely identification of situations when a return to the original employer is unlikely, with interventions to support new employment opportunities**

Return to work rates for psychological injury claims are much lower than those for physical injuries. This is often due, in part, to real or perceived interpersonal conflict within the workplace. An injured worker may be fit to return to a workplace, but not if they are required to work with particular people or report to a particular manager.

Whilst we support the general focus on working towards a return to pre-injury employment with the pre-injury employer, there are times when it is identified very early in the claim that this is unlikely to occur. In these situations, the worker should be supported to find alternative employment, rather than be required to stay attached to the current employer simply because that employer has an obligation to provide duties.

## **Consideration of how current WPI and WID assessments are made on these claims**

The valuations cited earlier in this submission highlight increasing costs associated with increasing WPI assessments and WID payments.

Ai Group encourages the committee to consider whether the legislative structure for these assessments, which were developed predominantly for physical claims, are fit for purpose when assessing psychological claims.

We note that NSW has a differentiation between the threshold for access to permanent impairment payments – 15% for psychological injuries and 10% for physical injuries.

Victoria also has a differentiation, but it is much more significant, with 30% for psychological injuries and 10% for physical injuries.

However, NSW does not differentiate between physical and psychological injury when creating a threshold to access WID (15% for all claims) or to access ongoing weekly benefits beyond 5 years (20% for all claims).

It is not clear why the legislation clearly creates a different level of WPI to access permanent impairment benefits, but not in other parts of the legislation that rely on a threshold to determine access to benefits.