Joint Select Committee on the NSW Workers Compensation Scheme

New South Wales Workers Compensation Scheme

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How to contact the Committee

Members of the Joint Select Committee on the NSW Workers Compensation Scheme can be contacted through the Committee Secretariat. Written correspondence and enquiries should be directed to:

The Director

Joint Select Committee on the NSW Workers Compensation Scheme

Legislative Council

Parliament House, Macquarie Street

Sydney New South Wales 2000

Internet www.parliament.nsw.gov.au/workerscompinquiry

Email workerscompinquiry@parliament.nsw.gov.au

Telephone 02 9230 2976

Facsimile 02 9230 2981

Terms of reference

1. That the Committee inquire into and report on the New South Wales Workers Compensation Scheme, in particular:
   (a) the performance of the Scheme in the key objectives of promoting better health outcomes and return to work outcomes for injured workers,
   (b) the financial sustainability of the Scheme and its impact on the New South Wales economy, current and future jobs in New South Wales and the State's competitiveness, and
   (c) the functions and operations of the WorkCover Authority.

2. That, in conducting the inquiry, the Committee note and examine the WorkCover NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011, and the External peer review of outstanding claims liabilities of the Nominal Insurer as at 31 December 2011.

The Committee was established, and these terms of reference referred, by resolution of the Legislative Council on 2 May 2012, Minutes 79, Item 17, pp 924-928 and the Legislative Assembly on 2 May 2012, Votes and Proceedings No. 80, Item 16, pp 792-794. The full text of the resolution establishing the Committee appears at Appendix 1.

Committee membership

Hon Robert Borsak MLC	Shooters and Fishers Party	*(Chair)*
Mr Mark Speakman MP	Liberal Party	*(Deputy Chair)*
Hon Niall Blair MLC	The Nationals	
Mr Michael Daley MP	Australian Labor Party	
Hon Paul Green MLC	Christian Democratic Party	
Hon Trevor Khan MLC	The Nationals	
Hon Adam Searle MLC	Australian Labor Party	
Mr Rob Stokes MP	Liberal Party	

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Abbreviations

AMWU	Australian Manufacturing Workers Union
CFMEU	Construction, Forestry, Mining and Energy Union
CTP	Compulsory Third Party
ICA	Insurance Council of Australia
MTA	Motor Traders Association of NSW
NTD	Nominated Treating Doctor
WPI	Whole Person Impairment

Chair's foreword

I am pleased to present the report of the Joint Select Committee on the NSW Workers Compensation Scheme.

The Committee was established on 2 May 2012 to inquire into and report on the New South Wales Workers Compensation Scheme. The Terms of Reference required that the Committee have particular regard to the performance of the Scheme in meeting its key objectives of promoting better health outcomes and return to work outcomes for injured workers; the financial sustainability of the Scheme and its impact on the New South Wales economy; and the functions and operations of the WorkCover Authority. This Inquiry has not examined specialised workers compensation arrangements that apply to specific industries such as the coal industry.

In undertaking this Inquiry, the Committee has had regard to an Issues Paper released by the Hon Greg Pearce MLC, Minister for Finance and Services, on 23 April 2012. The Issues Paper detailed a number of concerns with the NSW Workers Compensation Scheme, primarily that the Scheme had a deficit of over $4 billion and included sixteen reform options to address these concerns. The sixteen options outlined in the Issues Paper formed the basis of most of the evidence received by the Committee throughout this Inquiry.

The Committee acknowledges the diverse views of stakeholders impacted by the operation and management of the Workers Compensation Scheme in New South Wales and, in particular, the polarised views expressed about the options proposed in the Issues Paper. In light of the Scheme's poor financial position, the Committee is of the view that immediate reform is required, and on that basis has made a number of recommendations that have been forecast to have a quantifiable effect on the Scheme's deficit.

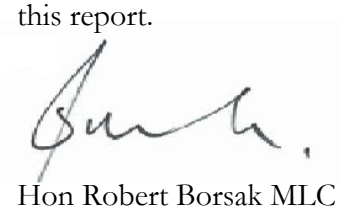
The Committee also considers that it is critical that the Scheme undergo an extensive and detailed review, with a view to developing a comprehensive strategy to address the Scheme's long term viability and improve its operation and performance in meeting its key objectives. The Committee has therefore made a recommendation that such a review be undertaken.

Further, the Committee considers it imperative that there be ongoing review and oversight of the WorkCover Authority to ensure that Scheme issues are identified early, and that appropriate, timely and effective responses are developed. The Committee considers that the appropriate mechanism by which the initial comprehensive review, and subsequent review and oversight role, should be undertaken is through the establishment of a joint standing committee of the Parliament of New South Wales. A recommendation to this effect has also been made.

On behalf of the Committee, I wish to express my appreciation to all Inquiry participants for their contributions to this Inquiry and, in particular, I would like to thank the individuals who shared their personal stories with the Committee.

I would like to thank each of the Committee members for their constructive and thorough approach to the Inquiry. On their behalf, I thank the Committee secretariat – Rachel Callinan, Teresa McMichael,

Vanessa Viaggio and Shu-fang Wei – for their efforts in managing the inquiry process and preparing this report.



Hon Robert Borsak MLC
Committee Chair

Summary of recommendations

long term viability of the Scheme and enhancing the management and administration of the Scheme. In conducting the review, consideration should be given to statutory and non-statutory reforms that reflect the breadth of the Scheme, including, although not limited to:

- improvements in WorkCover's management and administrative systems
- feasibility of permitting more specialised insurance for certain industries, particularly those industries considered 'high risk'
- establishing a centralised information and technology system within the Scheme
- feasibility of establishing an independent medical assessment service
- an examination of workers compensation schemes in other jurisdictions, particularly the Victorian model.

Recommendation 18 **110**

That the NSW Government re-open the opportunity for specialised insurance arrangements, with appropriate prudential supervision and safeguards.

Recommendation 19 **112**

That the NSW Government seek to amend the *Workers Compensation Act 1987* to remove the entitlement of the estate of a worker to receive a death benefit where the worker had no dependants.

Recommendation 20 **112**

That the NSW Government seek to amend the *Workers Compensation Act 1987* to increase the thresholds for permanent impairment lump sums under section 66 of the Act from the current 1 per cent WPI (general) and 6 per cent WPI (binaural hearing loss) to 10 per cent, but on the basis that savings be 'redistributed' in the form of higher permanent impairment lump sums for those with at least 10 per cent WPI and particularly those workers defined as severely injured (with a 15 per cent WPI threshold to be retained for psychological injury).

Recommendation 21 **114**

That the NSW Government ensure that the Workers Compensation Scheme's liability for injuries sustained by workers during 'recess' be limited to circumstances where the employment has been the significant contributing factor.

Recommendation 22 **116**

That the NSW Government review the WorkCover premium system to extend the experience rating system to create incentives for employers both with respect to safety performance and return to work of injured workers.

Recommendation 23 **120**

That the NSW Government seek to amend the *Workers Compensation Act 1987* to allow greater use of medical assessors to determine questions of causation.

Recommendation 24 **120**

That the NSW Government seek to amend the *Workers Compensation Act 1987* to adopt a model of medical assessment for injured workers similar to that used within the Motor Accidents Scheme.

Chapter 1 Introduction

This Chapter discusses the establishment of the Committee and describes the way in which the Inquiry was conducted.

Background to the Inquiry

1.1 The Joint Select Committee on the NSW Workers Compensation Scheme was established by both Houses of Parliament on 2 May 2012, following the announcement by the Government of its intention to reform the New South Wales Workers Compensation Scheme and the release of an Issues Paper which canvassed options for reform.[1]

Issues Paper

1.2 On Monday 23 April 2012, the Minister for Finance and Services, the Hon Greg Pearce MLC, released an issues paper and announced that a parliamentary committee would be established '… as the next steps in the vital reform of WorkCover'.[2]

1.3 With regard to the need for reform, the Minister said that the New South Wales Workers Compensation Scheme '… had a deficit of over $4 billion and would fast become unviable – and unable to help injured employees to get back to work – unless it was reformed to make it more effective.'[3]

1.4 The *NSW Workers Compensation Scheme Issues Paper* (hereafter referred to as the 'Issues Paper'), which is attached as Appendix 2, describes the need for reform, contains background information about the Scheme and its financial sustainability, sets out some guiding principles and identifies key differences between the New South Wales Scheme and schemes in other jurisdictions.

1.5 The Issues Paper also sets out 16 'options for change', which are '… intended to promote recovery and health benefits for injured workers returning to work while guaranteeing long term income support and treatment for severely injured workers and ensuring the costs of the workers compensation system are sustainable.'[4]

1.6 The options include: changes to weekly benefits and medical benefits provided to injured workers; strengthening the regulatory framework for health providers; the introduction of targeted commutations; and the exclusion of certain claims including journey claims.

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1 See Appendix 1 for resolution establishing Committee.

2 Hon Greg Pearce MLC, Minister for Finance and Services, 'WorkCover Improvements Begin', *Media Release*, 23 April 2012.

3 Hon Greg Pearce MLC, Minister for Finance and Services, 'WorkCover Improvements Begin', *Media Release*, 23 April 2012.

4 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', released on 23 April 2012.

Establishment of the Committee

1.7 The Committee was established by resolutions passed by both Houses of Parliament on 2 May 2012, to inquire into and report on the New South Wales Workers Compensation Scheme and report by 5.00 pm 13 June 2012.

1.8 The membership of the Committee comprises five members of the Legislative Council and three members of the Legislative Assembly. The names of the Committee members are set out on page v. The resolution establishing the Committee identified the Hon Robert Borsak MLC as the Chair of the Committee and Mr Mark Speakman SC MP was elected as Deputy Chair at the Committee's first meeting.

Terms of reference

1.9 The terms of reference require the Committee to inquire into and report on the New South Wales Workers Compensation Scheme, with particular reference to the performance of the Scheme in promoting better health and return to work outcomes for workers, the financial sustainability of the Scheme and the functions and operations of the WorkCover Authority.

1.10 The terms of reference also ask the Committee to examine an actuarial valuation conducted for WorkCover by PricewaterhouseCoopers entitled *WorkCover Authority of NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, and a peer review of that document by Ernst & Young titled *WorkCover Authority of NSW External peer review of outstanding claims liabilities of the Nominal Insurer as at 31 December 2011*.

1.11 The full terms of reference are set out on page iv.

Conduct of the Inquiry

1.12 The Inquiry was conducted over a short time frame of six weeks and included a call for submissions and three days of public hearings. The Committee is appreciative of all those who made submissions and gave evidence during the hearings.

Submissions

1.13 The call for submissions with a due date of 17 May was made immediately following the Committee's first meeting on 2 May, via media release and the Committee's website. The call for submissions was also advertised in *The Sydney Morning Herald*, *The Daily Telegraph,* the *Illawarra Mercury* and the *Newcastle Herald* on 5 May. In addition, letters inviting submissions were sent to a large number of stakeholders.

1.14 353 submissions were received and all public and partially confidential submissions have been placed on the Committee's website. A full list of submissions is set out in Appendix 3.

Hearings

1.15 The Committee held three full days of hearings on 21, 25 and 28 May 2012, at which representatives of 32 organisations and agencies appeared, as well as ten individuals who shared their experiences with work place injury and the Workers Compensation Scheme. A total of 79 witnesses appeared over the three hearing days. The Committee would particularly like to thank those individuals who shared their personal stories with us.

1.16 A full list of witnesses who appeared at the hearings is set out in Appendix 4 and the transcripts are available on the Committee's website. A list of documents tabled at the hearings is set out in Appendix 5.

1.17 The Committee also had the benefit of receiving written answers to questions taken on notice during the hearing, as well as answers to a number of supplementary questions that were asked of some of the witnesses who gave evidence. Those responses are also available on the Committee's website. The Committee is thankful to those organisations and individuals for responding with answers to questions on notice in a very short timeframes.

1.18 The Committee acknowledges that due to the six week duration of the Inquiry, we were not able to hear from all of those who requested to appear before the Committee and provide evidence. Nevertheless, the majority of these people provided submissions to the Inquiry. As noted above, these submissions are available to view on the Committee's website and have made a valuable contribution to the Committee's consideration of the issues surrounding the New South Wales Workers Compensation Scheme.

Structure of report

1.19 This report is comprised of two main Chapters. In Chapter 2 the Committee examines the financial sustainability of the Scheme and considers stakeholder views on the size and implication of the Scheme deficit. The Chapter concludes with an examination of the need for reform and the views of stakeholders in this regard.

1.20 In Chapter 3 the Committee examines the options for reform contained in the Issues Paper released by the Minister for Finance and Services. The Chapter examines the broad response of stakeholders to the reform proposals and examines the evidence presented in relation to the likely impact that the reform proposals, if implemented, would have on the Scheme deficit.

1.21 Chapter 3 also looks at a number of the reform proposals in detail. The views of stakeholders with regard to the potential impact of the reforms on injured workers and on the financial viability of the Scheme are examined. Due to the time constraints of this Inquiry, it has not been possible to examine the full range of reform options proposed in the Issues Paper in detail. The reforms chosen for detailed examination are those which stakeholders who participated in the inquiry particularly focused on.

1.22 During the Inquiry a number of reform options in the alternative to those contained in the Issues Paper, as well as a large number of other measures intended to contribute to cost savings and improve claims handling, injury management and return to work outcomes for injured workers were identified. These suggestions are discussed in Chapter 4.

Chapter 2 NSW Workers Compensation Scheme

This Chapter provides a general overview of the NSW Workers Compensation Scheme, including the financial viability of the Scheme, factors contributing to the Scheme's current financial state, and the Scheme's return to work performance. The underlying need for reform is also discussed, with specific reform proposals considered in Chapter 3.

Workers compensation system in New South Wales

2.1 Workers compensation provides protection to workers and their employers in the event of a work related injury or disease. Workers compensation in New South Wales is available under:

a) the statutory workers compensation scheme, or

b) through common law actions for damages where fault or negligence can be established on the part of the employer and a worker sustains injury that exceeds 15 per cent Whole Person Impairment ('WPI').

2.2 The workers compensation system in New South Wales comprises four elements:

- the NSW Workers Compensation Scheme, which provides workers compensation insurance to employers through contracted Scheme Agents
- SICorp (through the Treasury Managed Fund), which manages workers compensation, administration and financial liability for public sector employers (except those who self-insure)
- self-insurers, which are organisations with enough capital to underwrite, pay and manage their own claims, and
- specialised insurers, which hold restricted licences to underwrite workers compensation insurance risk for a specific industry or class of business or employers.[5]

2.3 The focus of this Inquiry is on the first element – the NSW Workers Compensation Scheme.

NSW Workers Compensation Scheme

2.4 The Workers Compensation Scheme is governed by two principal Acts – the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998*.

2.5 The Scheme is funded through insurance premiums paid by employers, which cover financial and medical support to injured workers and the costs of dispute management and scheme administration. The Scheme is administered by the WorkCover Authority of NSW

5 WorkCover Authority of NSW, accessed 31 May 2012, <http://www.workcover.nsw.gov.au/aboutus/workerscompensation/Pages/default.aspx>

('WorkCover'), which acts on behalf of the Nominal Insurer – the legal entity responsible for the performance of the Scheme.[6]

2.6 The Nominal Insurer contracts Scheme Agents to collect premiums and manage claims, based on guidelines set down by WorkCover and relevant legislation/regulation.[7] There are currently seven Scheme Agents:

- Allianz Australia Workers' Compensation (NSW) Ltd
- CGU Workers Compensation (NSW) Limited
- Employers Mutual NSW Limited
- Gallagher Bassett Services Pty Ltd
- GIO General Limited
- QBE Workers Compensation (NSW) Limited, and
- Xchanging Integrated Services Australia Pty Ltd.[8]

2.7 The Committee was informed that the Scheme currently provides insurance cover to nearly 270,000 employers and more than three million workers. It collects around $2.6 billion in premiums. Scheme assets are estimated by the Scheme actuary to be between $14.057 and $14.719 billion.[9]

2.8 The Scheme receives about 80,000 new claims every year, and has around 100,000 open claims at any one time. Around 42,000 of the currently active claims are injured workers receiving weekly benefits due to an ongoing incapacity to work.[10]

Financial viability of the Scheme

2.9 As noted in Chapter 1, concerns about the financial viability of the Scheme resulted in the Minister for Finance and Services, the Hon Greg Pearce MLC, releasing an Issues Paper and announcing the establishment of this Inquiry. The financial state of the Scheme will be considered in the following sections.

6 In addition to administering the Scheme on behalf of the Nominal Insurer, WorkCover also regulates and manages the NSW workers compensation system, including the licensing of self and specialised insurers and oversight of service providers.

7 Submission 137, Allianz Australia Workers' Compensation (NSW) Ltd, p 3.

8 WorkCover Authority of NSW, accessed 31 May 2012, <http://www.workcover.nsw.gov.au/insurancepremiums/schemeagents/Pages/default.aspx>

9 WorkCover Authority of NSW *Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, Appendix V, p 1.

10 Ms Geniere Aplin, General Manager, Workers Compensation Insurance, WorkCover Authority of NSW, Evidence, 21 May 2012, pp 1-2.

Position as at 31 December 2011

2.10 Independent Scheme actuaries conduct valuations twice a year, for the periods ending 30 June and 31 December, to estimate the Scheme's outstanding claims liability.[11] WorkCover advised that the Scheme has had a long history of deficit, having spent only two and a half of the last 16 years in surplus.[12] That surplus was primarily due to investment income accretion.

2.11 The following table shows the financial position of the Scheme from June 1997 to June 2011. There are two measures: net assets, and ratio of assets to liabilities (which is known as the funding ratio).

	Net assets ($m)	Funding ratio (%)
1997	-789	87%
1998	-1,675	77%
1999	-1,636	78%
2000	-1,639	80%
2001	-2,756	70%
2002	-2,801	67%
2003	-2,982	66%
2004	-2,353	73%
2005	-1,396	80%
2006	+85	101%
2007	+812	107%
2008	+625	105%
2009	-1,482	89%
2010	-1,583	89%

2.12 The table shows that the Scheme deficit increased between 1997 and 2003, before improving and moving into a surplus between 2006 and 2008. After 2008, however, the Scheme has been in deficit and this deficit has been growing.[13]

2.13 The Scheme Actuary for WorkCover since June 2002 has been PricewaterhouseCoopers Actuarial. In its most recent valuation as at 31 December 2011, PricewaterhouseCoopers calculated that the Scheme had amassed a deficit of $4.083 billion (a deterioration of $1,720 million in the six months since June 2011), equating to a decrease in the Scheme's funding ratio from 85 per cent in June 2011 to 78 per cent December 2011.[14] Ms Geniere Aplin, General Manager, Workers Compensation Insurance, WorkCover NSW, told the Committee that the Scheme now has one of the worst funding ratios in Australia.[15]

11 WorkCover Authority of NSW, accessed 31 May 2012, <http://www.workcover.nsw.gov.au/aboutus/workerscompensation/Pages/default.aspx>

12 Submission 144, WorkCover Authority of NSW, p 4.

13 The figures in this table were taken from WorkCover Authority of NSW annual reports from 1997/98 to 2010/11, cited at footnote 77 in L Roth & L Blayden, *E-brief: Workers Compensation: An update*, NSW Parliamentary Library Research Services 10/2012, pp 7-8.

14 PricewaterhouseCoopers, *WorkCover Authority of NSW Executive Summary: Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, p 3.

15 Ms Aplin, Evidence, 21 May 2012, p 2.

2.14 PricewaterhouseCoopers indicated that, unless changes were made, the Scheme's financial sustainability would continue to deteriorate, and it would require a 28 per cent increase in premium rates to return to full funding within five years, or an eight per cent premium rate increase to return to full funding in 10 years.[16] This conclusion was supported by the external Peer Review Actuary, Ernst and Young, which stated:

> … the Scheme's history in NSW suggests it is likely that adverse trends will continue in the claims experience and lead to further increases in Scheme liabilities unless there is a circuit breaker (i.e. legislative changes).[17]

2.15 The NSW Auditor-General, Mr Peter Achterstraat, agreed that the current Scheme is not financially sustainable. He advised that the Scheme's assets are lower than its liabilities, and that an audit for the year ending 30 June 2011 found that the Scheme had a net loss of $780 million.[18] During his opening remarks at the Inquiry hearing on 21 May 2012, Mr Achterstraat, said:

> If an organisation is in a situation where liabilities are greater than assets and the liabilities are increasing at a greater rate than the assets then eventually there will not be sufficient funds to meet everyday business. So one needs to either increase the assets or reduce the liabilities. The assets here, as I have pointed out, are returning an adequate return, above the benchmark; that is, the income from the assets. The premiums are another source of income to help supplement the assets. On the liabilities, there are three elements to the liabilities. The gross liabilities are determined by the entitlements that can be made and also determined by the expenses from WorkCover, et cetera, but they are also determined by the discount rate used. [19]

2.16 During questioning of Mr Peter McCarthy, Partner, Ernst and Young by the Hon. Adam Searle (ALP), the following exchange occurred:

> The Hon. ADAM SEARLE: Returning to what Mr Playford said earlier about the difference between publicly underwritten schemes and private insurance, there is no immediate danger of the scheme becoming insolvent though, is there?
>
> Mr McCARTHY: Depends on your definition of insolvent.
>
> The Hon. ADAM SEARLE: There is $14 billion worth of assets under investment, is that correct?
>
> Mr McCARTHY: In insurance the typical definition of a solvent organisation would be that assets are greater than liabilities. In this case the assets are actually $4 billion less than the scheme liabilities.
>
> The Hon. ADAM SEARLE: But at the present time there is no practical impediment to the scheme's ability to actually pay its liabilities as and when they fall due, is there?

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16 PricewaterhouseCoopers, *WorkCover Authority of NSW Executive Summary: Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, p 3.

17 Ernst & Young, *WorkCover Authority of NSW - External Peer Review - Outstanding Claims Liabilities of the Nominal Insurer as at 31 December 2011*, 22 March 2012, p 4.

18 Mr Peter Achterstraat, NSW Auditor-General, Evidence, 21 May 2012, p 39.

19 Mr Achterstraat, Evidence, 21 May 2012, p 38.

Mr McCARTHY: In the short term, no, but long term, yes.' [20]

2.17 Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers, noted that it is ultimately a matter of government policy as to whether it is important to return the Scheme to full funding, and if so, over what time frame.[21]

2.18 The projected deficit is the key driving factor behind the NSW Government's proposed reforms to the Scheme.[22] A number of stakeholders who made submissions to the Inquiry accepted the $4.1 billion deficit as conclusive evidence that the Scheme was financially unsustainable and that as a consequence significant reform was required.[23]

2.19 However, a number of Inquiry participants rejected the Government's reliance on this deficit to justify reforms that cut benefits to workers. For example, the NSW Nurses' Association stated: 'The Association does not necessarily accept the assertion in the Issues Paper that the workers compensation scheme is in deficit and that massive changes are urgently needed.'[24] Further discussion of stakeholder views about the reforms set out in the Issues Paper is contained in Chapter 3.

2.20 Particular concern was raised that the deficit is based on unfunded liability estimates. For example, Unions NSW argued that reference to the Scheme's 'deficit' and 'threats to its solvency' was 'factually inaccurate and highly misleading', declaring: 'The reality is WorkCover is not about to go broke and its unfunded liability is not a deficit.'[25]

2.21 Unions NSW pointed out that as workers compensation is a 'long-tail' form of insurance, it can be very difficult to accurately predict a scheme's long-term liabilities. The union stated that an unfunded the liability is not a debt or sum that needs to be paid out in full at any one time, but rather that it is:

> … an estimate of an amount that a scheme *might* need to pay out over the next 40 to 50 years in relation to existing claims *if* no policy changes, or improvements in the management of the scheme, take place during this period.[26]

2.22 The same point was raised by Mr Bruce McManamey, Barrister and NSW committee member of the Australian Lawyers Alliance, who commented:

> The deficit only exists on the assumption that if you had to pay all the liabilities today there would not be sufficient money to cover it. That can never happen under the scheme because of the way it flows out as weekly payments.[27]

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20 Mr Peter McCarthy, Partner, Ernst and Young, Evidence, 21 May 2012, p 16.

21 Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers, Evidence, 21 May 2012, p 14.

22 Hon G Pearce MLC, Minister for Finance and Services, 'Workcover Improvements Begin', *Media Release*, 23 April 2012.

23 For example, Submission 142, Australian Industry Group p 3; Submission 172, National Insurance Brokers Association, p 6; Submission 285, GIO, p 1; Submission 288, Alliance for a Safer and Competitive Workplace, p 4.

24 Submission 73, NSW Nurses' Association, p 50.

25 Submission 135, Unions NSW, p 9.

26 Submission 135, Unions NSW, p 6.

2.23 This is consistent with the evidence of the Scheme actuary, Mr Playford, who stated that 'we have allowed for a payment stream that continues for 40 or 50 years plus into the future.'[28]

2.24 Estimates of outstanding liabilities are based on a series of actuarial assumptions. Concerns were raised during the Inquiry about the assumptions used by the Scheme Actuary. Concern was also raised that the assumptions are provided to the actuary by WorkCover itself.[29]

2.25 The impact of using different economic assumptions and discount rates on actuarial valuations was highlighted by the Australian Lawyers Alliance, which quoted evidence given by Mr Richard Grellman to a 2001 NSW Legislative Council committee inquiry into the Workers Compensation Scheme:

> Depending on the assumptions and the various discount rates, you could come up with a report that would throw up a materially different result … You will get different view from different actuaries.[30]

2.26 The Australian Lawyers Alliance and the Law Society of New South Wales stated that over the last two and a half years, the Scheme's predicted deficit has changed by $1.5 billion merely due to changes in the assumptions applied by PricewaterhouseCoopers.[31] The Australian Lawyers Alliance noted that this amounted to 37.5 per cent of the current projected deficit, which it described as a 'stroke of the pen' increase in the alleged deficit.[32]

2.27 A number of Inquiry participants expressed the view that the assumptions provided by WorkCover to the Scheme Actuary are inaccurate and/or over-inflated.[33] For example, the Law Society noted that the projected net rate of investment return is less than the rate of inflation for four years, which it declared to be 'a pessimistic and overly conservative outlook'.[34]

2.28 The Law Society and the Australian Lawyers Alliance stated that, although the Scheme Actuary's report is peer reviewed, the Peer Review Actuary (Ernst and Young) does not examine the accuracy of the assumptions.[35] The Peer Review Report notes that it is not a 'second-opinion valuation' and that consequently:

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27 Mr Bruce McManamey, Barrister, NSW committee member of the Australian Lawyers Alliance, Evidence, 21 May 2012, p 61.

28 Mr Playford, Evidence, 28 May 2012, p 47.

29 Submission 122, Australian Lawyers Alliance, p 5.

30 Submission 122, Australian Lawyers Alliance, p 5.

31 Submission 122, Australian Lawyers Alliance, p 6; Submission 133, The Law Society of New South Wales, p 3.

32 Submission 122, Australian Lawyers Alliance, p 6.

33 For example, Submissions 133, The Law Society of New South Wales; Submission 135, Unions NSW; Submission 139, Mr David Shoebridge MLC, The Greens NSW.

34 Submission 133, The Law Society of New South Wales, p 3.

35 Submission 133, The Law Society of New South Wales, p 3; Mr McManamey, Evidence, 21 May 2012, p 65.

> … a conclusion that the Scheme Actuary's investigations are reasonable and that the valuation assumptions are supported by the analysis, does not necessarily mean that we would conduct similar investigations or arrive at similar results.[36]

2.29 With regard to assumptions the Peer Review Report acknowledges the inherent challenges in their use:

> The continued deterioration in the Scheme claims experience over the last few years creates additional uncertainty and risks in the assessment of the valuation liability. It creates additional challenges for actuaries in choosing appropriate assumptions. In such an environment actuaries may chose alternate assumptions that may be more or less conservative. Keeping an appropriate balance is a challenge for actuaries as future experience is unknown and different valid professional views can arise between actuaries (e.g. whether adverse trends will continue and for how long). [37]

2.30 Nevertheless Ernst and Young were able to state:

> We have reviewed the actuarial methods for suitability in the circumstances and against current actuarial practice, and conclude that they are suitable, or if not, we have considered materiality of the difference and find them immaterial…

And:

> We have reviewed the assumptions for consistency with the available experience and trends, and conclude that they are consistent, or if not, that there are valid reasons or valid materiality considerations surrounding the assumptions used, and conclude that they are suitable or the difference is immaterial ... [38]

2.31 In addition, PricewaterhouseCoopers stated:

> (a) That statement by Ernst and Young was also a clear requirement of the Actuaries Institute Professional Standard for undertaking an external review (PS315 External Peer Review of General Insurance Liability Valuations).
>
> (b) The NSW Audit Office also has a separate actuarial firm, Cumpston Sarjeant, carry out an external review of our valuations every 30 June. Cumpston Sarjeant's scope of work also includes considering the reasonableness of the valuation assumptions and makes a statement to that affect. Their review is also performed in compliance with the Actuaries Institute Professional Standard for undertaking an external review.[39]

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36 Ernst & Young, *WorkCover Authority of NSW - External Peer Review - Outstanding Claims Liabilities of the Nominal Insurer as at 31 December 2011*, 22 March 2012, p 3.

37 Ernst & Young, *WorkCover Authority of NSW - External Peer Review - Outstanding Claims Liabilities of the Nominal Insurer as at 31 December 2011*, 22 March 2012, p 4.

38 Ernst & Young, *WorkCover Authority of NSW - External Peer Review - Outstanding Claims Liabilities of the Nominal Insurer as at 31 December 2011*, 22 March 2012, p 3.

39 Answers to supplementary questions 25 May 2012, Mr Playford, Question 10(h), p 8.

2.32 The NSW Auditor-General confirmed that he is comfortable with the assumptions used for the 30 June 2011 financial statements, however advised the Committee that he has not audited the figures from the 31 December 2011 valuation.[40]

2.33 The Scheme Actuary, PricewaterhouseCoopers, acknowledged that there is inherent uncertainty in the accuracy of valuation results for any outstanding claims liability, as they are based on events that are yet to occur. However it stated:

> In our judgement, we have employed techniques and assumptions that are appropriate, and we believe the conclusions presented herein are reasonable, given the information currently available.[41]

2.34 PricewaterhouseCoopers added that nonetheless 'it should be recognised that future claim development is likely to deviate, perhaps materially, from our estimates.'[42]

2.35 Calculating the net position of the Scheme as at 31 December 2011 involved, among other things, valuing the liabilities of the Scheme. Because those liabilities are, for the most part, not immediately payable, the methodology used was to discount the nominal amounts of future liabilities by a discount rate and then to increase the nominal amounts of future liabilities by an inflation rate. No submission received by the Committee appeared to challenge that basic approach, although there were disputes by some lay witnesses about the appropriate rates to use.

2.36 PricewaterhouseCoopers described their valuation methodology as follows:

> The future cashflows projected in the Outstanding Claims Liability valuation are inflated to the expected date of payment based on an assumption about future rates of inflation and then discounted by 'risk-free' investment return rates back to the valuation date.[43]

2.37 Some submissions suggested that use of a risk free discount rate was overly conservative. However, this was what was required by relevant professional standards. As PricewaterhouseCoopers noted:

> Accounting Standard, AASB 1023, and Actuarial Standard, PS 300, state how discount rates should be derived for use in valuations.
>
> AASB 1023 states that outstanding claims liability shall be discounted 'using risk-free discount rates that are based on current observable, objective rates that relate to the nature, structure and term of the future obligations.' Furthermore, in the explanatory notes to the standard it states that 'typically, government bond rates may be appropriate discount rates for the purpose of this Standard, or they may be an appropriate starting point in determining such discount rates'.

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40 Mr Achterstraat, Evidence, 21 May 2012, p 40.

41 PricewaterhouseCoopers, *WorkCover Authority of NSW Executive Summary: Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, p 4.

42 PricewaterhouseCoopers, *WorkCover Authority of NSW Executive Summary: Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, p 4.

43 PricewaterhouseCoopers, *WorkCover Authority of NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, p 245.

> PS 300 of the Actuarial Standards states that 'discount rates used must be based on the redemption yields of a Replicating portfolio as at the valuation date, where reasonably practicable'. A 'Replicating Portfolio' means a notional portfolio of current, observable, market-based, fixed-interest investments of highest rating, which has the same payment profile (including currency and term) as the relevant claim liability being valued. However, if projected payment profile cannot be replicated (such as extended long tail classes of business) then discount rates consistent with the intention of the above must be used.'[44]

2.38 Mr Achterstraat gave oral evidence as follows:

> Mr ACHTERSTRAAT: …Under the accounting standards, the standards require that a discount rate be used of a government bond rate. That is what accounting standard 10.23 says. The Treasury circular says that it is to be the Commonwealth government bond rate rather than the State one. The Commonwealth one of course is lower generally than the State one…
>
> The Hon. ADAM SEARLE: Do you understand the rationale of using the Commonwealth bond rate rather than the State Treasury rate?
>
> Mr ACHTERSTRAAT: I think that is the case in *all* States…
>
> … the Australian accounting standard says a high quality government bond rate is to be used. Treasury circular 2011/17 says the Commonwealth bond rate is to be used. So it is a policy decision from Treasury.' [45]

2.39 Further, Mr Playford's response to a question on notice included the following statement:

> I note that using NSW Treasury Bond yields would not meet the requirements of the Accounting and Actuarial standards as representing 'risk free'.[46]

2.40 While Accounting Standard AASB 1023 and Actuarial Standard PS 300 state how discount rates should be derived for use in valuations, accounting, actuarial and prudential standards are silent on how future inflation assumptions should be derived for use in valuations.[47]

2.41 Against that background, PricewaterhouseCoopers described its methodology of using a fixed 'long term gap' between interest and inflation as follows:

> The methodology for selecting the future economic assumptions was changed at the December 2008 valuation. The key change was to fix the 'long term gap' between interest and inflation assumptions
>
> …

44 PricewaterhouseCoopers, *WorkCover Authority of NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, p 245.

45 Mr Achterstraat, Evidence, 21 May 2012, p 38 (emphasis added).

46 Answers to supplementary questions 25 May 2012, Mr Playford, Question 9, p 4.

47 PricewaterhouseCoopers, *WorkCover Authority of NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, p 245.

> Especially in setting long term assumptions, the difference between the discount rate and inflation rate (the 'real' inflation rate) is itself more important than the individual discount rate and inflation assumptions.
>
> The longest dated bond is only 12 years (with effective shorter maturity date when allowance is made for the payment of regular coupons). Beyond that we have no replicating portfolio.
>
> Most inflation forecasts do not extend beyond 3-4 years … and are made less frequently and with only an indirect reference to the market.
>
> One possible solution to this is to use a fixed 'long term gap' between interest and inflation. The advantage of this approach is that it significantly reduces the volatility of the liability and the calculation of the break-even premium rates to economic assumptions. In our view, this assumption should be reviewed infrequently. This approach is also used by other Accident Compensation Schemes in Australia and New Zealand and other long tail liabilities such as Asbestos.
>
> In our view, the revised approach of selecting a 'gap' assumption for the determination of long term economic forecasts is compliant with AASB 1023 and Australian actuarial standards.[48]

2.42 In calculating a fixed 'long term gap' between interest and inflation, the labour price index was used as the measure of inflation. Some lay submissions suggested that the use of the labour price index as a measure of inflation was inappropriate. Mr Playford gave the following oral evidence about use of the labour price index (with which Mr McCarthy agreed):

> Mr MARK SPEAKMAN: Why do you use that rather than some other index like the consumer price index?
>
> Mr PLAYFORD: The reason is that a large proportion of the liabilities is related to the weekly benefits and weekly benefits are indexed every six months in the legislation via the labour price index.
>
> Mr MARK SPEAKMAN: For how long as a scheme actuary have you been using the labour price index as the measure of inflation?
>
> Mr PLAYFORD: The labour price index, or its equivalent, going back throughout my involvement in the scheme back to 1997 …
>
> Mr MARK SPEAKMAN: What do other publicly underwritten workers compensation schemes around Australia use as a measure of inflation?
>
> Mr PLAYFORD: It will vary from jurisdiction to jurisdiction depending on is there an indexation rate defined in the legislation, but, typically, schemes where the benefits are related to wages it will be either average weekly earnings indexes or labour price indexes. Some schemes and some actuaries will also blend it a little bit so there is an element of consumer price index inflation to the extent that some of the services purchased by these schemes may be related to consumer price index inflation. Examples of that might be some elements of medical costs probably should be related to medical inflation indices. So in the sense the inflation rate we use is guided by the

[48] PricewaterhouseCoopers, *WorkCover Authority of NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, pp 245-246.

> labour price index because the majority of the liabilities or a significant proportion of the liabilities are related to weekly benefits, but we also consider the likely indexation rates of other benefits that are payable under the scheme, like medical benefits.[49]

2.43 In valuing liabilities as at 31 December 2011, PricewaterhouseCoopers used a 'risk margin' of 12 per cent. Mr Playford gave the following oral evidence about this risk margin:

> (a) Accounting, actuarial and APRA regulatory standards of APRA all 'require that an explicit risk margin be added to the central estimate liability to create an insurance provision that goes into the liabilities or the insurer of the scheme'.
>
> (b) The size of the risk margin is ultimately a decision for the board.
>
> (c) The WorkCover board made a decision at its board meeting several years ago that it would like to set a risk margin that provided a 75 per cent probability of adequacy.
>
> (d) The 12 percent risk margin is what needs to be added to provide that level of increased security for claimant entitlements.
>
> (e) The 75 per cent probability of adequacy 'has become the commonly adopted standard across accident compensation schemes in Australia'.[50]

2.44 Mr McCarthy agreed and added that 75 per cent was the figure in federal insurance regulations administered by APRA[51] (although APRA does not regulate WorkCover).

2.45 Mr Mark Lennon, Secretary, Unions NSW, has been a member of the board of directors of WorkCover NSW since 2007. He gave the following oral evidence:

> Mr MARK SPEAKMAN: And each financial year since you joined the WorkCover board have you voted to adopt the annual financial statements of the WorkCover scheme for that year?
>
> Mr LENNON: I have.
>
> Mr MARK SPEAKMAN: And each year since you joined the WorkCover board have you voted in favour of a board resolution to declare that in the opinion of the directors of WorkCover the financial statements and the notes thereto for that year give a true and fair view of the financial position and performance of the WorkCover scheme as at or over the relevant time?
>
> Mr LENNON: I have.
>
> Mr MARK SPEAKMAN: And on each occasion before you voted did you read the financial report for that year and satisfy yourself that it exhibited a true and fair view?

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49 Mr Playford, Evidence, 21 May 2012, p 7.

50 Mr Playford, Evidence, 21 May 2012, p 9.

51 Mr McCarthy, Evidence, 21 May 2012, p 10. The Australian Prudential Regulation Authority (APRA) is the prudential regulator of the Australian financial services industry. It oversees banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly societies, and most members of the superannuation industry.

> Mr LENNON: I did.
>
> Mr MARK SPEAKMAN: If you need to see the annual report I will provide you with a copy, but you know that in the case of the financial statements as at 30 June 2011 the accumulated net deficit was shown as $2.36 billion approximately?
>
> Mr LENNON: I accept that that is the figure.
>
> Mr MARK SPEAKMAN: And you were satisfied to say that the deficit as at 30 June 2011 gave a true and fair view?
>
> Mr LENNON: Yes.[52]

2.46 Specifically, Mr Lennon agreed that each year when he had voted as a board member on the annual accounts, he had satisfied himself that a 12 per cent risk margin was 'appropriate' and that 'using [the] risk-free rate [of return on Commonwealth Government bonds] g[a]ve a true and fair view of the WorkCover Scheme's financial position'.[53]

2.47 Mr Lennon also gave the following oral evidence:

> Mr MARK SPEAKMAN: Each time you have voted to adopt the accounts you have understood, other things being equal, that the lower the discount rate, the greater the outstanding claims liability?
>
> Mr LENNON: Yes.
>
> Mr MARK SPEAKMAN: And you have voted each year to adopt accounts that have included calculations made by the scheme actuary?
>
> Mr LENNON: Yes.
>
> Mr MARK SPEAKMAN: And each year you have known that the discount rate being used was a risk-free rate of return on Commonwealth Government bonds?
>
> Mr LENNON: Yes.
>
> Mr MARK SPEAKMAN: And you have never complained at board meetings about that approach?
>
> Mr LENNON: No, I have questioned it.
>
> Mr MARK SPEAKMAN: Notwithstanding that, you have satisfied yourself that accounts that have been arrived at using that risk-free rate give a true and fair view of the WorkCover scheme's financial position?
>
> Mr LENNON: Yes, in accordance with the practices.
>
> Mr MARK SPEAKMAN: Not only does it accord with the practice, you have decided and you have voted in favour of resolutions adopting financial accounts that use that risk-free rate of return as giving a true and fair view of WorkCover's position?

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52 Mr Mark Lennon, Secretary, Unions NSW, Evidence, 25 May 2012, pp 20-21.

53 Mr Lennon, Evidence, 25 May 2012, pp 21-22.

> Mr LENNON: Yes.
>
> Mr MARK SPEAKMAN: Do you agree with this? The Unions NSW submission now appears to advocate not adopting a risk-free rate of return and using—I withdraw that. The Unions NSW submission challenges the use of a risk margin of 12 per cent and challenges using a risk-free rate of return, is that correct? Am I characterising the submission properly?
>
> Mr LENNON: That is right.
>
> Mr MARK SPEAKMAN: Do you agree that that is quite different from the position you have adopted as a WorkCover board member year after year in voting for accounts that use that risk margin and use a risk-free rate of return?
>
> Mr LENNON: Yes.[54]

2.48 Mr Lennon further said:

> Mr MARK SPEAKMAN: Do you say on your oath that you have not adopted the view year after year that the financial statements of WorkCover give a true and fair view of the position of the WorkCover scheme?
>
> Mr LENNON: I accept that that is the fact in accordance with present accounting practices and actuarial practices, but understand that some of the actuarial practices we have adopted at WorkCover have been ones that of course were brought into place for better regulation of the private sector but have been adopted by WorkCover even though we are a public entity.
>
> Mr MARK SPEAKMAN: The size of the deficit is based on outstanding actual liabilities, albeit that opinions can differ about how you measure those liabilities, do you agree with that?
>
> Mr LENNON: I am sorry?
>
> Mr MARK SPEAKMAN: The size of the deficit is based on outstanding actual liabilities, albeit that opinions can differ about how you quantify those actual liabilities?
>
> Mr LENNON: That is right, yes.[55]

2.49 Notwithstanding those last two cited pieces of evidence, the fact remains that the approaches taken as to discount rate, inflation rate and risk margin has had the agreement of Mr Lennon in his role as a member of the board of directors of WorkCover. As such, he approved the accounts of, among others, the WorkCover Scheme contained in each annual report of WorkCover since he was appointed to the board.

2.50 Some non-actuarial witnesses criticised assumptions made by the Scheme Actuary.

2.51 These included witnesses from the Law Society of New South Wales. However, Mr Concannon, a witness for the Law Society and one of the three or four authors of its

54 Mr Lennon, Evidence, 25 May 2012, pp 22-23.

55 Mr Lennon, Evidence, 25 May 2012, pp 24-25.

submission,[56] conceded that he had strayed outside his area of expertise in opining about appropriate discount rates.[57] The focus of the attack by Law Society witnesses on the Scheme Actuary's assumptions was figures under the heading 'Modelled Ultimate Intimations' concerning work injury damages,[58] which those witnesses had taken to have been used by the Scheme Actuary in calculating liability for work injury damages.[59]

2.52 However in answer to questions on notice the Scheme Actuary made it clear that the impugned figures had not been used for that purpose.[60]

2.53 Witnesses from the Australian Lawyers Alliance asserted that PricewaterhouseCoopers had mistreated classification of commutation and work injury damages liabilities, with the potential for double counting of liability with the weekly and medical liabilities.

2.54 However, that was rebutted by PricewaterhouseCoopers as follows:

> There is no basis for this assertion and it is not factually correct. There is no 'double counting' of liability. The Weekly and Medical liabilities have been assessed only including an allowance for weekly and medical benefits up until the expected timing of commutation and WID lump sum payments. The actual commutation and WID lump sum payments are modelled separately both to improve the quality of the analysis and because it is critically important for the governance of the Scheme to be able to monitor and identify trends in lump sum payment patterns.[61]

2.55 The Australian Lawyers Alliance asserted that 'WorkCover or others on its behalf provided the actuaries with assumptions upon which to base their report'.[62]

2.56 However, that was rebutted by PricewaterhouseCoopers as follows:

> This is factually incorrect and shows a lack of understanding as to how PwC has performed the valuation of the outstanding claims liabilities. PwC has undertaken an independent and impartial review in compliance with the Actuaries Institute Code of Conduct and the relevant Professional Standard. PwC selects its all of its own assumptions based on its interpretation of the emerging trends in the claims and payment experience. The exception is the discount rate which is selected based on the accounting and actuarial standard requirements. PwC has in no way been influenced by WorkCover in any aspect of the valuation, the selection of assumptions or received any direction as to the valuation results.[63]

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56 Mr Timothy Concannon, Member, Injury Compensation Committee, The Law Society of New South Wales, Evidence, 21 May 2012, p 46.

57 Mr Concannon, Evidence, 21 May 2012, p 46.

58 PricewaterhouseCoopers, *WorkCover Authority of NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, p 174.

59 Mr Concannon, Evidence, 21 May 2012, p 43; Ms Roshana May, Member, Injury Compensation Committee, The Law Society of New South Wales, Evidence, 21 May 2012, pp 49-50.

60 Answers to supplementary questions 25 May 2012, Mr Playford, Question 10, pp 6-8.

61 Answers to supplementary questions 25 May 2012, Mr Playford, Question 10(h), p 9.

62 Submission 122, Australian Lawyers Alliance, p 5.

63 Answers to supplementary questions 25 May 2012, Mr Playford, Question 10(h), p 10.

Committee comment

2.57 Having regard to the evidence of the Scheme Actuary, Mr Michael Playford of PricewaterhouseCoopers, supported by the evidence of Mr Peter McCarthy of Ernst and Young, the Committee accepts that about $4.1 billion is the best estimate of the deficit as at 31 December 2011.

2.58 Due to the fact that WorkCover provides the assumptions to the Scheme Actuary, and that the accuracy of the assumptions are not questioned by either the Scheme Actuary, Peer Review Actuary or the Auditor-General, some Inquiry participants suggested that the Committee should engage its own actuary to provide advice on the proposals contained in the Issues Paper.[64] The view was expressed that this was particularly important given the reliance that the Government is placing on the existing actuarial advice.

2.59 The Committee gave serious consideration to this suggestion. However, the significant time constraints imposed on this Inquiry made this difficult to implement. In any event, the Committee considers that it does not need actuarial evidence additional to that from PricewaterhouseCoopers and Ernst and Young in order to reach the conclusions and recommendations in this report:

(a) In the end there was no serious challenge to the calculations or methodology of the Scheme Actuary PricewaterhouseCoopers.

(b) They were calculations and methodology which had been peer reviewed by leading firm Ernst and Young.

(c) The methodology had the imprimatur of the NSW Auditor-General, assisted by another actuarial firm Cumpston Sarjeant.

(d) The methodology reflected, and to a large extent was mandated by, accounting and actuarial standards.

(e) In Mr Lennon's opinion the methodology had resulted in a 'true and fair view' in past years.

(f) The methodology reflected common practice interstate.

(g) Purported criticisms were from unqualified witnesses.

(h) Attacks on particular assumptions effectively evaporated.

(i) There was no reason to doubt the professional competence and integrity of those giving actuarial evidence.

(j) The NSW Bar Association was invited to consider obtaining its own actuarial evidence, but did not proffer any to the Committee.

64 Correspondence from Mr Bernard Coles QC, President, NSW Bar Association to Chair 30 April 2012, Submission 122, Australian Lawyers Alliance, p 5.

(k) The Law Society of New South Wales had (late) access to data used by the Scheme Actuary and beyond the Scheme Actuary's report, but did not proffer any actuarial evidence to the Committee.

(l) Sensitivity analysis was available.

Position since 31 December 2011

2.60 The PricewaterhouseCoopers report as at 31 December 2011 contained a sensitivity analysis of the effect of changed discount rates and inflation assumptions on the valuation of the net central estimate. For example, a reduction of one percent in the discount rate would increase the valuation by $564.3 million (before claims handling expense and 12% risk margin) and a reduction in projected inflation rate of one percent per annum for the next five years would increase the valuation by $536.4 million (before claims handling expense and 12% risk margin).[65] In his oral evidence Mr Playford agreed, in effect, that these sorts of figures could be pro-rated where there where greater or lesser proportional changes.[66]

2.61 Between 31 December 2011 and 21 May 2012, when Messrs Playford and McCarthy had given their initial oral evidence to the Inquiry:

(a) the risk free interest rate on government securities had fallen by 50 basis points, and

(b) the budget papers for the federal budget showed for 2012-13 and 2013-14 a labour/wage price index forecast of 3.75 per cent,[67] which is 0.25 per cent lower than the 4 per cent figure used by PricewaterhouseCoopers.

2.62 Mr Playford's oral evidence (with which Mr McCarthy agreed) was that:

(a) the fall in the risk free interest rate to yields as at 15 May 2012 increased the liabilities of the Scheme, and therefore the deficit, by $335 million,[68]

(b) the fall in the labour price index forecast reduced the liabilities of the Scheme, and therefore the deficit, by roughly $300 million,[69]

(c) broadly speaking, (a) and (b) cancelled each other out.[70]

2.63 However, after the oral evidence of Messrs Playford and McCarthy, on 5 June 2012 there was a further decrease of 25 basis points in interest rates. This increases the liabilities of the Scheme, and therefore the deficit, by $200 million to $250 million.[71]

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65 PricewaterhouseCoopers, *WorkCover Authority of NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, pp 283-284.

66 Mr Playford, Evidence, 21 May 2012, p 61.

67 Budget Strategy and Outlook Budget Paper No. 1, 2012-13, Commonwealth Government, 8 May 2012, pp 2-11.

68 Mr Playford, Evidence, 21 May 2012, p 8.

69 Mr Playford, Evidence, 21 May 2012, p 8.

70 Mr Playford, Evidence, 21 May 2012, p 8.

71 Mr Playford, Evidence, 21 May 2012, p 8.

2.64 There are other factors pointing to a likely increase in the Scheme's liabilities, and therefore its deficit, since 31 December 2011.

2.65 In its peer review, Ernst and Young observed:

> All things being equal the Scheme's history in NSW suggests it is likely that adverse trends will continue in the claims experience and lead to further increases in Scheme liabilities unless an intervention or circuit breaker is applied (i.e. legislative changes).[72]

And:

> … in respect of s 66, s 67 and WID, in our view, plausible alternative assumptions could be adopted which are not particularly pessimistic and could increase the Scheme's liabilities by more than $500m.[73]

And:

> The base scenario for the funding projection [by PricewaterhouseCoopers] could be considered optimistic as it assumes no further deterioration in the outstanding claims liability, although such deterioration has been a feature of the scheme for the past four years.[74]

2.66 Mr McCarthy gave the following oral evidence:

> The projections in Mr Playford's report … assume that there is no further deterioration in the scheme's claims experience. History over the past three or four years shows that there is continued deterioration in the scheme. So, if a scheme continued to deteriorate at the rate it has over the past few years, that deficit is going to increase not decrease.[75]

Committee comment

2.67 The Committee accepts that the Scheme deficit has significantly increased from about $4.1 billion as at 31 December 2011. The increase, to the date of this report, is at least $200 million dollars; it is probably more.

2.68 The Committee accepts the need for urgent and effective action by the NSW Government to correct the current poor financial position of the Scheme.

Factors contributing to the current financial state of the Scheme

2.69 Although not all Inquiry participants agreed on the extent of the Scheme's deficit, or what the deficit itself means for the financial viability of the Scheme, there was general consensus that

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72 Ernst & Young, *WorkCover Authority of NSW - External Peer Review - Outstanding Claims Liabilities of the Nominal Insurer as at 31 December 2011*, 22 March 2012, p 4.

73 Ernst & Young, *WorkCover Authority of NSW - External Peer Review - Outstanding Claims Liabilities of the Nominal Insurer as at 31 December 2011*, 22 March 2012, p 6.

74 Ernst & Young, *WorkCover Authority of NSW - External Peer Review - Outstanding Claims Liabilities of the Nominal Insurer as at 31 December 2011*, 22 March 2012, p 9.

75 Mr McCarthy, Evidence, 21 May 2012, p 14.

financially the Scheme is in difficulty. A number of factors were identified as contributing to the poor financial performance of the Scheme.

2.70 In its December 2011 valuation, PricewaterhouseCoopers attributed approximately 50 per cent of the Scheme's projected deficit to external economic influences impacting investment returns (particularly the 'risk free' discount rate used to discount the outstanding claims liability), and the other 50 per cent to deterioration in claims management experience since June 2008 including, in particular, increases in:

- the number of work injury damages claims
- the number of 'top up' payments for permanent impairment lump sums and utilisation of pain and suffering lump sums under ss 66 and 67 of the *Workers Compensation Act 1987*
- medical spend, and
- the number of weekly benefit claims remaining on benefits.[76]

2.71 The Issues Paper noted that weekly payments, medical treatment and work injury damages liabilities are the largest three contributors to the Scheme's outstanding claims liability. Combined they account for:

- 76 per cent of the Scheme's estimated gross costs in 2012/13
- 81 per cent of the total gross outstanding claims liability, and
- 95 per cent of the total ($2.1 billion) deterioration in claims experience incurred since June 2008.[77]

2.72 Each of the factors highlighted by PricewaterhouseCoopers will be considered below. Inquiry participants also raised a number of other factors which they believe have contributed to the financial state of the Scheme, many of which are interrelated. The Committee has provided a summary of the key factors below.

External economic influences

2.73 As noted above, PricewaterhouseCoopers attributed approximately 50 per cent of the Scheme's projected deficit to external economic influences impacting investment returns. This factor was generally accepted by Inquiry participants. For example, the Law Society of New South Wales noted there was a significant loss of investment income to the Scheme as a direct result of the global financial crisis.[78]

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76 PricewaterhouseCoopers, *WorkCover Authority of NSW Executive Summary: Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, p 2.

77 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', p 8.

78 For example, Submission 133, The Law Society of New South Wales, p 2; Submission 150, Injury Support Network Inc, p 10; Submission 285, GIO, p 6.

2.74 The issue of interest rates was also raised by GIO, which suggested that the decline in rates over recent years is one of the most significant problems contributing to the Scheme's deficit.[79]

Increasing numbers of work injury damages claims

2.75 One of the factors highlighted by PricewaterhouseCoopers as contributing to a deterioration in claims management experience is a significant increase in work injury damages claims, PricewaterhouseCoopers indicated that between 30 June 2011 and 31 December 2011, the work injury damages liability had strengthened by $148 million (or 8 per cent). It noted that the liability had increased for nine consecutive valuations since June 2007, and that work injury damages benefits is now the Scheme's third largest payment type, with a current liability totalling $1,771 million (equating to 13 per cent of the gross outstanding claims liability).[80]

2.76 WorkCover suggested that one reason for the increase in the proportion of injured workers electing to pursue work injury damages may be a failure of legislated thresholds to limit access to work injury damages.[81]

2.77 Proposed reform of work injury damages is examined in Chapter 3.

Increasing lump sum payments under section 66 and section 67

2.78 Another factor highlighted by PricewaterhouseCoopers as contributing to the deterioration in claims management experience is an increase in the number of 'top up' payments for permanent impairment lump sums under s 66 of the *Workers Compensation Act 1987*, and the subsequent increase in pain and suffering lump sums under s 67. According to the December 2011 actuarial valuation, the s 66 liability had strengthened by $28 million (or 5 per cent), while the s 67 liability had strengthened by $14 million (or 6 per cent) since June 2011. PricewaterhouseCoopers noted that this is the third consecutive valuation that lump sum payments under s 66 and s 67 have increased, and that the combined liability in respect of s 66 and s 67 benefits now totals $827 million (equating to six per cent of the gross outstanding claims liability).[82]

2.79 PricewaterhouseCoopers recommended in its valuation that WorkCover develop and implement a strategy to stabilise the utilisation of s 66 and s 67 benefits.[83]

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79 Submission 285, GIO, p 6.

80 PricewaterhouseCoopers, *WorkCover Authority of NSW Executive Summary: Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, pp 16-17.

81 Submission 144, WorkCover Authority of NSW, p 8.

82 PricewaterhouseCoopers, *WorkCover Authority of NSW Executive Summary: Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, p 16.

83 PricewaterhouseCoopers, *WorkCover Authority of NSW Executive Summary: Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, p 28.

2.80 Concerns were raised by the NSW Auditor-General about a re-emergence of lump sum claims. The Auditor-General noted that these claims have led to a significant increase in workers compensation costs.[84]

2.81 The re-emergence of lump sum claims were also raised by numerous Inquiry participants, many of which contended that a 'lump sum culture' is being developed. These concerns will be considered in Chapter 3 in the context of an examination of proposed reforms to lump sum compensation.

Increasing medical costs

2.82 The third factor contributing to deterioration in claims management experience raised by PricewaterhouseCoopers is increased medical spend. The Committee was informed that medical liabilities have increased from around $1.8 billion in June 2008 to over $3.3 billion in December 2011, resulting in upward pressure on premium costs. WorkCover added that the upward trend is expected to continue as medical treatments become more sophisticated and expensive.[85]

2.83 Mr Playford of PricewaterhouseCoopers noted that medical payments are quite broad and include 'everything from hospital admissions to pharmaceuticals to surgery through to continuing care for the seriously injured, and so forth.'[86] He advised that since 2006, nearly every medical category has increased in excess of inflation.[87]

2.84 The increase in medical spend was also raised by Allianz Australia Workers' Compensation, which advised that recent national data shows that New South Wales has the highest expenditure on 'services to workers', which includes medical treatment and rehabilitation.[88]

2.85 The Australian Industry Group noted that unlike in other jurisdictions such as Victoria, the cost of medical and related treatments are not capped, which it considered to be a significant factor that has led to the Scheme's current financial state. The Industry Group further suggested that the ongoing provision of medical treatment without a cap has at times been 'misused by some service providers who may propagate a slow recovery and return to work.'[89]

2.86 PricewaterhouseCoopers recommended that WorkCover undertake further analysis of medical costs 'in order to holistically understand the drivers, identify any possible issues and implement strategies to control this escalation.'[90] This was supported by the Media, Entertainment and Arts Alliance, which observed that annual medical costs have increased significantly higher than other sectors and normal inflation levels, and suggested that further rises in medical costs are inevitable.[91]

84 Mr Achterstraat, Evidence, 21 May 2012, p 40.

85 Submission 144, WorkCover Authority of NSW, p 8.

86 Mr Playford, Evidence, 21 May 2012, p 15.

87 Mr Playford, Evidence, 21 May 2012, p 15.

88 Submission 137, Allianz Australia Workers' Compensation (NSW) Ltd, p 11.

89 Submission 142, Australian Industry Group, p 11.

90 PricewaterhouseCoopers, *WorkCover Authority of NSW Executive Summary: Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, p 28.

91 Submission 195, Media, Entertainment and Arts Alliance, p 4.

Increasing number of weekly benefit claims remaining on benefits

2.87 The fourth factor in deteriorating claims management experience highlighted in the PricewaterhouseCoopers valuation was an increase in the number of injured workers remaining on weekly benefits for longer. This was also raised as a concern by GIO, which stated: '[I]njured workers are remaining on workers compensation benefits for longer than ever before.'[92]

2.88 WorkCover noted that this increase has occurred even though the number of workers compensation claims in New South Wales has dropped.[93] Further, according to the NSW Business Chamber, the duration of claims has increased 'without evidence of a corresponding increase in the severity of injuries.'[94]

2.89 Issues surrounding weekly benefit claims were raised by numerous Inquiry participants. Proposed reforms to address this issue will be considered in Chapter 3.

Poor claims management by Scheme Agents

2.90 Numerous stakeholders identified poor claims management by Scheme Agents as a significant factor contributing to the Scheme's poor financial performance.[95]

2.91 Examples of concerns raised by employers are that Scheme Agents accept claims too easily without conducting adequate investigations, that they do not keep employers informed about costs or provide regular claims reviews, and that they do not take appropriate action to deal with problems concerning employee compliance or the performance of doctors and rehabilitation providers.[96]

2.92 The Australian Federation of Employers and Industries told the Committee that in a recent survey of its members, 44 per cent of respondents reported dissatisfaction with the management of claims by Scheme Agents.[97] In regard to the investigation of claims by Scheme Agents, for example, Ms Jill Allen, Manager, Research and Policy, Australian Federation of Employers and Industries said:

> There are a large proportion of our members who call saying that the claim has been accepted and then there is no investigation at all attached to that acceptance, or it is investigated inadequately. So whatever investigation that has taken place has not, in their eyes, had a full look at the circumstances, all the circumstances, surrounding the injury.[98]

92 Submission 285, GIO, p 4.

93 Submission 144, WorkCover Authority of NSW, p 18.

94 Submission 129, NSW Business Chamber, p 3.

95 For example, Submission 122, Australian Lawyers Alliance; Submission 129, Australian Rehabilitation Providers Association; Submission 133, NSW Farmers' Federation; Submission 150, Injury Support Network Inc; Submission 179, Injured Workers Support Network.

96 Submission 130, Australian Federation of Employers and Industries, p 24.

97 Submission 130, Australian Federation of Employers and Industries, p 23.

98 Ms Jill Allen, Manager, Research and Policy, Australian Federation of Employers and Industries, Evidence, 21 May 2012, p 66.

2.93 This point was reiterated by the NSW Business Chamber, which stated that Scheme Agents accept claims too easily and often fail to investigate claims that have been red-flagged by employers as being potentially fraudulent or exaggerated.[99]

2.94 In regard to the performance of Scheme Agents generally, the Injured Workers Support Network contended that many Agents are inadequately equipped to understand or appropriately manage many of the cases they receive. For instance, the Support Network claimed that: '[I]nsurers routinely deny and delay treatments and then fail to monitor and manage ongoing treatment when they are finally approved.'[100]

2.95 PricewaterhouseCoopers indicated that there have been varying levels of performance by Scheme Agents, and noted that the performance of some of WorkCover's largest Agents in particular has been deteriorating.[101] The peer review actuary, Ernst and Young, advised that further deterioration of the Scheme and claims experience could be prevented by improving claims management.[102]

2.96 The importance of good claims management was acknowledged by GIO. It stated that as a Scheme Agent it supported and had invested into the ongoing training and professional development of its staff, and that it had also invested into improving its claims management system. GIO considered that these investments have resulted in better Scheme outcomes.[103]

Scheme Agent remuneration

2.97 A closely related issue raised during the Inquiry is that the current remuneration arrangements do not provide sufficient incentives (or disincentives) for Scheme Agents to manage claims better or achieve better outcomes. Concerns were also raised regarding the amount of remuneration paid to Scheme Agents, with many expressing the view that remuneration levels are too high.

2.98 In regard to remuneration arrangements, for example, the Australian Lawyers Alliance observed that 'the costs structure and payments to Scheme Agents do not involve any degree of risk and the Scheme Agents receive the same reward regardless of the manner in which they handle each claim.'[104] The Lawyers Alliance suggested that introducing a degree of risk for the Scheme Agents into the fee structure would incentivise proper claims management.[105]

2.99 The Lawyers Alliance illustrated its point with the following quote from the 1997 Grellman inquiry into workers compensation in New South Wales, submitting that nothing has changed since then:

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99 Submission 129, NSW Business Chamber, p 4; Mr Greg Pattison, General Manager, Workplace Solutions, NSW Business Chamber, Evidence, 21 May 2012, p 74.

100 Submission 179, Injured Workers Support Network, p 11.

101 PricewaterhouseCoopers, *WorkCover Authority of NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, pp 288-289.

102 Ernst & Young, *WorkCover Authority of NSW External Peer Review – Outstanding Claims Liabilities of the Nominal Insurer as at 31 December 2011*, 22 March 2012, p 5.

103 Submission 285, GIO, p 6.

104 Submission 122, Australian Lawyers Alliance, p 9.

105 Submission 122, Australian Lawyers Alliance, p 9.

> [Scheme Agents are] spending someone else's money and with the best will in the world and with all of the protocols and monitoring, if someone or an entity is spending someone else's money, you do not have quite the same interest in where it goes as if it is your own ... [It is] very hard to keep an organisation focused when it is not their own capital that is going out the door. ... I do not think that there is much incentive for the insurers … to reach for best practice in rehab activities.[106]

2.100 However, Allianz Australia Workers' Compensation stated that Agent remuneration is based on key performance indicators that focus on operational efficiency and positive outcomes for injured workers, such as return to work.[107]

2.101 WorkCover acknowledged that there have been issues with remuneration arrangements, and advised that a number of changes have been implemented since 2001 in an attempt to address these issues. WorkCover informed the Committee that changes were recently introduced at the end of 2011 to attach greater incentives to performance based outcomes, particularly in regard to work injury damages, return to work and tail claim finalisation.[108]

2.102 Another issue raised during the Inquiry was the amount of remuneration paid to Scheme Agents. The Committee was informed that in 2010-11, the total remuneration paid to the seven Scheme Agents was $318 million. This equates to a 226 per cent increase since 1997, when the total amount of remuneration paid was $141 million. Over the same period there was a 47 per cent decrease in the number of claims of five days or more, from 60,109 to 28,056.[109]

2.103 Some Inquiry participants asserted that the increase in Scheme Agent remuneration over this period was five times faster than both inflation and actual benefits paid to injured workers.[110] In this regard, Unions NSW commented: 'Even after adjusting for inflation, these statistics suggest that agents were getting paid a lot more for doing a lot less.'[111] Likewise, the Australian Lawyers Alliance observed:

> Payments to scheme agents and insurers to manage claims has increased year upon year since 2001 despite the number of major injuries … reducing by almost half over that same period.[112]

2.104 The Lawyers Alliance added that the cost of managing the Scheme 'appears to be completely disproportionate to the benefits provided for injured workers' and expressed strong support for a review of Scheme Agent remuneration.[113]

106 Submission 122, Australian Lawyers Alliance, pp 9-10.

107 Submission 137, Allianz Australia Workers' Compensation (NSW) Ltd, p 3.

108 Submission 144, WorkCover Authority of NSW, pp 13-14.

109 Submission 135, Unions NSW, p 13.

110 Submission 143, Construction Forestry Mining and Energy Union, p 13; Submission 139, Mr David Shoebridge MLC, The Greens NSW, p 8.

111 Submission 135, Unions NSW, p 13.

112 Submission 122, Australian Lawyers Alliance, p 7.

113 Submission 122, Australian Lawyers Alliance, pp 7 and 9.

2.105 However, WorkCover rejected the suggestion that the amount of remuneration paid to Scheme Agents has increased out of proportion to Scheme activity, arguing that these perceptions are based on a misinterpretation of cash flow statements in Annual Reports.[114]

2.106 In answers to questions on notice, Ms Aplin, on behalf of the WorkCover Authority, noted:

> The maximum expense shown in the WorkCover Scheme accounts, which was $683 million in the year to June 2006, arose because of expenses relating to prior year services, going back to 2001, which had not previously been recognised in the accounts.
>
> For services provided in the 2011 calendar year, Scheme agents earned remuneration of $332 million. The most agents have earned in single calendar remuneration year over the last six years was $362 million for 2008.
>
> Scheme performance was positive at this time and the remuneration paid to Agents includes a performance based component.
>
> Australian Prudential Regulation Authority statistics indicate public insurers average underwriting expenses accounted for around 18 per cent of net payments in the 2010/11 financial year.
>
> The New South Wales Scheme figure in 2011 was 17 per cent of net payments, which is certainly not out of alignment with other public insurers.
>
> In addition, the SafeWork Australia Comparative Performance Monitoring Report shows that New South Wales insurance operation costs, as a proportion of total Scheme expenditure, are less than in Victoria, Western Australia and Tasmania.
>
> The total of the costs of running Workcover and agent remuneration in 1999 on the same basis as that applying in 2010/11 is $319 million. In 2010/11, these costs have increased to $584 million, which given cost increases over this period, represents a modest increase.[115]

2.107 The WorkCover Authority provided a table from the independent Scheme Actuary of the Scheme's valuation as at 31 December 2011.[116] The table shows that Agent remuneration has actually fallen since 2006 on an inflated basis.

Table 1 Insurer/Agent remuneration

2002-2012 Year	Original values ($m)	Inflated values ($m)	Inflated net payments ($m)	Insurer remuneration as a percentage of net payments
2001-02	$166	$241	3,673	6.6%
2002-03	$255	$358	3,197	11.2%
2003-04	$278	$375	2,455	15.3%
2004-05	$281	$367	1,859	19.7%
2005-05#	$203	$254	903	28.1%

114 Submission 144, WorkCover Authority of NSW, p 14.

115 WorkCover Authority of NSW, Answers to Questions on Notice, 28 May 2012, pp 22-23.

116 WorkCover Authority of NSW, Answers to Questions on Notice, 28 May 2012, p 24.

2002-2012 Year	Original values ($m)	Inflated values ($m)	Inflated net payments ($m)	Insurer remuneration as a percentage of net payments
2006	$337	$411	1,770	23.2%
2007	$339	$398	1,695	23.5%
2008	$362	$410	1,757	23.3%
2009	$300	$328	1,966	16.7%
2010	$303	$318	1,969	16.1%
2011*	$332	$338	1,989	17.0%
2012*	$368	$362	1,989	17.0%

a six month payment period due to change to calendar year remuneration under the Agent contracts from 1/1/06.

*Assuming no improvement post June 2012.

2.108 Concerns about Scheme Agent remuneration are not new, having been raised in both the 1997 Grellman inquiry and the 2003 McKinsey report.[117] Concerns were also raised by Ernst and Young in its 2012 Peer Review report, which acknowledged the recent changes implemented by in 2011, yet nonetheless recommended that WorkCover:

- review its overall approach to management of the Scheme and in particular the management of Agents (including their remuneration), and
- conduct a 'back to basics' review of the remuneration.[118]

Committee comment

2.109 The available evidence indicates large increases in insurer remuneration from 2001 to 2005 and, although the percentage rates have fallen since 2005, they are still much higher than in 2001. This is particularly so given that the large increases in insurer remuneration has occurred in an environment of falling claims numbers.

2.110 Having regard to these figures, the Committee accepts the need for further investigation into the overall management of the Scheme and in particular, the management of agents, including their remuneration.

Poor Scheme management by WorkCover

2.111 Numerous Inquiry participants suggested that the issues with Scheme Agents outlined above are a direct result of poor management by WorkCover. Stakeholders from a range of sectors were also generally critical of WorkCover's management of the Scheme and argued that the role of WorkCover needs to be examined when determining the appropriate measures to address the deficit.

117 R Grellman, *Inquiry into Workers' Compensation System in NSW: Final Report* (1997); McKinsey & Company, *Partnerships for Recovery: Caring for injured workers and restoring financial stability to workers compensation in NSW* (2003).

118 Ernst & Young, *WorkCover Authority of NSW External Peer Review – Outstanding Claims Liabilities of the Nominal Insurer as at 31 December 2011*, 22 March 2012, pp 8-9.

2.112 For example, Mr Garry Brack, Chief Executive, Australian Federation of Employers and Industries, asserted that poor design of the Scheme's operational factors by WorkCover has contributed significantly to its deterioration, leaving employers in a position where they cannot deal effectively with claims.[119]

2.113 The Civil Contractors Federation emphasised that: 'Responsibility for management of Scheme claim performance ultimately rests with WorkCover.'[120]

2.114 Unions NSW criticised WorkCover for its 'apparent inability to oversight the operations of its claims agents and align their performance with the scheme's return to work objectives.'[121] Return to work objectives are considered later in this Chapter.

2.115 Stakeholders used examples of other insurance systems to illustrate their view regarding WorkCover's poor management of the Scheme. For instance, the Australian Lawyers Alliance referred to self-insurers, declaring: 'Self-insurers are able to appropriately manage claims and remain profitable and yet WorkCover cannot.'[122]

2.116 This point was echoed by Mr Jeremy Gormly SC, Chair, Common Law Committee, NSW Bar Association:

> … the problem is more in the administration of the Scheme than in the payments being made. Self-insurers who are largely free of WorkCover are healthy; the statutory scheme probably should be healthy as well.[123]

2.117 Another example was given in reference to the coalmining industry (which is exempt from WorkCover), by Mr McManamey of the Australian lawyers Alliance who stated:

> Coalmining is one of the most dangerous industries in this country; it has a high level of injury and a high level of incapacity. The coalmines insurance system still runs quite happily, at a profit; it has never come running to WorkCover or anywhere else saying, 'We need assistance.' You might ask why. We say the difference is they had an exit strategy, and they do not have WorkCover.[124]

2.118 The submission made by Coal Services Pty Ltd, the company which owns and operates the monopoly coal mines insurer, Coal Mines Insurance Pty Ltd, pursuant to the *Coal Industry Act 2001* (NSW), demonstrates this clearly. In the last ten years (from 2001/02 to 2001/12), the target premium collection rate has decreased by 71.4 per cent, from 11.29 per cent to 3.24 per cent of wages. In this same time period, the number of workers covered has increased by 143 per cent, from 10,813 to 26,393. The claim rate has fallen by 71 per cent, from 26.4 per cent in June 2002 to 7.23 per cent at March 2012. In 2001/02, one in four employees in the coal

119 Mr Garry Brack, Chief Executive, Australian Federation of Employers and Industries, Evidence, 21 May 2012, p 66.

120 Submission 170, Civil Contractors Federation, p 2.

121 Submission 135, Unions NSW, p 33.

122 Submission 122, Australian Lawyers Alliance, p 9.

123 Mr Jeremy Gormly SC, Chair, Common Law Committee, NSW Bar Association, Evidence, 21 May 2012, p 51.

124 Mr McManamey, Evidence, 21 May 2012, p 59.

mining industry would receive an injury. At 31 March 2012, this has reduced to seven in 100.[125]

2.119 This significant improvement is said to have a number of foundations. Firstly, there has been significant investment in preventative measures and the involvement of employers and employees in their implementation, the impact of which 'cannot be underestimated.'[126]

2.120 In what can only be described as a significantly different approach to the rest of the New South Wales Workers Compensation Scheme, 'CMI has a suite of performance reporting which allows for real time monitoring of performance with adjustments made as necessary. Additionally, Coal Services Pty Ltd has implemented strong management processes and procedures to ensure our employees have the proper technical skill set to appropriately manage injured workers and get them back to health.'[127]

2.121 This has been possible because 'Coal Services Pty Ltd invested heavily in the technology to support claims management. There was also a significant investment in training and development of employees responsible for claims management. More recently Coal Services Pty Ltd has invested in performance analysis tools; allowing the claims management teams to appropriately manage their claims portfolios and to early identify emerging trends.'[128]

2.122 This has been achieved in an environment where workers in coal mining continue to receive permanent impairment benefits in accordance with the Table of Maims as opposed to Whole Person Impairment; have access to common law rather than Work Injury Damages; and have unrestricted access to commutations.[129]

2.123 The Coal Services submission makes some key points which are salutary when it comes to considering the options in the Issues Paper: 'The options for change do not offer any initiatives which strike at the root cause of the need for a workers' compensation system … the key task is to prevent injuries and incidents from occurring in the first place … None of the identified options for change examine the effectiveness of the premium model and whether it drives the right behaviours. The premium model is an important driver to achieving the performance objectives of any workers compensation scheme.'[130]

2.124 Other areas suggested for consideration should include the link between the regulatory authority and industry regarding injury prevention and a review of the premium model in the light of the behaviour it encourages.[131]

2.125 Unions NSW recommended that WorkCover 'develop and implement measures to better regulate claims Agents so as to promote the efficient management of the Scheme and ensure

125 Submission 272, Coal Services Pty Ltd.

126 Submission 272, Coal Services Pty Ltd, p 3.

127 Submission 272, Coal Services Pty Ltd, p 4.

128 Submission 272, Coal Services Pty Ltd, p 5.

129 Submission 272, Coal Services Pty Ltd, p 6.

130 Submission 272, Coal Services Pty Ltd, p 6.

131 Submission 272, Coal Services Pty Ltd, p 7.

that their focus is on assisting the injured and returning them to work safely, quickly and as easily as possible.'[132]

Costs of managing the Scheme

2.126 Another factor raised by Inquiry participants as contributing to the poor financial performance of the Scheme is a significant increase in the costs of managing the Scheme over recent years. In this regard the Committee was informed that:

- the claims handling expense allowance has increased over 20 per cent from $932 million in June 2011 to $1,132 million as at 31 December 2011[133]
- WorkCover's administrative costs have increased nearly tenfold from $70 million in 1999 to more than $630 million in 2009,[134] and
- the cost per dispute has risen 16 fold between 1999 and 2009.[135]

2.127 The Law Society of New South Wales observed that all these cost increases have occurred even though:

- the number of major injuries to workers has halved from 62,000 to 30,000 since 1996
- the number of disputed claims before the Workers Compensation Commission has fallen two thirds since 1996, and
- total payments by the Scheme to injured workers fell nearly 20 per cent between 2002 to 2010.[136]

Committee comment

2.128 The Committee is satisfied that there has been a substantial increase in the costs of managing the Scheme by the WorkCover Authority.

2.129 The Committee believes that further investigation of these increased costs is warranted, and believes that this warrants further oversight and investigation by the Parliament.

Underfunding of the Scheme

2.130 Another factor raised by stakeholders as contributing to the Scheme's deficit is underfunding as a result of premium cuts. The Issues Paper acknowledges that there has been a cumulative 33 per reduction in average premium rates since 2005.[137]

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132 Submission 135, Unions NSW, p 34.

133 PricewaterhouseCoopers, *WorkCover Authority of NSW Executive Summary: Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, p 5.

134 Submission 122, Australian Lawyers Alliance, p 7; Submission 133, The Law Society of New South Wales, p 5.

135 Submission 122, Australian Lawyers Alliance, p 7; Submission 133, The Law Society of New South Wales, p 5.

136 Submission 133, The Law Society of New South Wales, p 5.

2.131 In this regard, Unions NSW argued that the Scheme's average employer premium rates have been set at 'artificially low levels' in recent years as a direct result of bad policy.[138] The union emphasised that even though the Scheme has been less than fully funded, with a reported decline in its funding ratio since December 2007, average premium rates have nonetheless been decreased by WorkCover by approximately $1 billion a year since 2005.[139]

2.132 However, the Australian Federation of Employers and Industries emphasised that these rate reductions have not applied to everyone:

> … a reduction in the average premium rate overall does not translate to a cost reduction for experience rated employers or employers in those industries with higher than average WIC [WorkCover Industry Classification] rates. Our experience rated members report premium increases, not reductions, over the past three years …[140]

2.133 The impact of an increase in premiums as an option to reduce the deficit is examined later in this Chapter.

Return to work outcomes

2.134 Poor return to work outcomes was also identified as contributing to the Scheme's deficit, as the long term sustainability of the Scheme is highly dependent on returning injured employees to work in a timely fashion.

2.135 Assisting injured workers and promoting their return to work as soon as possible is one of the key objectives of the New South Wales workers compensation system.[141] Employers are also obliged under s 49 of the *Workplace Injury Management and Workers Compensation Act 1998* to provide suitable work to injured workers. However there has been deteriorating performance in return to work, which has been one of the key factors contributing to the Scheme's costs.[142]

2.136 There was general agreement among Inquiry participants that the Scheme was underperforming with regard to return to work outcomes for injured workers.

2.137 The performance of the Scheme in promoting recovery and the health benefits of returning to work was criticised in the Issues Paper released by the Minister for Finance and Services, which claimed that 'there are perverse financial incentives for workers to remain off work and there is not effective work capacity testing'.[143]

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137 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', p 13.

138 Submission 135, Unions NSW, p 10.

139 Submission 135, Unions NSW, p 33. See also, Submission 139, Mr David Shoebridge MLC, The Greens NSW.

140 Submission 130, Australian Federation of Employers and Industries, p 5.

141 *Workplace Injury Management and Workers Compensation Act 1998*, s 3.

142 Submission 129, NSW Business Chamber, p 4.

143 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', p 4.

2.138 WorkCover noted that best practice workers compensation systems encourage timely return to work for injured workers through financial incentives and disincentives and return to work support.[144] It expressed the view that the Scheme was not achieving these outcomes due to weekly payment arrangements that do not sufficiently incentivise return to work, too many lump sum compensation payouts, and too many services and benefits that fail to contribute to improved health or return to work.[145]

2.139 Another factor that has impacted return to work rates, raised by GIO, was the global financial crisis, due to the relationship between return to work and employment opportunities.[146] GIO also contended that return to work rates had deteriorated due to 'the lack of lack of legislative tools[147] required by Scheme Agents (particularly during economically challenging times) to 'get people off benefits once they have been restored to health, if no suitable jobs are available.'[148]

2.140 However, as with the criticism of the performance of Scheme Agents in managing claims, outlined earlier in this Chapter, other Inquiry participants argued that the poor return to work rates in New South Wales are due to WorkCover's ineffective management of the Scheme. For example, the Australian Lawyers Alliance stated: 'WorkCover, in its many roles, is failing to meet objectives particularly, return to work outcomes. It has developed into an expensive bureaucratic nightmare.'[149]

2.141 A number of stakeholders suggested that an even greater contributor to poor return to work performance is the failure of employers to provide suitable duties to injured workers. This was a key concern raised by the NSW Nurses Association, which told the Committee: '[i]n our experience, many employers are either unaware of, or willfully ignore their obligations to provide suitable work to their injured workers.'[150]

2.142 The Construction Forestry Mining and Energy Union ('CFMEU') insisted: 'If this review is all about getting workers back to work then consideration needs to be given to greater compulsion for employers to provide suitable duties if they are available.'[151]

2.143 A contrasting view raised during the Inquiry is that some injured workers do not want to return to work, and would prefer to stay on workers compensation. This was raised for example by the Australian Industry Group, which told the Committee that many of its members experience frustration trying to encourage employees to return to work.[152]

144 Submission 144, WorkCover Authority of NSW, p 7.

145 Submission 144, WorkCover Authority of NSW, p 5.

146 Submission 285, GIO, p 6.

147 The legislative tools referred to by GIO are strict work capacity testing, benefits step downs, and independent and binding whole person impairment assessments. These will be considered in Chapter 3.

148 Submission 285, GIO, p 7.

149 Submission 122, Australian Lawyers Alliance, p 10.

150 Submission 73, NSW Nurses' Association, p 4.

151 Submission 143, Construction Forestry Mining and Energy Union, p 13.

152 Submission 142, Australian Industry Group, p 11.

2.144 The Issues Paper also raises concerns that there are 'perverse financial incentives for workers to remain off work.'[153] Similarly, the NSW Department of Investment and Trade suggested that many injured workers are too 'financially comfortable or not motivated' to return to work.[154]

2.145 This suggestion was met with strong opposition by other stakeholders. For example, the Nurses' Association insisted that the 'vast majority of injured workers desperately want to return to work' and that the primary obstacle to returning injured employees to work is the unwillingness of employers to provide suitable work, rather than laziness or fraud by injured workers.[155]

2.146 The evidence before the Committee was clear that more needed to be done to improve return to work rates. Any reform measure must be developed in the light of hard information. In this regard, the information collected by WorkCover is important.

2.147 WorkCover reports that for persons who are injured and off work between 5 days and 30 days, suitable work was provided by only 34 per cent of employers in 2008/09; 38 per cent in 2009/10 and 42 per cent in 2010/11.

2.148 For persons who are injured and off work more than 30 days, the figures are 37 per cent in 2008/09; 39 per cent in 2009/10 and 39 per cent in 2010/11.

2.149 Unions NSW in its submission stated that 'NSW WorkCover does not provide published data on the number of workers who have their employment terminated while in receipt of compensation payments.'[156] The comparable figures from South Australia are that in 2008-90 4.6 per cent of workers who lodged lost time claims had lost their job within six months; 13.5 per cent by nine months; 27 per cent at 12 months and 48.5 per cent at 18 months.

2.150 WorkCover was asked on notice: 'What are the equivalent figures for New South Wales at each point in time? That is at 6 months, 9 months, 12 months and 18 months?' WorkCover appears not to have answered the question actually posed.

2.151 However, WorkCover has provided the following information in responses to questions taken on notice on 8 June 2012 at pp 12-13, that 'the rolling three-month Return To Work rates for the different measures at 30 April 2012:

6 month measure – 89.88 per cent

9 month measure – 93.27 per cent

12 month measure – 94.50 per cent

18 month measure – 93.70 per cent.

153 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', p 4.

154 Submission 125, NSW Department of Investment and Trade, p 4.

155 Submission 73, NSW Nurses' Association, p 10.

156 Submission 135, Unions NSW, p 17.

The need for reform

2.152 The NSW Government declared in its Issues Paper that:

> The NSW Workers Compensation Scheme is a broken system that does not produce good outcomes for injured workers, and without significant improvements it is not financially sustainable …[157]

2.153 The Issues Paper asserts that significant reform is required as:

- employer premiums in New South Wales are around 20 to 60 per cent higher than premium rates in competitor states, and this difference will continue to increase if the Scheme deteriorates further
- the system is difficult to navigate, with too much red tape
- weekly payment rates for seriously injured workers are inadequate, being barely above the poverty line
- recovery and the health benefits of returning to work are not effectively promoted, and are exacerbated by ineffective work capacity testing and 'perverse financial incentives' for workers to remain off work
- less seriously injured workers are not encouraged to recover and regain their financial independence, and
- WorkCover has limited power to discourage payments, treatments and services that do not contribute to recovery and return to work.[158]

2.154 As noted in Chapter 1, the Issues Paper sets out 16 'options for change'. These specific options will be considered in Chapter 3.

2.155 Generally speaking however, support for the reforms identified in the Issues Paper was mixed. Many Inquiry participants, including a number of business and insurance groups, generally welcomed the principles contained within the paper and supported its reform proposals.[159] The Australian Industry Group, for instance, expressed the view that the principles contained within the paper should form the 'building blocks for a new system' and be reflected in the relevant workers compensation legislation.[160]

2.156 Other stakeholders however, including a number of unions and legal organisations, disagreed with some of the Issues Paper's main premises. For example, in response to the suggestion that the Scheme is a 'broken system', the Law Society of New South Wales argued: 'The system is not broken. It is inefficient.'[161]

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157 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', p 4.

158 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', p 4.

159 For example, Submission 285, GIO; Submission 129, NSW Business Chamber; Submission 137, Allianz Australia Workers' Compensation (NSW) Ltd; Submission 142, Australian Industry Group.

160 Submission 142, Australian Industry Group, p 4.

161 Submission 133, The Law Society of New South Wales, p 6.

2.157 The Government's position expressed in the Issues Paper was also criticised by Unions NSW, which commented: 'The fundamental problem with the Government's diagnosis of WorkCover's difficulties is that it is concerned exclusively with symptoms rather than their causes …'.[162]

2.158 Nevertheless, while support for the Issues Paper and its reform proposals varied (as will be examined in detail in Chapter 3), Inquiry stakeholders generally agreed that the costs of the Scheme are increasing at an unsustainable rate and that reform is needed in order to improve the Scheme's financial viability, improve return to work outcomes for injured workers, reduce red tape and improve its overall performance and management.

2.159 For example, Allianz Australia Workers' Compensation asserted that 'fundamental reform of the NSW Workers' Compensation Scheme is essential.'[163] It suggested that too many claimants remain in the Scheme for too long due to ineffectual Scheme guidelines which are ambiguous, inconsistently applied and unenforceable.[164] Allianz further maintained that the Scheme does not provide sufficient incentive for employees with significant work capacity to exit the Scheme, and that the current benefits structure does not adequately support workers with significant injuries.[165]

2.160 The Injured Workers Support Network also described a review and restructure of the Scheme as essential, stating:

> Not only should this reap benefits for injured workers in streamlined early intervention, returning to work sooner and having good quality of life but would save the Scheme hundreds of thousands of dollars almost overnight.[166]

2.161 The Australian Industry Group expressed the view that the problems with the Scheme are 'deeply rooted in poor design', however agreed that they can be fixed with appropriate reform.[167] Scheme Agent GIO also acknowledged the need for reform, to ensure that the Scheme is fully funded and delivers better outcomes for injured workers and employers.[168]

2.162 Broad reform of the Scheme was supported by Ms Aplin, General Manager, Workers Compensation Insurance Operations, WorkCover, who told the Committee that good compensation schemes generally consider major reform at least every five years, and noted that there has not been any major reform of the NSW Workers Compensation Scheme in 10 years. Ms Aplin said that merely adjusting premium rates or changing management action would not be enough to address the Scheme's sustainability issues.[169]

2.163 A significant number of Inquiry participants also favoured reform of the Scheme over any increase in premium rates, as discussed in the following section.

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162 Submission 135, Unions NSW, p 20.

163 Submission 137, Allianz Australia Workers' Compensation (NSW) Ltd, p 5.

164 Submission 137, Allianz Australia Workers' Compensation (NSW) Ltd, p 5.

165 Submission 137, Allianz Australia Workers' Compensation (NSW) Ltd, p 5.

166 Submission 179, Injured Workers Support Network, p 11.

167 Submission 142, Australian Industry Group, p 3.

168 Submission 285, GIO, p 4.

169 Ms Aplin, Evidence, 21 May 2012, p 18.

Impact of an increase in premiums

2.164 As noted at paragraph 2.14, the Scheme Actuary's advised that, unless changes were made, the Scheme would require a 28 per cent increase in premium rates to return to full funding within five years, or an eight per cent premium rate increase to return to full funding in 10 years, in order to remain financially viable.

2.165 Inquiry participants from the business, insurance and employer sectors, in general, strongly rejected any increase to employer premium rates, arguing that it was a band aid solution. For example, the Australian Industry Group maintained that: 'Raising employer premiums is not the answer, not only because is it unfair to penalise employers for the mismanagement of the Scheme, but also it will not fix the underlying systemic problem.'[170]

2.166 Similarly, Mr Greg Pattison, General Manager, Workplace Solutions, NSW Business Chamber, said: 'Increasing premiums might balance the books but they do not fix the problem.'[171]

2.167 The Civil Contractors Federation argued that there is no guarantee that a 28 per cent increase in premiums would be adequate to recover the Scheme, stating:

> The fundamental legislative and regulatory inadequacies of the Scheme must be fixed before any increase in premiums should be considered. To do else would be to squander the economic viability and future of the State.[172]

2.168 The Government in its Issues Paper also rejected an increase in premium rates. While it acknowledged that there has been a cumulative 33 per reduction in average premium rates since 2005, it emphasised that premiums paid by employers are already significantly higher in New South Wales compared to other states. Victoria has announced that there will be a further reduction in its premium rates by three per cent in July.[173]

2.169 A Safe Work Australia report presents standardised average premium rates for the schemes in all Australian jurisdictions. To facilitate comparisons, the report adjusts the average premium rates published by each jurisdiction to take account of scheme variations (e.g. employer excess). The standardised average premium rates in 2009/10 for the five mainland States were as follows:[174]

170 Submission 142, Australian Industry Group, p 10.

171 Mr Pattison, Evidence, 21 May 2012, p 73.

172 Submission 170, Civil Contractors Federation, pp 2 and 7.

173 Submission 142, Australian Industry Group, p 23.

174 Safe Work Australia, Comparative Performance Monitoring Report: comparison of work health and safety and workers' compensation schemes in Australia and New Zealand, 13th edition, October 2011, pp 23-24, taken from footnotes 97 and 98 in L Roth & L Blayden, *E-brief: Workers Compensation: An update*, NSW Parliamentary Library Research Services 10/2012, p 13.

Table 2 The standardised average premium rates in 2009/10 for the five mainland States were as follows

	Average premiums (% of payroll)
Queensland	1.12
Western Australia	1.22
Victoria	1.39
New South Wales	1.82
South Australia	2.76

2.170 WorkCover insisted that an increase in premiums would reduce the State's competitiveness and have a detrimental impact on the economy, businesses and jobs growth, potentially driving investment and employment interstate.[175] This view was supported by a number of Inquiry participants, such as the Australian Industry Group which suggested that increasing premiums 'would have a dramatic effect on the competitiveness of NSW industry, and on industry's experience and perception of NSW as a place to establish a business.'[176]

2.171 In a part of its submission sourced from NSW Treasury, the WorkCover Authority stated (omitting footnotes):

> The impact on employment of lower premiums depends on how New South Wales labour demand and supply respond to changes in employment costs and wages. The available evidence suggests that each 1 per cent fall in labour costs may, in assisting the competitiveness of New South Wales businesses, lead to a 0.8 per cent increase in labour demand in the long run (i.e. the long run price elasticity of labour demand is 0.8), and each 1 per cent increase in wages may ultimately lead to a 0.3 per cent increase in labour supply across New South Wales.[177]

2.172 The NSW Business Chamber said that it conducted a state-wide survey, which had just over 500 respondents, immediately following the announcement of this Committee. 83.8 per cent of respondents said that a 28 per cent increase in premiums would have employment effects; 58.4 per cent of respondents said there would be employment impacts if premiums were to rise by 10 per cent.[178] The NSW Business Chamber extrapolated from these survey results as follows:

> For a premium increase of 28% more than 400 members told us that they would reduce their number of employees. This represents 4½% of the Chamber's membership. Applying that same percentage to approximately 280,000 workers compensation policy holders in NSW would result in 12,600 businesses reducing employment opportunities. Assuming a very conservative one employment opportunity lost per company that would mean 12,600 employment opportunities

175 Submission 144, WorkCover Authority of NSW, p 9.

176 Submission 142, Australian Industry Group, p 10.

177 Submission 144, WorkCover Authority, p 24.

178 Submission 129, NSW Business Chamber, pp 5-6.

> would be lost. The majority of these job losses would still occur under a 10% premium increase, where the corresponding number would be 8,120 policy holders and lost job opportunities.
>
> In manufacturing where employers face not only the imposts of increased costs but also imports and a strong currency the impact will be even more profound. Ninety-five percent of manufacturers said a 28% increase would have an impact on employment, and 74% said a 10% increase would have an effect. Respondents indicated the likely response would be to relocate overseas. Those job losses will be permanent.[179]

2.173 The potential impact of premium increases on business profitability and employment and wages was also highlighted by the Civil Contractors Federation, which said:

> We understand recently released employment data shows NSW is also already now lagging other States in employment generation, and has worsening unemployment rates. This is not an economic environment into which any increase in the cost of employing people will be received without a direct impact on employment and wages.[180]

2.174 GIO similarly maintained that increasing premiums would place a significant financial impost on employers during an already challenging economic environment.[181]

2.175 The NSW Cross-Border Commissioner advised the Committee that the cost of the New South Wales Workers Compensation Scheme contributes to the higher cost of doing business in New South Wales compared to other states:

> A significant issue that has been raised at all borders by a variety of business people has been the cost of doing business in NSW compared to the adjoining states. The costs relate to state taxes, duplication of costs with the need for licensing on both sides of the borders, and the cost and complications in dealing with the Workers Compensation Scheme in NSW.[182]

2.176 Concerns about the impact of increased premiums on the competitiveness of the small business sector were raised by the NSW Small Business Commissioner, Ms Yasmin King, who supported reforms to the Scheme to align it more closely with Queensland and Victoria.[183]

2.177 Concerns were also raised during the Inquiry about the impact of high cost premiums on farmers and small business in rural and regional New South Wales. In this regard, the Alliance for a Safe and Competitive Workplace stated:

> The need for serious reform of this failing scheme is now urgent. To do nothing will see the economy of New South Wales further stagnate, as the Government predicts premiums will continue to rise: while our Victorian counterparts will experience a three per cent reduction in premiums in the coming financial year, businesses in New South Wales have been told to expect a 28 per cent increase to pay for spiralling costs

179 Submission 129, NSW Business Chamber, pp 5-6.

180 Submission 170, Civil Contractors Federation, p 7.

181 Submission 286, GIO, p 1.

182 Submission 243, Cross Border Commissioner, NSW Trade and Investment.

183 Submission 119, NSW Small Business Commissioner, p 1.

> and a system which provides little incentive for injured workers to return to work. The impact of this is felt in all parts of the state, especially our regional centres and rural communities: the cost of doing business for farmers and small business owners in rural and regional towns in NSW is already a major impediment to keeping these towns alive.[184]

2.178 However, the notion that there would be an 'exodus of investment and employment opportunities' if there was an increase in premiums was rejected by Unions NSW, which argued that there was no evidence to support this suggestion.[185] Additionally, the union maintained that the notion fails to take into account interstate differences in workplace health and safety outcomes. It noted for example that in the five year period to June 2009, the rate of serious injury in New South Wales compared to Victoria was between 27 to 42 per cent higher, stating:

> This in turn raises the question of why should a State with a much higher risk of serious injury expect that its employers are entitled to the lower premium rates on offer in a State where the risk level has been reduced to a more manageable level? Lower premium rates should be based on performance, not a culture of entitlement.[186]

2.179 Mr Lennon argued that premium rates should not be used to measure the performance of the Scheme:

> The notion that any State in the nation may have the best workers compensation system simply because it has the lowest premiums is not the way to go forward. Clearly, in our view, that is a race to the bottom and a question of just trying to seek out the lowest common denominator.[187]

2.180 A number of Inquiry participants argued that some increase in premiums to address the Scheme deficit was warranted. For example, the CFMEU referred to the 'generous' premium reductions given to employers in recent years (discussed earlier in this Chapter) and suggested that '[t]o be fair', consideration *should* be given to increasing premium rates to meet the Scheme's alleged deficit.[188]

Committee comment

2.181 The Committee accepts the conclusion of Safe Work Australia that New South Wales has the second highest premium of the mainland States.

2.182 In the light of high premiums compared with other States, the Committee accepts that premium increases must be avoided.

2.183 The Committee further accepts that if premiums were raised (even by, say, 10 per cent instead of 28 per cent), it would result in many thousands of job losses in New South Wales. Some

184 Submission 288, Alliance for a Safe and Competitive Workplace, p 4.

185 Submission 135, Unions NSW, pp 10-11.

186 Submission 135, Unions NSW, p 10.

187 Mr Lennon, Evidence, 25 May 2012, p 16.

188 Submission 143, Construction Forestry Mining and Energy Union, p 13. See also Submission 146, Australian Manufacturing Workers Union, Submission 143, Construction Forestry Mining and Energy Union; Submission 135, Unions NSW.

submissions which advocated premium increases, to avoid restructuring benefits, appealed to notions of fairness and equity. But there is nothing fair and nothing equitable about pursuing premium increases which would put so many workers out of a job.

Committee conclusion

2.184 While not all Inquiry participants agreed that the Scheme has a $4.083 billion deficit, or agreed with the basis for calculating that deficit amount, it was generally accepted that there are significant issues with the financial viability of the Scheme.

2.185 According to the Scheme Actuary, the main contributors to the poor financial state of the Scheme have been the Global Financial Crisis, increasing numbers of Workplace Injury Damage claims, increased lump sum payments and medical costs, and more injured workers remaining on weekly benefits for longer.

2.186 Inquiry participants identified other factors that they argued contribute to the costs and overall financial state of the Scheme, including poor claims management, increased remuneration payments to Scheme Agents, and poorly designed remuneration arrangements that do not sufficiently incentivise Agents to produce better outcomes. Stakeholders also apportioned blame for the financial issues to WorkCover's management of the Scheme, as well as poor return to work performance – which is one of the key objectives of the New South Wales workers compensation system.

2.187 It is clear that urgent reform is needed to address the issues with the Scheme and ensure its long term sustainability. The alternative to reform would be to increase employer premium rates, an approach which the Committee considers undesirable because of its impact on employment in New South Wales.

2.188 The Government's reform proposals contained in the Issues Paper will be examined in the following Chapter. Numerous other reform options and Scheme improvement and cost saving measures were canvassed during the Inquiry and these are examined in Chapter 4.

Chapter 3 Issues Paper reform options

As noted in Chapter 1, in late April the Minister for Finance and Services released an Issues Paper setting out a number of options for reform to the NSW Workers Compensation Scheme. This Chapter provides an overview of stakeholder responses to the suite of reform options in the Issues Paper, as well as examining responses to several of the specific reforms. It also provides an overview of the estimated costings for the reforms in the Issues Paper, which was provided by PricewaterhouseCoopers in response to questions taken on notice during evidence.

Issues Paper

3.1 The Issues Paper (Appendix 2) puts forward a 'suite of options' for comment, consisting of 16 options, some of which are specific while others are more broadly drafted. Generally, the options involve altering the entitlements available to injured workers under the current Scheme, and changing the way in which those entitlements are assessed and administered. The options are set out under the following headings:

1. Severely injured workers
2. Removal of coverage for journey claims
3. Prevention of nervous shock claims from relatives or dependants of deceased or injured workers
4. Simplification of the definition of pre-injury earnings and adjustment of pre-injury earnings
5. Incapacity payments – total incapacity
6. Incapacity payments – partial incapacity
7. Work Capacity Testing
8. Cap weekly payment duration
9. Remove 'pain and suffering' as a separate category of compensation
10. Only one claim can be made for whole person impairment
11. One assessment of impairment for statutory lump sum, commutations and work injury damages
12. Strengthen work injury damages
13. Cap medical coverage duration
14. Strengthening regulatory framework for health providers
15. Targeted commutations
16. Exclusion of strokes/heart attach unless work is a significant contributor.

3.2 Broadly speaking, the reform options can be described as falling within three categories: exclusion of particular claim types, weekly and medical benefits and lump sum benefits.

Overview of stakeholder response to reform options

3.3 As discussed in Chapter 2, the Committee received overwhelming evidence that the Workers Compensation Scheme is in need of reform. However, there were two opposing views on the nature of reform options that should be utilised to address concerns related to the Scheme's performance and management.

3.4 Generally speaking, insurance, employer and business groups were supportive of reform options that would deliver cost savings through reductions in benefits to injured workers, on the basis that such measures would not only assist in addressing the Scheme's deficit, and therefore contribute positively toward boosting the State's economic prospects, but would also encourage better outcomes for those injured at work. For example, the Business Council of Australia stated:

> Reforms to the scheme have the potential to improve its focus, realign incentives and improve its management ... [They] would put the scheme on a more sustainable footing, and could improve both outcomes for workers and reduce costs and compliance impacts on firms. This would then allow NSW businesses to redirect resources to higher-value uses, freeing up their capacity to create new, higher paying jobs and expand wealth creation in New South Wales.[189]

3.5 Allianz framed its view as follows:

> Allianz believes that the…reforms will have a fundamental impact on claim management and *Return To Work* performance, leading to substantially reduced Scheme liabilities [Original emphasis]. [190]

3.6 It was submitted that the reforms proposed in the Issues Paper appropriately balanced the needs of various stakeholders, including injured workers, in part by creating greater incentives for those workers to return to work, and by providing better support for severely injured workers. For example, the Insurance Council of Australia (ICA) stated:

> The ICA supports the proposed options for change outlined in the Issues Paper. The options recognise the intention to achieve a reasonable balance between the statutory benefits and protection of injured workers whilst ensuring affordability of premiums for employers.[191]

3.7 Similarly, the Australian Industry Group submitted:

> Employers expect the Scheme to provide support for injured workers, are comforted that it does, and are willing to pay premiums to a well managed scheme reflecting that objective. However they are frustrated and annoyed when a scheme cannot do so at a cost that is clearly uncompetitive with other states. Their frustration compounds when they see claim numbers falling but costs leeching out as a result of lower return to work rates, perverse incentives, and higher transaction costs and payments to service providers unrelated to outcomes.[192]

3.8 Many of these stakeholders, including a number of small and medium business owners, in referring to the need for reform noted the significant impact that any increase in workers compensation premiums would have on business and industry:

189 Submission 185, Business Council of Australia, p 2.

190 Submission 137, Allianz Australia Workers' Compensation (NSW) Ltd, p 5.

191 Submission 145, Insurance Council of Australia, p 4.

192 Submission 142, Australian Industry Group, pp 8-9.

> The threat of a 28% increase in Workers Comp premiums is a worrying threat to my small business. I WILL NOT SURVIVE…any increase would close my business and put another 8 people out of work [Original emphasis]. [193]

> As a manufacturing business in NSW it pains me to hear that NSW businesses are facing an increase in workers compensation premiums…Manufacturing in NSW is already feeling the pinch from the high dollar, increase wage costs and increased costs relating to safety. Further pushing up the cost of employment is a big threat to the life of this industry.[194]

3.9 Some stakeholders who generally supported the reform options did, however, qualify their support on the basis that the reforms had not been fully costed. However, those submissions (such as from the Insurance Council of Australia and the NSW Business Chamber) were made prior to the Committee's receipt of costings from PricewaterhouseCoopers, which are Appendix 6 to this report.

3.10 The NSW Self Insurance Corporation (SICorp), part of NSW Treasury, was generally supportive of the reform options.[195] However in its submission, SICorp noted that there are inherent differences between the characteristics of claimants covered by the Treasury Managed Fund (public sector) and those covered by WorkCover (private sector), and consequently that the reform package would impact differently on the two schemes. A key plank of its submission was that reforms should not only be costed, but also scenario tested prior to implementation:

> The impact of any proposed reforms should be scenario tested and actuarially costed for both the TMF and the NSW WorkCover Nominal Insurer Scheme to understand the aggregate effect on the State budget before deciding on the package of reforms to be implemented.[196]

3.11 Mr Robert Lloyd, Manager, Strategic Projects, of the NSW Self Insurance Corporation, gave evidence to the Committee as to what 'scenario testing' actually meant:

> Whatever reform or package of reforms, it is not a financial assessment, it is saying we do this and how will that impact on this recommendation, how do they interact? Will it drive the right behaviours, what the proposed reforms are trying to achieve? From a Treasury Managed Fund point of view it is whether this reform and the other things that we interact with and which we mention in the paper about the death and disability schemes, part of the emergency services. So, if there is particularly a reform, how would that change behaviours so the desired result being looked for out of these reforms, will it be achieved in the Treasury Managed Fund?
>
> That is scenario testing. It is non-financial. It is trying to work out the balance. You do one thing, does it cause this to go up or down. It is everything pretty much in balance. It is just to have a reality check on whatever package of reforms is proposed, apart

193 Submission 18, Name suppressed, p 1.

194 Submission 16, Name suppressed, p 1.

195 The function of the NSW Self Insurance Corporation, or SICorp as it is known, is to operate the Treasury Managed Fund. The Fund was established in 1989 and is the NSW Government's self-insurance scheme providing broad protection for all asset and liability exposures to all budget sectors. Submission 131, NSW Self Insurance Corporation.

196 Submission 131, NSW Self Insurance Corporation – NSW Treasury, p 2.

> from just the financials, saying this is a good thing or whatever the results are. It is the other side of it.[197]

3.12 The reform proposals in the Issues Paper were broadly opposed by injured workers, unions and legal professionals on the basis that they: fail to acknowledge the underlying causes of the Scheme's deficit; are not costed; and would have a significant detrimental impact upon injured workers in New South Wales.

3.13 In this regard, Unions NSW expressed the view that the reform focuses the 'blame' on injured workers while ignoring the role of WorkCover and Scheme Agents:

> Inherent in [the Issues Paper] … is the view that injured workers are somehow to blame for the parlous state of the scheme … This is a simplistic, one dimensional view of the return to work process … [and] … divert[s] attention from the substantive issues which have been responsible for the deterioration in the scheme's performance. It contains no discussion of the WorkCover Board's management of the scheme or any consideration of the performance of WorkCover's claims agents, despite frequent concerns raised by trade unions and … the scheme's actuaries … nor is there any examination of the behaviour of those employers whose negligence has resulted in so many serious, and costly, injuries; or of those who have failed to assist injured workers in their efforts to return to meaningful employment.[198]

3.14 Similarly, the Australian Lawyers Alliance stated:

> … the Committee is … asked to inquire and report into the functions and operations of WorkCover. This has been completely ignored in the Issues Paper, which predominantly focuses on cutting injured workers' already modest benefits, rather than getting to the root of the problems with the Scheme.[199]

3.15 Some stakeholders argued that given the significant proportion of the deficit attributed to external factors it was unreasonable for the Government to develop a reform package that concentrated on reducing workers' benefits. For example, the NSW Nurses' Association cited the impact of external factors as a reason not to cut benefits: 'It would be wrong to ask injured workers to bear the brunt of any changes.'[200]

3.16 The same point was echoed in a submission from the Injury Support Network Inc, where Network member LHD Lawyers referred to the impact of the global financial downturn and poor returns on investments and stated: 'If this is the case, it seems highlight inappropriate to punish injured workers by reducing/removing entitlements simply to rectify the mistakes of the [WorkCover] authority.'[201]

3.17 The stakeholders who were broadly opposed to the reforms did acknowledge the need for reform to the Scheme, but focused on how the Scheme could be better managed and administered by WorkCover and other key players including Scheme Agents and employers, as

197 Mr Robert Lloyd, Strategic Projects, of the NSW Self Insurance Corporation, Evidence, 21 May 2012, p 25.

198 Submission 135, Unions NSW, pp 3-4.

199 Submission 122, Australian Lawyers Alliance, p 7.

200 Submission 73, NSW Nurses' Association, p 52.

201 Submission 150, Injury Support Network Inc, p 10.

well as supporting better early intervention measures, and advocating for a greater emphasis on return to work and rehabilitation of injured workers. The Law Society of New South Wales submitted that:

> The current financial performance of the Scheme is not driven by claim numbers or by benefits. It is driven by poor claims management, over-regulation and the inability of the Scheme to allow claims to be finalised by settlement mechanisms. It has also clearly been effected by the loss of revenue…as a consequence of the global financial crisis.[202]

3.18 The NSW Nurses' Association asserted that the main problems with the Scheme fell squarely with employers and expressed concern that the Issues Paper did not contain reforms that targeted employers or insurers:

> The Association is opposed to any attempt by the NSW Government to reduce or limit existing workers compensation entitlements … In our view, the main problems with the current workers compensation scheme are the fault of employers, not workers … the Association is concerned that the Issues Paper does not propose a single reform which attempts to impose some additional responsibility on insurers or employers. Nor … a single reform designed to seriously improve occupational health and safety.[203]

3.19 The Australian Medical Association (NSW) did not express a clear view on the reform options in the Issues Paper, but did highlight the impact of management and administration factors which imposed burdens on medical practitioners:

> The Issues Paper makes the comment that the workers compensation is a 'broken system that does not produce good outcomes for injured workers'. From a medical perspective, that is not a comment that AMA (NSW) entirely agrees with. The system provides injured workers with excellent medical care generally … The Issues Paper also comments that the system is difficult to navigate for all participants and subject to a lot of red tape. AMA (NSW) agrees entirely with this statement. AMA (NSW) received hundreds of calls from members requiring assistance with the many levels of bureaucracy and requirements, particularly in relation to the conduct of the scheme agents in administering the scheme. This is of particular frustration to general practitioners, who are at the centre of the system, and provide for patients the frontline management of their injury.[204]

Stakeholder response to specific reform options

3.20 This section examines reform options falling within each of the three categories referred to in paragraph 3.2: exclusion of particular claim types, weekly and medical benefits and lump sum benefits.

3.21 Each reform option would, if adopted, have financial implications for the Scheme. PricewaterhouseCoopers, the Scheme actuary, has undertaken costings of a reform package consistent with the options outlined in the Issues Paper.

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202 Submission 133, The Law Society of New South Wales, p 2.

203 Submission 73, NSW Nurses' Association, pp 4-6.

204 Submission 40, Australian Medical Association (NSW), p 3.

3.22 The PricewaterhouseCoopers costings are qualified in that they note that many of the reform options are interrelated and, as a consequence, individual analysis of specific reforms and findings in respect of each option need to be considered in the context of each other, as well as those reforms not examined in detail. Nonetheless, the costings provide a useful indication of the extent of savings that each of the reforms could make.

3.23 The financial analysis of the reform package, which incorporates the reform options discussed in this Chapter, is considered at paragraphs 3.259 – 3.287 of the Report.

Severely injured workers

3.24 Option 1 in the Issues Paper is entitled 'Severely injured workers'. The Issues Paper states that a key plank of any reforms to the workers compensation scheme should be to improve the benefits for severely injured workers. The Issues Paper notes a suggestion that reforms should provide for severely injured workers who have an assessed level of WPI of more than 30 per cent 'to receive improved income support, return to work assistance where feasible, and more generous lump sum compensation'. Option 1 in the Issues Paper does not specify the detail of extra support.

3.25 The Issues Paper makes the point that benefits payable to severely injured workers are currently inadequate, which provides a rationale for the reform option to improve benefits to this group:

> Payments for severely injured workers are inadequate, weekly payments in lieu of lost earnings for totally incapacitated workers that bear no relation to the income they have lost. In fact, they are paid a rate barely above the poverty line.[205]

3.26 Strong views supporting and opposing this option were expressed in submissions and during the hearing. Those supporting the option argued that it would provide better support to severely injured workers. For example, the Insurance Council of Australia asserted:

> The ICA supports the Whole Person Impairment (WPI) thresholds of 30% for serious injuries and this will ensure that the full resources of the scheme can be available to those who need the assistance the most.[206]

3.27 Similarly, the Business Council of Australia supported the proposal on the basis that it would appropriately redirect benefits toward those who needed them most:

> Refocusing and improving the targeting of benefits is very important. Such a reprioritisation can deliver an important dividend for severely injured workers. To this end, the BCA is supportive of well-designed, prudent implementation of Reform Option 1.[207]

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205 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', p 4.

206 Submission 145, Insurance Council of Australia, p 5.

207 Submission 185, Business Council of Australia, p 6.

3.28 The Australian Federation of Employers and Industries supported the proposal, but suggested that the critical issue was not the threshold itself, but rather the quality of the assessment. In supporting the proposal, they stated:

> … we caution that any such measures will depend upon the quality of impairment assessment. Given the problems evident in obtaining reliable and consistent impairment assessment within the scheme and the problems identified with management of high severity claims a great deal more rigour must be utilised to justify this change.[208]

3.29 Some stakeholders who broadly supported the proposal, suggested thresholds higher than 30 per cent should be adopted. For example, the NSW Workers Compensation Self Insurer's Association suggested that a 50 per cent threshold would be more appropriate on the basis that an assessed level of impairment is no indicator a person's capacity for work, citing an example a worker claiming for disfigurement consequent upon sun damage to the skin having been assessed as having 50 per cent whole person impairment, but nonetheless retaining a substantial capacity for work:

> It is beyond doubt … that impairment does not necessarily reflect capacity … the threshold for determining a category of severely injured worker should be set at a sufficiently high level to ensure that it does not also cover injured workers who retain a very substantial capacity for work.[209]

3.30 The Shoalhaven City Council and Hawkesbury City Council also supported a 50 per cent threshold of assessed whole person impairment.[210]

3.31 Strong opposition to this proposal was evident in the submissions of various union organisations, legal groups and individuals. Many of these stakeholders submitted that workers with very severe and debilitating injuries would struggle to meet the proposed 30 per cent threshold. For example, the AMWU suggested that less than 1.1 per cent of all workers suffering permanent impairment would meet this threshold.[211]

3.32 The NSW Nurses' Association similarly submitted:

> … limiting such reforms to workers with a 30% whole of body impairment will mean that only a small minority of injured workers will benefit. We note the Issues Paper does not identify the proportion of injured workers who would satisfy the 30% threshold. We believe it would be miniscule.[212]

3.33 A number of stakeholders opposing the proposal nonetheless indicated their support for the objective underlying the option, *specifically* to increase support to severely injured workers.[213] For example, Slater & Gordon Lawyers submitted:

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208 Submission 130, Australian Federation of Employers and Industries, p 38.

209 Submission 118, NSW Workers Compensation Self Insurer's Association, p 6.

210 Submission 148, Shoalhaven City Council, p 2; Submission 184, Hawkesbury City Council, p 5.

211 Submission 146, Australian Manufacturing Workers Union, p 17.

212 Submission 73, NSW Nurses' Association, p 57.

213 See, for example, Submission 73, Submission 126, Slater & Gordon Lawyers, Submission 145, Unions NSW, and Submission 146.

> The enhancement of benefits to the most seriously injured workers would be a welcome development … However, if the intention is to invent a new category of 'severely' injured workers to increase the threshold for access to entitlements (which would disentitle otherwise 'seriously' injured workers), then this would represent a seismic change to a fundamental aspect of the scheme.[214]

3.34 Several stakeholders opposing the proposal referred to the nature of the assessment guides used to assess whole person impairment.[215] The Bar Association of NSW asserted that the use of the guides did not appropriately recognise the effect of the particular injury on the worker, noting the absence of recognition of pain as part of the assessment:

> … the use of the AMA Guides in assessing WPI produces results which are often extremely unfair. The Guides do not provide for any assessment in cases involving neuropathic pain which can be a totally disabling condition. Indeed pain is not used as a criterion for assessment at all.[216]

3.35 The Bar Association also argued that assessments of WPI according to the guides do not always reflect what many in the community would regard as 'severely injured':

> There are many injured workers who by community standards would be regarded as severely injured who fall well below a 30% whole person impairment threshold…[including]: failed spinal surgery (20-28%)…[and] moderate brain damage (15-29%).[217]

3.36 The Bar Association's comments were reiterated by various stakeholders, including the Australian Manufacturing Workers Union, the Australian Lawyers Alliance and Slater & Gordon Lawyers in their submissions.

3.37 The Committee heard evidence from one injured worker about the impact that an increase in the level of whole person impairment to 30 per cent would have on her. After being medically discharged from the NSW Police Force after witnessing a suicide, she was assessed as having a 24 per cent level of whole person impairment. She described how the impairment affects her everyday life:

> I have been diagnosed with post traumatic stress disorder, major depression and anxiety. I avoid leaving my house … I have nightmares. I struggle to trust people. I am paranoid and very tearful … [and] … have regular panic attacks and startle very easily. I am very vigilant and anxious in general … I struggle to make day-to-day decisions. When my husband is at work I constantly contact him to ask him questions or ask for assistance to make decisions … from choosing the children's clothes to selecting the type of bread for lunch. The person I am today is far from the person I once was.[218]

3.38 The witness went on to describe her concern if the threshold were increased:

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214 Submission 126, Slater & Gordon Lawyers, p 11.

215 American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment 5th Edition*

216 Submission 77, Bar Association, p 3.

217 Submission 77, Bar Association, p 3.

218 Witness X, Published in-camera evidence, 28 May 2012.

> … I am seriously impaired and I cannot work … to determine someone has been seriously injured only if he or she reaches 30 per cent whole person impairment is ridiculous. I fall under that figure and I can tell you now I am seriously impaired and I struggle each and every day … to be potentially cut off from my benefits because I fall below this figure is not only ridiculous but also causes me great fear for my mental health and my future … at present I feel I am only just mentally stable. If I am unable to receive ongoing treatment I do not know what will happen to me. What am I going to do? How am I going to go on?[219]

Committee comment

3.39 The Committee received conflicting submissions about the appropriateness of setting the threshold at 30 per cent, or whether it should be a lower (or even higher) figure.

3.40 Stakeholders supporting the proposal, including insurance and employer organisations, did so on the basis that it would ensure that those benefits that are dependent on injured workers reaching that threshold were payable to those who needed them most. This reflected the rationale put forward in the Issues Paper that severely injured workers should receive improved benefits.

3.41 Some of these stakeholders suggested that the threshold should be higher than 30 per cent, on the basis that a person's level of impairment is not necessarily indicative of their capacity for work.

3.42 The Committee believes it is appropriate, irrespective of the level of WPI, to consider the effect of being severely injured on a person under the Scheme.

Recommendation 1

That the NSW Government ensure that, under the Workers Compensation Scheme, a worker assessed as severely injured be subject to work capacity testing but with the Workers Compensation Commission able to suspend or to waive the requirement for the severely injured worker to undergo work capacity testing.

Recommendation 2

That the NSW Government ensure that, under the Workers Compensation Scheme, any time cap on payment of weekly income benefits and medical expenses (apart from the Commonwealth retirement age) not apply to appropriately defined severely injured workers.

Removal of coverage for journey claims

3.43 The Scheme provides for compensation to be paid to workers who are injured on their way to or from the workplace.

[219] Witness X, Published in-camera evidence, 28 May 2012.

3.44 Option 2 in the Issues Paper proposes that coverage for injuries occurring on a worker's journey to or from work be removed, on the basis that it falls outside the object of the relevant legislation, which is designed to provide financial, medical and rehabilitative support to workers injured during the course of their employment.[220]

3.45 The proposal to remove journey claims is founded on the premise that an employee's journey to and from work are periods when an employer has little or no ability to manage risk, and therefore the removal of coverage for journey claims would ensure a closer connection between an employer's health and safety responsibilities and workers compensation premiums.

3.46 Stakeholder views on the merits of this proposal were divided.

3.47 Many of the stakeholders who supported the proposal did so with reference to the assertion in the Issues Paper that journey claims do not have a sufficient nexus to the workplace and, consequently that employers have little or no power to manage risk to workers who are travelling to or from work. The Australian Road Transport Industrial Organisation explained:

> In general, a worker travelling to and from work should not be covered … because an employee is not engaged in work and the employer has no responsibility or control over their actions.[221]

3.48 This view was supported by various stakeholders including Allianz Australia Workers' Compensation (NSW) Ltd, Shoalhaven City Council, Small Business NSW, the Business Council of Australia, the Insurance Council of Australia, the Australian Federation of Employers and Industries and the Australian Industry Group.[222]

3.49 In supporting the removal of coverage for journey claims, the Business Council of Australia submitted that 'employers should be able to manage risks they have some control over. It is not clear this is the case for the everyday journey to work … '[223]

3.50 Another reason cited as justifying the removal of coverage for journey claims from the Scheme was that the inclusion of journey claims is inconsistent with other areas of law. In this regard, the Australian Industry Group submitted:

> … no other area of law treats fixed journeys to and from work as a work related issue. Normal journeys to work are not treated as work related for the purposes of an expense deduction under the Income Tax Assessment Act, nor would an employer normally be liable for costs, loss or damage arising on such journeys under other employment legislation, including equal opportunity and anti-discrimination.[224]

3.51 A number of stakeholders who supported this reform also commented that New South Wales is one of the most generous jurisdictions in terms of providing coverage for journey claims,

220 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', p 22 (Option 2).

221 Submission 117, Australian Road Transport Industrial Organisation, p 2.

222 Submissions 137, 148, 119, 185, 145, 130 and 142.

223 Submission 185, Business Council of Australia, p 6.

224 Submission 142, Australian Industry Group, p 20.

noting that other Australian workers compensation schemes do not provide coverage for journey claims, or provide limited or restricted coverage.[225]

3.52 Allianz Insurance supported the proposal, noting that it would be desirable for some uniformity across state and territory borders, but also recognised the potential impact of the reform upon the New South Wales Compulsory Third Party (CTP) Scheme:

> We support this reform in principle, and it will bring NSW in line with other jurisdictions, but we do note analysis would need to be undertaken regarding cost implications for the CTP Scheme.[226]

3.53 Some of the stakeholders who supported the proposal recognised the difficulties in identifying when an employee is 'at work'. For example, the Australian Road Transport Industrial Organisation which supported removal of the broad coverage currently available, acknowledged that there may be exceptions where coverage for journey claims should continue, for example:

> … in an area such as road transport where a truck driver's day may begin or end at home because that driver is undertaking a journey directly related to work and is being remunerated for that task.[227]

3.54 The Australian Road Transport Industrial Organisation went on to suggest that an appropriate test 'could be based on whether the person concerned is entitled to remuneration at the time the incident took place.'[228]

3.55 There was strong opposition to the proposal to remove coverage for journey claims from a number of stakeholders. There were several reasons underpinning opposition to the proposal, including that journey claims comprise a relatively small number of claims within the Scheme (2.6 per cent) and therefore any savings would be small and at least partly recoverable from CTP insurers.

3.56 The Australian Lawyers Alliance, drawing on data from the PricewaterhouseCoopers report, also commented on the comparatively small cost of journey claims, and the fact that a proportion is recoverable from the motor accident compensation Scheme:

> The PWC report identifies that of the $4 billion alleged deficit only $70 million is made up of journey claims … Approximately $35 million is recovered against third party insurers [under the Motor Accidents Compensation Scheme].[229]

3.57 The Australian Manufacturing Workers Union (AMWU) supported this assertion:

> In practical terms … much of the cost for journey injuries is recoverable from motor accident compensation schemes, thereby reducing their financial impact on overall workers' compensation scheme costs.[230]

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225 Submission 170, Civil Contractors Federation (NSW); Submission 97, StateCover Mutual Limited; Submission 129, NSW Business Chamber.

226 Submission 137, Allianz Australia Workers' Compensation (NSW) Ltd, p 7.

227 Submission 117, Australian Road Transport Industrial Organisation, p 2.

228 Submission 117, Australian Road Transport Industrial Organisation, p 2.

229 Submission 122, Australian Lawyers Alliance, p 12.

3.58 The Committee received evidence from one of the Scheme actuaries, Mr Michael Playford of PricewaterhouseCoopers, confirming these assertions:

> The … analysis shows that the cost to the Scheme of journey claims is relatively small, with a significant proportion of claims costs being recovered from CTP insurers (31.9%).[231]

3.59 Mr Playford also provided evidence that the estimated cost saving to the Scheme if coverage for journey claims were removed would be over $90 million annually in premium costs, but that this figure would be reduced to $56 million when the reform package is costed in its entirety:

> Excluding most journey claims is estimated to result in a cost saving of $93 million per annum in premium costs (reducing the estimated breakeven premium rate by 3.6%). When costing the specified benefit reform package in its entirety, the allowance for a cost savings for removal of journey claims has been the last adjustment made after all other elements of the specified package have been allowed for. This reduces the cost saving calculated for excluding journey claims. For example, in the specified package with a 9 year cut off of weekly benefits, the calculated savings for also removing journey claims is reduced to $56 million (note this figure also includes a minor amount for excluding heart attack and stroke).[232]

3.60 Almost all submissions supporting retention of coverage for journey claims referred to the impact on workers injured while travelling to or from work should coverage for such claims be removed. A number of stakeholders referred to specific examples where families of workers killed or severely injured on the way to or from work would face significant hardship as a result of the reform. For example, State President of the Construction Forestry Mining and Energy Union (CFMEU), Ms Rita Mallia, provided the following example:

> Sanja is the mother of two young children and she lost her husband five years ago, leaving her and two children at that stage only one and three. Her husband was … [killed] … in a car accident on the way home from work … Without journey claim provisions under the Workers Compensation Act her family would have been left destitute and forced to sell their family home.[233]

3.61 The Police Association of NSW referred to the particular nature of policing and the potential impact that removal of coverage for journey claims would have on police:

> Our members are police officers 24 hours a day, seven days a week…their oath of office requires them to act and to intervene irrespective of whether they are rostered on duty and they can be recalled to duty at any time. Members are duty bound to assist in incidents when they are travelling to and from work, which places them in harm's way during their journey …

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230 Submission 146, Australian Manufacturing Workers Union, p 18.

231 Answers to questions taken on notice during evidence, 21 May 2012, Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers Actuarial, Question No. 4.

232 Answers to questions taken on notice during evidence, 21 May 2012, Mr Playford, Question No. 4.

233 Ms Rita Mallia, State President, Construction and General Division, Construction Forestry Mining and Energy Union, Evidence, 25 May 2012, p 38.

> We cite in our submission the case of a sergeant, whose name is suppressed— … She was seriously injured when she was attacked in Kings Cross when she got out of her car on the way to work. I do not need to go into the details, but that was a journey claim … had she not been covered that would have had a catastrophic impact on her family.[234]

3.62 In opposing the option, Workplace Tragedy Family Support also pointed out that workers in some industries, including miners, civil engineers, roads, forests and construction workers, would be disproportionately impacted by the reform option:

> In particular, many miners, civil engineers working on roads, forestry workers and construction workers have to travel long distances both throughout Sydney and throughout NSW because of the changing nature of their work sites. They are only making those journeys to carry out their employment.[235]

3.63 Some of those who opposed removing coverage for journey claims cited the converse of the argument used by stakeholders who supported it. That is, stakeholders opposing removal of coverage for journey claims were strongly of the view that a person's journey to and from work is demonstrable of a clear and necessary connection between the journey and the person's employment. In this regard, the issue of journey claims, perhaps more than any other of the proposed reforms, clearly demonstrated the divergence of opinion and perspective of those stakeholders in support of this option, and those against it.

3.64 For example, in its submission, Unions NSW asserted that:

> The everyday reality for millions of New South Wales workers is that their working day begins when they walk out the front door and start the journey to work. These journeys would not otherwise be undertaken. That they are undertaken is of obvious benefit to employers and this underscores their work related nature.[236]

3.65 Unions NSW went on to state that technological advancements have made it even more difficult to distinguish between when a person is working, and on that basis there is an even stronger case for coverage:

> With the advent of new work technology, including laptops, high speed Internet access and ever more sophisticated mobile phones, the distinction between the home and the traditional workplace has become increasingly blurred. More and more workers are working from home and/or are available for work purposes while at home.[237]

3.66 Some stakeholders, including the AMWU and the CFMEU, acknowledged the relatively broad coverage of journey claims in NSW compared to other Australian jurisdictions. However, they noted that in some of those jurisdictions, people injured on the way to or from work are protected by motor accident compensation schemes, unlike the NSW motor accidents compensation scheme which does not provide cover for 'at fault' drivers. Mr Jeremy Gormly of the Bar Association explained the situation in New South Wales:

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234 Mr Peter Remfrey, Secretary, Police Association of NSW, Evidence, 28 May 2012, p 67.

235 Submission 157, Workplace Tragedy Family Support, p 1.

236 Submission 135, Unions NSW, p 21.

237 Submission 135, Unions NSW, p 21.

> If you have two workers driving one another to work and there is an accident and one of them is at fault, the driver is at fault, one recovers compensation and common law damages because they are the passenger and the other one gets neither common law damages nor the ordinary prop up of workers compensation that keeps a family going when there is injury … [238]

3.67 The AMWU also made this point, noting the lack of cover for pedestrians under the New South Wales motor accidents compensation scheme:

> It is also worth noting that some jurisdictions do not have provisions for journey claims in the workers compensation legislation but cover both 'at fault' and 'not at fault' drivers under CTP insurance, unlike NSW. Whilst this would cover most journey claims in NSW it fails to cover pedestrians.[239]

3.68 Several unions also commented that acceptance of the argument that removal of coverage for journey claims is justified by the fact that employers have little or no ability to manage risk to workers travelling to or from work undermines the foundation upon which the Scheme is based. For example, the AMWU argued:

> The main limitation with this line of reasoning … is that it implies that employers should only be held accountable for injuries which they can be expected to prevent. This may make sense in the context of a tort based compensation scheme, but as applied to workers' compensation it serves to undermine the no-fault principle that underpins compensation for work-related injury.[240]

3.69 Some stakeholders supported the retention of coverage for journey claims on the basis that the saving to the Scheme, given the relatively low cost of journey claims in the context of all claims, would not justify the impact on workers. It was further noted by some stakeholders that at least some journey claims recoverable from the motor accident compensation scheme. For example, the Bar Association stated:

> The majority of [journey] claims relate to motor accidents. Where a worker can claim damages under that system the WorkCover authority obtains a full recovery of compensation paid by a CTP … insurer. The saving to the system made by removing journey claims would not justify the removal of the protection of weekly payments during incapacity.[241]

3.70 Notwithstanding this, the Bar Association proposes that there may be potential to reintroduce a fault provision, as previously existed with respect to journey claims, which may provide savings:

> The Act previously provided that compensation would not be payable with respect to an injury on a journey where the fault of the worker contributed to the occurrence of

238 Mr Jeremy Gormly SC, Chair, Common Law Committee, Bar Association of NSW, Evidence, 21 May 2012, p 57.

239 Submission 146, Australian Manufacturing Workers Union, p 19. See also Submission 143, Construction Forestry Mining and Energy Union, p 4.

240 Submission 146, Australian Manufacturing Workers Union, p 18. See also Submission 135, Unions NSW, p 21, which is supported by Submission 186, Australian Services Union and Submission 160, Australian Workers Union.

241 Submission 77, Bar Association of NSW, p 3.

> the incidence causing injury. The reintroduction of a fault provision along these lines would substantially lower the costs to the [Scheme].[242]

3.71 Mr Gormly of the Bar Association stated that it was a recommendation that they 'made with reluctance':

> It is not something we were warmly enthusiastic about, but the Scheme seems to be in difficulty so one looks for ways to assist the Scheme.[243]

3.72 The introduction of a fault provision was also suggested by National Disability Services:

> National Disability Services believes that work-related journeys should be covered under the Workers Compensation Scheme unless the worker's behaviour is the identified cause of the accident.[244]

Committee comment

3.73 The Committee notes the divergence of stakeholder views on whether the Scheme should continue to provide coverage for journey claims and, in particular, the arguments as to whether the journey to and from work is 'work related' or has sufficient connection to the workplace to justify its continued coverage under the NSW Workers Compensation Scheme.

3.74 The Committee notes that coverage for journey claims in New South Wales is more generous that those in most other Australian jurisdictions, but acknowledges that, in at least some of those jurisdictions, people injured on the way to work are covered by other statutory schemes whose equivalent schemes are not as generous in New South Wales.

3.75 The Committee accepts the philosophy that the core circumstances with which a workers compensation and injury management scheme should deal are those over which the employer has (at least limited) control.

3.76 The Committee accepts there are competing arguments whether a workers compensation and injury management scheme should extend to the ancillary circumstances of journeys to and from work. However, the Committee believes that, given the Scheme's poor financial position, a conservative position must be taken at the present time with respect to benefits available under the Scheme and that therefore journey claims should be largely abolished.

3.77 The Committee, however, notes the unique circumstances of members of the NSW Police Force who are, in effect, always 'on duty'.

3.78 The Committee notes that any abolition of journey claims would not preclude claims for injuries suffered by a worker while travelling anywhere on work duties. Nor, as the Committee understands it (although this should be confirmed by legal advice), would abolition of journey

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242 Submission 77, Bar Association of NSW, p 4.

243 Mr Gormly, Evidence, 21 May 2012, p 57.

244 Submission 138, National Disability Services, p 6.

claims preclude claims for injuries suffered while performing work duties on the way to or from a place of work.[245]

3.79 The Committee notes the advice from PricewaterhouseCoopers that savings to the Scheme would flow from removal of coverage for journey claims, discussed at paragraph 3.271.

Recommendation 3

That the NSW Government abolish journey claims under the Workers Compensation Scheme, except in relation to police officers.

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

3.80 The Issues Paper describes benefits presently payable in respect of nervous shock claims by relatives or dependants of deceased or injured workers.

3.81 The Issues Paper proposes the abolition of that present liability.

3.82 The Committee has received competing submissions on this proposal. Most employers favour it. On the other hand, unions, the Law Society of New South Wales and the NSW Bar Association oppose it.

Committee comment

3.83 The Committee considers that self-evidently injured workers are the main focus of a workers compensation and injury management scheme.

3.84 The Committee accepts there are competing arguments whether a workers compensation and injury management scheme should extend to the ancillary circumstances of nervous shock claims by relatives or dependants. However, the Committee believes that, given the Scheme's poor financial position, a conservative position must be taken at the present time with respect to the benefits available under the Scheme and that therefore nervous shock claims by relatives or dependants should be abolished.

Recommendation 4

That the NSW Government abolish the entitlement of dependents of deceased or injured workers to make nervous shock claims under the Workers Compensation Scheme.

[245] Section 4 of the *Workers Compensation Act* defines 'injury' to mean 'personal injury arising out of or in the course of employment'. Section 9(2) provides that '[c]ompensation is payable whether the injury was received by the worker at or away from the worker's place of employment'.

Weekly benefits

3.85 Three of the reform options in the Issues Paper propose changes to the current weekly benefits regime. Options 5, 6 and 8, concerning total incapacity payments, partial incapacity payments and capping weekly benefit duration respectively, propose to financially incentivise return to work.

Incapacity payments – total and partial incapacity

3.86 Workers who are injured at work and as a result are partially or totally incapacitated are entitled to weekly benefits under the *Workers Compensation Act 1987*.[246] The amount of weekly benefit is dependent on three factors:

- whether the level of incapacity is total or partial;
- whether or not the worker's pre-injury earnings are paid under an award, industrial or enterprise agreement; and
- whether the period is within the first 26 weeks of incapacity or later.[247]

3.87 For workers who are totally unfit for work (total incapacity) weekly payments are 100 per cent of the workers' weekly wage rate. This varies depending on whether the worker is covered by an award, industrial or enterprise agreement, or not. Where it is the former, injured workers are entitled to 100% of the remuneration rate. This does not include overtime, shift loading or other payments that some workers receive on top of their base pay. Where a worker is not covered by an award or agreement, the weekly wage rate is 80% of average weekly earnings, including regular overtime and allowances.[248]

3.88 In New South Wales, as with other jurisdictions, there are 'step-downs' in these benefits, however the timing of the step-downs varies between jurisdictions.

3.89 In New South Wales workers who are totally incapacitated are entitled to their weekly wage rate for the first 26 weeks, after which time weekly payments are reduced and are 'usually…the lesser of the statutory rate or 90 per cent of average weekly earnings.'[249] The statutory rate is indexed biannually and is currently $432.50.[250]

3.90 Workers who are partially fit for work (partially incapacitated) are entitled to weekly benefits to 'make up' any difference between their usual pay, and the potentially lower rate of pay that they may receive for undertaking alternate duties or for working on a part-time basis. Calculation of 'make up' pay is 'based on the difference between the workers pre-injury earnings (including overtime, shift work, payments for special expenses and penalty rates) and the amount the worker earns while on suitable duties.'[251]

246 *Workers Compensation Act 1987*, s 33.

247 *Workers compensation benefits guide*, 2012, WorkCover Authority of NSW, accessed 31 May 2012, <http://www.workcover.nsw.gov.au/formspublications/publications/Documents/workers-compensation-benefits-guide-April-2012-3444.pdf.>

248 *Workers compensation benefits guide*, 2012, WorkCover Authority of NSW, p 8.

249 *Workers compensation benefits guide*, 2012, WorkCover Authority of NSW, p 8.

250 *Workers Compensation Act 1987*, s 37.

251 *Workers compensation benefits guide*, 2012, WorkCover Authority of NSW, p 8.

3.91 Partially incapacitated workers are 'stepped down' after the first 26 weeks post-injury from their weekly wage rate to the statutory rate.

3.92 With respect to workers who are totally incapacitated as a result of a work injury, the Issues Paper proposes the first 'step down' after 26 weeks be reduced to 13 weeks and be combined with work capacity testing.[252] It does so on the basis that such a change would align New South Wales more closely to other jurisdictions, better align with clinical recovery patterns, and would incentivise return to work.

3.93 The Issues Paper also proposes reform to current arrangements for partially incapacitated workers by introducing financial disincentives to prevent long term dependency and refers to similar models in Victoria and South Australia, noting that this change would align with the goals of rehabilitation and return to work.[253]

3.94 Stakeholder responses to the proposals to reform weekly benefits for totally and partially incapacitated workers were polarised. Generally speaking, insurance, business and employer groups argued that the proposal to introduce shorter step-downs for workers with total incapacity would align New South Wales to other jurisdictions, more closely mirror clinical recovery outcomes (particularly when combined with work capacity testing) and therefore would encourage return to work. The NSW Business Chamber submitted:

> The purpose of step downs … is to act as an encouragement to injured workers to reengage with work. The vast majority of claims are resolved within three months. When claim duration moves beyond that point it would seem a sensible time at which to include a moderate step down.[254]

3.95 Similarly, in their submission, Small Business NSW stated:

> The suggestion that consideration be given to aligning weekly benefit payments more closely with other jurisdictions and to an earlier step down with capacity testing is supported. It is essential that arrangements in NSW are harmonised with other states and territories to the extent possible.[255]

3.96 In respect of partially incapacitated workers, these groups were firmly of the view that financial incentives and disincentives were key in encouraging return to work. In this regard, the Australian Industry Group submitted:

> Current weekly benefits for partial incapacity can operate as a disincentive to return to full duties and must be addressed as part of the reform.[256]

3.97 Similarly, Allianz supported the assertion that the current arrangements operated as a disincentive to return to work:

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252 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', pp 24-25 (Option 5).

253 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', p 25 (Option 6).

254 Submission 129, NSW Business Chamber, p 10.

255 Submission 119, Small Business NSW, p 4.

256 Submission 142, Australian Industry Group, p 16.

> We agree that the NSW arrangements for incapacity payments for partial incapacity means that there is no financial incentive to reduce an injured workers dependence on weekly benefits by increasing hours worked. We support the principle of other jurisdictional benefit arrangements where long term dependency is discouraged through the step down provisions.[257]

3.98 The Australian Road Transport Industrial Organisation stated in reference to injured workers with total and partial incapacity respectively:

> … reducing weekly benefits for incapacitated workers through the adoption of 'step down' procedures and linking that reduction to medical testing to determine fitness for work as applies in Victoria and SA is sound in principle … [and] provide[s] a financial incentive to return to work …
>
> Current arrangements for injured workers affected by partial incapacity … provide absolutely no incentive to return to work. As a matter of principle partially incapacitated workers should receive less than their total earnings from the outset as such workers realise that they will return to work and have a financial incentive to do so from the outset.[258]

3.99 Stakeholders opposing the reforms to introduce step-downs at an earlier point argued that there is no evidence supporting the foundation on which the reform proposal is based, namely that injured workers need a financial incentive to return to work. The Committee heard evidence to this effect from Mr Hayden Stephens, General Manager at Slater & Gordon Lawyers:

> … there are numerous references [in the Issues Paper] to the connection between cut in benefits, weekly payments, step downs and the like and return to work. As you would have read in our submission, we reject that connection. We do not believe there is any evidence to suggest that that connection exists; in fact, to the contrary. The Australian and New Zealand return-to-work monitor 2010-11 states that its survey results found that 1 per cent of injured workers said that being forced off benefits or benefits being too low was a factor in their return to work.[259]

3.100 Other stakeholders, including Unions NSW and the AMWU, also noted that there was little evidence to support the assertion that step downs encouraged better return to work outcomes.[260] The Australian Lawyers Alliance pointed to the Victorian experience to demonstrate this:

> Victoria has had the 13 week 'step down' since 2002. The return to work outcomes in Victoria are relatively no better than NSW, hence there is no evidence to suggest than an earlier step down would promote better return to work outcomes.[261]

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257 Submission 137, Allianz Australia Workers' Compensation (NSW) Ltd., p 9.

258 Submission 117, Australian Road Transport Industrial Organisation, p 3.

259 Mr Hayden Stephens, General Manager Slater & Gordon Lawyers, Evidence, 28 May 2012, p 29.

260 Submission 135, Unions NSW, p 24; Submission 146, Australian Manufacturing Workers Union, p 21.

261 Submission 122, Australian Lawyers Alliance, p 14.

3.101 The Australian Lawyers Alliance went on to note that comparisons between New South Wales and other jurisdictions based on the timing of step-downs is inadequate and therefore that harmonisation on this basis would be superficial:

> … other jurisdictions with an earlier step down, such as Victoria, provide for much greater benefits during the first 26 weeks, even with a step down after 13 weeks. Thus the step down is from a much larger figure. Other states, such as Victoria, have much greater access to common law rights and significantly better entitlements to damages … An early 'step down' in NSW would not 'harmonise NSW arrangements with Victoria, South Australia and Western Australia' as those schemes have a more appropriate compensation regime during the first 26 weeks of incapacity…their injured workers being entitled to receive much closer to their proper average weekly earnings than NSW workers.[262]

3.102 The United Services Union, opposing the proposal, suggested that there was no basis for harmonisation of New South Wales with other jurisdictions, other than financial savings:

> Arguments that the period of total incapacity payments should be brought into line with other states has no logical or moral support base other than a cost saving measure. One size does not fit all.[263]

3.103 Some opponents of the proposal argued that if the principle underpinning the reform was accepted, it followed that the current system already offered an incentive for workers to return to work because the rate received by injured workers on weekly benefits was so low. The CFMEU submitted:

> For many injured workers, being on workers compensation is a financial burden, especially when totally incapacitated. There is often a significant drop in weekly income as individuals will be paid the base rate of either the EBA or the award. They do not receive allowances or overtime … therefore from day one … lose out financially.[264]

3.104 The United Services Union agreed:

> There is already an incentive to work and get back to your pre-injury average weekly earnings and that flows from the fact that there is a cap on the weekly amount of compensation that you can receive during periods of partial incapacity.[265]

Cap weekly benefit duration

3.105 Weekly benefit payments are payable to injured workers in New South Wales until they reach retirement age plus 12 months.

3.106 As discussed in Chapter 2, WorkCover submitted that weekly payments are one the three main cost drivers of the Scheme, the others being work injury damages and medical costs.[266] WorkCover further submitted:

262 Submission 122, Australian Lawyers Alliance, p 13-14.

263 Submission 32, United Services Union, p 6.

264 Submission 143, Construction Forestry Mining and Energy Union, pp 7-8.

265 Submission 32, United Services Union, p 7.

266 Submission 144, WorkCover Authority of NSW, p 7.

> Over 42,000 claimants received weekly incapacity payments in the December 2011 quarter. This equates to around $800 million expended by the Scheme on weekly benefits in 2011. Weekly benefits account for approximately 40 per cent of the Scheme's gross cost. Of the claims currently receiving weekly benefits, 40 per cent have been receiving them for three or more years.
>
> This relatively high weekly benefit spend impacts the NSW Scheme's cost competitiveness significantly – because:
>
> - expected claim costs account for around 80 per cent of total Scheme costs;
> - weekly benefits are the primary driver of claim costs; and
> - weekly benefits are strongly correlated with usage of other benefit types, particularly Work Injury Damages and medical.[267]

3.107 The Issues Paper suggests that the payment of weekly benefits to a worker with a low level of permanent impairment for many years after their injury 'reinforces the perception that the worker is still injured.'[268] It proposes[269] that imposing a time limit on the duration of weekly benefit payments, and thereafter stoping weekly benefit payments altogether, will 'give workers a fixed timeframe during which they know they need to work toward a certain level of work readiness.'[270] The Issues Paper does not identify the timeframe for such a cap on weekly benefits.

3.108 The position in other jurisdictions is as follows:

> (a) In Victoria, there is no time cap on weekly benefits (but there is stricter work capacity testing and the payment of medical expenses ceases 12 months after the last payment of weekly benefits).
>
> (b) In Queensland weekly benefits are payable for a maximum of five years, or until reaching an indexed financial cap, currently standing at $273,055.
>
> (c) In Western Australia, while there is no duration cap, there is a financial cap of $190,700 on total benefits payable.
>
> (d) In Tasmania the maximum time period for weekly payment entitlements depends on the worker's degree of whole person impairment (WPI). If WPI is less than 15 per cent, weekly benefits are payable for up to nine years. If WPI at least 15 per cent but less than 20 per cent, weekly payments are payable for up to 12 years. If WPI at least 20 per cent but less than 30 per cent, benefits are payable for up to 20 years. If WPI is greater than 30 per cent, benefits are payable up to retirement age.

267 Submission 144, WorkCover Authority of NSW, p 7.

268 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', p 26.

269 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', p 26 (Option 8).

270 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', p 26.

(e) In South Australia and under the Commonwealth scheme, weekly benefits terminate upon the worker reaching Commonwealth retirement age.[271]

3.109 The proposal to place a time cap on weekly benefits was supported by insurance and employer groups for two key reasons, which are interrelated. Supportive stakeholders submit that this option will save money by reducing long-term reliance on weekly benefits, and consequently that it would incentivise the injured worker's return to work.[272] The Australian Industry Group framed it as follows:

> As there is no limit on the duration of weekly benefits under the Scheme, workers with little to no permanent impairment are able to receive weekly benefits up until 66 years of age. Ai Group supports a cap on the duration weekly payments of 2 years. This will encourage the worker to recover and return to work, rather than rely on weekly benefits.[273]

3.110 The Australian Federation of Employers and Industries stated this would help workers focus on return to work:

> [The proposal] would … give workers an indication of recovery time frames and assist them focus on achieving work readiness. This is consistent with the fundamental principle of workers compensation to support workers to return to work.[274]

3.111 In supporting the proposal, Shoalhaven City Council noted the difficulties experienced by employers in managing former employees who continued to receive weekly benefits:

> It is a huge burden for a Self-Insurer business to pay injured workers for many years, sometimes decades, where the Employer/Self-Insurer has no control over what the injured workers are doing in their continuing daily life. Access to weekly benefits should be limited to 2 years, following which all liability for an injury should cease.[275]

3.112 Some Inquiry participants alleged that some employees seek out particular doctors in order to obtain certificates that would enable them to remain off work. The Australian Federation of Employers and Industries submitted:

> The absence of any time frame for recovery and the widespread practice of nominating treating doctors to issue repetitive medical certificates without challenge is costly for the scheme and makes employers' stringent return to work obligations difficult to manage.[276]

3.113 The NSW Farmers' Federation supported this view, though acknowledged that evidence of this practice was anecdotal:

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271 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', Appendix 3, Comparison with other Australian jurisdictions.

272 Submission 142, Australian Industry Group, p 17; Submission 185, Business Council of Australia, p 6; Submission 145, Insurance Council of Australia, pp 4-5; Submission 118, NSW Worker's Compensation Self Insurer's Association, p 9.

273 Submission 142, Australian Industry Group, p 17.

274 Submission 130, Australian Federation of Employers and Industries, pp 41.

275 Submission 148, Shoalhaven City Council, p 3.

276 Submission 130, Australian Federation of Employers and Industries, p 41.

> From the discussions that I have with members I have found that one of the issues they encounter is receiving continuous medical certificates from the doctor stating that unfortunately the employee's condition has not improved to the extent that he can perform light duties or he needs to be off work because of total incapacity. It is anecdotal evidence, but they might see that person on the weekend in the community chasing pigs and so on. I repeat that that is anecdotal evidence.[277]

3.114 StateCover Mutual acknowledged that the proposal to cap weekly benefit duration would result in savings, but were cautious of supporting the proposal without the benefit of further detail:

> StateCover acknowledges that a cap on weekly payment duration would bring about a tangible and direct reduction in scheme costs; however, we would like to see further detail on this Option to provide a fully considered response. We believe there are opportunities to reinforce expectations around work readiness by strengthening the effectiveness of S52A (1987 Act) and the application of S40 (1987 Act) as intended (capable of earning rather than actually earning).[278]

3.115 There were many stakeholders who rejected the proposal to cap weekly benefit payments after a specified time period.[279] Some noted that the principle underlying the proposed reform, namely that workers require an incentive to return to work, already exists because the current rate of weekly benefit acts as an incentive for the worker to return to work. For example, the CFMEU submitted:

> … being on worker's compensation is a financial burden … There is often a significant drop in weekly income as individuals will be paid the base rate of either the EBA [Enterprise Bargaining Agreement] or award. They do not receive allowances or overtime whilst on workers compensation. Therefore from day one [they] lose out financially.[280]

3.116 Unions NSW submission raises a number of issues with the principle on which the proposed reform is based. These include that:

- it overlooks research that injured workers overwhelmingly want to return to work following injury;
- the majority of injured workers are able to return to work within a relatively short timeframe;
- it assumes that a return to work is the sole responsibility of the injured worker, whereas in reality … it also requires the cooperation of the compensating authority and … the worker's employer;
- it assumes return to work rates are correlated with steeper step-downs, and notes evidence to the contrary; and

277 Ms Gracia Kusuma, Industrial Relations Manager, NSW Farmers' Federation, Evidence, 25 May 2012, p 87.

278 Submission 97, StateCover Mutual Ltd, p 6.

279 Submission 32, United Services Union; Submission 143, Construction Forestry Mining and Energy Union; Submission 146, Australian Manufacturing Workers Union; Submission 153, Police Association of NSW; Submission 77, Bar Association of NSW; Submission 122, Australian Lawyers Alliance.

280 Submission 143, Construction Forestry Mining and Energy Union, pp 7-8.

- there is no evidence that malingering has been a contributing cause to the deteriorating performance of the New South Wales scheme, and refers to Australian research that supports the proposition that workers compensation fraud is not a systemic problem.[281]

3.117 The Law Society comment in its submission that the proposal to 'provide 'financial disincentives' as suggested in the Issues Paper'[282] is in direct conflict with the purpose of the legislation, prescribed in section 3(c) of the *Workplace Injury Management and Workers Compensation Act 1998*:[283]

> The purpose of this Act is to establish a workplace injury management and workers compensation system with the following objectives:
>
> (c) to provide injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses … [284]

3.118 A number of individuals who made submissions to the Inquiry referred to the hardship they already experience under the current Scheme with respect to receipt of weekly payments. One injured worker, who sustained a shoulder injury resulting in permanent severe disability in that shoulder, stated:

> I … continue to rely on the statutory payment to go a small way toward compensating me for the work hours I'm no longer able to manage and the promotions I'm no longer able to gain … the proposed changes would result in me losing these benefits. … this would obviously have a major impact on me and my family…I have already been told by a number of specialists that I will not be able to work to retirement age, in fact most are surprised that I am able to work at all. When this time comes we will be dependent on that small statutory payment. If this payment was to cease we would be forced to live in poverty.[285]

3.119 One barrister explained the circumstances of one of his clients, a 'typically disadvantaged young apprentice worker crippled at work at a factory in far western Sydney.' In explaining how his client sustained spinal injuries resulting in incomplete paraplegia after being directed by his negligent employer to drive, on an unsuitable surface, a forklift for which he was unlicensed and untrained, the barrister described the impact of the injury and his client's subsequent reliance on workers compensation. In particular, he notes the inadequacy of weekly benefits to appropriately provide for and compensate his client:

> He can, after 3 years rehab, walk but only to a limited extent, with the aid of expensive leg splints costing about $150 pw alone to maintain and replace and likely to cost more in the future as he ages and his needs become more pronounced and the technology improves. He has additional expenses for treatment and care of perhaps $350 pw. Estimated conservatively his ongoing expenses for treatment and needs are about $500 pw for life, another 60 odd years.

281 Submission 135, Unions NSW, pp 23-24.

282 Submission 133, The Law Society of New South Wales, pp 10-11.

283 Submission 133, The Law Society of New South Wales, pp 10-11.

284 *Workplace Injury Management and Workers Compensation Act 1998*, s 3(c).

285 Submission 6, Name suppressed.

> He previously earned about $600 pw net and was about to complete his apprenticeship as a cabinet maker and would have been earning about $1000 pw net plus by now, in future he would probably have done better still. He receives his s. 40 weekly benefits of about $450 pw and is losing about $500 pw in wages … He cannot work in his trade. He has limited skills and real barriers in terms of location and mobility and mental and physical stamina in gaining new ones.[286]

3.120 The barrister explained that his client has few viable options that will adequately compensate for his injury:

> If he sues in damages, he will receive only his economic loss to age 67, discounted by his residual capacity if any, vicissitudes, and, the 5% factor. He does not receive, as he would if he had had a motor accident, by for example, rolling the forklift on the driveway receive damages for his treatment expenses, domestic and personal care, and all the other special needs of a paraplegic including his splints. Nonetheless in a catastrophic case a substantial sum, perhaps $650,000.
>
> However on obtaining his judgement against his obviously negligent employer he loses his s 60 treatment expenses, which in 20-25 years will have exceeded the sum awarded.
>
> His options for compensation are to either take maybe $650,000 now and run out of money in a few years, or survive on $450 pw and have his medical needs met.
>
> At 25 he has become a pensioner through no fault of his own as a result of gross negligence by his trusted employer. He will never realise even a fraction of his economic potential and that loss will go substantially uncompensated throughout his life. If properly compensated he could employ carers, as it stands his mother bears this burden. She also has no right to be compensated.[287]

Committee comment

3.121 The Committee received evidence indicating strong support both for and against reform options to introduce earlier step-downs in weekly benefit payments and to cap weekly payment duration.

3.122 Those supporting these options noted the cost of weekly benefit payments to the Scheme as a rationale for their introduction, but many also referred to them incentivising workers to return to work.

3.123 Stakeholders opposing these reform options argued that they are pure cost saving measures, and that the hardship they would cause to injured workers would be catastrophic and is not justified. They also reject the second arm of the argument made by those supporting the reforms, that workers need incentives to return to work, on the basis that the current weekly benefit regime already creates an incentive because of what they describe as meagre payment amounts that do not match most injured workers pre-injury pay.

286 Submission 1, Mr David Elliot.

287 Submission 1, Mr David Elliot.

3.124 As discussed in Chapter 2, the Committee received limited evidence of the precise financial impact of the proposed reform options regarding weekly benefits, but notes that WorkCover submitted that they comprised one of three main cost drivers of the Scheme.

3.125 The Committee notes that costings for the suite of reforms in the Issues Paper provided by Scheme actuary, Mr Playford, include indicative projected savings arising from changes to the weekly benefit regime. These costings are examined later in this Chapter.

3.126 The Committee supports the simplification of the earnings base from which to calculate weekly income benefits viz a measure of average actual pre-injury earnings over, say, the previous 12 months. There is no reason of logic or fairness to treat award workers differently from than non-award workers. The Committee expects that a uniform measure would simplify the administration of benefit arrangements. It would also improve benefits by taking into account regular overtime.

Recommendation 5

That NSW Government ensure that, under the Workers Compensation Scheme, the weekly income benefits of both award and non-award workers be determined by reference to one measure of average actual pre-injury earnings.

3.127 The Committee agrees that step downs should occur at 13 weeks rather than 26 weeks. Among other things, this has the advantage of some harmonisation with the Victorian model. More importantly, this would more closely mirror clinical recovery outcomes (especially with work capacity testing) and incentivise return to work.

Recommendation 6

That the NSW Government ensure that, under the Workers Compensation Scheme:

- in cases of total incapacity, workers receive weekly income benefits on the Victorian model, namely (broadly speaking) 95 per cent of their pre-injury average weekly earnings for the first 13 weeks of total incapacity, and then 80 per cent from week 14 onwards.
- in cases of partial incapacity, workers receive weekly income benefits on the Victorian model, namely (broadly speaking) 95 per cent of their pre-injury average weekly earnings for the first 13 weeks of total incapacity and then 80 per cent from week 14 onwards (in each case less certain amounts).

3.128 The Committee accepts the need to cap the duration of weekly income benefits for less seriously injured workers.

3.129 First, given the Scheme's poor financial position, a conservative position must be taken at the present time with respect to the benefits available under the Scheme.

3.130 Secondly, after, say, five years less seriously injured workers should be back in the workforce.

3.131 The Committee therefore believes that an approach similar to Queensland's is appropriate for less seriously injured workers.

3.132 The Committee considers that for an intermediate category of injured worker, it would be appropriate for the Government to provide a more generous time cap of, say, nine years. For the most seriously injured workers there should be no time cap, except that benefits would cease at the Commonwealth retirement age.

Recommendation 7

That the NSW Government seek to amend the *Workers Compensation Act 1987* to impose a time cap on weekly income benefits of no less than five years for less seriously injured workers, with a more generous time cap for an intermediate category of injured worker and ultimately no time cap (except the Commonwealth retirement age) for the most seriously injured workers.

3.133 Unlike South Australia and the Commonwealth, in New South Wales weekly payments are payable until 12 months after reaching the Commonwealth retirement age. Given the Scheme's poor financial position, the Committee considers that this aspect of the Scheme should be changed.

Recommendation 8

That the NSW Government ensure that, under the Workers Compensation Scheme, in addition to any other caps, the absolute end date for the payment of all weekly benefits be the Commonwealth retirement age.

Cap medical coverage duration

3.134 Proposal 13 in the Issues Paper is a cap on the liability of the Scheme for medical costs.

3.135 In other jurisdictions the position on capping is as follows:

(a) In Victoria and Tasmania, the liability for costs of medical and related treatment is capped at one year after the cessation of weekly benefits.

(b) In Queensland there is a cap of five years.

(c) In Western Australia there are monetary caps viz reasonable expenses covered up to a cap of $57,319, then up to $50,000 on the order of an arbitrator and then $250,000 in some cases.

(d) In South Australia and in the Commonwealth scheme, there are no dollar or time caps.[288]

[288] Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', Appendix 3 Comparison with other Australian jurisdictions.

3.136 The Issues Paper notes that the most recent national data available, in the comparative performance monitoring report for 2009/10, show that New South Wales has the highest expenditure of service to workers which encompasses medical treatment, rehabilitation, legal costs, return to work assistance, transportation, employee advisory services and interpreter costs.

Committee comment

3.137 The Committee accepts that given the Scheme's poor financial position, a conservative position must be taken at the present time with respect to benefits available under the Scheme.

3.138 The WorkCover scheme should provide a level of reasonable coverage of medical and related treatment, but it is not unreasonable that that coverage be proximate to the date of injury and time off work by the worker. Australia has a comprehensive safety net of medical and hospital coverage for all Australians under Medicare. Injured workers whose workers compensation medical benefits expire after a time cap are not suddenly put on the 'scrap heap'. They will enjoy the benefits of the Medicare system like everyone else, including those whose serious accidents were never covered by any accident compensation scheme (e.g. because they were not in a motor accident or they were outside the work place) and those born with serious disabilities.

Recommendation 9

That the NSW Government seek to amend the *Workers Compensation Act 1987* to cap reasonable and necessary medical and related treatment expenses to those incurred whilst weekly benefits are paid and for one year after the cessation of those payments.

Work capacity testing

3.139 The Issues Paper proposes the introduction of work capacity testing of injured workers, who are receiving long term weekly benefits, at specific points although these points are not defined.[289] Although the Issues Paper does not define what 'work capacity testing' is, it suggests that it could aid in the transition of workers from weekly benefits back into paid employment:

> Ceasing weekly benefits after a certain period for workers with a work capacity would assist injured workers to move forward from their workplace injury and focus on their future employment prospects.[290]

3.140 The Issues Paper suggests that in the lead up to undertaking a work capacity test, injured workers would need to be supported by appropriate rehabilitation to make them as work

[289] Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', p 25 (Option 7).

[290] Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', pp 25-26.

ready as possible.[291] The proposal in the Issues Paper does not contain detailed information on what is proposed, and is vague about what it is referring to in using the term 'work capacity testing' and in respect of how it would be implemented.

3.141 The Committee understands that 'work capacity testing' refers to an assessment of an injured workers' capacity to undertake suitable employment. However, there is a lack of clarity as to what this means in the context of the reform option and more broadly. For example, it is not clear whether the term is intended to refer to a medical or some other form of assessment of capacity; or indeed whether the assessment relates to a specific type of work, or to an injured workers capacity for any work.

3.142 This lack of clarity was reflected in submissions to the Committee, some of which suggested that the legislation already provides for 'work capacity testing', although it is not called that, while other argued that such a reform should be introduced.

3.143 For example, the Law Society of New South Wales advised that provisions exist in the *Workers Compensation Act 1987* that allow for work capacity testing and there are severe penalties for non-compliance, such as the suspension of the right to weekly compensation.[292]

3.144 Ms Roshana May, Member, Injury Compensation Committee of the Law Society of New South Wales outlined the current provisions in the *Workers Compensation Act 1987* that provide for work capacity testing:

> Section 40A and section 38A provide for testing of a worker's capacity to return to work—commonly called functional capacity testing or vocational assessment. It is for the purpose of returning to work. How it works is; under section 40A an insurer can order a worker to comply with a direction to attend an assessment of their capacity to work. It is generally used for the purposes of evaluating their section 40 makeup pay entitlements or rather their ongoing partial incapacity entitlements. It is generally used as a function to discontinue payments or take people off payments. Under section 38A there is a capacity for employers to utilise vocational assessments for the purposes of determining what sort of work in the open labour market a worker might reasonably be able to return to, absent that work being provided by their employer. It is used for the purpose of delivering to them greater benefits than they would ordinarily get for the first 12 months of their partial incapacity after their first 26 weeks of benefits.[293]

3.145 However, there was some acknowledgement by Inquiry participants that the current work capacity testing system was not ideal and raised concerns about ineffectiveness and noted the lack of an independent assessment process and binding determinations. It was argued that, in some cases, injured workers can 'doctor shop' to get a desired outcome and others employers are not enforced to provide suitable duties for injured workers assessed with some level of work capacity.

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291 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', pp 25-26.

292 Submission 133, The Law Society of New South Wales, p 10.

293 Ms Roshana May, Member, Injury Compensation Committee, The Law Society of New South Wales, Evidence, 21 May 2012, p 44.

3.146 Mr Stephen Crerar, Manager, Human Resources, Shoalhaven City Council, advised that the current work capacity testing is not binding and therefore workers can potentially go back to their doctor for further review:

> … there is no binding effect of it [work capacity test] and the injured worker can go back to their general practitioner and they do not necessarily have to cooperate. We have had good success with occupational physicians, with medical specialists in giving us good quality advice on capacity to work but again that is not binding so the injured employee can go back to their general practitioner.[294]

3.147 This was also highlighted by the NSW Business Chamber which stated that some injured workers can go 'doctor shopping to find a practitioner who will provide medical certificates to allow continued absences from work. Such instances not only add unnecessary costs to the scheme, they may not be in the best interests of the worker and they only serve to undermine the credibility of the scheme in the minds of some employers. It is reasonable the scheme should require work capacity testing.'[295]

3.148 The Police Association of NSW commented that the existing provisions for work capacity testing in the Act are not being applied consistently or effectively and change is required, including some enforcement measures on the employer to provide suitable duties for the injured worker:

> Assessing an injured workers capacity is already available to insurers under the current regime, however it is not utilised consistently or effectively. At present under the Work Cover guidelines, the insurer can request that an injured worker be assessed when the medical information is not readily available or is inconsistent from the treating Doctor. Our experience however, is that when an insurer has an independent report particularly relating to capacity for work there is a heavy reliance upon the provision of suitable duties by the Employer. If those duties are not made available to the injured worker there is little that can be done to enforce this recommendation. The current systems available need to remain however changes to the scheme need to strictly enforce the implementation of such outcomes on the Employer by the insurer. If the duties are not being made available these assessments are pointless providing the injured worker with little or no options regarding suitable duties.[296]

3.149 The proposal in the Issues Paper was generally supported by insurance and business groups on the basis that it would assist in addressing the 'long tail' claims in New South Wales, thereby reducing costs currently falling onto the Scheme:

> The ICA strongly supports the implementation of work capacity testing to mitigate the longevity of less significant claims … NSW has the largest tail liability of all Australian workers compensation schemes as there is no effective mechanism to reduce long term payments to those who may be able to return to the workforce.[297]

3.150 The NSW Self Insurance Corporation supported the proposal for work capacity testing:

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294 Mr Stephen Crerar, Manager, Human Resources, Shoalhaven City Council, Evidence, 28 May 2012, p 61.

295 Submission 129, NSW Business Chamber, p 11.

296 Submission 153, Police Association of NSW, pp 8-9.

297 Submission 145, Insurance Council of Australia, p 8.

> We support this option, as we believe that it will promote return to work for claimants and possibly help offset any increase in costs that could potentially arise if weekly benefits are set to a higher level of pre-injury earnings than at present.[298]

3.151 The NSW Worker's Compensation Self Insurers' Association supported, in principle, the proposal for work capacity testing:

> The Association supports, in principle, the introduction of work capacity testing at least to the extent that this allows for greater consistency between the New South Wales Scheme and other jurisdictions. The implementation in New South Wales of work capacity testing should however be part of a broader range of amendments for payments to partially incapacitated workers if it is to provide any real benefit.
>
> The Association notes that in New South Wales there is already the opportunity for Employers to obtain reports specifically addressing work capacity and vocational opportunities, however it is the experience of many members of the Association that these reports are not accorded sufficient weight when disputes regarding incapacity are determined in the Workers Compensation Commission.[299]

3.152 Those supporting the proposal also suggested that it would incentivise return to work. For example Ms Denise Fishlock, Chairperson, NSW Worker's Compensation Self Insurer's Association commented:

> I think it would encourage more injured workers to gain suitable employment … At this point we are looking at people staying home longer and incapacity testing would be something that would give an indication of their ability to work.[300]

3.153 Mr David Krawitz, Chief General Manager, Allianz Insurance, indicated that '[w]e agree in principle with the proposed changes outlined in the issues paper and in particular the recommendation for a more effective work capacity testing regime.'[301]

3.154 Ms Susan Smith, Project Manager – Disability Safe, National Disability Services (NSW) indicated that they 'support the use of work capacity testing to identify work fitness so that a return to work can be progressed either with the same or an alternate employer.'[302]

3.155 Mr Peter Glover, Director, NSW Master Builders Association, advised that the Association supports more work in the area of work capacity testing:

> In simple terms, what we have identified there is that we believe there is very little or insufficient work in our industry relating to the issue of being able to test people's capacity and fitness to go back into the workforce. And I suppose too, sometimes that is somewhat limited because in the building industry there are not a lot of options for light duties. In most cases either you are fully fit or you are not fit, and that transition is not always easily managed in our industry. I think what we were seeking to highlight

298 Submission 131, NSW Self Insurance Corporation, p 5.

299 Submission 118, NSW Worker's Self Insurers Association, pp 8-9.

300 Ms Denise Fishlock, Chairperson, NSW Worker's Compensation Self Insurer's Association, Evidence, 21 May 2012, pp 32-33. See also Submission 185, Business Council of Australia, p 6.

301 Mr David Krawitz, Chief General Manager, Allianz Insurance, Evidence, 28 May 2012, p 38.

302 Ms Susan Smith, Project Manager – Disability Safe, National Disability Services (NSW), Evidence, 25 May 2012, p 73.

> there was that we believe there could be more work done in that area which would help to transition people from the workers compensation injury stage and back to work.[303]

3.156 Many stakeholders supporting the introduction of work capacity testing commented that it should be independent and of a particular standard to be of real benefit. For example, Allianz Australia Workers' Compensation Ltd stated that:

> To ensure consistency and correct application, the binding work capacity testing should be undertaken by an accredited WorkCover Injury Management Examiner (IME).[304]

3.157 Similarly, the Australian Federation of Employers and Industries commented that work capacity testing should be independent:

> We agree with capacity testing at specific points and appropriate rehabilitation to make workers as work ready as possible. However, there must be changes in the scheme to ensure that the capacity testing must be independently and properly done.[305]

3.158 Mr Mark Goodsell, New South Wales Director of the Australian Industry Group, advised that if work capacity testing is to be undertaken it needs to be done independently so that employers can rely on the reports:

> You need objectivity, and you need perception of objectivity, and you need to have someone making that decision who understands the full nature of the system they are engaged in. Most general practitioners engage in private medicine, and they make an assessment, as I understand it, almost solely on what they are told by the patient. So you need a system that gives the employer confidence; and it needs to be a proper system so the employee has confidence. But companies do get suspicious when the doctor makes decisions about work capacity without really knowing what the options are for work. The other phenomenon are the claimants—in much less cases—who keep changing doctors until they find one who says they are not fit for work.[306]

3.159 The Civil Contractors Federation supported the idea of work capacity testing and advised that '[t]he process of conducting work capacity assessments is, in our opinion, one of the keystone elements of an efficient workers compensation scheme.' Further to this, the Federation commented that they had some additional concerns that require consideration including:

- the conduct of work capacity assessment should be separated from injury treatment;
- there must be more structure in the work capacity assessment management process including clear lines of authority to ensure the focus remains on a timely return to work;
- the injured worker's exclusive right to select their nominated treating doctor to do assessments and treatment should be removed; and

303 Mr Peter Glover, Director, NSW Master Builders Association, Evidence, 28 May 2012, pp 23-24.

304 Submission 137, Allianz Australia Workers' Compensation (NSW) Ltd, p 9.

305 Submission 130, Australian Federation of Employers and Industries, p 41.

306 Mr Mark Goodsell, NSW Director. Australian Industry Group, Evidence, 25 May 2012, p 55.

- work capacity assessments must be undertaken at key benefit trigger points, and at regular periods throughout the life of a claim.[307]

3.160 A number of Inquiry participants, including some legal organisations and unions, opposed the idea of work capacity testing, primarily as they saw it as a mechanism for removing payments to injured workers.

3.161 Representatives from the Law Society of New South Wales suggested that existing provisions in the Act for work capacity testing 'are generally used as disentitling provisions rather than enabling provisions'[308] for workers to return to work and 'used in reality as nothing more than a tool by insurers to try and reduce benefits under section 40'.[309]

3.162 The Law Society of New South Wales indicated that 'the situation is not that there are inappropriate mechanism available; rather, it is their under-utilisation or misapplication. This is a matter highlighting the need for Scheme Agent training by Workcover NSW. The system does not need reform, it needs proper application.'[310]

3.163 The NSW Bar Association raised concerns with work capacity testing. For example, the Association argued that work capacity testing is largely used as a tool for getting injured people off payments. Further to this the Association stated:

> In the absence of a requirement for employers to employers to provide suitable employment for a worker returning from injury, work capacity testing does not achieve its stated goals. Forcing workers to return to unsuitable positions negatively affects the productivity of businesses and has clear adverse consequences for the worker. The process in reality increases red tape and therefore costs to the scheme without any viable result for the worker of employer.[311]

3.164 Similarly, the Australian Lawyers Alliance stated that 'work capacity testing is predominantly used as a method of terminating weekly payments, rather than identifying appropriate employment prospects and assisting injured workers to locate such prospects.'[312] In addition the Alliance commented:

> There are already mechanisms in place in the legislation and guidelines and these should be properly monitored and enforced rather than introducing new mechanisms which add to the cost of the scheme. The suggestion that ceasing payments will 'assist injured workers to move forward from their workplace injury to focus on their future employment prospects' is as offensive as it is misconceived. It is prefaced on the unsubstantiated assumption that injured workers do not want to return to work. [313]

307 Submission 170, Civil Contractors Federation, pp 21-23.

308 Ms May, Evidence, 21 May 2012, p 44.

309 Mr Timothy Concannon, Member, Injury Compensation Committee, The Law Society of New South Wales, Evidence, 21 May 2012, p 44.

310 Submission 133, The Law Society of New South Wales, p 10.

311 Submission 77, Bar Association, p 6.

312 Submission 122, Australian Lawyers Alliance, p 16.

313 Submission 122, Australian Lawyers Alliance, pp 16-17.

3.165 Slater & Gordon Lawyers stated that work capacity testing has no meaningful role in the return to work process as, while it may indicate a worker can perform a job, it does not take into account whether suitable work is available:

> Work Capacity Testing has no meaningful role in the return to work process. The arbitrary and unrealistic testing of physical tolerances is valueless for the injured worker. It doesn't help them get a job; it merely tells them that theoretically, they may have a physical capacity to perform a job, if they are lucky enough to find one.
>
> In our experience, injured workers have a good sense of whether they have any fitness for work, and they would take any opportunity to work that they can find. And this is the nub of the issue, they need to be able to find and perform work. Work Capacity Testing contributes nothing to this objective.[314]

3.166 Unions were generally opposed to the proposal for work capacity testing outlined in the Issues Paper as they see it as unfair and as a mechanism to reduce payments to injured workers.[315] For example Ms Mallia, representing the CFMEU, raised concerns that work capacity testing can result in poor outcomes for injured workers:

> We have some real concerns with it. We think that can be used as a tool—and we have seen it already in the system—whereby doctors and assessors can assess people have a capacity to work. They are taken off the system and they are left to fend for themselves in terms of finding alternative employment. We just do not think that is very realistic.[316]

3.167 Unions NSW also commented that work capacity testing is used as a mechanism to cut payments to injured workers. Unions NSW drew on experiences in Victoria and South Australia, where there are legislated requirements for work capacity testing, to demonstrate its assertion that this testing is unfair and currently undergoing legal challenge:

> Due to the inherent unfairness of work capacity reviews they have been the subject of an increasing number of appeals in the courts. In South Australia, there have been a number of successful challenges to the use of work capacity reviews. These have included the *Campbell, Yaghoubi* ([2011] SASCFC 58) and *Martin* ([2012] SASCFC 36) cases, which have all had the effect of reducing the expected liability reductions that work capacity reviews were intended to generate. Emerging judicial interpretations on the meaning of 'suitable employment' are likely to reduce their effectiveness even further.[317]

3.168 The NSW Nurses' Association is opposed to the work capacity testing of workers but put forward the notion of work capacity testing of employers.[318] Mr Stephen Hurley-Smith, Industrial Relations Officer, NSW Nurses' Association, explained the concept of work capacity testing of employers:

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314 Submission 126 Slater & Gordon Lawyers, p 15.

315 Submission 146, Australian Manufacturing Workers Union, pp 12-13; Submission 143, Construction Forestry Mining and Energy Union, pp 9-11; Submission 32, United Services Union, p 8.

316 Ms Mallia, Evidence, 25 May 2012, p 45.

317 Submission 135, Unions NSW, pp 25-26.

318 Submission 73, NSW Nurses' Association, p 7 and p 49.

> We believe, as I said before, that before an employer terminates an injured worker and before an employer withdraws suitable duties from an injured worker, there needs to be an assessment by someone independent not only to say to an injured worker, 'These are the duties you can perform', but also to say to the employer, 'These are the duties which you have to give to that worker.'[319]

Committee comment

3.169 The Committee received evidence from stakeholders both supporting and opposing this reform option. However, the lack of clarity in the Issues Paper as to the nature of the proposed reform resulted in stakeholder responses that were of a more general nature.

3.170 The Committee supports the concept of mandatory, independent, binding work capacity testing at defined intervals.

3.171 The Committee rejects any suggestions that this is somehow unfair. Rather it is self-evidently logical and fair, as a matter of both encouraging return to work and cost control, that a claim based on work incapacity should be tested in this way. There is nothing inherently unfair about using work capacity testing to remove a claimant from the system if that testing shows the claimant has the requisite work capacity. Further, if there is work capacity, return to work should not be dependent on the current employer providing suitable duties.

3.172 The Committee accepts the commentary of the Civil Contractors Federation noted above.

Recommendation 10

That the NSW Government seek to amend the *Workers Compensation Act 1987* to require mandatory, independent, binding work capacity testing at defined intervals.

Remove 'pain and suffering' as a separate category of compensation

3.173 The Issues Paper notes that the lump sum payment for pain and suffering was a subjective measure of the financial impact of a worker's injury which was originally inserted into the Workers Compensation Act 1987 in substitution for common law rights.

3.174 In 1989, an entitlement to pursue common law rights was restored in a modified form, however the lump sum payment for pain and suffering was retained in the Act.

3.175 The Issues Paper notes arguments that this is an 'anomaly' and that it 'creates significant disputation and legal costs'.

3.176 The Issues Paper notes a suggestion that the entitlement to compensation for pain and suffering be incorporated 'into lump sum payments for injuries with whole person impairment greater than 10 [per cent]' and that this 'would reduce disputation and reduce administration costs'.

[319] Mr Stephen Hurley-Smith, Industrial Relations Officer, NSW Nurses' Association, Evidence, 25 May 2012, p 67.

3.177 The Issues Paper notes a further suggestion that the proposed incorporation of compensation for pain and suffering into the lump sum payments for whole body impairment 'aligns with an objective measure of the worker's physical impairment ... rather than a subjective measure of the worker's 'loss'.'

3.178 According to material appended to the Issues Paper, the position in other jurisdictions is as follows:

(a) Victoria and South Australia – 'incorporated in non economic loss – not a separate category'.

(b) Queensland, Western Australia and Tasmania – 'Not specified. Common law for pain and suffering is available'.

(c) Commonwealth scheme – 'Workers can elect [between] common law and compensation for non economic loss including pain and suffering'.[320]

3.179 In its submission to the Inquiry, the NSW Bar Association did not oppose the incorporation of compensation for pain and suffering into lump sum payments, and acknowledged that the 'removal of this separate head of claim could result in administrative savings to the [S]cheme.'[321]

Committee comment

3.180 The Committee accepts the attractiveness of changes to reduce disputes and administration costs, especially given the comparatively modest amounts of compensation available as compensation for pain and suffering (a maximum of $50,000).

Recommendation 11

That the NSW Government seek to amend the *Workers Compensation Act 1987* to incorporate payments under section 67 for pain and suffering into section 66 for lump sum payments for injuries.

Only one claim can be made for WPI and 'One assessment for statutory lump sum, commutations and work injury damages'

3.181 In relation to proposal 10, the Issues Paper notes a suggestion that permitting only one claim for whole person impairment 'might ensure that [workers'] injuries are stabilised providing them with appropriate compensation' and that it 'might reduce the ability of fraudulent or exaggerated injuries to meet the thresholds.'

3.182 In relation to proposal 11, the Issues Paper notes that current WorkCover guidelines provide objective criteria for assessing whole person impairment. The Issues Paper notes suggestions that there is no reasonable rationale for the obtaining multiple reports, that such an approach

320 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', Appendix 3 Comparison with other Australian jurisdictions.

321 Submission 77, Bar Association, p 6.

can be distressing for injured workers and that this may contribute to feelings of being 'injured'. The Issues Paper states that having only one assessment of impairment for statutory lump sum payments, commutations and work injury damages might reduce disputes as well as medical, legal and administrative costs of the Scheme.

3.183 In its submission to the Inquiry, the NSW Bar Association expressed concern that these proposals may encourage injured workers to delay a WPI assessment 'for an extended period of time until all conservative and surgical measures have been exhausted'. The Association argued that such a delay may result in unnecessary uncertainty with adverse implications for the Scheme tail.

3.184 The Bar Association proposed that an approach similar to that in s 62 of the Motor Accidents Compensation Act 1999 be adopted. This provision allows an additional assessment or claim in circumstances where the injured worker's condition has deteriorated in a material way.'

Committee comment

3.185 The Committee accepts there are benefits in limiting the number of assessments which a worker may obtain. This will reduce medical, legal and administrative costs of the Scheme. The Committee however believes that in some isolated cases, an injustice may be done if there were a limit of one assessment where there has been a significant deterioration in a worker's condition. The Committee proposes that where a worker has suffered a deterioration of whole person impairment at least 5 per cent, then the worker should be entitled to further reassessment for the purposes of s 66 lump sums, commutation and work injury damages. A worker should be limited to no more than two further reassessments.

Recommendation 12

That the NSW Government ensure that, under the Workers Compensation Scheme, after the determination of a claim for whole person impairment, only up to two further claims be permitted and in each case only if there has been a deterioration of whole person impairment of at least 5 per cent since the last determination.

Commutations

3.186 The *Workers Compensation Act 1987* provides that compensation payable to an injured worker may be paid out as a lump sum, or commuted, in certain circumstances.[322]

3.187 The WorkCover Authority of NSW provides the following explanation of commutation:

> A commutation is an agreement between the injured worker, employer and Scheme Agent or insurer to pay all of the injured worker's entitlements to weekly benefits, medical, hospital and rehabilitation expenses as a lump sum.
>
> By agreeing to a commutation the injured worker's entitlements to weekly payments and all other expenses will no longer be paid and the Scheme Agent or insurer will not be liable for further claims with regards to the injury.[323]

322 *Workers Compensation Act 1987*, Div 9.

3.188 The legislation sets out a number of preconditions that are required before a person is eligible for commutation, and WorkCover must certify that these are met.[324] The conditions include that:

- the injured worker must have a permanent impairment that is at least a 15 per cent whole person impairment
- compensation for permanent impairment and pain and suffering has been paid
- it is two or more years since the worker first received weekly payments for the injury
- all opportunities for injury management and return-to-work have been fully exhausted
- the worker has received weekly benefits regularly and periodically throughout the previous six months
- the worker must be entitled to ongoing weekly benefits; and
- weekly benefits have not been stopped or reduced as a result of the worker not seeking suitable employment.[325]

3.189 Commutations are consensual agreements between the insurer, employer and worker, however there is a requirement that the worker receive independent legal and financial advice prior to receiving the commutation, and WorkCover must approve the agreement. All agreements are required to be registered with the Workers Compensation Commission.[326]

3.190 The Issues Paper included an option for targeted commutation. It suggested that targeted commutation would:

> … allow commutation thresholds to be relaxed for specific classes of claim on a time limited basis. The Scheme Actuary and industry experts have advised against broadening access to commutations and such a measure would need to be limited to very specific classes of injury/claim. [327]

3.191 The Issues Paper did not specify how the thresholds could or should be 'relaxed'.

3.192 As noted in the Issues Paper, the Scheme actuary was cautious about expanded use of commutations. The Committee heard evidence from Mr Playford of PricewaterhouseCoopers that there was a place for commutations, but that their expanded use could result in financial pressure on the Scheme particularly in respect of the unpredictable behavioural changes they

323 WorkCover Authority of NSW, accessed 1 June 2012, <http://www.workcover.nsw.gov.au/injuriesclaims/benefitsentitlements/Pages/Commutations.aspx>

324 *Workers Compensation Act 1987*, s 87EA

325 *Workers Compensation Act 1987*, s 87EA (a)-(g). WorkCover Authority of NSW, accessed 1 June 2012, <http://www.workcover.nsw.gov.au/injuriesclaims/benefitsentitlements/Pages/Commutations.aspx>

326 WorkCover Authority of NSW, accessed 1 June 2012, <http://www.workcover.nsw.gov.au/injuriesclaims/benefitsentitlements/Pages/Commutations.aspx>

327 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', p 28 (Option 15).

can generate. Mr Playford, noting that commutations were broadly used prior to 2001, gave evidence of these concerns to the Committee:

> … the main driver of claims deterioration prior to the 2001 reform … was led by significant liberalisation and use of commutations in that era. I would not recommend that you have liberalised commutations, like there were back in the late 1990s, as a way of trying to improve outcomes under this Scheme because I suspect you would get similar behavioural changes to those that we saw then, the same lump-sum culture that we saw then, and likely see a deterioration in the Scheme's costs as a result of that type of strategy. That is not to say that limited targeted use of commutations might not be beneficial for some certain categories of claimants where there is a higher ratio of administrative cost to the liability of those claims, but I think it has to be very targeted and done very carefully and selectively to avoid the risk of a lump-sum culture spreading in the Scheme like we saw pre the 2001 reforms.[328]

3.193 The external peer review of the Scheme's actuarial valuation supported Mr Playford's assertion that strategic and controlled use of commutation may be beneficial, recommending that consideration be given to expanded use of commutation to address tail liability.[329] In explaining that recommendation, Mr Peter McCarthy of Ernst and Young gave evidence that it was critical that there be tight regulation on their use:

> … It goes with a very clear warning that the past experience in using commutations in this scheme has not been successful, but we think there is a very strategic, targeted, implemented, effectively and tightly controlled role for commutations.[330]

3.194 The Committee received evidence from stakeholders that was generally supportive of greater use of commutations, however there was a divide as to the manner and types of claims in which commutations should be used between the broad stakeholder groups: business, insurance and employers on the one hand, and unions, legal, health and service providers on the other.

3.195 Business, insurance and employer groups aligned in their reasons for support of commutations, with most suggesting that they did so on the basis that use of commutations was strategic or targeted. For example, the Australian Federation of Employers and Industries submitted:

> We agree with the proposal to introduce limited commutation. There is a clear need to be limited to very specific classes of injury/claim within specific time frames.[331]

3.196 The Insurance Council supported this view, stating:

> While the ICA supports measures which aid the appropriate rehabilitation of injured workers back into the workforce, we support targeted commutation through appropriate actuarial analysis.[332]

328 Mr Playford, Evidence, 21 May 2012, p 21.

329 Ernst & Young, *WorkCover Authority of NSW - External Peer Review of Outstanding Claims Liabilities of the Nominal Insurer as at 31 December 2011*, 22 March 2012, p 9.

330 Mr Peter McCarthy, Partner, Ernst and Young, Evidence, 21 May 2012, p 21.

331 Submission 130, Australian Federation of Employers and Industries, p 46.

332 Submission 145, Insurance Council of Australia, p 8.

3.197 The NSW Business Chamber supported the option, but noted that historically there is evidence to demonstrate that commutations are only effective when tightly controlled:

> Commutations can be an effective strategy for managing long tail claims and providing long term claimants with both the incentive and means to move away from scheme dependency. A targeted commutation programme in the 1990's was initially successful allowing long tail claimants to move on while reducing scheme liabilities. That initial success was lost when commutations became a convenient way for the then licenced insurers to reduce their tail claims by offering settlements which were greater than the projected cost of individual claims. This is not a sustainable outcome and it lead to the current highly constrained commutation provisions. The use of commutations needs to be redesigned to allow for their greater use, but that design has to guard against commutations becoming another driver of a lump sum culture in the scheme.[333]

3.198 Union groups indicated cautious support for commutations, noting that they did so only if they resulted in fair outcomes for workers. However, at least two unions acknowledged that greater use of commutations offered the ability to target the Scheme's deficit and realise cost savings. For example, the Nurses' Association commented:

> The Association supports this proposal if the commutations result in fair compensation for workers. In our experience, the overwhelming majority of injured workers wish get out of the workers compensation system and take control of their lives. We believe that such commutations would massively reduce the alleged deficit within the workers compensation scheme.[334]

3.199 Similarly Ms Mallia, of the CFMEU, indicated her unions' support for the appropriate use of commutations, noting the benefits they offered to the worker and the Scheme:

> We would support them … on the basis that all options at the end of the day have been exhausted for a worker. So it could not be done on day one but, clearly, if someone could not go back to work … they should be given the option of getting off the drip-feed … many of our long-term injured workers use that money … to pay off their mortgages, defray some of their debts, to adjust to working or to living with life where they cannot earn the sort of money they were earning [previously] … There are consequences of taking the money, particularly if at the end of the day in the future there might be the need for other medical interventions. But we think that people should be, with the agreement of the worker, given the opportunity in those sorts of circumstances. I think that would contribute a saving of some money to the Scheme.[335]

3.200 The Committee heard evidence from Mr Mark Lennon of Unions NSW, who indicated his organisations' qualified support for commutations, noting that it had to be part of an overall strategy for ensuring the best outcomes for workers:

> Commutation is a very vexed question … We would only support commutations in certain circumstances where it clearly is in the best interests of the worker … the problem with commutations is that they come into favour for a while and they are

333 Submission 129, NSW Business Chamber, pp 13-14.

334 Submission 73, NSW Nurses' Association, p 72.

335 Ms Mallia, Evidence, 25 May 2012, p 45.

> available but they are not used very strategically. It is just people exiting the system and maybe down the track end up still needing assistance with their work injuries, for whatever reasons, or needing financial assistance because they have not been able to return to work, and the money has gone. It has to be part of an overall strategy of ensuring that it is in the best interests of the workers if they are not going to be able to return to work or they want to move on to somewhere else in terms of work. In that context commutation is the best option for them.[336]

3.201 The AMWU was also warily supportive of commutations, noting problems faced by workers currently in the Scheme who had no reasonable prospects of exiting it:

> … there are some workers who would benefit and who have a preference for exiting the Scheme. They see it as exiting the tyranny of being a slave to the scheme agents and insurers. If it were done with proper governance with specific cases, some positives could be derived from it. We do not want to see it being used as a mechanism to horse trade people's entitlements. If people are getting commutations it should be a genuine payout for what they would have recovered had they continued in the Scheme.[337]

3.202 Legal groups supported greater use of commutations essentially echoing the reasoning given by employer and business groups and unions alike as to why commutations should be more readily used. Legal groups suggested that commutations offer an effective way of managing long tail claims, and allowed workers the ability to move on after an injury. Indeed, the Bar Association suggested that WorkCover's reluctance to utilise commutation has been a significant factor resulting in the Scheme's long-tail:

> … commutations … [are] the most effective way of managing 'tail claims' … there has been a systematic and prolonged objection to commutation by Workcover which has been a principal cause of the present tail. The Association believes [greater use of commutations] to be critical to the long term future of the scheme.[338]

3.203 The Australian Lawyers Alliance which, along with the Law Society, advocate that the whole person impairment threshold be removed altogether along with the requirement for WorkCover approval, suggested commutations offered the following benefits:

- reduces weekly benefit liabilities of the scheme
- reduces the medical and treatment related expense liabilities of the scheme
- brings 'tail claims' under control
- reduces the significant ongoing administrative cost of claims
- reduces the incidence of lump sum top up claims
- provides and overall saving to the scheme through the discounted buyout of a worker's continuing entitlements to benefits

336 Mr Mark Lennon, Secretary, Unions NSW, Evidence, 25 May 2012, p 27.

337 Mr David Henry, New South Wales Health and Safety Officer, Australian Manufacturing Workers Union, Evidence, 25 May 2012, p 60.

338 Submission 77, Bar Association of NSW, p 8.

- allows workers to get on with their lives by providing them with the opportunity of removing themselves from the Scheme with dignity rather than remaining on the 'slow drip feed' of weekly benefits from the Scheme.[339]

3.204 The Law Society, in response to questions taken on notice during evidence, advised the Committee that there were significant cost savings to be made from expanded use of commutations:

> Experience tells us that the cost of commutations relative to the estimate of outstanding liability on a claim generally runs at 50% or less. When considering the impact of commutations on cost savings, regard has to be had to the future cost of medical treatment and rehabilitation expenses which are subsumed in the commutation value and thereby reduced to zero.[340]

3.205 Although most stakeholders cautiously supported commutations, the Committee heard evidence from various stakeholders, including Mr Playford as noted above, who raised concerns about the potential contribution that inappropriately used commutations may have toward the establishment or continuance of a 'lump sum culture'.

3.206 The Committee heard evidence from Mr Playford and Ms Geniere Aplin, General Manager, Workers Compensation Insurance within WorkCover, that certain elements of the Scheme experience were indicative of a 'lump sum culture.' Ms Aplin described how the data suggested that injured workers were holding out for a lump sum payment and by doing so were contributing toward the lump sum culture:

> When we look at the system, ultimately you have injured workers who are staying off work for longer to receive a lump-sum benefit. Medical payments have significantly increased and it is difficult to ascertain legal payments because work injury damages costs are not regulated. So, ultimately, they are included when you look at the data in terms of an overall payment. As I indicated before, the system is complex and it is not our role as WorkCover to look at blaming particular groups.[341]

3.207 Mr Playford supported Ms Aplin's assertion that the Scheme was complex, but noted that the 'lump sum culture' was a consequence of the behaviours of various key stakeholders including lawyers, doctors, insurers and injured workers:

> It is complex and these schemes are complex. I do not think you can point just to the behaviour of one participant; it is the changing behaviour of all the participants in the scheme. That is why we use this sort of term 'lump sum culture' because ultimately the behaviours of all the participants in the scheme, whether it is legal providers, whether it is claimants, whether it is the medical professional, whether it is the way the agents work, subtly changes around the edges and at a micro level that is not necessarily obvious.[342]

339 Submission 122, Australian Lawyers Alliance, pp 22-23. See also Submission 133, The Law Society of New South Wales.

340 Answers to questions taken on notice during evidence, 21 May 2012, Mr Justin Dowd President, The Law Society of New South Wales, Question 4.

341 Ms Geniere Aplin, General Manager, Workers Compensation Insurance, WorkCover Authority of New South Wales, Evidence, 21 May 2012, p 14.

342 Mr Playford, Evidence, 21 May 2012, p 12.

3.208 Mr Playford explained that a 'lump sum culture', arising from increased use of lump sum benefit payments, can result in significant deterioration of a scheme's financial position:

> If you look at other schemes around Australia that have experienced deterioration; over the last 20 to 30 years most scheme deteriorations have occurred because of a deteriorating experience with adversarial lump sum benefits. That is a major driver of the deteriorating claims experience of this scheme and that is an area of benefits that is very difficult to design well to prevent deterioration into the future and should be looked at.[343]

3.209 Several stakeholders also noted the need to manage commutations carefully. For example, the NSW Business Chamber commented:

> The use of commutations needs to be redesigned to allow for their greater use, but that design has to guard against commutations becoming another driver of a lump sum culture in the scheme.[344]

3.210 The Australian Industry Group supported this view stating that, in relation to less serious injuries, commutation may feed into a 'lump sum culture' with a negative impact on rehabilitation:

> … we strongly advise against making commutations available to workers with less serious injuries who have been on long term weekly benefits without permanent injury as this would feed into the lump sum culture and shift the focus away from recovery and rehabilitation. Where possible, workers on long term weekly benefits need to be encouraged to make a full recovery and return back into the workforce.[345]

3.211 The Law Society's Mr Concannon rejected the suggestion that greater use of commutations contributed at all toward a lump sum culture:

> The first point the Law Society would like to make about the alleged existence of a lump sum culture is, if it ever did exist or does exist now then one would have thought the 2001 amendments, which substantially remove the entitlements to lump sums, would have had an effect on eroding that culture. It appears 11 years down the track that it has proven not to be the case.[346]

3.212 Mr Concannon explained that most workers are keen to return to work and, in any respect, the type and value of payments currently available are too small to be considered a factor contributing to the development of a lump sum culture:

> What I found is far from workers expressing excitement at the prospect of a lump sum dangling at the end of the rainbow . The experience is quite to the contrary. When I explain [their entitlements] to them …, they express an abhorrence as to the fact, 'How do I pay off my mortgage?' How do I survive on a day-to-day basis with those entitlements? This alleged existence of a lump sum culture assumes there is some voluntary intent on the part of the worker to remain on the drip feed until this lump sum at the end of the rainbow becomes available. The lump sums that are now

343 Mr Playford, Evidence, 21 May 2012, p 18.

344 Submission 129, NSW Business Chamber, p 14.

345 Submission 142, Australian Industry Group, pp 14-15.

346 Mr Concannon, Evidence, 21 May 2012, p 43.

> available are so paltry that they would not attract anyone to remain in this system for an extended period of time.[347]

3.213 Dr Kevin Purse was of the view that the lump sum culture was not a result of the use of commutation at all, but rather misadministration of the Scheme:

> When the commutation bubble bursts it is invariably the injured workers and their lawyers or union advocates who are blamed for having a lump sum mentality or culture. If you look at it a little more accurately, you find that the Scheme administration has unleashed or given birth to lump sum payments as a mode of dealing with matters.[348]

3.214 The Committee heard evidence that the concept of a 'lump sum' culture may not accurately reflect the cultural concerns that have been expressed with regard to the Scheme. For example Mr Paul Macken, representing the NSW Self-Insurers Association, gave evidence rejecting the proposition that commutations can result in the establishment of a lump sum culture, suggesting that there may be a more general 'benefit entitlement' culture but that this should not restrict use of commutations:

> The Self Insurer's Association is very strongly in support of unrestricted commutations. We do not support the suggestion that it creates a lump-sum culture. There may well be a benefit entitlement culture that exists but it exists whether it is a lump sum or whether it is in entitlements to weekly payments of compensation. It is an unreal view to suggest that lump sums drive the cost of the Scheme.[349]

Committee comment

3.215 The Committee heard evidence from the majority of stakeholders that greater use of commutations could assist in managing the Scheme's long tail liabilities by enabling people who have been in the system for a significant period or who have no real prospects of returning to work as a result of their injury to exit the Scheme, thereby producing cost savings as a result of 'buying out' the claim at a discount.

3.216 However, most key stakeholders qualified their support for more widespread use of commutations noting that commutations should only be strategically used in 'appropriate' cases. The Committee notes in particular the comments of the Scheme actuary in this regard.

3.217 There were different views put forward on what constituted 'appropriate' cases, with unions advocating that injured workers should be appropriately compensated. Support for commutations from union groups generally reflected the view that they should be used as a last resort, when other measures to rehabilitate and return the person to work had failed, and were unlikely to succeed in the future.

3.218 However, stakeholders including some insurance companies and legal groups suggested that commutations should not be limited to those workers with injuries assessed as reaching the 15

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347 Mr Concannon, Evidence, 21 May 2012, p 43.

348 Mr Kevin Purse, Senior Research Fellow, Central Queensland University, Evidence, 28 May 2012, p 37.

349 Mr Paul Macken, Legal Advisor, NSW Worker's Compensation Self Insurer's Association, Evidence, 21 May 2012, p 37.

per cent whole person impairment threshold, on the basis that such limitations hindered the financial benefit to the Scheme because the threshold was difficult to reach.

3.219 Some stakeholders also noted that apart from the potential savings resulting from greater use of commutations, they also offered injured workers a degree of self determination and dignity when it came to managing their involvement with the Scheme.

3.220 Some stakeholders also suggested that the requirement for WorkCover approval in the use of commutations was too restrictive and should be scrapped.

3.221 The Committee is not convinced that liberal availability of commutations leads to a 'lump sum culture'. It has considerable sympathy for the views of the NSW Self-Insurers Association and the NSW Bar Association on this point. Any 'culture' is more likely to stem from the size and scope of the underlying benefits, rather than from an ability to commute them. Commutations have the potential to reduce ongoing administrative costs. If they release an injured worker from the 'system', he or she has a greater incentive to return to work than if kept on a 'drip feed'. The Committee considers that commutations should be much more freely available. They should be generally subject to the proviso that the injured worker has obtained independent legal and financial planning advice before agreeing to a commutation

Recommendation 13

That the NSW Government liberalise the availability of commutations, generally subject to the proviso that the injured worker has obtained independent legal and financial planning advice before agreeing to a commutation.

Exclusion of strokes/heart attack unless work a significant contributor

3.222 The Issues Paper states that covering liability for covering strokes and heart attacks 'is arguably inconsistent with the principles of workers compensation legislation, as the principles for the legislation are to provide income support [and] medical assistance for workers injured as a result of a workplace injury'.

3.223 The Issues Paper states that 'causation of strokes and heart attacks are not normally associated with workplace injuries and the factors that impact upon rehabilitation and return to work are not typically workplace issues'.

3.224 An annexure to the Issues Paper notes that:

(a) in Victoria, strokes and heart attacks are excluded,

(b) in Tasmania, heart diseases, aneurisms or prescribed injuries are non-compensable unless employment contributed to a substantial degree, and

(c) in other Australian jurisdictions there are no provisions dealing specifically with heart attacks and strokes.

3.225 The Committee received submissions that some 'lifestyle' and degenerative illnesses (such as arthritic changes) are presently the subject of claims in circumstances where the workplace commonly has only limited connection with the illness.

3.226 The Committee also received submissions that there should be a tightening of s 9A of the *Workers Compensation Act*. Section 9A(1) provides (emphasis added):

> No compensation is payable under this Act in respect of an injury unless the employment concerned was a substantial contributing factor to the injury.

3.227 The Committee received submissions that the connection test of 'a substantial contributing factor' should be replaced by a connection test of 'the substantial contributing factor'.

3.228 Also relevant is the definition of 'injury' in s 4 of the *Workers Compensation Act*. That section provides (emphasis in paragraph (b) added):

> In this Act:
>
> injury:
>
> (a) means personal injury arising out of or in the course of employment,
>
> (b) includes:
>
> (i) a disease which is contracted by a worker in the course of employment and to which the employment was **a** contributing factor, and
>
> (ii) the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was **a** contributing factor to the aggravation, acceleration, exacerbation or deterioration, 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.

Committee comment

3.229 The Committee considers that eligibility to make claims for strokes and heart attacks should be tightened, but not altogether abolished. There will be some cases where work (e.g. a particularly demanding or stressful job situation) is the main cause of a stroke or heart attack.

3.230 A change of the kind proposed to s 9A of the *Workers Compensation Act* would not only affect 'lifestyle' and degenerative illnesses, but all injuries. In no other Australasian jurisdiction is the general connection test as narrow as 'the substantial contributing factor'. A change this broad was not the subject of detailed submissions and the Committee prefers that it be examined in further periodic review of the Scheme.

3.231 The Committee considers that a more focused change would be one to the definition of 'injury' in s 4 of the *Workers Compensation Act*.

3.232 The Committee considers that the definition of 'injury' should be amended so far as it relates to diseases - not just strokes and heart attacks but others e.g. diabetes.

Recommendation 14

That the NSW Government seek to amend the definition of 'injury' in section 4 of the *Workers Compensation Act 1987* so that a disease is only included if the employment was the main contributing factor to the contraction, aggravation, acceleration, exacerbation or deterioration of the disease.

Work injury damages

3.233 Where an employer's negligence results in an injury to a worker, the worker is entitled to sue for damages, provided certain criteria are met. Such claims are referred to as 'work injury damages', or sometimes as 'common law claims'. A work injury damages settlement cancels all further entitlements to workers compensation benefits.

3.234 The WorkCover Authority of NSW provides the following information in respect of work injury damages claims:

- Damages are paid as one lump sum and only cover the economic loss of past and future earnings.
- The worker must have received all statutory lump sum entitlements for permanent impairment and pain and suffering (non-economic loss) to which they are entitled before a work injury damages claim is settled.
- A work injury damages settlement cancels all further entitlements to workers compensation benefits including lump sum payments, weekly payments, medical, hospital and rehabilitation expenses.
- The amount of weekly compensation that has already been paid to the worker must also be repaid out of the amount awarded. The amount awarded can also be reduced if the worker's own negligence contributed to the injury.
- A claim for work injury damages can only be started at least six months after the worker gave notice of the injury to the employer, and not more than three years after the date of injury.[350]

3.235 There are three preconditions that must be met to establish eligibility for work injury damages. Firstly, the injury must be a result of the employer's negligence. Secondly, the injured worker must have an assessed level of whole person permanent impairment of at least 15 per cent. Finally, claims for lump sum compensation for permanent impairment and pain and suffering must be made prior to or at the same time as the work injury damages claim, and must be settled prior to a work injury damages claim being finalised.[351]

350 WorkCover Authority of NSW, accessed 1 June 2012, <http://www.workcover.nsw.gov.au/injuriesclaims/benefitsentitlements/Pages/Commonlawdamages.aspx>

351 WorkCover Authority of NSW, accessed 1 June 2012, <http://www.workcover.nsw.gov.au/injuriesclaims/benefitsentitlements/Pages/Commonlawdamages.aspx>

3.236 Work injury damages claims are mediated in the first instance through the Workers Compensation Commission in an attempt to reach a settlement between all parties. If this is unsuccessful, the District Court hears the claim.

3.237 WorkCover notes that unsuccessful claims for work injury damages does not preclude the injured worker from continuing to receive workers compensation benefits under the statutory scheme, but notes that unsuccessful claims may result in liability for court costs incurred during the work injury damages claim.[352]

3.238 The Issues Paper proposes 'strengthening' work injury damages by amending the *Civil Liability Act 2002* to extend its application to work injury damages claims. The Issues Paper states:

> It has been suggested that there is no reason to exclude workers compensation common law claims from the principles of the law of negligence which apply to other damages claims and it has been proposed the Civil Liability Act provisions dealing with the law of negligence should apply to those claims.[353]

3.239 The Issues Paper states that the 2002 changes codifying the principles underpinning the laws of negligence in NSW has, by excluding work injury damages claims from their scope, resulted in a divergence in how negligence matters involving employer negligence are dealt with compared to those occurring in general law:

> The general law governing civil liability was reformed in 2002 following the enactment of the *Civil Liability Act 2002*. The Act codifies the principles governing the law of negligence and other specific areas and was enacted following a comprehensive review of the law of negligence … However, the provisions of the *Civil Liability Act* dealing with the law of negligence do not apply to work injury damages claims made under the workers compensation legislation. As a result, the principles used to determine negligence in workers compensation Common Law matters are those which applied to the law of negligence prior to 2002 and now diverge from the general law.[354]

3.240 The Issues Paper, while suggesting the adoption of the principles in the *Civil Liability Act,* does not explain the precise nature, rationale or impact of the reform option, other than to suggest that harmonisation is desirable and that the current scenario 'compromises the ability of insurers and employers to defend work injury damages claims.'[355]

3.241 Slater & Gordon Lawyers in its submission explain the principles of the *Civil Liability Act* as follows*:*

> These principles are centred around the concept of personal responsibility. In this Act, contributory negligence is applied more strictly and defendants generally no longer owe a duty of care for failure to warn of obvious risks unless asked.[356]

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352 WorkCover Authority of NSW, accessed 1 June 2012, <http://www.workcover.nsw.gov.au/injuriesclaims/benefitsentitlements/Pages/Commonlawdamages.aspx>

353 Hon Greg Pearce MLC, Minister for Finance and Services, 'NSW Workers Compensation Scheme Issues Paper', p 27 (Option 12).

354 *NSW Workers Compensation Scheme Issues Paper*, Office of the Minister for Finance and Services, p 20.

355 *NSW Workers Compensation Scheme Issues Paper*, Office of the Minister for Finance and Services, p 27.

356 Submission 126, Slater & Gordon Lawyers, p 17.

3.242 Based on this information, the practical outcome of the reform option would be to restrict access to damages where an employer is injured as a result of employer negligence. This is because the principles of the *Civil Liability Act* require a person to take a degree of personal responsibility in managing risk of harm to themselves.[357]

3.243 The *Civil Liability Act* does not currently apply to civil liability compensation arising under the *Workers Compensation Act*. Slater & Gordon Lawyers argue that this is reflective of the nature of the relationship between an employer and an employee:

> It is essentially a master and servant relationship … Master and servant has been used to describe the legal relationship between an employer and employee for the purposes of determining an employer's liability for acts of an employee. An employer is vicariously liable for acts of an employee committed within the scope of employment. Further the employer has a non-delegable duty of care. The Civil Liability Act was not drawn to take into account this unique relationship and the duty of an employer to provide a safe workplace. The employer determines how, when and in what manner the work is to be undertaken. To such an extent the notion of personal responsibility is therefore removed from the employee … If the Civil Liability Act was applied it would have to be amended to incorporate provisions to safeguard the laws of vicarious liability and non delegable duty. The reason for this is very clear. There are many occupations which are inherently dangerous and involve obvious risks. To undermine an employer's duty to take reasonable care for its employees would be inconsistent with industrial work safety and all of the present occupational health and safety legislation.[358]

3.244 There was a divergence of views on this reform option. Those supporting the option generally did so in reference to the assertion in the Issues Paper that it would bring negligence matters occurring in a workers compensation context into line with the general law of negligence. Those opposing the option suggested that it would have the opposite effect and would, in fact, create a divergence from accepted law relating to negligence on the basis that work injury damages currently are largely consistent with the general law.

3.245 Representatives of insurance groups supported the proposal, referring to the point in the Issues Paper that the principles used to determine negligence in work injury damages diverged to the principles of negligence that applied more generally to civil liability claims. For example, the Insurance Council of Australia stated their agreement in their submission:

> The ICA also supports the option to align work injury damages with the provisions of the Civil Liability Act 2002 in relation to the principles of common law negligence.[359]

3.246 Allianz' position was similar to the ICA's, however they noted that the extension of the *Civil Liability Act* to work injury damages claims may offer better defences to defendants:

> … there is no reason to exclude Workers' Compensation common law claims from the principles of the law of negligence which apply to other damages claims and we support the application of the Civil Liability Act provisions dealing with the law of negligence to those claims. The application of the Civil Liability Act to Workers'

357 As explained in the Second Reading Speech to the Civil Liability Amendment (Personal Responsibility) Bill 2002, *LA Debates* (23/10/2002).

358 Submission 126, Slater & Gordon Lawyers, p 17.

359 Submission 145, Insurance Council of Australia, p 7.

> Compensation common law claims may provide employers in appropriate circumstances defences that may not otherwise have been by way of application similar to applications for assessment of threshold issues for the purposes of Work Injury Damages available to them under the general laws of negligence and enable them to better defend work injury damages claims.[360]

3.247 In a similar vein, GIO contended:

> The recommended introduction of the Civil Liability Act … ensures that the determination of negligence is more aligned to the application of current legal precedent.[361]

3.248 Business and employer groups, including Small Business NSW, the Civil Contractors Federation, the Australian Federation of Employers and Industries, the Australian Road Transport Industrial Organisation, and the Australian Industry Group, were also supportive of the option for the same reason that it aligned with the general principles of negligence under the *Civil Liability Act*.[362]

3.249 In addition, the Australian Industry Group suggested that it was inappropriate to have a provision for negligence based damages in the context of 'no fault' scheme and suggested it had been causal factor of the Scheme's deficit:

> The availability of negligence-based work injury damages sits uneasily with a non-fault statutory scheme with a heavy and necessary focus on rehabilitation. It has been the root cause of the Scheme's instability in all its crises over the past thirty years.[363]

3.250 The Civil Contractors Federation contended that work injury damages claims contributed to the 'culture' of the Scheme which, it argued, was a significant cost factor in and of itself:

> Aside the obvious direct Scheme cost issues CCF NSW's great concern is by the separation of the Civil Liability Act's negligence provisions from work injury damages, the culture of 'compensation = money' (that we believe should be avoided, in favour of one based on rehabilitation and return to work) is furthered. Such a culture we believe is ultimately far more expensive for the Scheme to manage than just the direct cost of the work injury damage claims before the Scheme today.[364]

3.251 Legal groups generally rejected the reform proposal and the proposition in the Issues Paper regarding inconsistency, instead arguing that the current work injury damages regime already complies for the most part with the general law of negligence. They oppose the general application of the *Civil Liability Act* to work injury damages on the basis that it would fail to appropriately recognise the nature of employment relationships.

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360 Submission 137, Allianz Australia Workers' Compensation (NSW) Ltd, pp 7-8.

361 Submission 285, GIO General Limited, p 14.

362 Submission 119, Small Business NSW; Submission 170, Civil Contractors Federation; Submission 130, Australian Federation of Employers and Industries; Submission 117, Australian Road and Transport Industrial Organisation, Submission 142, Australian Industry Group.

363 Submission 142, Australian Industry Group, p 14.

364 Submission 170, Civil Contractors Federation, p 33.

3.252 The contention in the Issues Paper that the general law of negligence applicable under the *Civil Liability Act* is deviates from negligence principles applied in work injury damages claims was challenged by the Australian Lawyers Alliance and the Bar Association, who suggested that it was misleading and incorrect. The Australian Lawyers Alliance argued:

> The main provisions of the *Civil Liability Act NSW 2002* dealing with negligence largely reflect the common law hence, it is not correct to say that the principles used to determine negligence in work injury damages diverge from the general law. It is a long established principle at common law that employers owe a non-delegable duty of care to their employee (*Stevens v Brodribb Sawmilling Company Pty Ltd*)…The common law duty is not inconsistent with the principles of negligence now enshrined in the *Civil Liability Act*.[365]

3.253 In rejecting the proposal, the Australian Lawyers Alliance went on to state that they 'fail to see how bringing work injury damages claims within the *Civil Liability Act* sections dealing with negligence will have any impact on the deficit.'[366]

3.254 The Bar Association indicated its support for harmonisation of personal injury laws, but made a similar point to the Australian Lawyers Alliance, noting that minor amendments could achieve an appropriate balance with work injury damages by excising those workplaces and industries that have an inherent element of risk of injury:

> The Association has long advocated a single uniform system of personal injury laws based on the general principles contained in the *Civil Liability Act*. However it is not correct to say, as the Issues Paper does, that the principles used to determine negligence in workers compensation common law matters diverge from the general law. There are some parts of the *Civil Liability Act* which are presently incompatible with the workplace negligence but that can easily be accommodated by some [amendments] in the *Civil Liability Act* which prevent damages claims for inherently dangerous activities or where a risk is obvious.[367]

3.255 The Bar Association, while advocating harmonisation of personal injury laws, argued that the reform option as outlined in the Issues Paper would necessarily require adjustment to be workable and just:

> Implementation of the proposal in the Issues Paper without this adjustment would gravely undermine an employer's duty to take reasonable care for its employees and would be inconsistent with community expectations of industrial work safety. Those provisions would simply be excluded for workplace claims. To do so would not interfere with the law on contributory negligence by a worker.[368]

3.256 The Finance Services Union went further, arguing that an attempt to 'align' work injury damages with the *Civil Liability Act* would result in a divergence between the two that does not currently exist:

> Subjecting an injured worker to the additional tests of the *Civil Liability Act 2002* would go against the principles that an employer's duty of care is far greater than is

365 Submission 122, Australian Lawyers Alliance, p 20.

366 Submission 122, Australian Lawyers Alliance, p 21.

367 Submission 77, Bar Association of NSW, p 7.

368 Submission 77, Bar Association of NSW, p 7.

> the case generally and therefore an employee should not have the same onerous hurdles when bringing a negligence claim that applying general circumstances. Should the *Civil Liability Act 2002* be applied to workplace injuries in NSW, the system would be diverging from decades of common law principle.[369]

3.257 The NSW Nurses' Association argued that the various circumstances and environments to which the *Civil Liability Act* applies are inherently different to employment environments, where an employer is in an intrinsically more powerful position to manage risk to employees:

> One of the original aims of the Civil Liability Act 2002 (NSW) was to supposedly promote individual responsibility to avoid injury. However, the notion of individual responsibility does not sit easily within an employment context. At its heart the workplace is characterised by master-servant relationships, wherein the employer has control over the premises, the nature of the work to be performed, how the work is to be performed, when the work is to be performed, etc. In short, the Civil Liability Act 2002 (NSW) was not designed for the employment context and if it is now extended to apply to work injury damages, we believe there will be a host of unintended and undesirable consequences.[370]

3.258 Other stakeholders opposing the reform noted that there are already barriers that limit workers access to the law where employer negligence has resulted in injury. In this regard, Slater & Gordon Lawyers along with various unions, including the AMWU and Unions NSW, referred to the requisite 15 per cent whole person permanent impairment that must be met before an injured worker can claim work injury damages. Slater & Gordon submitted:

> … currently many seriously injured workers are excluded from Common Law/Work Injury Damages (WID) by the current threshold of 15% WPI. The impact of a 15% WPI threshold can be simply illustrated – the majority of workers who suffer from back injuries that have serious ongoing consequences including chronic pain and severe limitation of movement and who are unable to return to any form of work are excluded from making a common law claim. The majority of workers with serious hand, wrist, foot, ankle and knee injuries are also excluded. To meet the 15% WPI a worker would generally have to have to have sustained multiple conditions and this is rare in a workplace setting.[371]

Committee comment

3.259 The Committee considers that the provisions of the *Civil Liability Act* should extend to include work injury damages claims. However, the Committee considers that, as suggested by the NSW Bar Association, the application of the *Civil Liability Act* to work injury damages claims should be modified by inclusion of some additional sections dealing with the workplace, in particular inherently dangerous activities and obvious risks.

369 Submission 187, Finance Services Union, p 38.

370 Submission 73, NSW Nurses' Association, pp 68-69.

371 Submission 126, Slater & Gordon Lawyers, pp 11-12.

Recommendation 15

That the NSW Government seek to extend the *Civil Liability Act 2002* to work injury damages claims, but modified by inclusion of some additional sections dealing with the workplace, in particular inherently dangerous activities and obvious risks.

Overview of financial implications of reform packages

3.260 The Scheme actuary, PricewaterhouseCoopers, provided the Committee with a report analysing the potential cost implications of two alternative reform packages (the Reform Costing Report).[372] The first reform package subject to financial analysis in the Reform Costing Report is consistent with the options detailed in the Issues Paper. The second reform package is based upon the proposals submitted by the Bar Association of NSW.[373] The Reform Costing Report is attached (Appendix 6).

3.261 The Reform Costing Report contains a number of caveats on the analysis provided in respect of the packages, including that:

- there is considerable uncertainty associated with the financial cost impact results and that 'they should be considered as indicative of the magnitude of the possible cost impact rather than being precise';
- the costings assume the reforms are introduced as a package; and
- there are a number of areas of uncertainty and risk with costing the benefit reform packages (including assumptions on the manner in which legislative changes will be introduced and framed; uncertainty about the effectiveness of implementation of reform; potential behavioural changes by all Scheme participants; and the uncertainty of the impact of management costs arising from significant changes to benefit structure).[374]

3.262 The Reform Costing Report's analysis of the first benefit reform package, based on 'a package of benefit reforms consistent with the options discussed in the Government's Issues Paper',[375] concludes that the package could offer a reduction in the Scheme's current outstanding claims liability of $14,378 million excluding risk margin of between 38 and 32 per cent, depending on whether a 5 or 11 year time limit were introduced on the payment of weekly benefits.[376]

372 PricewaterhouseCoopers, *WorkCover Authority of NSW Inquiry into the NSW Workers Compensation Scheme – benefit package costing*, 25 May 2012. This report was provided to the Committee in response to a question taken on notice during the hearing of 21 May 2012.

373 PricewaterhouseCoopers, *WorkCover Authority of NSW Inquiry into the NSW Workers Compensation Scheme – benefit package costing*, 25 May 2012, p 3. See also Submission 77, Bar Association, p 2.

374 PricewaterhouseCoopers, *WorkCover Authority of NSW Inquiry into the NSW Workers Compensation Scheme – benefit package costing*, 25 May 2012, p 3-5.

375 PricewaterhouseCoopers, *WorkCover Authority of NSW Inquiry into the NSW Workers Compensation Scheme – benefit package costing*, 25 May 2012, p 3.

376 PricewaterhouseCoopers, *WorkCover Authority of NSW Inquiry into the NSW Workers Compensation Scheme – benefit package costing*, 25 May 2012, pp 15-17 .

3.263 The package is also estimated to reduce the current estimated breakeven premium cost of the Scheme of $2,601 million (an average premium rate of 1.64% of covered wages) to between $1,894 million (an average premium rate of 1.19% of covered wages) and $1,967 million (an average premium rate of 1.24% of covered wages). This represents a reduction to the breakeven premium cost of the Scheme of between 27 and 24 per cent, again dependent upon whether a 5 or 11 year time limit were introduced on the payment of weekly benefits.[377]

3.264 Costings in relation to specific reform proposals is considered in paragraphs 3.270 – 3.283.

3.265 The second package costed by PricewaterhouseCoopers in the Reform Costing Report is of the Bar Association's proposal. Though the Reform Costing Report does not offer a detailed analysis of the Bar Association's proposal, it makes a number of observations about the impact of an adversarial lump sum model, based on its similarity to the model in place prior to the 2001 amendments.[378] The Bar Association's package is not considered in this section. For more detail, refer to Appendix 6.

3.266 In addition to the Reform Costing Report, the NSW Self Insurance Corporation (SICorp) have provided, in response to a question taken on notice during evidence, information about the impact of the reform options contained in the Issues Paper on SICorp and the Treasury Managed Fund.

3.267 The package of reform options costed by SICorp is largely consistent with the package used by PricewaterhouseCoopers in assessing the costings of the Issues Paper reforms.

3.268 SICorp's response, as with the PricewaterhouseCoopers Report, contains a caveat on the information provided, noting that the reforms contained in the package are not individually costed, and that the outcomes are indicative, as opposed to precise:

> We have costed the above scenario as a single package, consistent with the recommendation put forward in our submission to the inquiry that scenarios be costed as a package rather than as individual items … It is important to note the significant uncertainty associated with the costing of the financial impact of the proposed scenario. Therefore, the costing provided in this letter should be treated as indicative rather than a precise measure of the financial impact. In particular, the costing has required subjective assumptions of the likely impact of the proposal and their effectiveness, and the eventual impact may differ significantly from these assumptions.[379]

3.269 The financial impact of the reform package on the Treasury Managed Fund varies, depending on whether the cap on weekly benefits is implemented at the 5, 7, 9 or 11 year point. SICorp's response indicates that if a 5 year cap on weekly benefits were implemented, the Treasury Managed Fund could expect to reduce its liabilities by 32 percent, representing approximately $908 million. If the cap on weekly benefits were implemented at the 11 year mark, the

377 PricewaterhouseCoopers, *WorkCover Authority of NSW Inquiry into the NSW Workers Compensation Scheme – benefit package costing*, 25 May 2012, pp 15-17.

378 PricewaterhouseCoopers, *WorkCover Authority of NSW Inquiry into the NSW Workers Compensation Scheme – benefit package costing*, 25 May 2012, p 18.

379 Answers to questions taken on notice during evidence, 21 May 2012, Mr Robert Lloyd, Manager, Strategic Projects, of the NSW Self Insurance Corporation, Question 5.

Treasury Managed Fund could expect to reduce its liabilities by 19 percent, representing approximately $545 million.[380]

3.270 SICorp's response indicates that the average wage of Treasury Managed Fund claimants is 'much higher than current statutory benefits', and notes that this will result in some cost to the Fund, but that this could be offset by the work capacity test and the cap on duration of weekly benefits:

> The average wage of TMF claimants is much higher than current statutory benefits. Since the proposed scenario for weekly benefits will replace the statutory benefit with one that is more generous and dependent on the pre-injury earnings of the claimant, there will actually be a cost to TMF. However, the impact of this is offset by the work capacity test and the cap to the duration of claimants on benefit, as shown in the 'Weekly' impact in the tables ... For example, in the scenario that caps weekly benefit duration at 9 years, the 17% improvement shown in the table for weekly benefits consists of a 10% cost to the TMF due to the replacement of the statutory benefit, which has been more than offset by a 16% saving from the introduction of the work capacity test and a 11% saving from the cap in weekly benefit duration.[381]

Financial implications of specific reform options

3.271 Although the PricewaterhouseCoopers Report explicitly provides that the reforms are costed as a package, the details in the Report with respect to particular reform options is indicative of the estimated savings that might be realised in respect of some proposals.

Journey claims

3.272 The reform package estimates that there are savings in the region of $93 million annually in premium costs if coverage for journey claims were removed.

Weekly benefits and work capacity testing

3.273 The reform package costed involves alterations to weekly benefits, including the introduction of a step-down at 13 weeks for total incapacity from 95 per cent average weekly earnings (AWE) to 80 per cent AWE; a similar step-down for partial incapacity, but variable depending on how many hours are worked; and the introduction of work capacity testing for partially and totally incapacitated workers. The package also introduces time caps on the duration of benefits, costed at 5, 7, 9 and 11 years from the date of first incapacity for new claims, or from the date of legislation commencing for existing claims.[382]

3.274 Various other aspects of the weekly benefits package costed but are not examined here. Refer to Appendix 6 for detail.

3.275 The Report estimates that if a work capacity testing model similar to that used in Victoria's WorkSafe Scheme were introduced, up to 60 per cent of claims in the Nominal Insurer Scheme would move off weekly benefits during that period post injury. Currently, 25 per cent

380 Answers to questions taken on notice during evidence, 21 May 2012, Mr Lloyd, Question 5.

381 Answers to questions taken on notice during evidence, 21 May 2012, Mr Lloyd, Question 5.

382 Note that the time cap limitation does not apply to high WPI (>30%) claims.

of claims in the Nominal Insurer Scheme move off weekly benefits during that period. The Report does not indicate a dollar value for this reform.

3.276 The Report states that the time cap limitation (5, 7, 9 or 11 years) on the entitlement to weekly benefits could be expected to have a 'major impact', although a figure is not indicated. The Report notes that the assessment would be 'reliant on the threshold being implemented in the objective form of a single medical assessment of WPI and at the level stated.'[383]

Lump sum benefits

3.277 The Report costs a lump sum package, which comprises various elements including a change in the definition of 'negligence' to match that provided by the *Civil Liability Act*; and the introduction of a 10 per cent whole person impairment threshold for permanent impairment (section 66) claims. The package retains the minimum 15 per cent whole person impairment threshold to access work injury damages.

3.278 There are various other aspects of the lump sum package which are included in the costings but which not examined here. Refer to Appendix 6 for detail.

3.279 The Report notes that 'the Scheme has an increasing number of 'top up' WPI assessments which are having the effect of undermining the robustness of the current WID benefit and Pain and Suffering benefit thresholds.' It suggests that an amended definition of negligence that aligns with the *Civil Liability Act 2002* could assist in balancing this, but does not give an indication of the cost saving that may result.

3.280 The Report suggests that significant savings could be realised through the introduction of a 10 per cent whole person impairment threshold, which would 'reduce the number of claims eligible to receive Permanent Impairment benefits significantly.' The report does not provide a figure as to potential savings in this regard.

3.281 However, the Report notes that the package would offer 'significantly higher benefits' to the most severely injured workers, by adopting a scale similar to the Victorian permanent impairment scale. This would change the current regime whereby claimants are entitled to claim both permanent impairment and pain and suffering benefits, which have a 1 per cent and 10 per cent threshold respectively, to a single scale with a 10 per cent permanent whole person impairment threshold. The revised scale provides for significantly higher benefits for the most severely injured compared with the current scale.

3.282 The package includes a 'tightly controlled commutation strategy', although the Report notes that 'no detail has been provided by WorkCover as to exactly how this might occur.'[384]

3.283 The Report emphasises the need to ensure that tightly managed, and targeted to specific claims, including those with a 'high ratio of ongoing management expense to claims liability'; and the consolidation of identified claims with a single Agent who would manage all commutations on WorkCover's behalf.

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383 PricewaterhouseCoopers, *WorkCover Authority of NSW Inquiry into the NSW Workers Compensation Scheme – benefit package costing*, 25 May 2012, p 11.

384 PricewaterhouseCoopers, *WorkCover Authority of NSW Inquiry into the NSW Workers Compensation Scheme – benefit package costing*, 25 May 2012, p 14.

3.284 The Report does not indicate a specific figure which might provide an indication of the impact of this reform option on the Scheme's deficit.

Committee comment

3.285 The Committee notes the actuarial analyses undertaken by PricewaterhouseCoopers of two reform packages.

3.286 The Committee acknowledges the advice of the Scheme actuary, and author of the Reform Costing Report, that the analyses are highly qualified and are not reflective of precise costs, but rather provide an indication of the range of savings that may result as a consequence of the adoption of either of the two packages.

3.287 The Committee acknowledges that for the most part the document does not enable savings arising from specific reform options to be assessed in exclusivity of each other; that the costings relate to the specific packages referred to them by WorkCover and arising from the submission of the Bar Association; and that the projected financial analyses are variable.

3.288 Nonetheless, the costings document does provide an indicative guide to the savings that could be achieved by the reforms.

Committee conclusion

3.289 The sixteen reform options outlined at a high level in the Issues Paper which, in general, would lead to a reduction in Scheme coverage and benefits for injured workers, formed the basis of the majority of evidence received by the Committee in submissions and at the hearings.

3.290 Some stakeholders noted the limitations of the Issues Paper itself, and the options it contained, although, as discussed in Chapter 2, most stakeholders agreed that the NSW Workers Compensation Scheme is in serious need of reform.

3.291 Generally speaking, the reforms proposed in the Issues Paper were accepted by employers, businesses and insurers. The same reform options were roundly rejected by unions and injured workers. Representatives of the legal sector rejected most reforms, but did embrace a small number of them, in particular, expanded and liberal use of commutations.

3.292 The precise financial impact of the reform package on the Scheme's deficit is uncertain. The actuarial costings provided by PricewaterhouseCoopers and the NSW Self Insurance Corporation in response to questions taken on notice during evidence were qualified, and included a number of caveats. Nevertheless the costings provided by PricewaterhouseCoopers provide reasonable guidance to the likely cost savings of implementing a reform package.

3.293 The Committee notes, in particular, that significant savings would flow from the proposed changes to the weekly benefit structure, including the introduction of earlier step-downs and caps on the duration of weekly benefit payments, particularly as weekly benefit payments are one of the key drivers of cost to the Scheme. The Committee also notes that savings would clearly result from the implementation of the option to remove coverage for journey claims.

3.294 The Committee is mindful, however, that cost savings cannot be the only driver for reform. The Committee received a large number of submissions from a range of organisations expressing concern that injured workers would be significantly disadvantaged by many of these reform options. We also heard first hand from a number of injured workers, which assisted the Committee to understand the very real impact that some of the reforms might have on the lives of injured workers.

3.295 Whether to implement reforms that reduce Scheme coverage and benefits to injured workers as a means of addressing the deficit is a matter for Government. In determining where the balance lies the Government should consider a number points raised during this Inquiry and discussed in this report, including:

- The imperative to address the serious financial position of the Scheme, which will have serious implications for the Scheme and the New South Wales economy in the long term if not remedied.
- The primary purpose of the Scheme which is to provide protection to workers and their employers in the event of workplace injury.
- The range of factors that have contributed to the deficit, including 50% being attributed to external factors.
- The impact of significant premium increases on employers and the economy.
- The impact of the package of reform in the Issues Paper on injured workers and their family.
- The range of alternative reforms and other measures to address the Scheme deficit and inefficiencies in the management and operation of the Scheme identified in Chapter 4.

3.296 The Committee has taken all these considerations into account in reaching its recommendations in this report.

3.297 Given the (understandably) urgent time frame that the Committee has been given, the Committee's recommendations have concentrated on reversing the Scheme's poor financial position, by recommending changes to the Scheme for which it is possible to forecast a quantifiable effect, albeit indicatively and not precisely. Cost savings may well be possible, and return to work performance improved, by changes to WorkCover's general operations, including guidelines, claims handling, Scheme Agents structure and the like. However most of the evidence which the Committee received on those topics (while often passionate and forceful) was impressionistic, unquantified, unquantifiable and often disputed. The serious concerns expressed in these areas warrant further review and investigation, but the Committee can have no confidence that changes in those areas would produce the major cost savings needed in order to avoid cost savings instead through restructuring benefits.

3.298 The Committee expects that some people will object to its recommendations as being 'harsh' or 'unfair'. But workers compensation should not be an open ended welfare scheme. When considering 'harshness' and 'unfairness', the reader needs to compare the position of workers under the proposed benefit reforms with the position of many people who have accidents each year outside the workplace or who are born with serious disabilities. Those people are commonly limited to social security (including Medicare) unless they are privately insured. Workers have, and will continue to have, preferential treatment in accident compensation.

3.299 Unlike damages for a civil wrong at general law, workers compensation is not intended to place a worker fully in the position he or she would have been but for the injury. It is a no fault scheme which has to be affordable and, like insurance generally, therefore subject to realistic limits and exclusions.

3.300 Restructuring of benefits is not a matter of 'blaming' workers for the Scheme's current financial predicament. Rather it is a function of the Scheme having to live within its means. An alternative of premium increases would have an unacceptable effect on the New South Wales economy and jobs. Complementary or alternative measures in the form of operational and administration changes may well be worthwhile, but at the moment they have no measurable assurance of cost savings.

Chapter 4 Additional reforms

During the Inquiry a number of alternative reform options to those contained in the Issues Paper, as well as a large number of other measures intended to contribute to cost savings and improve claims handling, injury management and return to work outcomes for injured workers, were proposed.

The time frame for the Inquiry prohibits a detailed examination of each of these suggestions and the Committee is not in a position to assess the merits of all of the proposals, or to fully appreciate the complex backgrounds that accompany many of them. The proposals are, however, set out in this Chapter in order to summarise the range of issues of concern identified by stakeholders and the solutions they propose in relation to them.

It is also noted that many more recommendations and suggestions than have been identified in this chapter are contained in the submissions to this Inquiry, some of which relate to technical and specialised aspects of the Scheme. A full list of submissions is contained in Appendix 3 and all public submissions have been placed on the Committee's web page.

Scheme design and management

4.1 A number of broad suggestions for changes to Scheme design and the way it is managed were made, including:

- comprehensive review of the Scheme and its management by WorkCover (see discussion below)
- permitting specialised insurance for certain industries (see discussion below)
- the prudential requirements of self insurers
- simplification of the regulatory framework[385]
- promote a 'cultural' shift from emphasis on the payment of compensation to a focus on provision of appropriate support for workers, injury management and return to work, including changing the name of the Scheme[386]
- increased harmony with schemes in other jurisdictions[387]
- enhanced injury prevention including incentives[388]
- improved investment strategy and management[389]

385 Submission 170, Civil Contractors Federation; Submission 140, Australian Rehabilitation Providers Association. See also Mr David Castledine, CEO NSW Branch, Civil Contractors Federation, Evidence, 28 May 2012, p 18.

386 For example, Submission 142, Australian Industry Group; Submission 169, Professor Michael Nicholas; Submission 170, Civil Contractors Federation.

387 Submission 243, Cross-Border Commissioner, NSW Trade and Investment.

388 Submission 1, Mr Christopher Barry; Submission 96, Timber Trade Industrial Association; Submission 141, Australian Physiotherapy Association; Submission 140, Australian Rehabilitation Providers Association; Submission 135, Unions NSW; Submission 247, Master Grocers Australia; Submission 253, Work Options Pty Ltd; Submission 185, Business Council of Australia; Submission 241, Konekt Limited.

- specialised management of catastrophic injury cases[390]
- incorporate a 'co-pay' system to motivate injured workers back into work[391]
- privatisation of the Scheme/private underwriting[392]
- legislative action to pare back Scheme Agents profits to the long-term bond rate[393]
- limit WorkCover's oversight of self and specialised insurers to prudential matters only (see discussion below)[394]
- allow actions against third party tortfeasors under the *Civil Liability Act 2002*[395]
- ensure that fines under the Act for work-related deaths are fully imposed by the courts[396]
- reforming the Scheme along the lines of other models, including the Motor Accidents Insurance Board of Tasmania,[397] and the Western Australian workers compensation scheme.[398]

4.2 As discussed in Chapter 2, a number of Inquiry participants referred to the management and administration of the Scheme by WorkCover as one of the key reasons for the deficit in the Scheme. And, as noted in the first dot point above, some stakeholders called for a review of the management of the Scheme by WorkCover, which will be discussed below. In addition, a number of specific suggestions were made to improve to the way in which WorkCover exercises its functions, including:

- increased investment in WorkCover, including ensuring staff with appropriate skills and expertise are engaged[399]

389 For example, Submission 126, Slater & Gordon Lawyers; Submission 185, Business Council of Australia. See also Mr Hayden Stephens, General Manager, Slater & Gordon Lawyers, Evidence, 28 May 2012, p 26.

390 Submission 126, Slater & Gordon Lawyers.

391 Submission 295, University of Sydney.

392 For example, Submission 122, Australian Lawyers Alliance. See also, Mr Bruce McManamey, New South Wales Committee Member, Australian Lawyers Alliance, Evidence, 21 May 2012, pp 61-62; and Mr David Nagle, Solicitor, Slater & Gordon Lawyers, Evidence, 28 May 2012, p 31.

393 Submission 174, Public Service Association.

394 For example, Submission 118, NSW Workers Compensation Self Insurers Association; Submission 184, Hawkesbury City Council. See also, Mr Paul Macken, Legal Advisor, NSW Worker's Compensation Self Insurer's Association, Evidence, 21 May 2012, p 36.

395 For example, Submission 77, Bar Association of NSW; Submission 126, Slater & Gordon Lawyers. See also Ms Elizabeth Welsh, Member, Common Law Committee, New South Wales Bar Association, Evidence, 21 May 2012, p 57.

396 Submission 157, Workplace Tragedy Family Support.

397 For example, Submission 10, Professional Health Partners Pty Ltd.

398 Submission 172, National Insurance Brokers Association.

399 For example, Submission 82, Dr Ian Gardner; Submission 109, SCO Recruitment; Submission 174, Public Service Association. See also Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers, Evidence, 28 May 2012, p 51.

- separating workers compensation functions from Work Health and Safety regulatory and compliance functions[400]
- improved management and transparency of Agent performance, reward strong performance, manage poor performance[401]
- increased investment by WorkCover in research and development.[402]

Review of the Scheme and the operations of WorkCover

4.3 During the Inquiry it was noted by several stakeholders that the New South Wales Workers Compensation Scheme had not been comprehensively reviewed for a number of years. For example, Infrastructure Partnerships Australia, 'the nations' peak infrastructure body' stated: '[t]he NSW Scheme has not been comprehensively reviewed for over ten years and the opportunity that the current review presents must not be wasted.'[403]

4.4 Ms Aplin, General Manager, Workers Compensation Insurance Operations, WorkCover, advised the Committee that the Scheme had not had major reform for 10 years:

> Generally good compensation schemes across the nation and internationally will look at major reform at least every five years. This Scheme has not had major reform for 10 years. The scale of the underlying financial result, which we need to remember, has come about from claims experience as well as investment experience, and injured workers are not returning to work. We know the health benefits of people returning to work and the benefits to the community. Premium benefit reform and management action alone will not enough, it needs to be a balanced and combined response, in my view.[404]

4.5 Several stakeholders argued that there should be a comprehensive review of the Scheme and its administration by WorkCover. For example, the Australian Lawyers Alliance argued that '…the NSW Workers Compensation Scheme … requires a careful and thorough review. Such review must include a comprehensive analysis of the WorkCover bureaucracy, its framework and its micromanagement of the Scheme.'[405]

4.6 The Housing Industry Association recommended a 'robust review' including extensive consultation with stakeholders:

400 Submission 129, NSW Business Chamber. See also, Mr Gary Pattison, General Manager, Workplace Solutions, NSW Business Chamber Evidence, 21 May 2012, p 77.

401 For example, Submission 170, Civil Contractors Federation; Submission 153, NSW Police Association; Submission 146, Australian Manufacturing Workers Union; Submission 143, Construction Forestry Mining and Energy Union; Submission 138, National Disability Services; Submission 135, Unions NSW. See also Mr Castledine, Evidence, 28 May 2012, pp 17-18.

402 For example, Submission 169, Professor Michael Nicholas.

403 Submission 240, Infrastructure Partnerships Australia, p 1.

404 Ms Aplin, Evidence, 21 May 2012, p 18.

405 Submission 122, Australian Lawyers Alliance, p 1.

> HIA would strongly recommend that any proposed changes to the Scheme undergo extensive consultation with interested stakeholders and as such, more expansive timeframes be established in order to ensure a robust review of the Scheme.[406]

4.7 The United Services Union called for a review of the operations of WorkCover:

> There should be an open and transparent review of the operations of the WorkCover Authority to consider whether it is efficient in the conduct of its operations and identify elements of waste, duplication and red tape with a view to streamlining it, such that less money is spent on the WorkCover Authority from collected premiums.[407]

4.8 The suggestion was also made that the Scheme and the administration of it by WorkCover would benefit from being *regularly* reviewed. In particular, Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers noted that schemes such as this should be review regularly rather than being reviewed when they are in crisis:

> It has been more than 10 years since the Scheme was last reviewed. I believe that schemes of this nature around Australia would benefit from regular review - perhaps every five years or so. My experience is that most reforms to these schemes happen when they get into crisis. It would be much better if they were looked at regularly and corrections made so that they do not get to crisis point before corrective action is taken.[408]

Committee comment

4.9 The Committee accepts the suggestion from various stakeholders that a comprehensive review of the Scheme is desirable and the comment from the Scheme Actuary that the Scheme would benefit from regular ongoing review.

4.10 The Committee agrees that such reviews would offer the opportunity to identify and develop appropriate responses to legislative, management and administrative issues before they become significant problems resulting in increased Scheme liability. This issue is considered again in the Committee Conclusion section at the end of this Chapter.

Recommendation 16

That the NSW Government seek to establish a joint standing committee of the Parliament of New South Wales:

- to conduct ongoing oversight of the New South Wales Workers Compensation Scheme by undertaking annual reviews of its operation, management and performance,
- to conduct an extensive review (see Recommendation 17) of the Workers Compensation Scheme, and
- with the capacity to engage actuarial expertise to assist it to perform its functions.

406 Submission 151, Housing Industry Association, p 2.

407 Submission 32, United Services Union, p 18.

408 Mr Playford, Evidence, 28 May 2012, p 51.

Recommendation 17

That the NSW Government commence an extensive, detailed review of the New South Wales Workers Compensation Scheme to develop a comprehensive strategy aimed at addressing the long term viability of the Scheme and enhancing the management and administration of the Scheme. In conducting the review, consideration should be given to statutory and non-statutory reforms that reflect the breadth of the Scheme, including, although not limited to:

- improvements in WorkCover's management and administrative systems
- feasibility of permitting more specialised insurance for certain industries, particularly those industries considered 'high risk'
- establishing a centralised information and technology system within the Scheme
- feasibility of establishing an independent medical assessment service
- an examination of workers compensation schemes in other jurisdictions, particularly the Victorian model.

Permitting specialised insurance for certain industries and/or injuries

4.11 A number of Inquiry participants argued that the area of specialised insurance should be opened up to additional industries. Specialised insurance is explained on WorkCover's website as being industry based insurance, that is underwritten by the insurer, as opposed to the Scheme:

> Self and specialised insurers are an integral part of the NSW workers compensation system. Their status is derived from the *Workers Compensation Act 1987* which provides for employers to be licensed by WorkCover and carry their own underwriting risk, subject to meeting certain criteria. Specialised insurers are licensed to insure employers of a particular industry type. Self and specialised insurers take responsibility for the payment of their claim liabilities and for the management of those claims.[409]

4.12 This proposal was made in relation to the construction industry, the motor traders industry and the tourism accommodation industry. It was argued that permitting more specialisation would have a significant impact on the Scheme's deficit, as well as providing better return to work outcomes for employees and employers.

4.13 For example, the Motor Traders Association of New South Wales (MTA) expressed its strong support for '… re-opening the specialised insurer licensing category to new entrants with an industry based focus'. The MTA referred to the successful track record of current specialised insurers such as Coal Mines Insurance Pty Ltd and argued that:

> Re-opening the market for specialised insurers on a limited basis to trusted industry participants would assist in the financial sustainability of the Workers Compensation Scheme.[410]

409 WorkCover Authority of NSW, accessed 5 June 2012, <http://www.workcover.nsw.gov.au/insurancepremiums/selfspecialisedinsurers/Pages/default.aspx>

410 Submission 175, Motor Traders Association of New South Wales, p 2 and 5.

4.14 The Accommodation Association of Australia also supported the issuing of new specialised insurance licences and noted the numerous benefits of a specialised workers compensation insurer with a specific focus on the tourism accommodation businesses:

> There would be numerous benefits for the NSW accommodation industry should new specialised workers compensation licences be made available, including lower premiums, more efficient management of claims, reduced exposure of the accommodation industry to claims and the development of industry-wide programs for rehabilitation and deployment. By extension, the broader tourism industry in NSW and NSW's economy, current and future jobs, and competitiveness would benefit as well.[411]

4.15 The Civil Contractors Federation argued that existing specialised insurance schemes perform well and establish a clear nexus between safe work practices, claim management and premiums:

> Specialised insurance has been a closed avenue in NSW for some years now, yet existing Specialised Insurance schemes perform very well and in doing so induce no liability towards the main NSW Scheme. They perform well in no small part because they create a very clear nexus between safety and claim management performance and the size of the premium paid, all whilst retaining worker protections provided for under the Act. This is most beneficial to the Scheme in high risk industries. …
>
> We respectfully recommend that specialised insurance arrangements be reopened and that arrangements be made to make them more commercially accessible for niche, high risk industries, particularly when involved in government servicing where the premium cost returns to the taxpayer.[412]

4.16 The Federation was careful to point out that 'Specialised Insurance cannot of course be privatisation by stealth', stating that '[t]he main Scheme must be protected, however, to achieve a financially sustainable Scheme and economically competitive State, innovation needs to be encouraged.'[413]

4.17 The Master Builders Association argued for the establishment of a specific compensation scheme for the construction industry:

> MBA submits that consideration be given to the establishment of a Construction Industry Compensation Scheme. Considerable investigative work was undertaken by the industry in the late 1990's. This work was discussed at Ministerial level with the then State Government. MBA submits that one option is for universal cover on all sites, universal compliance in premium payment and a 'whole-site' approach to workplace safety, compensation, rehabilitation and return to work, strongly suggests the inclusion in a new construction industry system of all people working in the industry.[414]

4.18 The MBA's submission noted that its proposal is along the lines of the NSW Long Service Corporation:

411 Submission 264, Accommodation Association of Australia, p 2.

412 Submission 170, Civil Contractors Federation, pp 33-34.

413 Submission 170, Civil Contractors Federation, pp 33-34.

414 Submission 134, Master Builders Association, pp 10-11.

> It has been suggested that an industry specific scheme be established which would require all workers including self employed workers and employers to be registered for workers compensation coverage on a site specific basis. This registration would be managed by a scheme similar to the NSW Long Service Corporation. Basic insurance premiums could be funded on the same basis as the industry's Long Service Leave liability. Namely though the lodgement of Development Applications. Employers would then be responsible for insuring only their individual claims history experience. Such an approach would ensure that every worker and business engaged in the industry would be covered for workers compensation insurance.[415]

4.19 Specialised insurance was also supported by the Steadfast Group, 'Australia's largest insurance broker cluster group', which recommended that specialised insurance be encouraged and expanded:

> Schemes such as Hotel Employers Mutual Limited (HEM) have been very successful in the same period that the WorkCover scheme has fallen into an unsustainable hole. Part of the Specialised Insurance system is to work closely with brokers and employers. HEM pays broker commissions of two to four percent, recognising that brokers are the key communication/trust channel to employers.[416]

4.20 Specialisation was also raised by some inquiry participants in relation to certain occupational injuries. For example, Dr Ian Gardner, a medical specialist in occupational & environmental medicine noted the good record of the compensation scheme for dust diseases and advocated for one guaranteed funding system to be applied to cover similar injuries:

> My suggestion is that the artificial distinction between Dust Diseases and other chronic occupational health conditions be abolished, and the one guaranteed funding system be applied to cover all occupational health, toxicology, noise, chemical exposures and dust exposures.[417]

Committee comment

4.21 The Committee accepts the views of various stakeholders that specialised insurance should be expanded into additional industries, including the tourism accommodation, motor traders and construction industries.

4.22 The Committee acknowledges the comments of several stakeholders that specialised insurance allows for better management of claims, including better return to work outcomes, and that such outcomes have been realised in industries that do have specialised insurance.

4.23 The Committee notes in particular the comments of the Civil Contractors Federation that specialised insurance enables a better balance between safety and claim management performance and the amount of premium paid, while retaining worker protection.

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415 Submission 134, Master Builders Association, p 11.

416 Submission 189, Steadfast Group Ltd. See also Submission 197, Aged Care Employers Mutual.

417 Submission 82, Dr Ian Gardner, p 5.

Recommendation 18

That the NSW Government re-open the opportunity for specialised insurance arrangements, with appropriate prudential supervision and safeguards.

Scheme coverage

4.24 Various stakeholders put forward proposals in relation to the coverage of the Scheme. Some proposals would broaden the coverage of the Scheme while others would remove coverage in certain circumstances:

- introduce some 'fault based' exclusions into the Scheme[418]
- review/improvement of provisional liability provisions[419]
- tighter monitoring of sub-contracting arrangements,[420] and clarification and review of provisions relating to deeming contractors as workers[421]
- review of certain claim types such as hearing loss,[422] psychological injury including stress,[423] industrial deafness[424]
- extend coverage to include volunteers[425]
- review of the level of coverage for older workers[426]

418 For example, Submission 77, NSW Bar Association; Submission 125, Department of Trade and Investment; Submission 138, National Disability Services. See also Ms Welsh, Evidence, 21 May 2012, p 56.

419 For example, Submission 118, NSW Workers Compensation Self Insurers Association; Submission 127, ASCIANO; Submission 130, Australian Federation of Employers and Industries; Submission 151, Housing Industry Association. See also Ms Melissa Adler, Executive Director, Workplace Relations, Housing Industry Association, Evidence, 25 May 2012, p 94.

420 For example, Submission 143, Construction Forestry Mining and Energy Union. See also Ms Rita Mallia, State President, Construction Forestry Mining and Energy Union, Evidence, 25 May 2012, p 41.

421 For example, Submission 130, Australian Federation of Employers and Industries; Submission 151, Housing Industry Association. See also Ms Adler, Evidence, 25 May 2012, p 94; and Mr Garry Brack, Chief Executive, Australian Federation of Employers and Industries, Evidence, 21 May 2012, p 71.

422 For example, Submission 142, Australian Industry Group.

423 For example, Submission 109, SCO Recruitment; Submission 118, NSW Workers Compensation Self Insurers Association; Submission 130, Australian Federation of Employers and Industries; Submission 184, Hawkesbury City Council.

424 For example, Submission 118, NSW Workers Compensation Self Insurers Association; Submission 130, Australian Federation of Employers and Industries; Submission 184, Hawkesbury City Council.

425 Submission 92, Community Care Consortium. See also Submission 190, NSW Rural Fire Service Association Inc.

426 For example, Submission 119, Small Business NSW.

- remove payment of death benefits where there are no dependents (see discussion below)[427]
- introduce a higher threshold for whole person impairment lump sums (see discussion below)
- insurance cover for self-employed[428]
- redefinition of coverage for recess claims (see discussion below)[429]
- removal of coverage for rural work as deemed employee[430]
- cessation of benefits if an employee is dismissed for serious misconduct.[431]

Removal of payment of death benefits where there are no dependants

4.25 The NSW Bar Association submitted that '[d]eath benefits should not be payable unless they go to dependants of the worker that died'.[432]

4.26 Mr Jeremy Gormly, Chair, Common Law Committee, New South Wales Bar Association expanded on this in oral evidence:

> On the death claims, our objection to that is not so much that it affects a lot of people. I do not think it does. But the objection is that it is just absurd to have a workers compensation system where a chunk of money goes into someone's estate when they have no dependants. If they have left their entire estate to the cat home, then the money, the nearly half million dollars, is going to be buying cat food. Where is the logic in that? It is completely inconsistent with the compensation scheme. It is just absurd.[433]

4.27 The Committee agrees with these observations of Mr Gormly, and various other witnesses. The payment of death benefits from the Scheme where there are no dependants is not a core function of a worker's compensation and injury management scheme. It is particularly inappropriate to have such benefits in the Scheme's current financial circumstances.

427 For example, Submission 77, NSW Bar Association. See also Mr Jeremy Gormly, NSW Bar Association, Evidence, 21 May 2012, p 56.

428 For example, Submission 134, Master Builders Association. See also Mr Brian Seidler, Executive Director, Master Builders Association, Evidence, 28 May 2012, p 23.

429 For example, Submission 118, NSW Worker's Compensation Self Insurers Association, Submission 132, NSW Farmers' Federation. See also Mr Macken, Evidence, 21 May 2012, p 31 and Ms Fiona Simson, President, NSW Farmers' Federation, Evidence, 25 May 2012, p 89.

430 Submission 132, NSW Farmers' Federation. See also Ms Gracia Kusuma, Industrial Relations Manager, NSW Farmers' Federation, Evidence, 25 May 2012, p 89.

431 Submission 199, Australian National Retailers Association.

432 Submission 77, NSW Bar Association, p 2.

433 Mr Gormly SC, Evidence, 21 May 2012, p 56.

Recommendation 19

That the NSW Government seek to amend the *Workers Compensation Act 1987* to remove the entitlement of the estate of a worker to receive a death benefit where the worker had no dependants.

Thresholds for permanent impairment lump sums

4.28 In New South Wales the current thresholds for accessing statutory permanent impairment lump sums are 1 per cent for general whole person impairment, 6 per cent WPI for binaural hearing loss and 15 per cent WPI for psychological injury.[434]

4.29 The Issues Paper notes:

> Many claims for whole person impairment result in small assessments. Workers frequently make successive, or 'top-up', claims for deterioration following on from a work injury….

4.30 In South Australia and Tasmania there is a general threshold of 5 per cent WPI. In the Commonwealth scheme the general threshold is 10 per cent WPI. In Victoria there is a 10 per cent WPI threshold for physical impairment and 30 per cent WPI threshold for psychiatric impairment.[435]

Committee comment

4.31 Consistent with the approach of attempting to reduce dispute, administration and legal costs, the Committee favours increasing the general threshold from 1 per cent WPI to 10 per cent WPI for lump sum payments for permanent impairment. This would place New South Wales in the same position as two other large schemes, Victoria and the Commonwealth. The claims excluded by increasing the threshold would be fairly modest (less than $13,750 and as little as $1,375).

4.32 The Committee considers however that all savings achieved by raising the threshold for permanent impairment should be 'redistributed' to those exceeding the threshold and particularly those workers defined as severely injured.

Recommendation 20

That the NSW Government seek to amend the *Workers Compensation Act 1987* to increase the thresholds for permanent impairment lump sums under section 66 of the Act from the current 1 per cent WPI (general) and 6 per cent WPI (binaural hearing loss) to 10 per cent, but on the basis that savings be 'redistributed' in the form of higher permanent impairment lump sums for those with at least 10 per cent WPI and particularly those workers defined as severely injured (with a 15 per cent WPI threshold to be retained for psychological injury).

434 Issues Paper, Appendix 3 *Comparison with other Australian jurisdictions*, row 13.

435 Issues Paper, Appendix 3 *Comparison with other Australian jurisdictions*, row 13.

Removal of recess claims

4.33 The Committee received evidence of anomalies arising from the availability of entitlements arising from injuries sustained during recess breaks at work. Amongst those to address this issue were the NSW Workers Compensation Self Insurers Association and NSW Farmers Federation.

4.34 Mr Paul Macken, Legal Advisor, New South Wales Workers Compensation Self Insurers Association explained the position to the Committee as follows:

> **Mr MICHAEL DALEY:** So you support it nonetheless. Could you explain a [recess] claim to me? On page 5 your submission states: The Association supports the removal of coverage of workers compensation for journey claims and says further that coverage for 'recess' claim should also be removed. I have not heard that expression.
>
> **Mr MACKEN:** Journey claims are covered under section 10, [recess] claims under section 11. If somebody takes an ordinary recess from work that they take away from work and they sustain an injury, they are still covered even though the employer has no particular responsibility or ability to oversee what happens in that situation. Visiting that on the employer we say philosophically is a bad decision.[436]

4.35 Similarly, when giving evidence to the Inquiry, Ms Fiona Simson, President of NSW Farmers Federation, said:

> Our employers provide, and are very focused on providing, a safe workplace. If the employees in their recess do something that is potentially unsafe, which is very easy to do on a farm—and there is a celebrated case of shearing contractors in the Central West with the fish hook in the eye—that sort of activity then, clearly, we do not see as a worker's compensation issue, if they choose to do that sort of thing in their breaks.[437]

Committee comment

4.36 The Committee accepts the philosophy that the core circumstances with which a workers compensation and injury management scheme should deal are those over which the employer has (at least limited) control.

4.37 The Committee accepts that there are competing arguments whether a worker's compensation and injury management scheme should extend to the ancillary circumstances of recesses. However, the Committee believes that, given the Scheme's poor financial position, a conservative position must be taken at the present time with respect to benefits available under the Scheme and that therefore recess claims should be restricted.

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436 Mr Macken, Legal Advisor to the New South Wales Workers Compensation Self Insurers Association, Evidence, 21 May 2012, p 31.

437 Ms Simson, Evidence, 25 May 2012, p 91.

Recommendation 21

That the NSW Government ensure that the Workers Compensation Scheme's liability for injuries sustained by workers during 'recess' be limited to circumstances where the employment has been the significant contributing factor.

Premiums and competition

4.38 A number of suggestions were made in relation to workers compensation insurance premiums and market competition. As noted in Chapter 2, several stakeholders argued that there should be no increase in premiums, while others argued that a modest and fair increase in premiums should occur in order to contribute to reducing the deficit.[438] Other suggestions related to premiums and competition included:

- improving competition in the market[439]
- greater clarity and transparency around premium determination[440]
- improved premium dispute resolution[441]
- restructure the way in which claims history is taken into account when calculating premiums[442]
- a more flexible approach to estimating wage premium calculations/more regular premium payments[443]
- a review of the premium model in the light of the behaviour it encourages.[444] This is consistent with the evidence of employer interests generally: 'premium should reflect … historical level of risk'[445]

438 For example, Submission 146, Australian Manufacturing Workers Union; Submission 143, Construction Forestry Mining and Energy Union; Submission 135, Unions NSW.

439 Submission 151, Housing Industry Association, p 4. See also Mr David Humphrey, Executive Director, Business, Compliance and Contracting, Housing Industry Association, Evidence, 25 May 2012, p 97.

440 For example, Submission 130, Australian Federation of Employers and Industries. See also Submission 196, Association of Independent Schools of NSW.

441 For example, Submission 130, Australian Federation of Employers and Industries.

442 For example, Submission 117, Australian Road Transport Industrial Organisation; Submission 129, NSW Business Chamber.

443 For example, Submission 134, Master Builders Association. See also Mr Seidler, Evidence, 28 May 2012, p 22.

444 Submission 272, Coal Services Pty Limited, p 7.

445 Answers to questions taken on notice during evidence 25 May 2012, Mr David Humphrey, Senior Executive Director, Business Compliance and Contracting, Housing Industry Association, p 2.

Improving competition in the market

4.39 The Committee received various submissions regarding deficiencies in competition between Scheme Agents. Mr David Castledine, Chief Executive Officer of the New South Wales Branch of the Civil Contactors Federation gave evidence including the following:

> **The Hon. ADAM SEARLE:** A lot of your submission … is very critical of the role of the scheme agents. What measures do you think could be put in place that would actually turn that performance around because it seems to me that a lot of what you say is wrong with the system, they are the sort of gatekeepers for a lot of those issues?
>
> **Mr CASTLEDINE:** I would say a sizeable portion but it is by no means only the agents; there are some significant structural problems and those problems go to the heart of I think the first major problem with the scheme and that is how the structure builds the relationship between employer and employee. But going to your question, it is very difficult for me to answer because I do not understand the contractual relationship, so the first question we must ask is: Is there enough legislative power for WorkCover to control agents? Is there enough contractual power for WorkCover to control agents? Does WorkCover have the skills and experience to control agents? Is there the will to control agents?
>
> If those questions are asked then we come back to one final question, and that is, is transparency ever a good thing in these sorts of arrangements and I think it is but we cannot see that. When my members come to me and say, 'Which are the best agents?' I refer to a three-page report I pulled from the WorkCover website which is extremely difficult to follow and I then refer to WorkCover and ask them the question, and you see in my response the answer which they are obliged to provide under their current contract.[446]

4.40 The Committee is persuaded that the level of information available to employers is presently inadequate. Performance by individual Scheme Agents will be improved by various mechanisms, however the Committee accepts that a significant contributor to Scheme Agent performance will be the willingness, or otherwise, of employers to take out policies with individual Scheme Agents.

WorkCover premium calculation

4.41 The Committee notes that the WorkCover premium system provides for experience rating of employers with a basic premium in excess of $100,000. This represents 12 per cent of employers.

4.42 Employers with premiums of less than $100,000 are not experience rated.

4.43 The Committee accepts that an experience rated system provides incentives to employers, both with respect to a achieving and maintaining a good safety record and also as an inducement to employers to accept workers back into the workplace on suitable duties.

4.44 The Committee accepts the recommendation of the Business Chamber that there is a the need to develop a new premium system which is fair and balanced and rewards employers who

446 Mr Castledine, Evidence, 28 May 2012, p 18.

make little use of the system and motivates those who need to improve their safety performance.

Recommendation 22

That the NSW Government review the WorkCover premium system to extend the experience rating system to create incentives for employers both with respect to safety performance and return to work of injured workers.

Medical assessment and treatment

4.45 Another area that submission makers focused on was medical assessments and treatment, with a number of stakeholders identifying room for improvement in terms of services provided to injured workers and reducing costs to the Scheme.

4.46 As noted in Chapter 2, rising medical treatment costs has been identified as contributing to the Scheme deficit. It is also noted that one of the reform options contained in the Issues Paper relates to capping medical benefits, while another proposes strengthening the regulatory framework for health providers (which due to the time constraints of the Inquiry is not among the reforms examined in detail in Chapter 3).

4.47 A number of suggestions were made in relation to medical treatment provided to injured workers and the assessment of injuries for the purposes of determining eligibility for compensation, including:

- establishment of an independent medical assessment service/panel to assess injuries and resolve disputes (see discussion below)
- improving medical certification processes for injury and capacity[447]
- remove injured workers exclusive right to select their nominated treating doctor[448]
- improved training and accountability of doctors[449]
- adoption of best practice strategies for assessment and management of workplace injuries and pain[450]
- requiring doctors to be accredited to work within the Scheme.[451]

447 For example, For example, Submission 9, Reed Group Asia Pacific; Submission 141, Australian Physiotherapy Association; Submission 80, Dr Robert Boland; Submission 295, University of Sydney. See also Mr Tamer Sabet, NSW Branch President, Australian Physiotherapy Association, Evidence, 28 May 2012, p 55.

448 For example, Submission 170, Civil Contractors Federation.

449 For example, Submission 138, National Disability Services.

450 Submission 161, Painaustralia.

451 For example, Submission 295, University of Sydney.

Independent medical assessment service/panel

4.48 A number of stakeholders commented on the way in which an injured persons injuries were assessed for the purpose of determining eligibility for compensation, making the suggestion that a medical assessment service such as exists within the Motor Accidents Authority which administers the New South Wales CTP Scheme should be established within the New South Wales Workers Compensation Scheme. The suggestion was also made that medical assessment decisions should be binding.

4.49 For example, the Insurance Council of Australia (ICA) argued for the establishment of an independent medical assessment service in the context of assessing whole person impairment for the purposed of lump sum compensation, commutations and work injury damages:

> The ICA submits that the assessment of impairment based on objective medical criteria for the purpose of accessing appropriate lump sum compensation, commutations and work injury damages for all claims will ensure friction costs are minimised and more of the compensation premium is paid directly to injured workers.
>
> The independent binding WPI assessment would allow for consistency in the awarding of compensation based on the level of objective impairment suffered by the injured person irrespective of their injury or particular circumstance.[452]

4.50 Like a number of other stakeholders the ICA supported a model similar to the Medical Assessment Service within the CTP Scheme.[453] In this regard, Ms Vicki Mullen, General Manager, Consumer Relations and Market Development, ICA, commented:

> I am no expert on that but what I can say is that, as members may be aware, in the CTP scheme in NSW there is a specific system for the assessment of medical injuries. So I guess what we are saying there is really support for an independent and binding medical assessment scheme.[454]

4.51 GIO, one of three Scheme Agents who made a submission to the Inquiry, advocated in relation to the eleventh option in the Issues Paper for the creation of a medical panel which could issue binding assessments along the lines of the Motor Accidents Scheme model:

> GIO supports regulating and enforcing the use of medico-legal reports as part of a single qualified assessment to drive improved scheme outcomes and efficiencies. Establishing and using an accredited medical panel or similar where binding assessments are issued would reduce rates of disputes over the accuracy of medical assessments. GIO suggests the Medical Assessment Service (MAS) used by the NSW Compulsory Third Party (CTP) Scheme is a model that could be adopted.[455]

4.52 The Australian Medical Association (NSW), which highlighted the issue of causation and argued that there should be tighter control of what is assessed to be an injury, also supported the Motor Accidents Scheme model:

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452 Submission 145, Insurance Council of Australia, p 6.

453 Submission 145, Insurance Council of Australia, p 6.

454 Ms Vicki Mullen, General Manager, Consumer Relations and Market Development, Insurance Council of Australia, Evidence, 25 May 2012, p 9.

455 Submission 285, GIO, p 14.

> AMA (NSW) submits that the way to achieve this is to have the injury assessed; and a decision on causation made by an Approved Medical Specialist or a Panel of medical assessors. This is the case in other jurisdictions (including the Motor Accidents Authority Scheme, we understand).[456]

4.53 Dr Michael Gliksman, NSW Councillor, Australian Medical Association gave the following evidence:

> **Dr GLIKSMAN**: Coming back to where the resources could be found in terms of the powers, as well as the resource to which [Dr] Peter [Burke] made mention—the AMS [approved medical specialist] and the assessors with the Motor Accident Authority in relation to that—the specialist colleges, including the College of General Practitioners would be more than willing, I believe, to provide independent expertise in that regard. I make mention of the College of General Practitioners particularly—I am not a general practitioner, I might add— because general practitioners by and large feel left out of decisions in the system and yet are responsible for a great deal of the effort provided. A college input into issuing guidelines would be of great value to general practitioners who would require the back up of their college. I think it would be a well worthwhile step.
>
> May I address the other issue that Peter mentioned, and that is of causation? Both [Dr] Peter [Burke] and I work on both the Workers Compensation Commission and the Motor Accidents Authority. In the Motor Accidents Authority the medical assessor addresses both causation and percent impairment. To access the system does not require there to be an established motor vehicle related injury.
>
> Causation is determined by the medical practitioner. In the workers compensation system that is not the case. To gain access to the system under the Act causation needs to be shown beforehand and that causation is decided by a non-medical practitioner— qualifications, possibly legal. Once that is accepted as being an accident— ….
>
> **Dr GLIKSMAN**: …….. It really is outside the expertise of those who make a decision on causation but that is done to allow access to the system. Once it is done the assessor, the AMS, cannot change it. It is cause. It has been determined that this problem has been caused by this particular work-related event. All we can decide on is per cent impairment. In my view, and I think Peter has given a good example of it, there are some ludicrous things that get through that would not get into the Motor Accidents Authority scheme. My off-the-cuff estimate is about a third of the cases that are accepted in the workers compensation system and then proceed through impairment assessment would not get to first base in the Motor Accidents Authority scheme.[457]

4.54 Dr Gliksman stated: '… I point to the concept of medical panels to provide guidance as to treatment, appropriate rehabilitation plans and stepping up the return to work.'[458] The Australian Medical Association also argued that a medical assessment panel could also be used to stop unnecessary treatments and over-servicing.[459]

456 Submission 40, Australian Medical Association (NSW), p 5.

457 Dr Michael Gliksman, NSW Councillor, Australian Medical Association, Evidence, 28 May 2012, pp 4-5.

458 Dr Gliksman, NSW Evidence, 28 May 2012, p 3.

459 Submission 40, Australian Medical Association (NSW), p 5.

4.55 Dr Yvonne Skinner, Chair, NSW Branch Faculty Forensic Psychiatry, Royal Australian and New Zealand College of Psychiatrists, when asked her view about the establishment of a medical assessment panel, commented favourably:

> I think that would be very valuable because it would enable a proper management plan to be worked out using proper evidence-based management principles. If that could be formulated early it might prevent the problem of the person not receiving treatment and ending up being away from work for a prolonged period when that might not have been necessary. It would be advantageous both in terms of returning a worker to work and formulating a proper treatment plan.[460]

4.56 The Australian Federation of Employers and Industries raised concerns with the ability of employers to challenge medical practitioners assessment of injury and treatment and called for a panel of medical examiners independent of WorkCover:

> … a system of independent, properly accredited occupational physicians should be utilised with employers having the right to an independent medical examination immediately in matters of causality, treatment and reasonable injury management plans and particularly wherever return to work is dubious.
>
> In this, and other areas of dispute within the Scheme such as WPI, there should be access to a panel of independent (of WorkCover) medical examiners which is well managed and controlled and can make binding assessments.[461]

4.57 The Leading Edge Group, 'a group of over 1,200 independent retail businesses, accounting for over $350 million of purchases per annum' argued for the establishment of a single medical assessment service for all New South Wales compensation schemes:

> We strongly recommend that there should be one medical panel in NSW for all compensation scheme injury assessments. Ideally it would be controlled by a single entity. We recommend the Motor Accidents Authority, as they have shown a great success in the management of the panel to achieve fair assessments. WorkCover have an abundance of cultural and capacity issues during this process of reform. It is critically important that referrals come from the WCC and that the assessment is binding. Without these changes we consider the Issues paper reforms will not achieve the success necessary to achieve lower deficit reduction or improved return to work[462]

Committee comment

4.58 As the preceding discussion demonstrates there is some support for the establishment of a Scheme specific medical assessment service charged with making binding determinations about injury and impairment, although stakeholders differed in their rationale for the proposal. Business and employers groups argued for independent binding medical assessments because of concerns about nominal treating doctors and the ability for non-binding assessments to be appealed to the Workers Compensation Commission. Others suggested that an assessment service could provide a more holistic assessment of an injury, its impacts and rehabilitation

460 Dr Yvonne Skinner, Chair, NSW Branch Faculty Forensic Psychiatry, Royal Australian and New Zealand College of Psychiatrists, Evidence, 28 May 2012, p 9.

461 Submission 130, Australian Federation of Employers and Industries, pp 14-15.

462 Submission 191, Leading Edge Group.

and return to work prospects. The Medical Assessment Service within the Motor Accidents Scheme was commonly referred to as an appropriate model.

4.59 The Committee is alarmed by the evidence given by Australian Medical Association representatives that about a third of cases referred for impairment assessment are not work related.

Recommendation 23

That the NSW Government seek to amend the *Workers Compensation Act 1987* to allow greater use of medical assessors to determine questions of causation.

Recommendation 24

That the NSW Government seek to amend the *Workers Compensation Act 1987* to adopt a model of medical assessment for injured workers similar to that used within the Motor Accidents Scheme.

Early intervention and return to work

4.60 A central focus in many of the submissions made to the Inquiry was the key objective of the Scheme of promoting better health outcomes and return to work outcomes for injured workers. A large number of stakeholders expressed the view that return to work, in particular, was an area that needed improvement. As noted in Chapter 2, poor return to work outcomes has been identified as one of the factors contributing to the Scheme deficit.

4.61 This is supported by the submissions of the Australian Rehabilitation Providers' Association who gave evidence regarding the delays in injured works being referred by Scheme agents to rehabilitation providers, sometimes up to 31 months after the injury.[463] ARPA also gave evidence of the significantly greater cost to the Comcare scheme when there is delay getting injured workers into appropriate rehabilitation and the savings achieved from early referral and treatment.[464]

4.62 A 2011 study conducted by Cortex for ARPA discloses that return to work outcomes are more likely where referral to rehabilitation occurs within 12 months of injury, compared to after this time where successful return to work outcomes are greatly diminished. The study found 55% of cases were referred to a rehabilitation providr after 2 years of injury. Nearly a third (31%) were referred to a rehabilitation provider after years of injury. Nearly a quarter (24%) of cases were referred to a rehabilitation provider between 6 months and 2 years of injury. 12% of cases were referred between 3 months and 6 months of injury. A third (33%) of cases were referred within 3 months injury. The study found that better return to work rates were achieved where referral occurred sooner:

463 Submission 128, Australian Rehabilitation Providers Association, p 3.

464 Submission 128, Australian Rehabilitation Providers Association, p 2.

Table 3 Referrals to rehabilitation for same employer services (where the worker is assisted in returning to their pre-injury employer)[465]

Delay to referral	Return to work Rate
0 – 6 months	80%
6 – 18 months	76%
18 months – 3 years	76%
➢ 3 years	60%

Total number of referrals: 8,747
Average delay to referral: 25.77 weeks

Table 4 Referrals to rehabilitation for new employer services (where the worker is assisted in returning to the workforce with a new employer)[466]

Delay to referral	Return to work Rate
0 – 6 months	50%
6 – 18 months	35%
18 months – 3 years	24%
➢ 3 years	19%

Total number of referrals: 7,857
Average delay to referral: 149.49 weeks

4.63 The ARPA evidence states that some 15% of claims account for 85% of claims costs. The reasons for this phenomenon require further investigation if there is to be a response that is effective and fair.

4.64 Consequently, stakeholders called for an increased focus on intervention and return to work,[467] and a number of specific proposals were put forward, including:

- increased monitoring and oversight by WorkCover, including establishment of a return to work inspectorate[468]
- provide incentives for employers with regard to early intervention and return to work[469]
- strengthening employer obligations to provide suitable employment[470]
- greater emphasis on re-training injured workers[471]

465 Submission 128, Australian Rehabilitation Providers Association, p 4.

466 Submission 128, Australian Rehabilitation Providers Association, p 5.

467 For example, Submission 73, NSW Nurses Association; Submission 126, Slater & Gordon Lawyers; Submission 135, Unions NSW; Submission 141, Australian Physiotherapy Association; Submission 170, Civil Contractors Federation; Submission 185, Business Council of Australia; Submission 174, Public Service Association; Submission 241, Konekt; Submission 253, Work Options Pty Ltd.

468 For example, Submission 135, Unions NSW. See also Mr Stephen Hurley-Smith, Industrial Officer, NSW Nurses' Association, Evidence, 25 May 2012, p 66.

469 For example, Submission 125, Department of trade and Investment, Submission 143, Construction Forestry Mining and Energy Union. See also Mr Humphrey, Evidence, 25 May 2012, p 93.

470 For example, Submission 135, Unions NSW. See also Mr Hurley-Smith, Evidence, 25 May 2012, p 66.

- ban on employers requiring applicants to disclose workers compensation history.[472]

4.65 The Committee was informed by WorkCover that it is undertaking work to improve return to work outcomes, including the establishment of a new inspectorate to focus on return to work:

> … WorkCover has been working on a return-to-work inspectorate to work with the inspectorate that already exists around workplace health and safety, to look at the top 10 industries with the top 10 risks, and to be able to work with those employers very closely in terms of education and helping them look at different return-to-work options.[473]

4.66 Given the financial and other impacts on workers of not returning to work, the Committee recommends that each of the ideas contained in paragraph 4.64 be fully explored by the proposed joint standing committee.

Recommendation 25

That, given the financial and other impacts on workers of not returning to work, the NSW Government ensure that each of the ideas contained in paragraph 4.64 be fully explored by the joint standing committee proposed at Recommendation 16.

Claims management

4.67 The claims management process was another area commented on by Inquiry participants, with concerns being expressed about poor claims management practices by Scheme agents and problems with regard to oversight by WorkCover. As discussed in Chapter 2, many stakeholders attributed the Scheme's financial issues to poor claims management by Scheme Agents.

4.68 A number of measures to improve claims management were suggested, including:

- centralised information technology system (see below)
- simplification of claims management[474]
- better training of Scheme Agent claims officers[475] and WorkCover claims managers[476]

471 For example, Submission 143, Construction Forestry Mining and Energy Union; Submission 135, Unions NSW. See also Ms Susan Smith, Project Manager – Disability Safe, National Disability Services, Evidence, 25 May 2012, p 72 and Mr Mark Lennon, Secretary, Unions NSW, Evidence, 25 May 2012, p 17.

472 For example, Submission 143, Construction Forestry Mining and Energy Union.

473 Ms Aplin, Evidence, 21 May 2012, p 4.

474 For example, Submission 122, Australian Lawyers Alliance.

475 For example, Submission 166, Transport Workers Union of NSW; Submission 161, Painaustralia; Submission 250, Mr Adrian Kimbler.

476 For example, Submission 146, Australian Manufacturing Workers Union; Submission 161, Painaustralia; Submission 166, Transport Workers Union of NSW; Submission 250, Mr Adrian Kimbler.

- benchmark skills and capacity of claims officers and establish a ratio of files per officer.[477]
- enhance power of WorkCover and Agents to investigate fraudulent and exaggerated claims,[478] and to recover monies paid where fraud is established.[479]

4.69 We note that in its peer review, Ernst and Young stated at page 5 that 'In our experience it is possible to arrest deterioration and improve the claims experience by improving claims management and WorkCover guidelines' and that 'a very high priority needs to be given to these issues.' The Committee agrees and recommends that the functions, behaviour and powers available to Scheme agents, and the guidelines to them from WorkCover, be reviewed to achieve better claims management outcomes.

Recommendation 26

That the NSW Government review the functions, behaviour and powers available to Scheme agents under the Workers Compensation Scheme, and the guidelines issued to them by WorkCover, to achieve better claims management outcomes.

Centralised information technology system

4.70 One potential savings measure identified during the Inquiry was the implementation of a centralised information technology system within the Scheme.

4.71 In this regard, Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers, expressed his support for the Victorian model which includes a centralised IT system noting that this is one area where operational efficiencies could be improved:

> One of the key differences between the NSW and the Victorian WorkCover Scheme is that the Victorian Scheme was set up with a centralised information technology system. One of the key differences in WorkCover's ability to be agile and manage the Scheme well is that it has to negotiate seven system changes with seven Scheme agents every time it wants to change the way claims management occurs in this Scheme. It is also inefficient in that it has to pay for maintenance of seven information technology systems, compared to the cost of maintaining a single information technology system. That is one area I suggest that operational efficiencies could be improved.[480]

4.72 Mr Playford also noted that a single IT system may be one way to improve competition in the market:

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477 Submission 126, Slater & Gordon Lawyers.

478 For example, Submission 96, Timber Trade Industrial Association; Submission 170, Civil Contractors Federation; Submission 182, D&M Excavations and Asphalting Pty Ltd.

479 For example, Submission 141, Australian Physiotherapy Association. See also Mr Sabet, Evidence, 28 May 2012, p 54.

480 Mr Playford, Evidence, 21 May 2012, p 17.

> It is difficult to encourage competition in the current model because there are significant barriers to entry and exit for agents. Again, there has been talk about IT systems and that is just one example of those barriers. If you are a new agent wanting to enter the Scheme you have to have your own IT system. If you are an existing agent and you are not sure about whether you want to be in the scheme it is difficult because if you exit you have to turn off your IT system. There is big cost involved in turning off an IT system and potentially you cannot spread that cost over other parts of your portfolio. So there are challenges in trying to encourage new entrants and also in trying to get the best outcome from your existing agents in the scheme. That is one area where I think there are opportunities to look at how you can improve competition between agents in this model.[481]

4.73 Ms Geniere Aplin, General Manager of Workers Compensation Insurance, WorkCover, informed the Committee that WorkCover has undertaken a review of the option of establishing a centralised system and noted that WorkCover '…would be able to quantify a range of management savings but they are not going to significantly contribute to a reduction of the deficit.'[482]

4.74 In answers to questions taken on notice, WorkCover noted that a centralised system may have the potential to reduce IT costs and encourage competition, but may also have the effect of decreasing competition:

> A single claims and policy IT system may have the potential to reduce annual IT costs in the Scheme. A single claims and policy IT system may have the potential to encourage competition by:
>
> - Making it easier for new agents to be attracted to the market
> - Making it easier for existing agents to be exited if they do not perform, or from the agents perspective, if the contractual arrangements are not commercially viable
> - Allowing the existing agent role to be more readily re-defined or segmented, allowing innovation in model, new entrants and specialisation
> - Increasing the portability of claims and policies.
>
> However, it may also contribute to decreasing competition by reducing agent innovation.[483]

4.75 WorkCover also advised that '[a] feasibility study is required to quantify the cost/benefit of a single claims and policy IT system including estimated costs'.[484]

4.76 The suggestion of a centralised IT system was not met with enthusiasm from the insurer organisations appearing at the Committee's hearings. For example, Mr David Krawitz, representing the Insurance Council of Australia, as Chair of the National Workers Compensation Committee, commented that the matter of a centralised system was a matter

481 Mr Playford, Evidence, 28 May 2012, p 48.

482 Ms Aplin, Evidence, 21 May 2012, p 17.

483 Answers to questions taken on notice during evidence 21 May 2012, Ms Geniere Aplin, Question No. 9, p 26.

484 Answers to questions taken on notice during evidence 21 May 2012, Ms Geniere Aplin, Question No. 9, p 26.

for WorkCover but noted that Scheme agents having their own systems in place allows them to customise their systems:

> I think ultimately a single system is a question for WorkCover. I would say there are certain benefits that WorkCover would derive from a single system. I believe, as agents, we find to have our own system in place also has benefits because it does allow us to customise our systems. It also allows us to make investments in our systems and in some way differentiate what we have to offer from the other agents in the scheme. … To determine whether or not there would be savings for the scheme as a whole, I think that would be an exercise that WorkCover would need to undertake to fully understand the costs and the benefits.[485]

4.77 In his capacity representing Allianz Insurance, Mr Krawitz noted that a centralised system may not have as much advantage as other information technology improvements such as using entirely electronic based processing:

> We have also invested heavily over the years in our information technology systems and I know that the discussion around a centralised information technology model has come up but I would note that we have a full image paperless environment which we believe does offer distinct benefits. If you look at some of the other centrally run schemes such as Victoria, they are still running on paper-based files, so centralised, I do not believe, is always a better outcome in terms of the service that can be offered.[486]

4.78 Mr Greg Pattison, General Manager, Workplace Solutions, NSW Business Chamber expressed the view that the benefits of a centralised IT system would be modest:

> To my knowledge there have been one or two attempts to look at it over the past 15 years. It has been rejected on the basis of cost. It seems to us, given the size of the Scheme and the sorts of improvements you need to make to get a positive cost benefit out of the centralised IT system, the benefits are probably quite modest.[487]

4.79 The NSW Business Chamber in its submission referred to the importance of timely and reliable information noting that a centralised core system would not prevent agents operating their own front-end system:

> Effective management of a system as large as the NSW Workers Compensation system requires timely and accurate information, not only for those charged with its overall management but also those who are directly engaged in the delivery of services to injured workers and their employers.
>
> Workers compensation systems are complex and dynamic and their effective management requires timely and reliable information. Similarly claims agents will be better equipped to meet their claims management responsibilities if they have access to more complete information. A centralised core system would not prevent agents

485 Mr Krawitz, Chair, National Workers Compensation Committee, Insurance Council of Australia, Evidence, 25 May 2012, p 13.

486 Mr Krawitz, Chief General Manager, Workers Compensation Allianz Insurance, Evidence, 28 May 2012, p 43.

487 Mr Pattison, Evidence, 21 May 2012, p 73.

> operating their own front end systems in correlation with the centralised core capacity.[488]

4.80 Mr Mark Lennon, Secretary of Unions NSW, expressed support for the idea of a centralised system but acknowledged the difficulty in implementing it stating, '[y]es, we would support anything that improves IT, but the problem is that despite the fact that people tell you they have the best IT system in the world, synchronising IT systems is often very difficult'.[489]

4.81 Mr David Castledine, CEO, NSW Branch of the Civil Contractor Federation also expressed support for an improved data collection and computer software system:

> I strongly support the views presented already that a single collection system would benefit everyone. WorkCover has struggled gainfully to try to extract data out of agents but it is very complex. We have got seven different systems. All the service providers under the agents operate under different data collection systems so I appreciate that that is very, very difficult and makes it difficult to make informed decisions.[490]

Committee comment

4.82 The Committee notes the suggestion by various stakeholders, including the Scheme Actuary, that savings could result from reform implementing a single information technology system across the Scheme, to be used by all seven Scheme Agents.

4.83 The Committee acknowledges that the implementation of a single IT system would likely involve initial investment. However, the Committee also notes evidence from some stakeholders that such reform may offer significant benefits including providing for better data capture. It has been suggested that this may lead to an improved understanding of how claims progress through the system and enable analysis and review of how claims are managed.

4.84 However, the also Committee notes the views of some organisations that savings resulting from the implementation of a single IT system may be modest, and may have unintended negative consequences.

4.85 The Committee does not have the benefit of costings for such a proposal, nor any comprehensive assessment of what impact such reform may have. Nonetheless, the Committee considers that there is merit in considering such a reform in the future.

4.86 The Scheme actuary stated in his oral evidence to the Committee on 28 May 2012 that in his view WorkCover as an institution had not been properly invested in since it was created in 1987 to the level required in terms of capacity and capability. He cited the IT situation as well as the observation that, in his view, the number and caliber of people employed in the Victorian WorkCover Authority it larger proportionally compared to the NSW WorkCover Authority.[491] He said: 'Its ability to do the things that you suggested is hamstrung by the extent

[488] Submission 129, NSW Business Chamber, p 15.

[489] Mr Lennon, Evidence, 28 May 2012, p 26.

[490] Mr Casteldine, Evidence, 28 May 2012, p 20.

[491] Mr Playford, Evidence, 28 May 2012, p 51.

that it has the right number of people and the right caliber of people to do that. If you want to set WorkCover up for success in the future, that needs to be considered.'[492]

4.87 This is consistent with the submission of the Public Service Association, that when expenditure per worksite is compared the Victorian regulator has nearly twice as many resources as in NSW.[493] This would have an impact on a range of functions, not only insurance but also safety inspections, enforcement and quite likely premium collections.

Committee conclusion

4.88 As identified in this Chapter, there are a large number of alternative reforms and additional measures that the Government could consider when developing its strategy for getting the New South Wales Workers Compensation Scheme back on track.

4.89 It is clear that reforms that reduce benefits to injured workers, such as those contained in the Issues Paper, if introduced, must form only a part of the measures taken to improve the key outcomes of the Scheme of promoting better health outcomes and return to work benefits for injured workers, goals which if realised will contribute to a reduction the Scheme's deficit. Reform options must be carefully balanced to ensure that both Scheme viability and protection of injured workers and employers is attained.

4.90 The Committee further notes the halving of serious incidents over the last ten years in New South Wales. The Committee recommends that options to prevent and reduce workplace injury be a priority for both government and the joint standing committee proposed.

Recommendation 27

That the NSW Government and the joint standing committee proposed in Recommendation 16 make options to prevent and reduce workplace injury a priority.

4.91 It is noted that a number of stakeholders expressed the view that without additional reforms and changes to the way the Scheme is administered and managed the reforms contained in the Issues Paper will not achieve the aim of sufficiently lowering the deficit.

4.92 A strong message has been sent that there is a need for a wholesale review of the Scheme and its management by WorkCover, as well as the need for ongoing regular review. The sheer number of suggestions raised in the submissions and during the hearings, as well as their breadth across all areas of the Scheme, reflects the need for an extensive review of the Scheme to commence as soon as possible. The evidence presented by 79 witnesses and in over 350 submissions clearly demonstrates that the current operation of the workers compensation scheme is not sustainable.

4.93 The Committee therefore recommends that a comprehensive review of the New South Wales Workers Compensation Scheme be undertaken and that consideration be given to a range of reform options, including statutory and non-statutory reforms, which reflect the breadth of

[492] Mr Playford, Evidence, 28 May 2012, p 51.

[493] Submission 174, Public Service Association, pp 12-13.

the Scheme. The review should aim to address the long term sustainability of the Scheme, and develop a comprehensive fully costed program of reform.

4.94 The review should take into account the Committee's report, which has analysed stakeholder views in relation to many of the reforms in the Issues Paper and has attempted to identify the range of alternative reforms and measures put forward by stakeholders. The submissions presented to the Inquiry should also be considered.

4.95 The Committee notes the large number of Scheme improvement and cost saving measures raised by Inquiry participants described in this Chapter, many of which address very specific technical or operational matters. A regular review process, involving stakeholder participation and consultation, would go a long way toward examining operational issues as they arise and to explore practical solutions.

4.96 The Committee considers that the appropriate mechanism by which the initial comprehensive review and subsequent regular reviews of the workers compensation system could be undertaken is through a joint standing committee of the Parliament of New South Wales.

4.97 The Committee has been asked to review the New South Wales workers compensation system in urgent circumstances and in a tight frame. The Committee has made recommendations largely triggered by the Scheme's poor financial position. The Committee recognises that in the medium to long term, the Scheme should not be looked at in isolation. It should be examined as a part of a project to harmonise, so far as possible, accident compensation across different 'systems' (e.g. work injury, motor accidents, 'public liability') and across different Australian jurisdictions. The diversity of workers compensation across Australia, and indeed accident compensation across Australia, is a 'dog's breakfast'. A comprehensive harmonisation project has been beyond the reach of the present inquiry.

4.98 But it must happen in the future.

Recommendation 28

That the NSW Government consider a comprehensive examination of opportunities to harmonise compensation schemes in New South Wales.

Appendix 1 Resolutions establishing the Committee

Legislative Council, 2 May 2012, Minutes No 79, Item 17, pp 924-928:

1. That a joint select committee be appointed to inquire into and report on the New South Wales Workers Compensation Scheme, in particular:

   (a) the performance of the Scheme in the key objectives of promoting better health outcomes and return to work outcomes for injured workers,

   (b) the financial sustainability of the Scheme and its impact on the New South Wales economy, current and future jobs in New South Wales and the State's competitiveness, and

   (c) the functions and operations of the WorkCover Authority.

2. That, in conducting the inquiry, the committee note and examine the WorkCover NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011, and the External peer review of outstanding claims liabilities of the Nominal Insurer as at 31 December 2011.

3. That, notwithstanding anything to the contrary in the standing orders of either House, the Committee consist of eight members, as follows:

   (a) five members of the Legislative Council, comprising:
      (i) Mr Blair,
      (ii) Mr Borsak,
      (iii) Mr Green,
      (iv) Mr Khan,
      (v) Mr Searle, and

   (b) three members of the Legislative Assembly of whom:
      (i) two must be Government members,
      (ii) one must be an Opposition member.

4. That the Chair of the committee be Mr Borsak and that the Deputy Chair be elected at the first meeting before proceeding to any other business.

5. That, notwithstanding anything contained in the standing orders of either House, the quorum of the committee is four members, of whom two must be Government members and two must be non-Government members, and the committee must meet as a joint committee at all times.

6. That, notwithstanding anything contained in the standing orders of either House, the committee have leave to sit and transact business during the sittings or any adjournment of either House.

7. That, notwithstanding anything contained in the standing orders of either House, a committee member who is unable to attend a deliberative meeting in person may participate by electronic

communication and may move any motion and be counted for the purpose of any quorum or division, provided that:

(a) the Chair is present in the meeting room,

(b) all members are able to speak and hear each other at all times, and

(c) a member may not participate by electronic communication in a meeting to consider a draft report.

8. That the committee report before 5.00 pm on 13 June 2012.

9. That this House requests the Legislative Assembly to agree to a similar resolution, appoint three members to serve on the committee and fix the time and place for the first meeting—put and passed.

Legislative Assembly, 2 May 2012, Votes and Proceedings No. 80, Item 16, pp 792-794:

(1) That this House agrees with the Legislative Council's resolution relating to the appointment of a Joint Select Committee on the NSW Workers Compensation Scheme.

(2) That Mr Daley, Mr Speakman and Mr Stokes be appointed to serve on such committee as the members of the Legislative Assembly.

(3) That Wednesday 2 May 2012 at 6.30 pm in the Waratah Room be fixed as the time and place for the first meeting.

(4) That a message be sent informing the Legislative Council of this resolution.

Appendix 2 Issues Paper released by Minister

NSW Workers Compensation Scheme

Issues Paper

Purpose of this Issues paper

There are many indications that the current Workers Compensation Scheme is failing the people of NSW, and urgent action is required.

The NSW Government is responding to the deteriorating performance of the Workers Compensation Scheme and is acting urgently to ensure its long term sustainability to provide injured workers with the support they deserve while remaining affordable, fair and competitive for NSW.

The premiums paid by New South Wales employers are estimated to be between 20 and 60 per cent higher than equivalent employers in our competitor states and the scheme actuary projects that the continued deterioration in the scheme deficit will require an eventual increase of up to 28 per cent in premium rates if no changes are made to the scheme. The Insurance Premium Order which sets premium rates is gazetted each year to commence at 4pm on 30 June, therefore decisions about premium rates need to be made at the latest at the end of May 2012.

An increase of this size would impact current and future jobs in NSW, flowing through to reduced state revenues such as payroll tax and would further exacerbate the State's lack of competitiveness as compared to our most comparable competitor States (Victoria and Queensland). Given these risks, increasing premium is not an acceptable solution.

The NSW Government is canvassing a number of suggested solutions to the problems currently being experienced in the NSW Workers Compensation system, with particular reference to other State workers compensation systems.

These solutions for the Scheme deliver effectively on seven reform principles:

1. enhance NSW workplace safety by preventing and reducing incidents and fatalities;
2. contribute to the economic and jobs growth, including for small businesses, by ensuring that premiums are comparable with other states and there are optimal insurance arrangements;
3. promote recovery and the health benefits of returning to work;

4. guarantee quality long term medical and financial support for seriously injured workers;
5. support less seriously injured workers to recover and regain their financial independence;
6. reduce the high regulatory burden and make it simple for injured workers, employers and service providers to navigate the system; and
7. strongly discourage payments, treatments and services that do not contribute to recovery and return to work.

1. Priorities for New South Wales

The NSW Government has set out five priorities for NSW. These are to:

- rebuild the economy;
- return quality services;
- renovate infrastructure;
- strengthen our local environment and communities; and
- restore accountability to Government.

The workers compensation system is a critical component of the NSW economy. Employers and workers are entitled to expect a workers compensation system that is efficient, cost effective and offers fair, timely assistance to employers and workers.

1.1 The need to reform the NSW Workers Compensation Scheme

The NSW Workers Compensation Scheme is a broken system that does not produce good outcomes for injured workers, and without significant improvements it is not financially sustainable:

1. The premiums paid by New South Wales employers are estimated to be between 20 and 60 per cent higher than equivalent employers in our competitor states and if the Scheme continues to deteriorate the difference will increase starkly. The insurance arrangements offered to businesses are not optimal insurance arrangements reflecting risk;
2. The system is difficult to navigate for all participants with a lot of red tape;
3. Payments for seriously injured workers are inadequate, weekly payments in lieu of lost earnings for totally incapacitated workers that bear no relation to the income they have lost. In fact, they are paid a rate barely above the poverty line;
4. Recovery and the health benefits of returning to work are not effectively promoted as there are perverse financial incentives for workers to remain off work and there is not effective work capacity testing;

5. Less seriously injured workers are not encouraged effectively through financial incentives and the system to recover and regain their financial independence; and
6. WorkCover has limited power to strongly discourage payments treatments and services that do not contribute to recovery and return to work.

Because the NSW Scheme does not do these things well, it costs far more to get a claimant back to work in NSW than it does in Queensland or Victoria and costs are increasing at an unsustainable rate.

The NSW Government is proposing a suite of reforms that will focus the NSW Workers Compensation Scheme on these critical principles.

1.2 Guiding Principles

As a guiding principle the object of the workers compensation legislation is to provide income support, medical assistance and rehabilitation support for workers injured during the course of their employment.

The best workers compensation systems are designed to:

1. enhance NSW workplace safety by preventing and reducing incidents and fatalities;
2. contribute to the economic and jobs growth, including for small businesses, by ensuring that premiums are comparable with other states and there are optimal insurance arrangements;
3. promote recovery and the health benefits of returning to work;
4. guarantee quality long term medical and financial support for seriously injured workers;
5. support less seriously injured workers to recover and regain their financial independence;

6. reduce high regulatory burden and make it simple for injured workers, employers and service providers to navigate the system; and
7. strongly discourage payments, treatments and services that do not contribute to recovery and return to work.

Schemes that align to the above principles are fair, affordable, efficient and financially sustainable. International research has consistently found a correlation between early return to work and improved health outcomes. Long term absence and work-disability are harmful to physical and mental health and wellbeing. Recovery and return to work should be the key objects of any workers compensation system.

The premiums paid by New South Wales employers are estimated to be between 20 and 60 per cent higher than equivalent employers in our competitor states and if the Scheme continues to deteriorate the difference will increase starkly.

The Independent Scheme actuary projects that an increase of 28% in premium rates would be required if no changes are made to the Scheme. An increase of this size would impact current and future jobs in NSW, flowing through to reduced state revenues such as payroll tax and would further exacerbate the State's lack of competitiveness as compared to our most comparable competitor States (Victoria and Queensland). Given these risks, increasing premium is not an acceptable solution.

It has been suggested that the goal of any reform package should be to:

- adopt the most effective workers compensation measures from around Australia
- simplify benefit calculation,
- make workers' entitlements more transparent and easier for workers and employers to understand
- workers whose injuries are less serious should have greater incentives and support to return to work, while more seriously injured workers should receive improved weekly benefits and lump sum compensation entitlements.

1.3 Financial Background

The financial sustainability of the Workers Compensation Scheme is deteriorating. An independent valuation of the Scheme's outstanding claim liabilities is undertaken every six months (for the periods ending 30 June and 31 December). The most recent valuation is for the period ending 31 December 2011. The executive summary of the valuation is attached as **Appendix A**. The valuation has been Peer reviewed and the Peer review report is attached as **Appendix B**. A table of jurisdictional comparisons to the current benefit regime in NSW is attached as **Appendix C.**

As at 31 December 2011, the Independent Scheme Actuary calculated the Scheme's deficit at $4.083 billion, a deterioration of $1,720 million in six months. Its funding ratio is 78%, a deterioration of 7% in six months.

This is the worst financial result incurred since the Scheme commenced in 1987.

The Scheme's net outstanding claims liability (inflated and discounted, and including claims handling expenses (CHE)) was $14.378 billion ($16.104 billion when a 12 per cent risk margin is added). The risk margin ensures that, if the Scheme's ultimate liability is greater than estimated, there is a 75 per cent probability that there will be sufficient assets to cover all claims.

Outstanding Claims Liability

	Jun-11	Dec-11	Difference
	$m	$m	$m
Gross claim payments	12,225	13,679	1,454
less Recoveries	-409	-433	-23
Net central estimate (before CHE)	**11,816**	**13,246**	**1,431**
plus Claim handing expense allowance	923	1,132	209
Net central estimate (with CHE)	**12,739**	**14,378**	**1,639**
Risk margin	1,529	1,725	197
Provision	**14,268**	**16,104**	**1,836**

The financial sustainability of the Scheme, at current premium levels, is expected to deteriorate further in future years. This is not good for business or injured workers.

In New South Wales, there are 269,562 policies held by employers and 3 million workers are covered by the Scheme. To provide a view of the quantum of the deficit, the deficit is equal to an amount of $15,146 per employer and $1,326 per every worker that is covered by workers compensation insurance. The growth in the Scheme deficit from June 2011 to December 2011 cost NSW more than $9 million per day. The cost of compensating workplace injury is borne by employers through workers compensation insurance premiums.

1.4 Outstanding Liability categories

Weekly payments, medical treatment and Work Injury Damages liabilities are the largest three contributors to the Scheme's outstanding claims liability. They are also the main contributors to the $2.1 billion increase in claims liability since 2008.

Together they account for:

- 76% of estimated gross Scheme costs in 2012/13;
- 81% of the total gross outstanding claims liability; and
- 95% of the total ($2.1billion) deterioration in claims experience incurred since June 2008.

Estimate of Discounted Outstanding Liability by component, as at 31 December 2011

Benefit Type	Outstanding claims liability	Impact of A v E experience and changed actuarial assumptions	
	$m	$m	%
Commutations	290	5	2%
Weekly	5,912	48	1%
Workplace Injury Damages	1,771	148	8%
Legal Costs	433	-2	0%
Permanent Injury (Section 66)	590	28	5%
Pain and Suffering (Section 67)	237	14	6%
Medical	3,339	-117	-4%
Investigation	383	15	4%
Rehabilitation	236	-11	-5%
Death	81	-4	-4%
Other Payments	143	6	4%
Pre-WorkCover Liability	1	0	-20%
Asbestos	155	14	9%
ULIS - Gross	106	-8	-8%
Total Gross Outstanding Claims Liability	13,679	135	1%

The cost of the Scheme, in adjusted dollars, on current projections for 2012/13 will be $2,601 million, which means that the premium collected at the current rates won't be enough to cover the ongoing cost of the Scheme.

Breakdown of 2012/2013 breakeven premium rate (excl GST)

Benefit Type	PPCI	Annual Cost (Constant $)	Annual Cost (Adjusted $)	% of Wages
	$	$m	$m	%
Commutations	289	24.3	21.0	0.01%
Weekly	12,030	1,013.0	875.9	0.55%
Common Law	3,494	294.2	254.4	0.16%
Legal	1,132	95.3	82.4	0.05%
S66 - permanent impairment	2,023	170.3	147.3	0.09%
S67 - pain & suffering	734	61.8	53.4	0.03%
Medical	7,958	670.0	579.4	0.36%
Investigation	1,035	87.2	75.4	0.05%
Rehabilitation	1,277	107.5	93.0	0.06%
Death	569	47.9	41.4	0.03%
Other payments	454	38.2	33.1	0.02%
Gross cost	30,995	2,609.8	2,256.7	1.42%
Excess recoveries	-87	-7.3	-6.4	0.00%
Tax recoveries	-274	-23.1	-20.0	-0.01%
Other recoveries	-1,029	-86.7	-75.0	-0.05%
Net cost (excl expenses & levies)	29,604	2,492.7	2,155.4	1.36%
Expenses and Levies	6,117	515.1	445.4	0.28%
Net cost	35,721	3,007.8	2,600.8	1.64%

1.5 Workers Compensation System, Insurance, Premium, Benefit and Regulatory Systems

The Scheme operates under the *Workers Compensation Act 1987, Workplace Injury Management and Workers Compensation Act 1998*.

Insurance policies

All NSW employers must have a workers compensation insurance policy if they pay more than $7500 in wages per annum, employ an apprentice or trainee, or are part of a group for premium purposes.

Insurance cover can be obtained in the following ways:

- The Workers Compensation Scheme – provides workers compensation insurance through contracted Scheme Agents to employers operating in New South Wales, and is responsible for underwriting risk, funds management, and premium setting.
- SICorp (through the Treasury Managed Fund) – underwrites workers compensation, administration and financial liability for most public sector employers except those who are self-insurers.
- Self insurers –organisations with enough capital to underwrite, pay and manage their own claims may be licensed to self-insure (there are currently 60 self-insurers).
- Specialised insurers – seven NSW insurers are licensed to underwrite workers compensation insurance risk for specific industry classes. The specialised insurer license category has been closed to new entrants.

The Scheme is funded by the insurance premiums paid by employers. The amount payable is based on a number of factors, including:

- the industry in which the employer operates (the industry premium rate takes into account the costs of compensation claims that have occurred in the industry);
- the amount of wages the employer pays to its workers;
- the costs of any claims made by their workers (for employers with a basic tariff premium greater than $10,000 and with wages greater than $300,000);
- the dust diseases levy, paid by employers whose businesses may expose workers to the risk of contracting a dust disease; and
- the mine safety premium adjustment (for mining industry employers).

Premiums fund financial and medical support to injured workers and cover the costs of dispute management and administration of the schemes.

Benefits

The NSW Workers Compensation system is one of the most generous benefit systems in the nation providing unlimited 'no fault' protection to workers and their employers in the event of a work-related injury or disease.

An injured worker may be entitled to claim a range of compensation benefits. The Scheme's actuary has estimated the total number of claims incurred over the life of the Scheme (as at 30 June 2011) to be 2,600,316.

The amount and type of benefit available to an injured worker broadly depends on the type, nature and severity of their injury, the period they are unable to work, and the date of their injury and claim lodgement.

Types of benefit under the Scheme include:

- weekly incapacity payments in lieu of lost income (including up to 12 months post-retiring age), which:
    - vary depending on: whether the injured worker's level of capacity is total (unfit for any work), or partial (partially fit for work); whether or not the worker's pre-injury earnings are paid under an award, industrial or enterprise agreement; and whether the period is within the first 26 weeks of incapacity or after (at which point a 'step down' occurs in the amount paid); and
    - are also capped (the maximum amount from 1 April 2012 to 30 September 2012 is $1838.70);
- medical, hospital and allied health costs for an indefinite period of cover. The Scheme is liable for all 'reasonable and necessary' medical treatment, with limited power to refuse to meet the costs of treatment;
- lump sum permanent impairment payments for non-economic loss (and pain and suffering, where applicable) – the amount of compensation depends on the degree of impairment[1];

[1] i.e. if the degree of impairment is:

- intensive rehabilitation assistance;
- employer and employee legal expenses;
- death compensation (funeral costs, lump sum and dependency payments); and
- commutation of statutory entitlements to a lump sum.

Injured workers also have limited access to negligence-based, lump-sum damages for economic loss (of past and future earnings) at common law (Work Injury Damages claims), which are made when the injured worker takes legal action against their employer. These claims are heard in the District Court.

To make such a claim, the following legislated criteria must be met:

- the work injury is a result of employer negligence;
- the injured worker must have at least 15 per cent whole person impairment;
- a claim can only commence at least six months after the worker gave notice of the injury to the employer; and
- court proceedings cannot be commenced more than three years after the date on which the injury was received, except with the leave of the Court.

Successful Work Injury Damages claims are paid out of the Scheme.

The worker must have received all statutory lump sum entitlements for permanent impairment and pain and suffering (non-economic loss) to which they are entitled under the Scheme before the Work Injury Damages claim can be settled. The settlement cancels all further entitlements to benefits under the Scheme.

In addition, the amount of weekly compensation that has already been paid to the worker must be repaid out of the amount awarded. The amount awarded can also be reduced if the worker's own negligence contributed to the injury.

- not greater than 10 per cent, the amount is: Degree x $1,375;
- greater than 10 per cent but not greater than 20 per cent, the amount is: $13,370 + [(Degree – 10) x $1,650];
- greater than 20 per cent but not greater than 40 per cent, the amount is: $30,250 + [(Degree – 20) x $3,850];
- greater than 40 per cent but not greater than 75 per cent, the amount is: $85,250 + [(Degree – 40) x $3,850]; and
- greater than 75 per cent, the amount is: $220,000.

WorkCover's regulatory role

WorkCover is responsible for regulating the System by:

- managing the Workers Compensation Scheme on behalf of the Nominal Insurer, which is the public sector legal entity responsible for the management of the Workers Compensation Insurance Fund;
- assisting workplaces to prevent work-related injury and disease;
- promoting prompt and efficient management of work-related injuries;
- licensing self and specialised insurers; and
- oversight of service providers.

1.6 Premium Levels

The cost to employers of premiums in New South Wales does not encourage investment in the NSW economy and is not competitive with other jurisdictions.

The target premium collection rate for the Scheme in 2011-12 is 1.68 per cent of wages, which is:

- less than the rate required to cover the expected cost of claims for the year based on risk free investment returns; and
- marginally higher than the break even rate based on long term expected investment returns.

While there has been a cumulative 33 per cent reduction in average workers compensation premium rates since 2005 (with resulting savings for employers of around $1 billion per annum), NSW premiums remain higher than those in Victoria, Queensland and Western Australia. This has consequences for the costs of NSW businesses, and their competitiveness in relation to businesses in jurisdictions with lower premiums.

1.7 Key differences compared to schemes in other jurisdictions

1.7.1 Scheme Premium Jurisdictional Comparisons

The actual premium paid by an employer in New South Wales varies according to the size and claims experience of the employers.

Premium rates are generally pooled across similar risk profile groups. This allows employers who share a common set of risks to spread the risk across their industry type. Across the schemes, there are hundreds of specified premium rates for industry types.

The examples below compare the basic tariff premium rates for several employers with the corresponding Queensland and Victorian rates.

They also include a projection of the potential increases in premium, being 28% on average that may be required if no action is taken to reduce the spiralling costs of the Scheme.

Employer	Annual wages	NSW current premium	Vic comparison	Qld comparison	NSW if premiums increase by 28%
A wooden structural component manufacturing company	$1,000,000	$42,540 (4.25%)	$23,110 (2.31%)	$35,230 (3.52%)	$54,451 (5.45%)
A residential construction company	$250,000	$12,600 (5.04%)	$2,570 (1.03%)	$6,983 (2.79%)	$16,128 (6.45%)
A regional café with 11 staff	$326,126	$8,613 (2.64%)	$1,957 (0.60%)	$4,103 (1.26%)	$11,025 (3.38%)
A regional club employing 467 people	$19,096,377	$595,616 (3.12%)	$206,623 (1.08%)	$361,876 (1.89%)	$762,388 (3.99%)
A road freight transport company	$140,000	$9,138 (6.53%)	$4,361 (3.12%)	$6,927 (4.95%)	$11,696 (8.35%)
A small cleaning company	$151,589	$10,681 (7.05%)	$3,709 (2.45%)	$4,901 (3.23%)	$13,672 (9.02%)

1.7.2 Injured Worker Benefit Jurisdictional Comparisons

NSW benefits regime has not been comprehensively reviewed for over 10 years. The key differences from other jurisdictions are summarised in Appendix C but some of the detail follows:

i) Journey claims

In NSW workers are covered for injuries which occur on their journey between home and work. Victoria, Western Australia and Tasmania exclude such claims. The Commonwealth scheme generally excludes journey claims except in exceptional circumstances. South Australia covers journeys only where there is real and substantial connection between the journey and the industry. Queensland allows journey claims unless there is a substantial delay not connected to employment.

ii) Weekly benefits for total incapacity

Workers in NSW receive 100% of their pre-injury average weekly earnings for the first 26 weeks of total incapacity, if they are paid under an award. Non award workers receive 80% of their pre-injury average weekly earnings. Benefits are capped at a statutory amount.

From week 27 onwards, all workers who have total incapacity receive the statutory rate, plus allowances for dependants. This amount is currently $432 per week. These payments may continue until 12 months after retiring age.

Some jurisdictions have weekly benefit schemes which incorporate 'step downs', or reductions, after 13 weeks, to encourage workers to return to work. This approach is in line with research which indicates the longer a worker is away from work, the less likely they are to return.

In Victoria, the calculation of benefits for award and non award workers is simpler and more consistent. Average weekly earnings are calculated on the basis of the rate paid for the ordinary working hours of the worker. If the worker has no base rate, the calculation is made on the basis of the actual earnings of the worker. Workers receive 95% of their pre-injury average weekly earnings for the first 13 weeks of total incapacity and 80% from week 14 onwards. Workers undergo work capacity tests at specified points throughout the claim, and at least once every 2 years. After week 130, workers receive benefits for total incapacity only if they have no work capacity and are likely to have no work capacity for an indefinite period.

South Australia's calculation method is similar to that of Victoria. Injured workers receive 100% of their pre-injury earnings for weeks 1-13, with step downs to 90% from weeks 13-26 and 80% from week 26 onwards. Like Victoria, South Australia has work capacity tests, once workers have passed or are approaching 130 weeks of benefits. Workers are subject to annual reviews to assess their work capacity.

In Western Australia, workers are subject to a step-down after 13 weeks through a recalculation of their benefit, to exclude payments for pre-injury overtime, bonuses, and regular over-award payments.

Queensland, Tasmania and the Commonwealth ComCare scheme do not have step downs at 13 weeks and do not specifically provide for work capacity testing.

iii) Weekly benefits-partial incapacity

In NSW, a worker who has partial incapacity, who is working at less than their pre-injury capacity or who is looking for work, can receive a benefit up to the amount of the benefit the worker would have received if the worker was receiving benefits for total incapacity. The worker is eligible for this benefit as well as the actual earnings from their employment. This means that the worker's benefit, combined with their actual earnings, can add up to the worker's pre-injury average

weekly earnings. These arrangements apply even if a worker is only working a few hours each week.

These arrangements act as a disincentive for workers to return to their pre-injury employment. Most other jurisdictions provide for injured workers who have partial capacity to receive benefits which, combined with their actual earnings, are up to the amount received by a worker who has total incapacity. These arrangements ensure that workers who have partial incapacity have a financial incentive to return to their pre-injury employment.

For example, in Victoria, workers who have partial incapacity during the first 13 weeks of a claim, receive 95% of their pre-injury average weekly earnings, less what they are actually earning. For the period from weeks 14-130, workers receive 80% of their pre-injury average weekly earnings, less 80% of what they are actually earning.

After week 130, a worker can only receive benefits for partial incapacity if the worker has returned to work, is working at least 15 hours each week and is earning at least $166 per week. The worker must also demonstrate that because of their injury, they are likely to remain physically and mentally incapable of working beyond their current level, in any job.

In South Australia, workers who have partial capacity are paid 100% of their pre-injury earnings, less any amount they are fit to earn in suitable employment. This means they receive the same amount as a worker who has total incapacity from weeks 1-13. From week 14-26 they receive 90% of their pre-injury earnings, less any amount they are fit to earn in suitable employment. From week 27 onwards, workers are paid 80% of their pre-injury earnings, less any amount they are fit to earn in suitable employment. This is the same amount as workers who have total incapacity.

In Tasmania, a worker who is working less than 50% of their pre-injury hours receives the same benefit as a worker having total incapacity, less their actual

earnings. However, if a worker is working over 50% of their pre-injury hours the worker can receive up to 100% of their pre-injury earnings.

iv) Duration

Weekly benefits

There is no limit on the duration of weekly benefits (except the retiring age plus 12 months) in New South Wales and no effective cap on medical and related expenses.

Several jurisdictions limit access to workers compensation based on the length of time benefits are received or a financial cap. Victoria ceases payment of weekly benefits after 130 weeks unless an injured worker has no current work capacity and that is likely to continue indefinitely. Queensland limits payments of weekly benefits to 5 years or a cap of $200,000, whichever arrives first. Western Australia has no cap on duration but does have a weekly benefit cap, which means entitlement to weekly benefits stops once the claimant reaches a total cumulative payment amount of $190,700.

Tasmania has a staggered scheme for the duration of benefits, depending on the degree of whole person impairment of the worker. The duration cap is 9 years for a worker having less than 15% whole person impairment; 12 years for a worker whose whole person impairment is between 15 and 19%; 20 years for a worker whose whole person impairment is between 20% and 29% and retirement age for a worker whose whole person impairment is more than 30%.

v) Medical expenses

In practice, NSW workers compensation insurers must meet the cost of all medical and related treatment provided to injured workers, with no cap on cost or duration, provided the treatment relates to a work injury. Treatment costs are met after retirement age.

Most other schemes cap medical and related treatment for work injuries by duration or cost.

In Victoria, the workers compensation scheme is liable for the costs of medical and related treatment provided while weekly benefits are paid and for one year after the cessation of weekly benefits.
In Queensland a cap of 5 years applies to the payment of weekly benefits and benefits for medical and related treatment.

In Tasmania, a cap on the duration of benefits for medical and related treatment applies in the same way as it does for weekly benefits.

vi) Lump sum benefits

The threshold for claiming a lump sum for whole person impairment in New South Wales is 1%. Whole person impairment is medically assessed applying The *WorkCover Guides* are based on the American Medical Association's (AMA) *Guides to the Evaluation of Permanent Impairment,* fifth edition..

Many claims for whole person impairment result in small assessments. Workers frequently make successive, or 'top-up', claims for deterioration following on from the work injury. These claims can increase their overall assessment to 15%, the threshold for a work injury damages claim.

Damages of up to $50,000 are also available for pain and suffering. Pain and suffering damages are not awarded using objective measures but are awarded on the basis of a percentage of a most extreme case.

Other jurisdictions generally have higher thresholds for whole person impairment and do not have separate awards for pain and suffering. In South Australia and Tasmania the threshold is 5% and in Victoria and the Commonwealth ComCare scheme the threshold is 10%.

Other jurisdictions do not have a separate category of 'pain and suffering' statutory compensation. Most jurisdictions have a single table of lump sum compensation for permanent impairment or specific injuries.

Some other jurisdictions, including Victoria, permit only one claim to be made for whole person impairment, rather than allowing successive or 'top-up' claims. The ComCare scheme permits a further claim only if there is a deterioration of more than 10%.

vii) Work Injury damages

Workers in New South Wales can make work injury damages, or common law claims. Common law claims are subject to modified damages provisions set out in the workers compensation legislation.

The general law governing civil liability was reformed in 2002 following the enactment of the *Civil Liability Act 2002*. The Act codifies the principles governing the law of negligence and other specific areas and was enacted following a comprehensive review of the law of negligence, conducted by an expert Panel appointed by Ministers from the Commonwealth, State and Territory Government. The review was in response to community perceptions that the law of negligence as it was applied in the courts was unclear and unpredictable and it had become too easy for plaintiffs in personal injury cases to establish liability for negligence on the part of defendants.

However, the provisions of the *Civil Liability Act* dealing with the law of negligence do not apply to work injury damages claims made under the workers compensation legislation. As a result, the principles used to determine negligence in workers compensation Common Law matters are those which applied to the law of negligence prior to 2002 and now diverge from the general law.

Regulatory framework for health providers

The obligation of the workers compensation scheme to meet the costs of reasonable and necessary medical treatment in NSW means in practice there is virtually no limitation on the liability of insurers to meet the costs of medical or other treatment provided to injured workers.

Other schemes generally also have few effective controls on the provision of medical and related treatment to injured workers. However, the Victorian scheme does exercise more control over treatment provision, especially limitation on treatment with poor evidence base and capacity to respond to over servicing and poor billing practices.

viii) Commutations

The availability of commutations in NSW is limited to workers whose whole person impairment is assessed at more than 15%, who have received lump sum compensation for whole person impairment and for whom return to work opportunities have been exhausted. Commutations can only be made with the agreement of the worker and the insurer.

There are a number of workers who do not meet these criteria, but who would benefit from the commutation of their claims, such as workers receiving small weekly benefits or whose claims remain open in case future medical treatment is required.
Some other jurisdictions have greater flexibility for the commutation (or redemption) of workers compensation claims. These include Victoria, where the criteria for commutations can be related for specified time periods for particular classes of claims.

2. Options for Change

A suite of options for comment have been developed, having regard to the guiding principles set out above. The options are intended to promote recovery and health

benefits for injured workers of returning to work while guaranteeing long term income support and treatment for severely injured workers and ensuring the costs of the workers compensation system are sustainable.

1. **Severely injured workers**

A key plank of any reforms should to improve the benefits for severely injured workers.

It has been suggested that reforms should provide for severely injured workers, who have an assessed level of whole person impairment of more than 30%, to receive improved income support, return to work assistance where feasible, and more generous lump sum compensation.

2. **Removal of coverage for journey claims**

It has been suggested this would provide a closer connection between work, health and safety responsibilities and workers compensation premiums through eliminating workers compensation costs arising in circumstances over which employers have limited control.

The object of the workers compensation legislation is to provide income support, medical assistance and rehabilitation support for workers injured during the course of their employment.

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

There is recognition of the profound impact of the tragic event of fatality from workplace injury.

In 2008 amendments to the workers compensation legislation increased the lump sum death benefit and made it more widely available. When a deceased worker leaves no dependants the lump sum death benefit is payable to their Estate. The distribution of the lump sum is in accordance with the Family Provision Act and

therefore relatives of the deceased entitled under the Family Provision Act will receive part of the lump sum death benefit.

Legal costs associated with these injuries are not regulated by workers compensation legislation and can be substantial, therefore following the death of a worker the workers compensation scheme pays:

- the lump sum death benefit ($481,950),
- weekly benefits to dependants;
- any common law liability under the Compensation to Relatives Act;
- civil liability for nervous shock to family members, and
- associated regulated and unregulated legal costs.

Arguably 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 it has been suggested that such claims should no longer be allowed

It has been suggested this would provide a closer connection between work, health and safety responsibilities and workers compensation premiums through eliminating workers compensation costs arising in circumstances over which employers have limited control.

Consistent with the principles of the Act workers who witness the workplace death of a colleague and suffer psychological injury would still able to make a claims under the legislation.

4. Simplification of the definition of pre-injury earnings and adjustment of pre-injury earnings

It has been suggested the current arrangements should be updated to more closely reflect changes in employment arrangements in NSW.

Stakeholders have argued the existing arrangements for determining weekly benefits are overly complex, anachronistic and fail to deliver consistent outcomes for injured workers.

The current system was designed in an era where employment was characterised by permanency and regulated via industrial instruments, while such arrangements still exist there are an increasing number of workers who are employed under more flexible arrangements. Casualisation is increasing, in 2009 around 20 percent of the workforce in Australia was employed under casual arrangements; this had increased from 17% in 1992[2].

By creating a single measure for pre-injury earnings, the existing disparity between benefits paid to award and non award workers would be removed and administration of benefit arrangements would be simplified.

Changes to weekly benefits would remove the difficult and confusing provisions that currently exist to determine the amount of weekly benefits that an injured worker would receive and thereby reduce disputation over weekly benefits. A new simplified measure more closely aligned to workers actual pre-injury earnings would be welcomed.

In Australia, New South Wales is the only State that does not take regular overtime and allowances into account when calculating a totally incapacitated worker's weekly payment.

Finally, these arrangements would ensure that weekly benefits more closely reflect a worker's actual earnings prior to their injury.

5. Incapacity payments-total incapacity

Step downs feature in all workers compensation jurisdictions in Australia. Currently in the NSW model the first step down occurs at 26 weeks. It has been suggested that consideration be given to aligning weekly benefit payments more closely with other jurisdictions and to an earlier step down with capacity testing

[2] Australian Bureau of Statistics, 1370.0 - Measures of Australia's Progress, 2010, Work, Casual Employees, http://www.abs.gov.au/ausstats/abs@.nsf/2f762f95845417aeca25706c00834efa/08e70c82447487c0ca25779e001c479f!OpenDocument

would align with clinical recovery patterns. This may create more appropriate and effective point for a financial return to work incentive to commence. For example, most fractures have a healing period of within six weeks and the many other injuries have a healing period within 13 weeks.

An earlier step down would harmonise NSW arrangements with Victoria, South Australia and Western Australia.

6. Incapacity payments - partial incapacity

It has been suggested that the NSW arrangements for incapacity payments for partial incapacity do not encourage recovery and return to full employment.

In other jurisdictions, including Victoria and South Australia, financial disincentives are utilised to prevent long term dependency.

This benefit arrangement for partially incapacitated workers would put into practical effect the object of the workers compensation legislation of rehabilitation and return to work. By increasing benefits as workers increase their hours of work, all participants; workers, employers and treatment providers have a clear and simple objective.

7. Work Capacity Testing

It has been suggested 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. In the lead up to undertaking a work capacity test, injured workers would need to be supported by appropriate rehabilitation to make them as work ready as possible.

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'. Ceasing weekly benefits after a certain period for workers with a work capacity would assist injured workers to move forward from their workplace injury to focus on their future employment prospects.

Such a reform as well as the changes to weekly benefits could act together in reducing weekly benefit liabilities of the scheme in therefore improve the overall performance of the scheme. Such changes may be more consistent with the objects and principles of the workers compensation legislation in that they support a workers return to work and rehabilitation.

8. Cap weekly payment duration

There is a concern that paying weekly benefits many years after a worker's workplace injury, for those workers a lower level of permanent impairment, reinforces the perception that the worker is still injured.

It has been suggested that capping weekly payment duration to within a certain timeframe and thereafter ceasing payment of weekly benefits would give workers a fixed timeframe during which they know they need to work toward a certain level of work readiness.

9. Remove "pain and suffering" as a separate category of compensation

The lump sum payment for pain and suffering was a subjective measure of the financial impact of a worker's injury and was originally inserted to replace common law provisions in the 1987 Act. While common law provisions were restored and modified in 1989, the lump sum payment for pain and suffering was not removed. It has been argued that this is an anomaly within the statutory scheme and one that creates significant disputation and legal costs.

It has been suggested that the incorporation of this provision into lump sum payments for injuries with Whole Person Impairment greater than 10% would reduce disputation and reduce administration costs.

Such changes would also ensure that statutory lump sum compensation aligns with an objective measure of the worker's physical impairment following a workplace injury rather than a subjective measure of the worker's 'loss'.

10. Only one claim can be made for whole person impairment

It has been suggested that such a measure might ensure that workers injuries are stabilised providing them with appropriate compensation. It may also reduce the ability of fraudulent or exaggerated injuries to meet the meet thresholds.

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

The current Guidelines provide objective criteria for assessing whole person impairment. It has been suggested that there is no reasonable rationale for obtaining multiple reports and it can be distressing for injured workers and contributes to their feeling of being 'injured'. It does not enable them to focus on recovery. Having one assessment of impairment for statutory lump sum, commutations and work injury damages might reduce scope for new disputes about level of whole person impairment in the course of determining commutation applications or work injury damages and thereby reduce medical, legal, red tape and administrative costs in the Scheme.

12. Strengthen work injury damages

The provisions of the Civil Liability Act dealing with the law of negligence do not apply to work injury damages claims made under the workers compensation legislation. As a result, the principles used to determine negligence in workers compensation common law matters are those which applied to the law of negligence prior to 2002 and now diverge from the general law. It has been suggested that this situation compromises the ability of insurers and employers to defend work injury damages claims.

Legislation similar to the Civil Liability Act was enacted in other Australian jurisdictions. These provisions also do not apply to workers compensation common law claims in those jurisdictions. It has been suggested there is no reason to exclude workers compensation common law claims from the principles of the law of negligence which apply to other damages claims and it has been proposed the Civil Liability Act provisions dealing with the law of negligence should apply to those claims.

13. Cap medical coverage duration

There would be the potential for capping medical benefits as they do in other States.

There is currently no cap on benefits for medical and related treatment and many workers have access to medical treatment many years after their date of injury.

The most recent national data available, the Comparative Performance Monitoring Report (CPM) for the 2009-10 financial year, shows NSW has the highest expenditure on 'services to workers' which encompasses medical treatment, rehabilitation, legal costs, return to work assistance, transportation, employee advisory services and interpreter costs that are used to assist employees recover from their injury and return to work.

14. Strengthen regulatory framework for health providers

Increases in medical costs over the last five years have been significant and it may be desirable to strengthen the regulatory framework for health providers 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.

15. Targeted commutation

Targeted commutation would allow commutation thresholds to be relaxed for specific classes of claim on a time limited basis. The Scheme Actuary and industry experts have advised against broadening access to commutations and such a measure would need to be limited to very specific classes of injury/claim

16. Exclusion of strokes/ heart attack unless work a significant contributor.

It has been suggested this would provide a closer connection between work, health and safety responsibilities and workers compensation premiums through eliminating workers compensation costs arising in circumstances over which employers have limited control.

Covering liability for strokes and heart attacks is arguably inconsistent with the principles of the workers compensation legislation as the principles of the legislation are to provide income support, medical assistance for workers injured as a result of a workplace injury. Whilst tragic for all concerned, causation of strokes and heart attacks are not normally associated with workplace injuries and the factors that impact on rehabilitation and return to work are not typically workplace issues.

Why change is needed

The workers compensation system is a critical component of the NSW economy. It should not hinder productivity but should enhance the growth of jobs.

Workers compensation has to be affordable and efficient and allow New South Wales to be competitive with our most comparable States of Victoria and Queensland

Employers and workers are entitled to expect a workers compensation system that is efficient, cost effective and offers fair, timely assistance to employers and workers.

It has been suggested that the goal of any reform package should be to adopt the most effective workers compensation measures from around Australia, to simplify benefit calculation, to make workers' entitlements more transparent and easier for workers and employers to understand. Workers whose injuries are less serious should have greater incentives and support to return to work, while more seriously injured workers should receive improved weekly benefits and lump sum compensation entitlements.

Glossary

ACS average claim size

actuarial projection – an actuarial estimate - usually an estimate of outstanding claims liabilities, inflated and discounted to a particular date, based on the estimates for future premiums collected, investment returns, and future claims obligations and related expenses.

actuarial valuation – actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer – prepared six monthly (as at 31 December and 30 June)

agent – (Scheme Agent) entities providing workers compensation claim and policy services under contract with the Workers Compensation Nominal Insurer. Does not refer to an agency relationship in the legal sense.

arithmetic average – for Scheme valuation purposes, a method for selecting and testing the continuance rate assumptions

B

breakeven premium rate – the percentage of wages required to be sufficient (together with expected investment income) to meet the expected cost of claims arising during the coming 12 month policy year.

C

CED case estimation development

chain ladder method - the Chain Ladder Ratio (CLR) method is typically used by the Scheme actuary when preparing the Scheme valuation to project claim numbers. It looks at patterns in the development of claim numbers from one development period to the next. The selected ratios of development (the chain ladder ratios) are multiplied with the current level of claim numbers to project future numbers. See also **triangulation.**

claims experience – an employer's claims history, including claims frequency and total payments made.

CHE claims handling expense – an allowance in the Scheme accounts for claim administration costs

common law claim – a claim that has resulted in legal action for negligence being taken against an employer in relation to a work related injury. Referred to as Work Injury damages in NSW legislation.

commutation – the process of settling a claim with a lump-sum payment to buy out future payment streams.

continuance rates –a measure of claim duration or more specifically, how the number of active claims changes from one period to the next

costs of claims all payments made by the insurer in respect of the claims and the estimated costs of all future payments arising from the claims

D

discounted values – Accounting and actuarial standards require the Scheme outstanding claims liability to be paid in future years to be discounted to the valuation date using "risk free" returns on Commonwealth Government Bonds

F

front end claims - workers compensation claims for injuries incurred in the most recent accident years – usually the most recent two years

front end continuance rates continuance rate is essentially the ratio of how the number(s) of active claims change from development period to development period. Front end continuance is the behaviour of claims in the first two years.

fully funded – when a scheme's current assets are sufficient to cover the liability associated with all incurred claims and related expenses

funding ratio Scheme total assets divided by total liabilities - commonly used as an indicator of the Scheme's overall financial position/ funding adequacy.

funding ratio projections - estimate of the funding ratio at future points in time (see funding ratio)

funds management – the investment and oversight of the Scheme's assets.

G

geometric average – for Scheme valuation purposes, a method for selecting and testing the continuance rate assumptions

I

incapacity benefit – the payment made under a workers compensation claim to compensate an injured worker for lost income.

inflated values - The future cashflows projected in the Outstanding Claims Liability valuation are inflated to the expected date of payment based on an assumption about future rates of inflation

J

journey claims - claims for injuries that occur while travelling between the claimants home and place of employment

L

long-tail claims – refers to active claims from over a certain age – usually three years

long term gap assumptions - a set of economic assumptions used by the Scheme Actuary to estimate outstanding claims liabilities. Specifically the difference between the discount rate and inflation rate (the 'real' inflation rate) – projected over the long term. Essential for converting long term liabilities into an as at date value.

loss ratio - the measure of incurred claims cost divided by prerniums earned

M

managed fund scheme - the structure of the current WorkCover Scheme. It is an underwriting structure where a statutory pool of assets exists to fund future claim liabilities

N

net central estimate –The Scheme valuation uses central estimates, in the sense that they represent the actuary's best estimate of the liability for outstanding claims, with no deliberate bias towards either over- or under- statement. They are, however, uncertain and the amount which eventually turns out to have been required to provide for the liability may be more or less than the central estimate. the central estimate of claims incurred is the mean of all possible values of outstanding claims liabilities as at the reporting date

non-economic loss measure of the impact of an injury on a worker's lifestyle, such as pain and suffering, disfigurement and reduced expectation of life, normally associated with permanent impairment

P

PCE - Projected Case Estimates

PPAC - payments per active claim

PPCI – payments per claim incurred

premium - the payments made by an employer to an insurance provider to buy, and maintain, a policy

probability of adequacy – the likelihood that the central estimate will be adequate to meet all future claims payments

projected solvency trajectory projection/estimate of the amount of time required for the Scheme to return to full funding

R

return-to-work management - the process of physical and workplace rehabilitation of an injured worker to enable his/her successful reentry into the workforce. This can also include job modification

risk margin - a 12% risk margin is factored into the Scheme accounts and ensures that if the Scheme's ultimate liability turns out to be greater than estimated, there is a 75% probability that there will be sufficient assets to cover the difference. This 75% probability of adequacy is based on the Australian Prudential Regulatory Authority's requirement for private insurer risk margins and has been applied to the Scheme valuation since 2007. In the absence of a risk margin, the probability of adequacy would fall to 50%.

S

self-insured employer - an employer that is licensed to carry its own workers compensation liability and is responsible for managing its own workers compensation claims

superimposed inflation the tendency for claims costs to increase at a rate that is usually greater than wage inflation

T

top up payments - an informal term, which may refer to:
1 – where a claimant returns to work, but as a result of their injury now earns less, weekly incapacity "top up" payments make up the difference between their pre and post injury earnings. Generally paid under section 40 of the 1987 Act.

2 – claimants who have received a lump sum payment for permanent impairment may subsequently claim additional lump sums for deterioration in their condition. In some cases claimants make multiple "top up" claims over many years. Generally paid under section 66 of the 1987 Act

triangulation - reserving for future claims by comparing the emergence of claims year by year for each underwriting year, the relevant data being set out in triangular arrays.

W

Work Injury Damages NSW legislative term for common law claims – see **common law**

Y

yield curve - accounting and actuarial standards require the Scheme's outstanding claims liability to be discounted to a present value based on observable market yields from Commonwealth Government securities. Where yields fall, claim liability values increase.

4. List of appendices

1. *Executive Summary WorkCover NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer at 31 December 2011*
2. *External peer review of outstanding claims liabilities of the Nominal Insurer at 31 December 2011*
3. *Table of jurisdictional comparison of current benefit regime in NSW*

Appendix 3 Submissions

No	Author
1	Mr David Elliott
2	Confidential
3	Mr Christopher Barry
4	Mr MR Griffiths
5	Mr Andrew Walker
6	Name suppressed
7	Mr Dennis Burke
8	Mr Chris Moody
9	Reed Group Asia Pacific
10	Professional Health Partners P/L
11	Name suppressed
12	L & M Smash Repairs P/L
13	Confidential
14	Mr Rhett Morson
15	Confidential
16	Name suppressed
17	Name suppressed
18	Name suppressed
19	Ms Jayne Moran
20	Mr John McPhilbin
20a	Mr John McPhilbin
21	Name suppressed
22	Name suppressed
23	Lindsteel fabrication (Newcastle) Pty Ltd
24	Confidential
25	Mr Neil Grover
26	Confidential
27	Name suppressed
28	Emplus Solutions Pty Limited
29	Name suppressed
30	Name suppressed
31	Name suppressed

No	Author
32	United Services Union
33	Mrs Roma Pedersen
34	Rosebrook Sand & Gravel P/L
35	Kaytering Supplies Tamworth
36	Name suppressed
37	Pinus Sawmills
38	McLachlan Partners
39	Name suppressed
40	Australian Medical Association (NSW) Limited
41	Name suppressed
42	Name suppressed
43	Mr Philip Sheehan
44	Name suppressed
45	Name suppressed
46	Confidential
47	Name suppressed
48	Name suppressed
49	Mr Sean Fox
50	Name suppressed
51	Mr David Young
52	Confidential
53	Name suppressed
54	Confidential
55	Mr Ferdinand Graf
56	Mr Cameron Smith
57	Confidential
58	Britton Timbers
59	Mr Mark Olson
60	Name suppressed
61	Name suppressed
62	Mrs Jeannie Green
63	Confidential
64	HW Barnwell
65	Smash Repairs
66	Alkane Resources Ltd

No	Author
67	Custom Coaches (Sales) Pty Ltd
68	Mr Stephen King
69	Ms Jo Spengeler
70	Name suppressed
71	Australasian College of ENT Physicians
72	Name suppressed
73	NSW Nurses' Association
73a	NSW Nurses' Association
74	Name suppressed
75	Mr John Degan
76	Name suppressed
77	NSW Bar Association
78	Name suppressed
79	Name suppressed
80	Dr Robert Boland
81	Confidential
82	Dr Ian Gardner
83	W.H.Ireland & Sons [Machinery] P/L
84	Alumac Industries Pty Ltd
85	Name suppressed
86	Name suppressed
87	LJ Hooker Belmont
88	Mr Lance Chapman
89	Name suppressed
90	Name suppressed
91	Name suppressed
92	Community Care Consortium
93	Name suppressed
94	Name suppressed
95	WestWise Recruitment Pty Ltd
96	Timber Trade Industrial Association
97	StateCover Mutual Limited
98	St Andrew's Village Ballina Ltd
99	Name suppressed
100	Ms Genevieve Grant

No	Author
101	Name suppressed
102	Confidential
103	Name suppressed
104	Mr Allan Kidson
105	Confidential
106	Name suppressed
107	IMR
108	Name suppressed
109	SCO Recruitment
110	Name suppressed
111	Confidential
112	Name suppressed
113	Mr Ryan Shaw
114	Mend Services
115	Confidential
116	Ms Lorraine Fordham
117	Australian Road Transport Industrial Organisation
118	NSW Worker's Compensation Self Insurer's Association
119	NSW Small Business Commissioner
120	Tomola Motors Pty Ltd T/As Ryde Toyota
121	Name suppressed
122	Australian Lawyers Alliance
123	Name suppressed
124	Workers Health Centre
125	Department of Trade and Investment
126	Slater & Gordon
127	Confidential
128	Australian Rehabilitation Providers Association
129	NSW Business Chamber
130	Australian Federation of Employers and Industries
131	NSW Self Insurance Corporation - The Treasury
132	NSW Farmers' Association
133	The Law Society of New South Wales
133a	The Law Society of New South Wales
134	Master Builders Association of New South Wales

No	Author
135	Unions NSW
136	Australian Society of Orthopaedic Surgeons
137	Allianz Australia Workers' Compensation (NSW) Ltd
138	National Disability Services
139	Greens NSW
140	Australian Rehabilitation Providers Association
141	Australian Physiotherapy Association
142	The Australian Industry Group
143	Construction Forestry Mining and Energy Union (NSW Branch)
144	WorkCover Authority of NSW
145	Insurance Council of Australia
146	Australian Manufacturing Workers Union
147	Name suppressed
148	Shoalhaven City Council
149	Confidential
150	Injury Support Network Inc
151	Housing Industry Association
152	Mr Grant Casey
153	Police Association of NSW
154	Confidential
155	FINEOS Corporation Limited
156	Shop Distributive & Allied Employees Association, NSW Branch
157	Workplace Tragedy Family Support Group
158	Mr Doug Vorbach
159	Confidential
160	The Australian Workers' Union, New South Wales
161	Painaustralia
162	Confidential
163	Name suppressed
164	Australian Psychological Society
165	Dr Coralie Wales
166	Transport Workers' Union of NSW
167	Confidential
168	Confidential
169	Professor Michael Nicholas

No	Author
170	Civil Contractors Federation (NSW)
171	Confidential
172	National Insurance Brokers Association of Australia
173	Furnishing Industry Association of Australia Ltd
174	Public Service Association
175	Motor Traders' Association of NSW
176	Confidential
177	Confidential
178	Confidential
179	The Injured Workers Support Network
180	Exercise & Sports Science Australia
181	Penrith Auto Parts Plus
182	D & M Excavations and Asphalting Pty Ltd
183	Laurie Earthmoving Pty Ltd
184	Hawksbury City Council
185	Business Council of Australia
186	Australian Services Union
187	Finance Sector Union
188	Confidential
189	Steadfast Group Ltd
190	NSW Rural Fire Services Association Incorporated
191	Leading Edge Group
192	Aged & Community Services Association of NSW & ACT Incoorporated
193	Confidential
194	Mr Michael Peters
195	Media, Entertainment and Arts Alliance
196	Association of Independent Schools of NSW
197	Aged Care Employers Mutual Pty Limited
198	International Governance and Performance Research Centre, Macquarie University
199	Australian National Retailers Association
200	New South Wales Minerals Council Ltd
201	Mr Karl Nash
202	Wilson Gilkes
203	Bolte Civil Pty Ltd
204	Confidential

No	Author
205	Ms Jennifer Clarke
206	Red Lea Chickens Pty Ltd
207	Back Office Biz
208	Abax Contracting Pty Ltd
209	TALIS Civil Pty Ltd
210	Bick Hire Pty Ltd
211	Mr John Isaksen
212	Site Worx Civil Pty Ltd
213	Eire Contractors Pty Ltd
214	B & B Mechanical Repairs
215	Advance LPG & Mechanical Repairs
216	Versalite Windows
217	Mr Sarjit Saini
218	Miedecke Motor Group
219	Wingham Frames & Trusses Pty Ltd
220	Big Wheel Tyre & Mechanical Repairs
221	Carline Gladesville Pty Limited
222	Mr Steve Barrett
223	Proven Products Pty Ltd
224	Checkpoint Vehicle Inspections
225	Barrie Auto Electrics Pty ltd
226	Mr Garry Archer
227	Ms Vicki Roser
228	Name suppressed
229	Name suppressed
230	Camden Automatics
231	Parramead Automotive Service Specialists
232	Carters Clutch & Brake Service
233	Ms Karen Hurley
234	Statewide Car Carriers
235	Eraring Energy
236	David A. Zaman Pty Ltd
237	Boating Industry Association NSW
238	Confidential
239	NSW Teachers Federation

No	Author
240	Infrastructure Partnerships Australia
241	Konekt Limited
242	Sydney Water
243	Aged Care Association Australia – NSW
244	Name suppressed
245	Ms Danielle Hartland
246	Confidential
247	Master Grocers Australia
248	Cross Border Commissioner
249	Name suppressed
250	Mr Adrian Kimber
251	Independent Contractors Australia
252	Ms Gail Fairclough
253	Work Options Pty Ltd
254	Kenny Spring Solicitors
255	Ms Kim Apps
256	White Outsourcing Pty Limited
257	Name suppressed
258	Mr Leslie Burrows
259	The Group Training Association of NSW
260	Confidential
261	Joint Dynamics Pty Ltd
262	Industry Mid North Coast Inc.
263	Name suppressed
264	Accommodation Association of Australia
265	Name suppressed
266	Rehab Co
267	Name suppressed
268	Interact Injury Management Pty Ltd
269	Confidential
270	Mr William McNally
271	Name suppressed
272	Coal Services Pty Limited
273	Name suppressed
274	Name suppressed

No	Author
275	Confidential
276	Name suppressed
277	Confidential
278	Confidential
279	Name suppressed
280	Name suppressed
281	Name suppressed
282	Name suppressed
283	Mr David Pickford
284	Marsh Pty Ltd
285	GIO
286	Mr Robert K Bell
287	Katoomba Neighbourhood Centre
288	Alliance for a Safer and Competitive Workplace
289	Associate Professor Gordon Robert Wyndham Davies
290	Ms Dianne Carroll
291	Confidential
292	Mr Donald McDonald
293	Mr Ronald Allen
294	R J O'Halloran & Co Solicitors Tamworth
295	The University of Sydney
296	Ms Carmine Pontieri
297	Mr Alan Payne
298	Mr Wayne Woodward
299	Mr Neil Miller
300	Mr Norm Dezius
301	Divall's Bulk Haulage
302	Glennos Constructions Pty Ltd
303	Tynan Motors
304	Confidential
305	Name suppressed
306	Mr Chris McIntosh
307	Confidential
308	Mr Warren Bracht
309	Mr Tony Pottage

No	Author
310	Hanley's Removals Pty Limited
311	Confidential
312	Ms Gina Elghazawi
313	Bob White's Panel Shope
314	Confidential
315	Name suppressed
316	Name suppressed
317	Ms Glenda Ireland
318	Mr Robert Reid
319	Confidential
320	Confidential
321	Mr Joseph Writer
322	Ms Anna Narayanan
323	Name suppressed
324	Ms Royada Kyranakis
325	Confidential
326	Ms Vicki Johnston
327	Mr Thomas Phillips
328	Mr Mark Christos
329	Confidential
330	CGU Workers Compensation (NSW) Limited
331	Confidential
332	Ms Katrina Marshall
333	Ms Linda Michalak
334	Ms Elizabeth Marr
335	South Coast Ford
336	Confidential
337	Confidential
338	Name suppressed
339	Mr Gai Robinson
340	Confidential
341	Confidential
342	Confidential
343	Name suppressed
344	Confidential

No	Author
345	Individual workers' stories
346	Ms Jennifer Stafford
347	Mr Roger Davison
348	Bourke Love Lawyers
349	Bega Valley Motors
350	All Vehicle Services
351	Mr Robert Garland
352	Ms Liz Hammond
353	Confidential

Appendix 4 Witnesses at hearings

Date	Name	Position and Organisation
21 May 2012 **Macquarie Room** **Parliament House**	Ms Geniere Aplin	General Manager, Workers Compensation Insurance Operations, WorkCover Authority of NSW
	Mr Michael Playford	Consulting Actuarial & Analytics Leader, PricewaterhouseCoopers
	Mr Peter McCarthy	Partner, Ernst & Young
	Mr Richard Cox	Economic Strategy Branch Director, NSW Treasury
	Mr Robert Lloyd	Manager, Strategic Projects, NSW Self Insurance Corporation
	Ms Christa Marjoribanks	Principal Actuary, PricewaterhouseCoopers
	Ms Denise Fishlock	Chairperson, NSW Workers Compensation Self Insurers Association
	Mr Paul Macken	Legal Advisor, NSW Workers Compensation Self Insurers Association
	Mr Peter Achterstraat	NSW Auditor General
	Mr Justin Dowd	President, Law Society of New South Wales
	Ms Roshana May	Member, Injury Compensation Committee, Law Society of New South Wales
	Mr Timothy Concannon	Member, Injury Compensation Committee, Law Society of New South Wales
	Mr Jeremy Gormly SC	Chair, NSW Bar Association Common Law Committee
	Ms Elizabeth Welsh	Member, NSW Bar Association Common Law Committee.
	Mr Bruce McManamey	NSW Committee Member, Australian Lawyers Alliance
	Mr Andrew Stone	NSW Director, Australian Lawyers Alliance
	Mr Garry Brack	Chief Executive, Australian Federation of Employers and Industries
	Ms Jill Allen	Manager, Policy & Research, Australian Federation of Employers and Industries
	Mr Greg Pattison	General Manager, Workplace Solutions, NSW Business Chamber
	Mr Paul Orton	Director, Policy, NSW Business Chamber

Date	Name	Position and Organisation
25 May 2012 **Jubilee Room** **Parliament House**	Mr David Krawitz	Chair, National Workers Compensation Committee, Insurance Council of Australia
	Ms Vicki Mullen	General Manager Consumer Relations and Market Development, Insurance Council of Australia
	Mr Mark Lennon	Secretary, Unions NSW
	Ms Emma Maiden	Deputy Assistant Secretary, Unions NSW
	Ms Casey Young	Senior Industrial Officer, United Services Union
	Ms Rita Mallia	State President, CFMEU - NSW Branch
	Mr Ivan Simic	Partner, Taylor & Scott Lawyers
	Ms Jodie Wormleaton	Spouse of injured worker Mr David Wormleaton
	Mr Mark Goodsell	NSW Director, Australian Industry Group
	Ms Genevieve Vaccaro	Senior Advisor, , Workplace Relations Policy, Australian Industry Group
	Mr Tim Ayres	NSW State Secretary, Australian Manufacturing Workers Union
	Mr David Henry	NSW Workplace Health & Safety Officer, Australian Manufacturing Workers Union
	Mr Stephen Milgate	National Coordinator, Australian Society of Orthopaedic Surgeons
	Dr John Harrison	Member and Past President, Australian Society of Orthopaedic Surgeons
	Mr Stephen Hurley-Smith	Industrial Officer, NSW Nurses' Association
	Ms Velma Gerbach	Organiser, NSW Nurses' Association
	Ms Emily Orchard	Member, NSW Nurses' Association
	Ms Joanne Maxwell	Injury Management Advisor, National Disability Services (NSW)
	Ms Susan Smith	Project Manager, Disability Safe, National Disability Services (NSW)
	Mr Daniel Kyriacou	National Communications Manager, National Disability Services (NSW)
	Ms Annette Williams	National President, Australian Rehabilitation Providers Association
	Ms Nikki Brouwers	NSW President, Australian Rehabilitation Providers Association
	Ms Fiona Simson	President, NSW Farmers
	Ms Gracia Kusuma	Industrial Relations Manager, NSW Farmers
	Miss Melissa Adler	Executive Director, Workplace Relations,

Date	Name	Position and Organisation
		Housing Industry Association
	Mr David Humphrey	Executive Director , Housing Industry Association, Business, Compliance and Contracting
28 May 2012 **Macquarie Room** **Parliament House**	Ms Fiona Davies	Chief Executive Officer, Australian Medical Association, NSW
	Dr Michael Gliksman	NSW Councillor, Australian Medical Association
	Dr Peter Burke	Member specialist, Australian Medical Association
	Mr David Stokes	Executive Manager Professional Practice, Australian Psychological Society
	Dr Yvonne Skinner	Chair, NSW Branch Faculty Forensic Psychiatry, Royal Australian and New Zealand Society of Psychiatrists
	Ms Agnes Levine	Chair NSW State Committee, Australian Psychological Society
	Mr Bo Li	Senior Policy Advisor Professional Practice, Australian Psychological Society
	Mr David Castledine	Chief Executive Officer NSW, Civil Contractors Federation
	Mr Brian Seidler	Executive Director, NSW Master Builders Association
	Mr Peter Glover	Director, NSW Master Builders Association
	Ms Roshana May	Practice Group Leader, Slater & Gordon Lawyers
	Mr Hayden Stephens	General Manager, Slater & Gordon Lawyers
	Mr David Nagle	Solicitor, Slater & Gordon Lawyers
	Dr Kevin Purse	Senior Research Fellow, Central Queensland University
	Mr Nicholas Scofield	General Manager, Corporate Affairs, Allianz Insurance
	Mr Mike Siomiak	General Manager, NSW Workers Compensation, Allianz Insurance
	Mr David Krawitz	Chief General Manager, Workers Compensation, Allianz Insurance
	Mr Michael Playford	Consulting Actuarial & Analytics Leader, PricewaterhouseCoopers
	Mr Peter McCarthy	Partner, Ernst & Young
	Mr Tamer Sabet	President NSW Branch, Australian Physiotherapy Association
	Mr Chris Winston	Manager NSW Branch, Australian

Date	Name	Position and Organisation
		Physiotherapy Association
	Mr Cameron Bulluss	Compensable Bodies Portfolio, NSW Branch Council, Australian Physiotherapy Association
	Mr Stephen Crerar	Manager, Human Resources, Shoalhaven City Council
	Ms Angela Keating	Workers Compensation Coordinator, Shoalhaven City Council
	Mr Patrick Gooley	Vice President, Police Association of NSW
	Mr Peter Remfrey	Secretary, Police Association of NSW
	Ms Kirsty Membreno	Senior Legal Coordinator, Police Association of NSW
	Inspector Toby Lindsay	Member, Police Association of NSW
	Detective Senior Constable Melissa Kilminster	Member, Police Association of NSW
	Mr Peter Windle	
	Mr John McPhilbin	
	Mrs Lorraine Fordham	
	Mr Ronald Smith	
	Ms Michelle Burgess	Injured Persons Support Network
	Mr Colin Fraser	

Appendix 5 Tabled documents

Monday 21 May 2012
Public Hearing, Macquarie Room, Parliament House

1 A letter from Mr Playford to Ms Aplin dated 16 May 2012, providing an observation on bond rates since the December 2011 valuation of insurance liabilities – tabled by Mr Michael Playford, Consulting Actuarial & Analytics Leader, PricewaterhouseCoopers.

2 A document entitled 'Workers Compensation Nominal Insurer (trading as the NSW WorkCover Scheme), Audit Opinion' – tabled by Mr Peter Achterstraat, NSW Auditor-General.

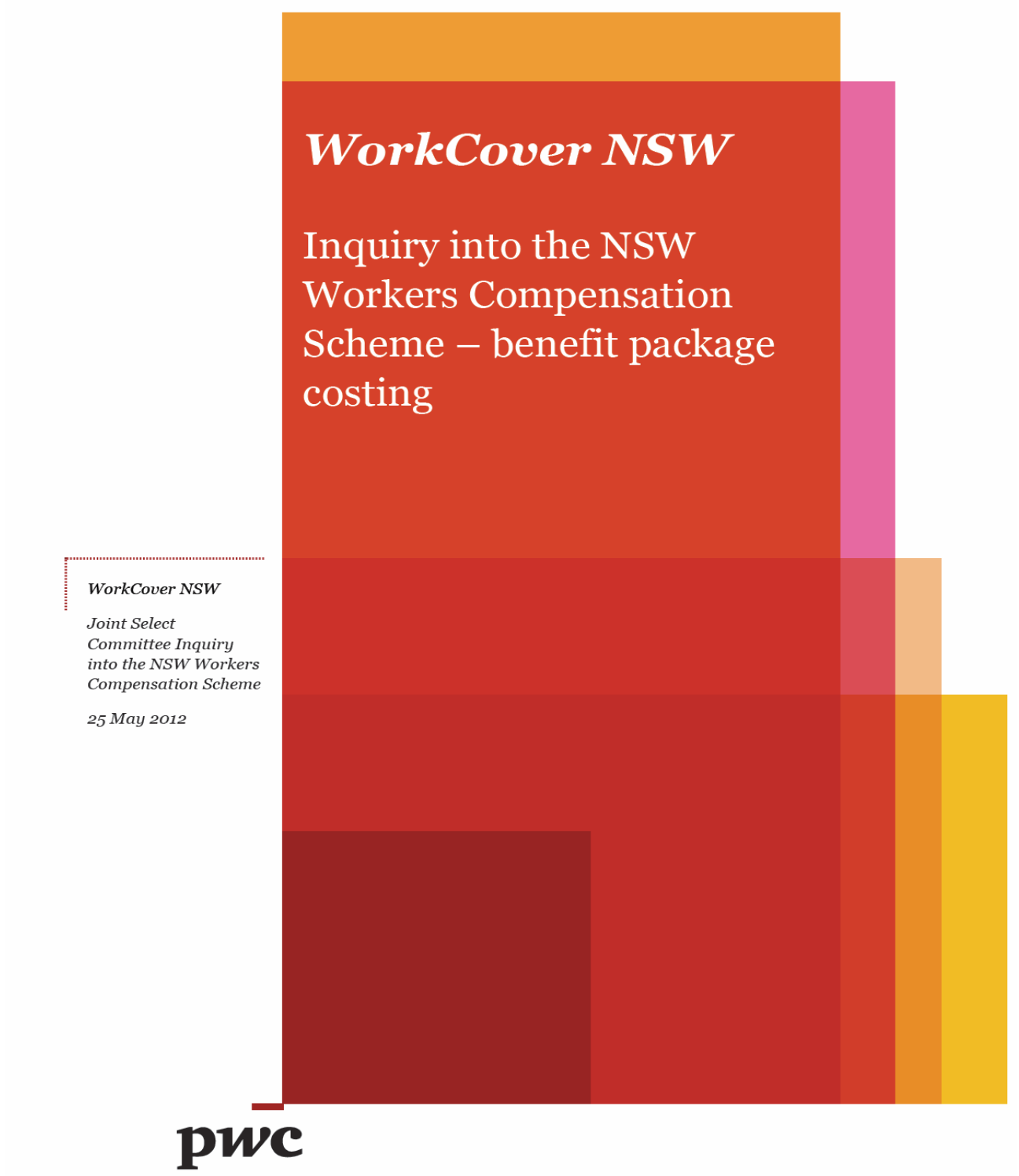
3 A document entitled 'E-Brief: Workers Compensation: An update', by Lenny Roth and Lynsey Blayden, NSW Parliamentary Library – tabled by Hon Trevor Khan MLC.

4 A document entitled 'Comparison of workers' compensation arrangements in Australia and New Zealand', Commonwealth of Australian (Safe Work Australia), April 2012 – tabled by Hon Niall Blair MLC.

Monday 28 May 2012
Public Hearing, Macquarie Room, Parliament House

5 A document entitled 'The Duty to Accommodate in the Canadian Workplace: Leading Principles and Recent Cases (2008) Michael Lynk' – tabled by Mr Peter Remfrey, Secretary, Police Association of NSW.

Appendix 6 PWC – benefit package costing



Contents

WorkCover NSW
PwC

1 Introduction

1.1 Introduction

A Joint Select Committee of the NSW Parliament has been established to inquiry into the NSW WorkCover Scheme (the Inquiry).

The Inquiry has requested WorkCover to provide advice to the submission on the possible financial implications of two distinct packages of potential benefit reforms, namely:

- A package of benefit reforms consistent with the options discussed in the Government's Issues Paper
- A package of benefit reforms consistent with the points raised in the submission to the Inquiry by the NSW Bar Association (Submission 77).

NSW WorkCover in turn has requested PwC provide advice as to the possible financial impact of each of the above two options.

1.2 Considerations

Depending on how the reforms are introduced they may potentially have an impact on:

- The existing outstanding claims and hence the outstanding claims liability, and/or
- The cost associated with future new claims and hence an impact on premiums.

We have considered both in this report. The cost implications contained in this report are only with reference to the WorkCover Nominal Insurer Scheme.

The costings have assumed the reforms are introduced as a package. It is imperative that they be considered as such. Various elements of the package work to reinforce each other, removal of one element of the package might undermine the assessed cost implication of other elements of the package. The costing has also occurred as a hierarchy. The cost impact of a particular change can depend on what order the costing has occurred. As a result of these two issues the cost impact of a single change considered as a stand-alone change may be different from that allowed for within this package.

Our analysis of the possible financial impact has been made by reference to the recently completed December 2011 valuation of the Nominal insurer's outstanding claims as documented in the PwC report *WorkCover NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer at 31 December 2011* dated 12 March 2012.

1.3 Risks and uncertainty

It is important to recognise there is considerable uncertainty associated with the financial cost impact results contained in this report. They should be considered more as indicative of the magnitude of the possible cost impact rather than being precise.

There must be recognition that legislation is just one part of the necessary change and there also needs to be a strong focus on change management and implementation. In particular it requires a focused capability by the regulator (WorkCover), the Nominal Insurer and Scheme Agents.

WorkCover NSW
PwC

The estimated cost impacts we have calculated are based on the assumptions that any legislative changes are made in the way interpreted, and that they are well implemented. This costing assumes the immediate application of any new legislative requirements, the longer a transition period applies implies that benefits would continue to be paid under the current regime, posing a greater risk of further Scheme cost deterioration in the interim.

Areas of uncertainty and risk associated with costing the financial implication of these reform packages include:

- **Estimating reform impact** – Evaluating the cost implications from reforms is extremely difficult and relies in large part on subjective interpretation of the likely impact of the various reforms. There is likely to be a range of possible outcomes corresponding to more optimistic or pessimistic views compared to that presented in this report.

- **Behavioural impacts** – In particular the impact of reforms, especially major reforms such as those considered in this report, can be expected to lead to significant behavioural changes by all Scheme participants which will impact on the utilisation of benefits. It is not possible to estimate the impact of these behavioural changes accurately.

  These behavioural changes can be reinforced or conflicted by various elements of a reform package. Thus it is extremely important that reforms be considered as part of a package rather than just individually.

- **The honeymoon effect** – There are 'short-term' versus 'long term' issues to consider. Shortly after a major benefit reform, it is not unusual for there to be a 'honeymoon' of very favourable experience while participants better understand the implications of the new benefit structure. This honeymoon effect will then dissipate with time. We have not tried to estimate any initial honeymoon effect in our cost estimates. However, it is important for this issue to be considered when interpreting initial experience once a reform package has been implemented.

- **Drafting and legislative amendments** – This report is prepared based on a high-level understanding of the reform package(s). It is possible that any legislative changes introduced may differ from this understanding. Similarly, it is entirely possible that legislative amendments may occur prior to the passing of any legislative change, which may significantly change what is then implemented from the version of reforms considered in this report.

- **Effectiveness of implementation** – The impact of legislative reform is only as effective as how well it is implemented. As an illustration, many of the proposed reforms in the Issues Paper are modelled on the Victorian WorkSafe Scheme. The WorkSafe Scheme is regarded as a well run scheme which has been able to optimise scheme outcomes under a particular set of legislation. For example, WorkSafe appears to achieve significant cessation of weekly benefits prior to the 78 week work capacity test being performed, by implementing claim management strategies that work towards the looming work capacity test.

  It is not clear to what extent the NSW Scheme would be able to operationally implement the same or similar legislation, and supporting work practices, to achieve a similar level of outcomes, at least initially. It must be recognised that legislation is just one part of the necessary change and there also needs to be a strong focus on change management and implementation. In particular it requires a focused capability by the regulator (WorkCover), the Nominal Insurer and Scheme Agents.

  The estimated cost impacts we have calculated are based on the assumptions that any legislative changes are made in the way interpreted, and that they are implemented well.

- **Impact on management costs** – The costs of managing the Scheme will change significantly as a result of a major change in benefit structure. The overall impact is unknown. To be prudent we have not allowed for any management cost savings.

- **Slippage** – Over time, Scheme participants also begin to better understand the new benefit structure and begin to optimise their benefits and/or potentially exploit any loopholes identified. An example of a current loophole is the recent increase in Permanent Impairment "top up" payments. This is the opposite of the honeymoon effect described above.

- **Timeframe and information available to complete this analysis** – With more time, greater clarity on the specifics of the proposed reforms and the identification of additional information (potentially from other Schemes) to support the analysis, the results documented in this report could potentially be refined.

In summary, it is important to recognise there is considerable uncertainty associated with the financial cost impact results contained in this report. They should be considered more as indicative of the magnitude of the possible cost impact rather than being precise.

2 Benefit model consistent with the issues paper

2.1 Summary of proposed benefit package

The NSW Government released an Issues Paper when it established the Inquiry. The Issues Paper contained a number of broad areas of potential reforms to current benefit structure without making any specific suggestions. At the request of the Inquiry, WorkCover has now provided PwC with a specific package of benefit reforms to be considered which might be considered aligned with the broad areas identified in the Issues Paper.

The specific reform package is extensive, with a number reflecting benefit design from the Victorian WorkSafe Scheme. The reform package costed involves a number of key changes impacting the following benefits:

- Weekly benefits – Resulting from:
    - Simplification in definition of pre-injury earnings
    - Changes in benefit levels before 13 weeks for both Total and Partial Incapacity benefits
    - A revised step down at 13 weeks, with changes in benefits levels for both Total Incapacity and Partial Incapacity benefits after 13 weeks
    - The introduction of a work capacity test similar to Victoria between 78 and 130 weeks
    - A requirement for claimants to be either Severely Impaired (30% WPI or more), Totally Incapacitated or Partially Incapacitated and working at least 15 hours per week to continue to receive incapacity benefits after 130 weeks
    - A cap on weekly benefits at nine years, with exceptions for the most severely impaired (greater than 30% WPI). For existing claims the nine year cap will apply from date of commencement of the new legislation rather than date of first incapacity. Alternative caps at 5, 7, and 11 years have also been separately costed.
- Medical benefits – Indirectly resulting from the weekly benefit reforms, and directly from introduction of a one year maximum period for the payment of medicals from date of injury/cessation of weekly benefits, with exceptions for the severely impaired
- Workplace Injury Damages – No change in the current 15% WPI threshold but amendments resulting in a stronger statute of limitations and indirectly via the elimination of Permanent Impairment "top up" payments and from the changes to weekly benefits
- Statutory lump sums – Combining Permanent Impairment with Pain and Suffering, reduction in legal involvement, introduction of a 10% Whole Person Impairment threshold to access, elimination of "top up" payments and a change in benefit scale to match Victoria
- Exclusion of journey and heart attack/stroke claims.

More detail on the specified benefit package is described in the relevant sub-sections of Section 2.

2.2 *Exclusion of particular claim types*

We have assumed these proposals would only be made prospectively with no impact on existing journey, heart attack or stroke claims reported and continuing on benefits in the Scheme.

2.2.1 *Journey claims, except for work, workers compensation or training related journeys.*

The specified package removes most journey claims from coverage.

A separate document has been provided to the Inquiry summarising Journey claim experience over recent accident years.

In summary:

- There is a variable on the WorkCover database which identifies Journey claims
- Approximately 6,500 to 7,000 journey claims are reported in respect of recent accident years. The proportion of claims reported which are journey claims has increased from 6.2% in 2000 to circa 8% for more recent accident years.
- Journey claim payments (net of CTP and other recoveries) have been approximately 6% to 8% of total Scheme net payments in recent years.
- Not all journey claims involve motor vehicles. The following table shows there are approximately 4,000 motor vehicle Journey claims each year.

Mechanism of injury = 92(Motor Vehicle accident)				
Financial Year of	Commuting Journey	At Work - road traffic accident	All other Dury Status	Total
2005/06	4,076	719	634	5,429
2006/07	4,319	804	464	5,587
2007/08	4,158	766	536	5,460
2008/09	4,093	746	491	5,330
2009/10	3,890	763	477	5,130
All	20,536	3,798	2,602	26,936

- Journey (and recess) claims are currently excluded from experience premium rating, so there is an incentive for employers to have these claims miscoded as journey and recess. The potential for this miscoding of motor vehicle claims is illustrated in the above table where approximately 80% of all motor vehicle claims are currently coded as commuting journey claims.
- The exclusion of journey claims from the Scheme may result in many motor vehicle claims being more appropriately classified. If this issue is important, then conclusions based on the net cost of journey claims shown in the following tables may overestimate the 'true' net cost of journey claims.
- We have allowed for slippage in our costing (circa 40-50%) to allow for the potential for reclassification of many claims rather than their exclusion if journey claims were to be excluded from the Scheme.

The following tables summarise the modelled cost impact of excluding journey claims assuming no other reforms occur:

Journey claims

	Outstanding claims liability (all benefits)			Next years premium (all benefits)			
		Difference		Breakeven premium		Difference	
Scenario	Liability	$m	%	$ m		$m	%
Baseline	n/a	n/a	n/a	2,601	1.64%		
Exclude journey claims				2,507	1.58%	-93	-3.6%

Excluding most journey claims is estimated to result in a cost saving of $93 million per annum in premium costs (reducing the estimated breakeven premium rate by 3.6%).

When costing the specified benefit reform package in its entirety, the allowance for a cost savings for removal of journey claims has been the last adjustment made after all other elements of the specified package have been allowed for. This reduces the cost saving calculated for excluding journey claims. For example, in the specified package with a 9 year cut off of weekly benefits, the calculated savings for also removing journey claims is reduced to $56 million (note this figure also includes a minor amount for excluding heart attack and stroke).

2.2.2 *Heart attack and stroke*

The specified package removes heart attacks and strokes from coverage.

Slippage may occur with respect to excluding these types of claims in that there will be an incentive for injured workers to have these claims coded elsewhere in order to have liability accepted by the Scheme. For heart attack and stroke there may also be challenges related to cause and effect (ie did the heart attack/stroke cause the accident or did the accident have a side effect of triggering a heart attack/stroke).

The following tables summarise the modelled cost impact of excluding heart attack and stroke claims assuming no other reforms occur:

Heart Attack and Stroke

	Outstanding claims liability (all benefits)			Next years premium (all benefits)			
		Difference		Breakeven premium		Difference	
Scenario	Liability	$m	%	$ m		$m	%
Baseline	n/a	n/a	n/a	2,601	1.64%		
Exclude heart attack and stroke				2,595	1.63%	-6	-0.2%

Excluding most heart attack and stroke claims is estimated to result in a cost saving of $6 million per annum in premium costs (reducing the estimated breakeven premium rate by 0.2%).

Where other reforms are made, the incremental impact of excluding Journey and Heart Attack/Stroke claims will reduce proportionately to the impact of the rest of the reform package.

2.3 Weekly benefit package with flow-on impact to medical benefits

2.3.1 Proposal for weekly benefits

The main elements of the specified reform package we were asked to consider are:

- A change in the wage definition to one based on the worker's own average weekly earnings over the 12 months prior to injury. This removes the concept of the "Current weekly wage rate" and the discrepancy between award and non-award workers:
  - Regular overtime to be included in the definition of average weekly earnings for the first 12 months only
  - Special provisions will apply for those who have been employed for less than 12 months.
- Total incapacity benefits (see table overleaf for full details):
  - Step down in wage replacement levels from 95% AWE to 80% AWE at 13 weeks (replacing current 26 week step down)
  - Workers to be subject to work capacity tests between week 78 and week 130. An exemption applies for serious injuries (WPI>30%). Only those determined to have continuing total incapacity can receive benefits after 130 weeks. Further capacity assessments will occur every 2 years.
  - There are 4 separate time caps on the duration of weekly benefits which we have been asked to cost as separate options. For new claims benefits to continue for up to 5, 7, 9 or 11 years from date of first incapacity unless have WPI>30%, or until 12 months post retirement age if earlier. For existing claims the 5, 7, 9 or 11 year cap will apply from date of commencement of the new legislation rather than date of first incapacity.
- Partial incapacity benefits:
  - Benefit is "make-up pay" to a target level of wage replacement:
    - The make-up pay is determined after considering the amount that the worker is "fit to earn" in suitable employment.
  - Step down in target level from 95% AWE at 13 weeks (replacing current 26 week step down):
    - to 80% AWE if working 0-15 hours per week
    - remain at 95% if working more than 15 hours per week.
  - Workers to be subject to work capacity tests between week 78 and week 82, or as soon as possible if a worker achieves partial incapacity after week 78. Further capacity assessments will occur every 2 years.
  - Further step downs in target level of wage replacement or cessation of benefits at 130 weeks:
    - Benefits cease if working 0-15 hours per week, unless severely disabled
    - Step down to target level of 80% AWE if working more than 15 hours per week or severely disabled

- There are 4 separate time caps on the duration of weekly benefits which we have been asked to cost as separate options. For new claims benefits to continue for up to 5, 7, 9 or 11 years from date of first incapacity unless have WPI>30%, or until 12 months post retirement age if earlier. For existing claims the 5, 7, 9 or 11 year cap will apply from date of commencement of the new legislation rather than date of first incapacity.

- Participating in vocational rehabilitation (previously Section 38 - retraining benefits):
  - No explicit benefit provisions apply. Claimants will access either total or partial incapacity benefits depending on whether working or not.

- Caps on weekly benefits:
  - The Section 35 cap which currently applies for the first 26 weeks remains unchanged (currently $1,805)
  - This cap will continue to apply beyond 26 weeks, replacing the statutory rate. (The statutory rate is currently $432.50 for a single person with additional components if the claimant has a dependent spouse and/or children).

- Safety nets:
  - A safety net of a minimum weekly compensation amount will apply. This is to be 95% of the Commonwealth government minimum wage for adults, which is currently $589.30 per week[1]. This will apply to all claimants, irrespective of age.

    The safety net does not apply for those whose pre-injury earnings is below this level (in practice this mostly occurs for those who are working part time).

[1] http://www.fairwork.gov.au/pay/national-minimum-wage/pages/default.aspx

Table 1 Summary of current and proposed weekly benefits

Duration of incapacity	Totally unfit for work		Partial capacity: performing suitable duties		Participating in voc rehab		Partial capacity – not working	
	Proposed	Current	Proposed	Current	Proposed	Current	Proposed	Current
0-12 weeks	95% Avg weekly earnings	Current weekly wage rate[2]	Make up pay[3] to 95% Avg weekly earnings	Make up pay to 100% average weekly earnings	95% Avg weekly earnings	Current weekly wage rate	95% Avg weekly earnings	Current weekly wage rate
13-130 weeks	80% Avg weekly earnings	13-26 weeks Current weekly wage rate 26-130 weeks Statutory rate[4]	Make up pay to 80% AWE if working 1-15 hours per week (hpw) 95% AWE if working >15 hpw	For the first 26 weeks after first received incapacity payments, make-up pay is capped at current weekly wage rate; for any later period, capped at the statutory rate	Total or partial incapacity benefits apply depending on work capacity.	13-26 weeks Current weekly wage rate 26-52 weeks Statutory rate[5] No benefits payable beyond 52 weeks.	80% AWE less any amount deemed able to earn in suitable employment	0-26weeks: Current weekly wage rate 26-52 weeks, statutory rate 52-130 weeks: Statutory rate less any amount deemed able to earn in suitable employment
131 weeks – 9 years*	80% Avg weekly earnings	Statutory rate	Cease entitlements unless working in excess of 15 hrs per week or severely disabled. Severely disabled or working > 15 hpw, make up pay to 80% AWE	Make up pay capped at the statutory rate	Total or partial incapacity benefits apply depending on work capacity.	Stat rate unless S38 benefits have not previously been accessed	Cease entitlements unless severely disabled	Statutory rate less any amount deemed able to earn in suitable employment
After 5, 7, 9 or 11 years* (depending on option)	Payments cease unless >30%WPI	Statutory rate	Payments cease unless >30%WPI	Make up pay capped at the statutory incapacity rate	Total or partial incapacity benefits apply depending on work capacity.	Stat rate unless s38 benefits have not previously been accessed	Payments cease unless >30%WPI	Statutory rate less any amount deemed able to earn in suitable employment
Retiring age	Payments cease the earlier of nine years after the first incapacity or 12 months post retiring age	Payments cease 12 after retiring age or 12 months after injury (if injury occurs post retiring age)	Payments cease the earlier of nine years after the first incapacity or 12 months post retiring age	Payments cease 12 months post-retirement age	Payments cease the earlier of nine years after the first incapacity or 12 months post retiring age.	Payments cease 12 months post-retirement age	Payments cease the earlier of nine years after the first incapacity or 12 months post retiring age	Payments cease 12 after retiring age or 12 months after injury (if injury occurs post retiring age)

[2] *Current weekly wage rate* calculated as: for workers paid under an award, industrial or enterprise agreement, 100 per cent of the rate of remuneration for one week of work (excluding overtime, shiftwork, payments for special expenses and penalty rates) or for workers not employed under an award, industrial or enterprise agreement, 80 per cent of average weekly earnings (including regular overtime and allowances)

[3] *Make up pay* is the difference between pre-injury earnings and the amount earned while on suitable duties. 'Make up' pay cannot exceed the amount payable for total incapacity

[4] *The statutory rate* is the amount specified in section 37 of the *Workers Compensation Act 1987* and is indexed twice each year in April and October. The statutory rate from 1 April 2012 to 30 September 2012 is $432.50 gross for a single person, plus additional payments for dependents.

[5] *The statutory rate* is the amount specified in section 37 of the *Workers Compensation Act 1987* and is indexed twice each year in April and October. The statutory rate from 1 April 2012 to 30 September 2012 is $432.50 gross for a single person, plus additional payments for dependents.

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2.3.2 *Proposal for medical benefits*

The main elements of the specified reform package we have been asked to consider are:

- Limit medical costs to a maximum period (whichever is later of):
    - 1 year post commencement of entitlement (either as a provisionally accepted or liability accepted claim)
    - 1 year post cessation of weekly benefits.

  Claims with WPI in excess of 30% are to be excluded from the maximum period.
- Define "reasonable and necessary" medical treatment and provide regulatory power to exclude unreasonable classes of medical service.

2.4 *General comments*

Wage definition

The proposed change in wage definition removes the differential between award and non-award workers.

The shift away from the use of the statutory rate (which previously applied post 26 weeks) will simplify the benefit calculation as it removes the need to assess components for dependents. This change also has the potential to benefit higher wage earners, although the Section 35 cap still serves to limit benefits to a maximum of $93,860 pa.

Proposed wage replacement levels

The proposed benefits include a number of step downs in the target level of wage replacement.

The major element is an initial replacement level of 95%, stepping down to 80% after 13 weeks. Within this there is a slight variation, in that after 12 months (52 weeks) regular overtime is no longer included. This is an implicit step down which will affect some workers more than others.

Work capacity tests

The specified work capacity test is modelled on the one which operates in the Victorian WorkSafe Scheme.

Currently approximately 25% of claims in the Nominal Insurer Scheme move off weekly benefits during that period post injury. It is estimated this would increase to approximately 60% if a work capacity test was introduced similar to the Victorian test.

Victoria has a reputation as a well run and proactively managed scheme. WorkCover NSW would need to work hard with Scheme Agents and others to ensure the implementation of any legislative reforms were supported by operating guidance and protocols and proactive management aligned with optimising any legislative intent. It would be important for WorkCover to be appropriately resourced and supported for this to occur.

For existing claims, the proposed changes are that work capacity tests will apply immediately from the date of enactment of any legislation. A transition period might need to apply to allow the necessary work capacity tests to be completed on the large number of existing weekly claims which are currently at or beyond the timeframes where this test will be applied. This costing assumes the immediate application of any new legislative requirements (ie work capacity tests). The longer a transition period applies, the more the cost reduction will be diluted.

Impact of the time cap (5, 7, 9 or 11 years) for weekly benefit entitlement

Only high WPI claims (those with >30% WPI) will continue on benefits after 5, 7, 9 or 11 years post injury (new claims)/date of legislation commencement (existing claims). This threshold is expected to have a major impact, only allowing a small number of the most serious claims to continue on benefits. However, this assessment is reliant on the threshold being implemented in the objective form of a single medical assessment of WPI and at the level stated.

Reasonable and necessary medical treatment

It is not possible for us to estimate any cost savings which might arise from more tightly defining the definition of "reasonable and necessary" medical treatment. Firstly, because a precise definition is not currently available, and importantly it is unclear how this would be interpreted in practice. Such a definition would ultimately need to be supported by consistent supporting guidelines and operating protocols.

However, it is difficult to argue that there is not room for efficiencies in medical spend by the Nominal Insurer Scheme. Anecdotal evidence from WorkCover supports the need for tighter controls on medical treatment.

It would also be important for any cost savings attributed to this change not "double count" medical cost savings resulting from other elements of the reform package (in particular the significant reduction medical costs expected indirectly resulting from the change in weekly benefit structure and the capping of medical costs to a maximum 1 year period post injury/cessation of weekly benefits).

Assessment of flow on of weekly changes to medical costs

Approximately 90% of medical costs other than those to severely injured claimants are paid while claims are on weekly benefits. The work capacity test, and the time cap limitation period, followed by medical costs coverage ending 1 year post cessation of weekly benefits, will flow on to reduce medical benefits.

The resulting change to the medical benefits is expected to impact medical cost for lower WPI claims more than for higher WPI assessed claims. While we do not have information on the medical costs for lower WPI claims only, we expect these claims to have a lower medical spend than the higher WPI claims. Our modelling assumes the medical spend on lower WPI claims is currently around 55% of the total medical outstanding claims liability. We are then able to translate the expected changes in weekly numbers, into an expected impact on medical costs.

2.5 Lump sum package

2.5.1 Proposal

In summary the key elements of the specified benefit package we were asked to consider are:

- Whole Person Impairment (WPI):
  - Only one assessment of WPI allowed.
- Workplace Injury Damages (WID):
  - Introduce a robust statutory of limitations three years post injury (on emergence of the injury).
  - Change in the definition of negligence to match that contained in the Civil Liability Act 2002
  - Prevent nervous shock claims.
- Permanent Impairment (Section 66) and Pain and Suffering (Section 67) lump sum benefits:
  - Introduction of a 10% WPI threshold to access Permanent Impairment benefits (30% for psychiatric or psychological impairment)
  - Replace existing Permanent Impairment benefit scale with the Victorian scale
  - Eliminate Pain and Suffering benefits (effectively blending into the revised Permanent Impairment scale)
  - No indexation (no change from current).
- Legal costs:
  - No requirement for legal involvement in paying of a Permanent Impairment benefit
  - Legal fees only associated with disputed Permanent Impairment payments
  - Current schedule of rates increased by 15% (to reflect that scheduled rates have not been increased for a number of years).

2.5.2 General comments

Whole Person Impairment (WPI)

Currently the Scheme has an increasing number of "top up" WPI assessments which are having the effect of undermining the robustness of the current WID benefit and Pain and Suffering benefit thresholds.

The requirement for there to only be a single assessment of WPI may be expected to eliminate this negative feature of current experience with an expectation of stability in the future Scheme experience.

There is a future risk of an incentive to delay having a WPI assessment until there is complete certainty as to the outcome of the injury (ie to minimise the risk of further deterioration). This may result in the same ultimate numbers exceeding threshold levels as is currently observed, but just delaying the emergence.

On balance we would still expect this amendment to be cost beneficial to the Scheme.

Workplace Injury Damages (WID)

The specified benefit package we have been asked to cost maintains the current 15% WPI Threshold to access WID.

There is a significant risk that the introduction of work capacity tests for weekly benefits may lead to an increased propensity for claimants to pursue WID prior to the work capacity test occurring. By intimating for WID prior to the work capacity test, claimants might potentially circumvent the work capacity test resulting in a loss of weekly benefits.

To an extent the elimination of "top up" WPI assessments and the application of the Civil Liability Act 2002 test of negligence may balance this. However, we have no data or expertise in the application of the CLA negligence test on which to consider whether this would be the case.

More than 80% of WID claims are lodged "out of time" (meaning lodged beyond the current statute of limitations). It is understood the District Court applies its discretion to hear out of time applications generously and as a result only the most exceptional circumstances will leave to have a claim heard not be given. Introduction of a more robust statute of limitations may only result in claims being lodged earlier rather than reduce the ultimate number of WID intimations. On balance we would still expect this amendment to be cost beneficial to the Scheme. **Although we have assumed this reform will not result in an immediate cost saving, we believe this reform is critical to stabilising the cost of WID which is currently a major source of Scheme instability.** If the statute threshold is effective, the majority of claims will be known after three years. This compares to the current environment where there is still significant uncertainty regarding the future number of WID intimations for accident periods that are ten years old. A robust statute threshold will provide more certainty when estimating premium rates.

Perhaps more powerful than the statute of limitations in changing speed of WID intimation will be the work capacity test (at 78 to 130 weeks). There would be an incentive for claims to pursue WID prior to undergoing a capacity test to eliminate the risk of the test undermining their argument for future economic loss. As a result, under the proposed package we might well see a spike of WID intimations well before 78 weeks.

Nervous shock claims are a relatively minor proportion of WID claims currently received. Consequently, excluding such claims will not likely have a material impact on total Scheme cost. However, the emergence of this category of claim is a relatively recent phenomenon and has been identified as an area of Scheme risk.

Permanent Impairment and Pain and Suffering lump sum benefits

The introduction of a 10% WPI threshold is expected to reduce the number of claims eligible to receive Permanent Impairment benefits significantly. There will always be a risk of WPI bracket creep so it is important to be continually diligent at monitoring its effectiveness, no matter what the threshold level is set at. This risk will be reduced by the prevention of secondary WPI assessments.

Currently claimants are entitled to claim both Permanent Impairment and Pain and Suffering benefits. The eligibility threshold for Permanent Impairment is 1% WPI and Pain and Suffering benefits is 10% WPI. The second change is to replace these two benefits with the Victorian permanent impairment scale which has a 10% WPI threshold. The revised scale provides for significantly higher benefits for the most severely injured compared with the current scale.

Legal costs

Currently a claimant receiving a Permanent Impairment or a Pain and Suffering payment is required to have legal representation. The current proposal removes this requirement for all non disputed payments. As the assessment of WPI explicitly determines eligibility for Permanent Impairment benefits and possible future entitlement to WID, the removal of legal representation may be difficult to achieve in practice. Legal costs will also reduce to the extent the Pain and Suffering benefits and small Permanent Impairment payments are eliminated.

2.6 A tightly controlled commutation strategy

No detail has been provided by WorkCover as to exactly how this might occur.

It is extremely important for any commutation program to be tightly targeted, operate for only a short period of time and have other controls to mitigate the real risk that behavioural changes by Scheme participants could occur (the development of the so called "lump sum" culture) which could be very detrimental to overall Scheme financial performance.

An example of the risks posed by a lump sum culture is the experience of the NSW Nominal Insurer Scheme in the period 1998 to 2001 when the use of commutations was liberalised. The widespread focus on commuting claims led to significant changes in the behaviour by all Scheme participants which, together with high transactional costs, contributed to an overall deterioration in the financial cost of the Scheme.

It is our recommendation that any proposed commutation strategy be kept tightly controlled to guard against the risk of a lump sum culture developing. Such controls include:

- Tightly defined cohorts of claims which are intended to be commuted. Claim cohorts which we consider might be reasonable to consider as part of a targeted commutation strategy include those which have a high ratio of ongoing management expense to claims liability.
- A short window (perhaps only 3 months) in which a program of commutation offers will be made to the identified claims. At the end of the window no future commutations occur for a period. To the extent possible minimise legal involvement in the commutation process. This could either require:
    - Preferably no legal involvement at all. If this is not acceptable then measures to minimise legal involvement (such as the payment of a once off meeting according to a scheduled rate).
    - A real risk is that any claim which approaches a legal provider for advice might lead to unintended consequences such as seeking of S66/S67 damages and perhaps even intimating for a WID, which might drive up total Scheme costs.
- Commutation amounts need to be proposed at a discount to the expected cost if the claim had continued on benefit. This is necessary to reflect the fact that a significant proportion of claims do not continually utilise benefits until retirement age (or beyond in the case of medical benefits) and that many do and would continue to exit the Scheme voluntarily in the absence of a commutation, but also to provide a margin to create savings (thus justifying the commutation action).
- Preferable consolidation of identified claims with a single Agent who will manage all commutations on WorkCover's behalf. The advantage of this approach is it prevents other Agents from being distracted by commutations from their core job of ongoing claims management. Furthermore, concentrating the necessary skills in a single Agent builds up expertise and experience to optimise Scheme outcomes.

If not tightly managed there is a real risk that a liberalised use of commutations might actually result in an increase in Scheme costs rather than a saving. Assuming the commutations strategy is tightly controlled we believe the main focus should be on groups of claims which have a high ratio of ongoing management expense to claims liability. In reality, commuting such groups of claims, while tidying up, is unlikely to result in material liability savings. As a result we do not believe it is appropriate to assume a cost savings from the implementation of such a strategy.

2.7 Overall package result

The following table summarises the estimated cost impact of the benefit reform package assuming a 5, 7, 9 or 11 year time cap on weekly benefits respectively. Although the estimated cost impact on each benefit type is shown separately in the table, the components of the package should not be considered individually but rather as a comprehensive package. Individual elements of the package support and reinforce the impact of the overall package.

It is important to recognise there is considerable uncertainty associated with the financial cost impact results contained in this report. They should be considered more as indicative of the magnitude of the possible cost impact rather than being precise. The estimated cost impacts we have calculated are based on the assumptions that any legislative changes are made in the way interpreted and that they are well implemented. This costing assumes the immediate application of any new legislative requirements (eg work capacity tests) the longer a transition period applies the more the cost reduction will be diluted.

It needs to be recognised that legislation is just one part of the necessary change to introduce substantive benefit reform as intended. There also needs to be a strong focus on change management and implementation. In particular it requires a focused capability by the regulator (WorkCover), the Nominal Insurer and Scheme Agents.

Option with a 5 year time limit on weekly benefits

Benefit reform scenario - 5 year cut-off

	Outstanding claims		Next years premium		
	Net Central Estimate	Change	Breakeven Premium		Change
	$m	$m	$m	% covered wages	% covered wages
Base	14,378		2,601	1.64%	
Reform impact					
Weekly (incl 5 year cut off)		-3,576	-339		-0.21%
Medical		-1,235	-151		-0.09%
WID		-36	-5		0.00%
S66/S67		-332	-101		-0.06%
Legal		-233	-56		-0.04%
Claim exclusions		n/a	-54		-0.03%
Revised Total Cost	8,965		1,894	1.19%	
% cost reduction	-38%		-27%		-27%

* There would also be a further reduction in the reported outstanding claims liability from release of a proportionate part of the 12% risk margin currently held in addition to the net central estimate

The current outstanding claims liability is $14,378 million excluding risk margin ($16,103 million including a 12% risk margin).

The possible reform package, if implemented immediately to apply to existing claims, is estimated to reduce the currently liability by 38%, reducing the outstanding claims liability to $8,965 million excluding risk margin ($10,041 million including risk margin).

The current estimated breakeven premium cost of the Scheme (actuarial estimate of required average premium to meet expected cost of claims for 2012/13 policy renewal year) is $2,601 million (an average premium rate of 1.64% of covered wages).

The possible reform package is estimated to reduce the breakeven premium cost of the Scheme by 27% to $1,894 million (an average premium rate of 1.19% of covered wages).

Option with a 7 year time limit on weekly benefits

Benefit reform scenario - 7 year cut-off	Outstanding claims		Next years premium		
	Net Central Estimate	Change	Breakeven Premium		Change
	$m	$m	$m	% covered wages	% covered wages
Base	14,378		2,601	1.64%	
Reform impact					
Weekly (incl 7 year cut off)		-3,315	-312		-0.20%
Medical		-1,164	-144		-0.09%
WID		-36	-5		0.00%
S66/S67		-332	-101		-0.06%
Legal		-233	-56		-0.04%
Claim exclusions		n/a	-55		-0.03%
Revised Total Cost	9,298		1,927	1.21%	
% cost reduction	-35%		-26%		-26%

* There would also be a further reduction in the reported outstanding claims liability from release of a proportionate part of the 12% risk margin currently held in addition to the net central estimate

The possible reform package, if implemented immediately to apply to existing claims, is estimated to reduce the currently liability by 35%, reducing the outstanding claims liability to $9,298 million excluding risk margin ($10,414 million including risk margin).

The possible reform package is estimated to reduce the breakeven premium cost of the Scheme by 26% to $1,927 million (an average premium rate of 1.21% of covered wages).

Option with a 9 year time limit on weekly benefits

Benefit reform scenario - 9 year cut-off	Outstanding claims		Next years premium		
	Net Central Estimate	Change	Breakeven Premium		Change
	$m	$m	$m	% covered wages	% covered wages
Base	14,378		2,601	1.64%	
Reform impact					
Weekly (incl 9 year cut off)		-3,099	-292		-0.18%
Medical		-1,102	-140		-0.09%
WID		-36	-5		0.00%
S66/S67		-332	-101		-0.06%
Legal		-233	-56		-0.04%
Claim exclusions		n/a	-56		-0.04%
Revised Total Cost	9,576		1,950	1.23%	
% cost reduction	-33%		-25%		-25%

* There would also be a further reduction in the reported outstanding claims liability from release of a proportionate part of the 12% risk margin currently held in addition to the net central estimate

The possible reform package, if implemented immediately to apply to existing claims, is estimated to reduce the currently liability by 33%, reducing the outstanding claims liability to $9,576 million excluding risk margin ($10,725 million including risk margin).

The possible reform package is estimated to reduce the breakeven premium cost of the Scheme by 25% to $1,950 million (an average premium rate of 1.23% of covered wages).

Option with a 11 year time limit on weekly benefits

Benefit reform scenario - 11 year cut-off	Outstanding claims		Next years premium		
	Net Central Estimate	Change	Breakeven Premium		Change
	$m	$m	$m	% covered wages	% covered wages
Base	14,378		2,601	1.64%	
Reform impact					
Weekly (incl 11 year cut off)		-2,919	-277		-0.17%
Medical		-1,048	-137		-0.09%
WID		-36	-5		0.00%
S66/S67		-332	-101		-0.06%
Legal		-233	-56		-0.04%
Claim exclusions		n/a	-57		-0.04%
Revised Total Cost	9,809		1,967	1.24%	
% cost reduction	-32%		-24%		-24%

* There would also be a further reduction in the reported outstanding claims liability from release of a proportionate part of the 12% risk margin currently held in addition to the net central estimate

The possible reform package, if implemented immediately to apply to existing claims, is estimated to reduce the currently liability by 32%, reducing the outstanding claims liability to $9,809 million excluding risk margin ($10,986 million including risk margin).

The possible reform package is estimated to reduce the breakeven premium cost of the Scheme by 24% to $1,967 million (an average premium rate of 1.24% of covered wages).

3 An adversarial lump sum benefit model

The NSW Bar Association has made a submission to the Inquiry (Submission 77). At the request of the Inquiry, WorkCover has asked PwC to consider the potential financial implications of a benefit model consistent with the broad recommendations contained this in this submission.

Unfortunately the NSW Bar association submission's recommendations are not specific. However, it is suggesting an increase access to lump sum benefits and an increase in litigation and an adversarial approach to claim resolution. It might be that what was intended by that submission is different to how it has been interpreted.

3.1 High level cost observations

The Bar Association has advocated for the return to an adversarial lump sum benefit model with a litigated approach to dispute management. This has many features similar to the benefit and structural model which existed in the NSW Workers Compensation Scheme prior to the 2001 reforms. The most obvious approach to considering the likely cost implications of returning to such a Scheme is to consider the cost of the Scheme during that period.

Section 2.7 (page 14) of the Executive Summary of the PwC report *Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer at 31 December 2011* shows calculations of the Breakeven Premium rates for each policy renewal year since 1987. Of particular relevance is the average breakeven premium rate for the policy renewal years 1994/95 to 2000/2001 inclusive, which were most impacted by the lump sum environment which existed during the second half of the 1990s in the WorkCover Scheme. Assuming risk free discount rates, this average is 3.12% of covered wages. Adjusting for using long-term expected investment returns (based on WorkCover's current asset strategy) rather than risk free discount rates would reduce this average to 2.75% of covered wages.

Subsequent to the 2001 reforms, the experience of these policy years has been much improved compared to the trajectory of these policy renewal years if the lump sum environment had been allowed to continue. As a result, an average premium cost of 2.75% of covered wages should be considered as being a very optimistic view of the likely cost of reintroducing an adversarial lump sum scheme similar to the pre-2001 Scheme. In all likelihood, a more realistic cost estimate would be significantly higher.

Similarly, the workers compensation Scheme which existed prior to 30 June 1987 was also very much an adversarial lump sum based Scheme. The average premium rate set by the Government in the last year of the previous Scheme was 3.82% of covered wages. Insurers viewed that rate as significantly inadequate; they believed it should be about 5%, and hence left the market.

The above two examples illustrate the significantly higher likely premium cost of a scheme similar to that suggested by the Bar Association Submission compared to current Scheme costs.

3.2 Observations on elements of an adversarial lump sum based compensation model

Given the lack of specificity to the benefit costing and the available timeframe it has not been possible to undertake a detailed bottom-up costing of a specific model. Such an approach also runs the risk of challenge that a particular element of a package is not what was intended in order to invalidate the conclusions to be drawn.

The development of a lump sum culture in the 1990s was the key driver of the large deficit which emerged during that time and necessitated the significant changes in Scheme design which occurred in the 2001 reforms before the issue was controlled. Escalation in lump sum costs (with associated indirect cost escalation to weekly and other benefits) have been a key issue in the majority of cost escalations observed in Australian accident compensation schemes over the past three decades.

From an actuarial perspective a lump sum culture is how the changing behaviour of Scheme participants manifests itself in the claim and payment experience of the Scheme.

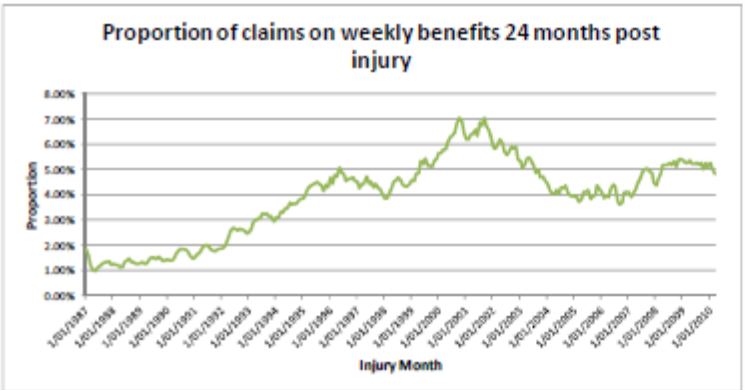
Some observations on some key elements of the Bar Association submission are:

Weekly benefits – The submission is to maintain the status quo with no changes to the definition of pre-injury earning, and unchanged benefit levels, with a step down at 26 weeks.

Comments

Weekly and medical benefits are likely to be adversely impacted by the shift in the balance of the scheme from one which pays the majority of benefits via periodic benefits to one which pays the majority of benefits via an adversarial lump sum process.

Although the weekly and medical benefit outstanding claim liabilities will reduce as claims substitute to being compensated more via the lump sum benefits available, the total costs of these two payment types are likely to be adversely affected by a deterioration in return to work (RTW) rates at early periods post injury. The following graph illustrates a measure of the proportion of claims which have received at least one day of incapacity benefits and remain on incapacity benefits 2 years post-injury.



The following observations can be made:

- Scheme benefits were enhanced in 1992 and almost immediately the Weekly benefit continuance rate in the above graph began to deteriorate.
- Two reform packages were introduced at the start of 1996 and 1997 to reduce permanent impairment benefits. During 1996 and 1997 the weekly continuance rate began to reduce.

- The weekly benefit continuance rate increased again during the period 1999 to 2001 inclusive, which coincided with the large numbers of commutations and common law settlements which occurred in the scheme during this period.
- The weekly benefit continuance rate reduced subsequent to the 2001 reforms as these restricted the use of commutation and common law benefits.
- The weekly benefit continuance rate increased again at the start of the GFC.

Increased role for lump sums benefits as a mechanism to achieve claim finalisation – The submission recommends that WID "*should be permitted not discouraged*". This has been interpreted as advocating the current threshold to access WID should be either weakened or indeed removed completely. Similarly the submission recommends a liberalisation of commutations as a major mechanism for finalising tail claims. This has been interpreted as a return to the environment which existing in the years immediately prior to the 2001 reforms.

Comments

The use of lump sum benefits as a mechanism to compensating injured workers is not efficient. I have attached to the costing report a copy of Chapter 17 of the Productivity Commission Report into Disability Care and Support which considers the issue. The arguments presented in this chapter are also relevant when considering the merits of common law compensation as well as other lump sum benefits such as commutations.

At an individual claim level, it is argued that a lump sum settlement may result in a Scheme liability saving compared with a continuation of the claim on periodic (weekly incapacity and medical benefits). This may be true of some individual cases. However the "averaging" approach to deciding on the amount of a lump sum results in some claimants being over-compensated (compared to the alternative of staying in the periodic benefits scheme (eg those who subsequently return to work) or under-compensated (eg those claims where their condition subsequently deteriorates). For the purpose of the following discussion, I have termed Category 1 and Category 2 claims respectively. A periodic benefit scheme is more efficient at directing a limited pool of funding to where it is best needed by individual circumstances.

Furthermore, in my experience the averaging amount tends to over-compensate Category 1 claims collectively more than it under compensates the Category 2 claims. This leads to an overall Scheme cost increase. Even more important as a cost driver is that benefit claiming patterns might potentially change with an increasing volume of the Category 1 claims utilising the available lump sum benefits. Lastly, there is likely to be material transactional costs (particularly legal costs) which add a further cost pressures to the Scheme. For example, legal costs accounted for 20% of the assessed Breakeven Premium Rate immediately prior to the 2001 reforms. Legal costs currently account for only 3% of the Breakeven Premium rate assessed at 31 December 2011 (NB these legal cost percentages exclude legal costs captured with common law and WID settlements over which there is no visibility).

Dispute management – There are a number of elements to the Bar Association's submission which would increase the adversarial nature of the Scheme and the number of disputes. Examples include the suggestions to:

- Revoke Section 151z(2) of the Workers Compensation Act
- Change claim handling guidelines for Scheme Agents with respect to pre-filing for workplace injury damage claims
- Reintroduce the concept of fault as a mitigating factor on journey claims.

Superficially each of these might be considered as assisting the Scheme to reduce costs. However, a large numbers of disputes can have a negative impact on Scheme costs. This can be via a direct increase in transactional (legal) costs. More significant though is that a litigative and adversarial environment might negatively impact the focus on achieving return to work, which would have an indirect cost impact via an increase in weekly and medical costs.

A feature of the pre-2001 Scheme was that there were almost 28,000 disputes per annum. Currently there are only 10,000 disputes per annum.

Death benefit lump sums should only be payable to dependents.

Comments

This represents a return to the requirements prior to 24 October 2007. It is estimated that approximately 43% of fatalities do not have dependants. The estimated annual cost impact of re-introducing this restriction would be to reduce the annual cost of the Scheme by approximately $20 million.

4 Reliances and limitations

The purpose of this report is to provide advice to NSW WorkCover as to the possible financial cost implications of two specific packages of possible benefit reforms to the NSW WorkCover Scheme. NSW WorkCover in turn will use this advice to respond to a request for information from the Joint Select Committee Inquiry into the NSW Workers Compensation Scheme. We understand that this report will be provided to the Inquiry.

Our responsibilities and liabilities are to NSW WorkCover in the context of using our report for the purpose set out above. We do not accept any liability or responsibility in relation to the use of our report for any other purpose or by any other third party. This report must be read in its entirety. Individual sections of this report could be misleading if considered in isolation from each other.

The results of contained in this report are subject to significant uncertainty. It is important that the reader of this report appreciate this uncertainty. We refer you to Section 1.3 of the report which discusses aspects of this uncertainty in detail.

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Appendix 7 Minutes

Minutes No. 1
Wednesday 2 May 2012
Joint Select Committee on the NSW Workers Compensation Scheme
Waratah Room, Parliament House, at 6.30 pm

1. Members present
Mr Borsak *(Chair)*
Mr Blair
Mr Daley
Mr Green
Mr Khan
Mr Searle
Mr Speakman
Mr Stokes

2. Meeting declared open
The Chair declared the meeting open.

3. Tabling of resolution establishing the Committee
The Chair tabled the resolution establishing the Committee from the draft Minutes of the Legislative Council of 2 May 2010.

4. Election of Deputy Chair
The Chair called for nominations for Deputy Chair.

Mr Blair moved: That Mr Speakman be elected Deputy Chair of the Committee.

There being no further nominations, the Chair declared Mr Speakman elected Deputy Chair.

5. Procedural motions
Resolved, on the motion of Mr Khan: That, unless the Committee decides otherwise, the following procedures apply for the life of the Committee:

That committee proceedings may be suspended upon the calling of a division or quorum of the House.

That the Committee authorises the filming, broadcasting and still photography of the public proceedings of the Committee, in accordance with the resolution of the Legislative Council of 18 October 2007.

That the Committee authorises the publication of transcripts of evidence taken at public hearings.

That the Committee authorises the publication of answers to questions on notice.

That the Committee authorise the publication of all submissions to the inquiry, subject to the Committee Clerk checking for confidentiality, adverse mention and other issues and, where those issues arise, bringing them to the attention of the Committee for consideration.

That media statements on behalf of the Committee may be made only by the Chair.

That arrangements for inviting witness are to be left in the hands of the Chair and the Committee Clerk, after consultation with the Committee.

6. Conduct of Inquiry

The Committee noted the proposed timeline (attached) and discussed the conduct of the Inquiry.

Resolved, on the motion of Mr Searle:

That a media release announcing the inquiry and calling for submissions be issued by the Chair and posted on the Committee's website and distributed via Media Monitors.

That advertisements calling for submissions be placed in *The Sydney Morning Herald*, *The Daily Telegraph*, *Newcastle Herald* and *The Illawarra Mercury* as soon as possible.

That the closing date for submissions be Thursday 17 May.

That the Committee write to the stakeholders identified on the attached list to invite them to make a submission, and that Members advise the Secretariat of any additional stakeholders to invite by 5pm Monday 7 May 2012.

That the Committee hold two days of hearings on Monday 21 May and Friday 25 May 2012.

That the Committee reserve two additional hearing days on Monday 28 May and Friday 1 June.

That Members advise the Secretariat of proposed witnesses by 5pm Monday 7 May 2012.

That the Committee meet on Tuesday 8 April at 1pm to determine the witnesses to appear at the hearings.

That the Committee require that answers to questions taken on notice taken during the hearings be provided to the Secretariat within 3 working days.

That the Committee meet on the morning of Tuesday 12 June at 1.30pm for the report deliberative.

7. Adjournment

The Committee adjourned at 6.50 pm, until Tuesday 8 May 2012 at 1.00pm *(deliberative meeting)*.

Rachel Callinan
Clerk to the Committee

Minutes No. 2
Tuesday 8 May 2012
Joint Select Committee on the NSW Workers Compensation Scheme
Waratah Room, Parliament House, at 1.00 pm.

1. Members present

Mr Borsak *(Chair)*
Mr Speakman *(Deputy Chair)*
Mr Blair
Mr Daley
Mr Green
Mr Khan
Mr Searle

Mr Stokes

2. Previous minutes

Resolved, on the motion of Mr Green: That Minutes No. 1 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence:

Received

- 3 May 2012 – From Mr Bernard Coles QC, President of the NSW Bar Association to the Chair, recommending that the Committee hold public hearings for this Inquiry and obtain independent actuarial advice on the proposals contained in the Issues Paper prepared by the Government.

Debate ensued.

Resolved, on the motion of Mr Daley: That the Secretariat obtain preliminary advice on the costings and timeframes of engaging an actuary to provide advice on the assumptions used in the Pricewaterhouse Coopers actuarial report.

Resolved, on the motion of Mr Speakman: That the Committee write to the NSW Bar Association to advise that due to the timeframe for the Inquiry, the Committee may not have the opportunity to obtain independent actuarial advice and invite the Bar Association to consider supporting any submission they make to the Inquiry with their own actuarial evidence.

- 3 May 2012 – From P A Selth, Executive Director of the NSW Bar Association to the Chair, advising of their intention to make a submission to the Committee and their interest to give evidence at one of the hearings scheduled on 21 and 25 May.
- 4 May 2012 – From Mr Brett Holmes, General Secretary, NSW Nurses' Association, requesting the opportunity to appear before the Committee during its public hearings.

Sent

- 4 May 2012 – Letters inviting submissions sent to stakeholders. Additional stakeholders notified via email.

4. Conduct of the Inquiry

Resolved, on the motion of Mr Blair: That the Committee meet at 9:30am on Monday 11 June 2012 for the report deliberative.

Resolved, on the motion of Mr Speakman: That the second reserve hearing day be cancelled.

The Committee discussed the draft hearing schedule and proposed witnesses.

The Committee discussed the management of submissions containing adverse mention.

The Committee discussed the nature of the report in the context of the timeframe within which it is required to be tabled.

5. Adjournment

The Committee adjourned at 2.02 pm until Monday 21 May 2012 at 8.45 am *(deliberative followed by public hearing)*.

Vanessa Viaggio
Clerk to the Committee

Minutes No. 3
Monday 21 May 2012
Joint Select Committee on the NSW Workers Compensation Scheme
Macquarie Room, Parliament House, at 8.45 am

1. Members present

Mr Borsak *(Chair)*
Mr Speakman *(Deputy Chair)*
Mr Blair
Mr Daley
Mr Green
Mr Khan
Mr Searle
Mr Stokes

2. Deliberative meeting

2.1. Previous minutes

Resolved, on the motion of Mr Khan: That Minutes No. 2 be confirmed.

2.2. Correspondence

The Committee noted the following items of correspondence:

Received

- 4 May 2012 – From Hon Judge G Keating, President, Workers Compensation Commission to the Chair, advising that the Commission will not make a submission
- 7 May 2012 – From Mr J Dowd, President, NSW Law Society to the Chair, requesting an urgent release of the appendices to the PricewaterhouseCoopers report
- 8 May 2012 – From Ms J Newman, A/CEO, WorkCover NSW to the Chair, advising of WorkCover's intention to make a submission and identifying the witnesses that will be representing WorkCover
- 9 May 2012 – From Mr C Winston, Manager, NSW Branch, Australian Physiotherapy Association to the Chair, advising their intention to make a submission to the Committee and requesting to appear before the Committee
- 9 May 2012 – From Mr H Stephens, General Manager, Personal Injuries, NSW, Slater & Gordon to Chair, requesting to appear as a witness
- 9 May 2012 – From Mr J McPhilbin expressing interest in appearing as a witness
- 10 May 2012 – From Mr J McPhilbin to committee secretariat, providing a Youtube video link to support information provided in his submission
- 11 May 2012 – From Mr A McInerney, Finity Consulting, providing advice on potential actuarial assistance that could be provided to the Committee
- 14 May 2012 – From Mr D Shoebridge MLC requesting to appear as a witness.

Sent

- 10 May 2012 – From Chair to Mr B Coles QC, President, NSW Bar Association, responding to Mr Coles' request for the Committee to obtain independent actuarial advice.

2.3. Tabled documents

Mr Khan tabled the following publically available document: Workers Compensation: An update, by Lenny Roth and Lynsey Blayden, NSW Parliamentary Library.

Mr Blair tabled the following publically available document: *Comparison of workers' compensation arrangements in Australia and New Zealand,* Commonwealth of Australian (Safe Work Australia), April 2012.

2.4. Submissions

2.4.1. Public submissions

The Committee noted that Submission Nos. 1, 3, 7, 9, 10, 12, 14, 19, 20, 25, 28, 32, 33, 34, 35, 37, 38, 40, 43, 49, 51, 55, 56, 58, 59, 62, 64-69, 71 and 73 were published by the Committee Clerk under the authorisation of an earlier resolution.

2.4.2. Partially confidential

Resolved, on the motion of Mr Daley: That the Committee authorise the publication of Submission Nos. 6, 11, 16, 17, 18, 21, 22, 27, 29, 30, 31, 36, 39, 41, 42, 44, 45, 47, 48, 50, 53, 60, 61, 70 and 72, with the exception of the name and other identifying details of the authors which are to remain confidential.

2.4.3. Confidential submissions

Resolved, on the motion of Mr Green: That Submission Nos. 2, 13, 15, 26, 46, 52, 54, 57, 63 and 73a remain confidential.

2.5. Request from Mr Shoebridge to appear as a witness

The Committee noted Mr Shoebridge's request to appear as a witness at the hearings for the Inquiry.

Mr Khan moved: That the Committee decline the request from Mr Shoebridge to appear as a witness.

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Daley, Mr Green, Mr Khan, Mr Speakman, Mr Stokes.
Noes: Mr Searle.

Question resolved in the affirmative.

2.6. Actuarial advice

The Committee considered the memo from Finity Consulting outlining the potential assistance that could be provided to the Committee and the cost and timeframe of such work. The discussion was held over until a later hour.

3. Public hearing

The witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Ms Geniere Aplin, General Manager, Workers Compensation Insurance Operations WorkCover Authority of NSW
- Mr Michael Playford, Consulting Actuarial & Analytics Leader, PricewaterhouseCoopers
- Mr Peter McCarthy, Partner, Ernst & Young.

Mr Playford tendered the following document:

- Letter from Mr Playford to Ms Aplin dated 16 May 2012, providing an observation on bond rates since the December 2011 valuation of insurance liabilities.

The evidence concluded and the witnesses withdrew.

The following witnesses from the following organisations were sworn and examined:

- Mr Richard Cox, Economic Strategy Branch Director, NSW Treasury
- Mr Robert Lloyd, Manager, Strategic Projects, NSW Self Insurance Corporation
- Ms Christa Marjoribanks, Principal Actuary, PricewaterhouseCoopers.

The evidence concluded and the witnesses withdrew.

The following witnesses from the NSW Worker's Compensation Self Insurer's Association were sworn and examined:

- Ms Denise Fishlock, Chairperson
- Mr Paul Macken, Legal Advisor.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Peter Achterstraat, NSW Auditor-General.

Mr Achterstraat tendered the following document:

- *Workers Compensation Nominal Insurer (trading as the NSW WorkCover Scheme), Audit Opinion.*

The evidence concluded and the witness withdrew.

The Chair requested the public and the media to withdraw for committee deliberative meeting.

The public and the media withdrew.

4. Deliberative meeting

4.1. Additional questions on notice

Resolved, on the motion of Mr Searle: That members provide any additional questions on notice for witnesses appearing at the hearings to the Secretariat by 12pm the following business day.

4.2. Actuarial advice

The Committee considered the memo from Finity Consulting outlining the potential assistance that could be provided to the Committee and the cost and timeframe of such work. The discussion was held over until the end of the hearing day.

5. Public hearing

The public hearing resumed at 2.15 pm.

The following witnesses from the Law Society of New South Wales were sworn and examined:
- Mr Justin Dowd, President
- Ms Roshana May, Member, Injury Compensation Committee
- Mr Tim Concannon, Member, Injury Compensation Committee.

The evidence concluded and the witnesses withdrew.

The following witnesses from the NSW Bar Association were sworn and examined:
- Mr Jeremy Gormly SC, Chair, Common Law Committee
- Ms Elizabeth Welsh, Member, Common Law Committee.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Australian Lawyers Alliance were sworn and examined:
- Mr Bruce McManamey, NSW Committee Member
- Mr Andrew Stone, NSW Director.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Australian Federation of Employers and Industries were sworn and examined:
- Mr Garry Brack, Chief Executive
- Ms Jill Allen, Manager, Policy and Research.

The evidence concluded and the witnesses withdrew.

The following witnesses from the NSW Business Chamber were sworn and examined:
- Mr Greg Pattison, General Manager, Workplace Solutions
- Mr Paul Orton, Director, Policy.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 5.45 pm. The public and the media withdrew.

6. Deliberative meeting

6.1. Actuarial advice

The Committee considered the memo from Finity Consulting outlining the potential assistance that could be provided to the Committee and the cost and timeframe of such work.

Mr Blair moved: That the Committee not proceed with the proposal to obtain separate independent actuarial advice.

Question put.

The Committee divided:

Ayes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Stokes, Mr Speakman.
Noes: Mr Daley, Mr Searle.

Question resolved in the affirmative.

6.2. Submissions

6.2.1. Public submissions

The Committee noted that Submission Nos. 20a, 23, 75, 77, 80, 82, 83, 84, 87, 88, 92, 95, 96, 97, 100, 104, 107, 109, 113, 114, 116, 117, 118, 119, 120, 122, 124, 125, 126, 128, 129, 130, 131, 132, 133, 135, 136, 137, 138, 139, 140, 141, 142, 143 and 144 were published by the Committee Clerk under the authorisation of an earlier resolution.

6.2.2. Partially confidential submissions

Resolved, on the motion of Mr Green: That the Committee authorise the publication of Submission Nos. 74, 76, 78, 79, 85, 86, 89, 90, 91, 93, 94, 98, 99, 101, 103, 106, 108, 110, 112, 121, 123 and 134, with the exception of the name and other identifying details of the author which are to remain confidential.

6.2.3. Confidential submissions

Resolved, on the motion of Mr Green: That Submission Nos. 81, 102, 105, 111, 115 and 127 remain confidential.

6.3. Reserve hearing day

Resolved, on the motion of Mr Khan: That the first reserve hearing day on 28 May 2012 be utilised.

6.4. Individuals seeking to give evidence

The Committee noted requests from a number of individuals and organisations to be heard at the public hearings and noted that, due to the timeframe for the Inquiry, it was not possible to hear from further witnesses.

7. Adjournment

The Committee adjourned at 6.00 pm until Friday 25 May 2012 at 8.45 am.

Rachel Callinan
Clerk to the Committee

Minutes No. 4
Friday 25 May 2012
Joint Select Committee on the NSW Workers Compensation Scheme
Jubilee Room, Parliament House, at 8.45 am

1. Members present

Mr Borsak *(Chair)*
Mr Speakman *(Deputy Chair)*
Mr Blair
Mr Daley
Mr Green
Mr Khan
Mr Searle
Mr Stokes

2. Deliberative meeting

2.1. Previous minutes

Resolved, on the motion of Mr Speakman: That Minutes No. 3 be confirmed.

2.2. Correspondence

The Committee noted the following items of correspondence:

Received

- 21 May 2012 – From Ms P Theoret, Director/Co-ordinator, Injury Support Network Inc, to the Committee, requesting to appear before the Committee at the hearing on 28 May 2012
- 22 May 2012 – From Mr D Bare, NSW Regional Executive Director, Housing Industry Association to Secretariat – expressing dissatisfaction at not being invited to appear before the Committee at the hearings
- 22 May 2012 - From Ms P Theoret, Director/Co-ordinator, Injury Support Network Inc, to the Committee, requesting the Committee to reconsider her request to appear before the Committee or otherwise requesting a private hearing with the Committee
- 22 May 2012 – From Mr M Coyne, Chief Executive, Employers Mutual Management P/L, to the Committee requesting to appear as a witness.

Sent

- 22 May 2012 – From the Chair to Mr Andrew McInerney, Finity Consulting, thanking him for his assistance
- 22 May 2012 – From the Chair to Mr David Shoebridge, advising that the Committee had resolved to decline his request to appear as a witness.

2.3. Request from Injury Support Network to appear as witness

Resolved, on the motion of Mr Blair: That due to time constraints the Committee declined the request from Ms Theoret, Director/Coordinator, Injury Support Network Inc, to appear as a witness.

2.4. Submissions

2.4.1. Public submissions

The Committee noted that, in accordance with the Committee's resolution of 2 May 2012 authorising the publication of submissions, the Secretariat has published the following submissions on the website: 4, 5, 8, 133a, 145, 146, 150, 151 and 152.

2.4.2. Partially confidential

Resolved, on the motion of Mr Green: That the Committee authorise the publication of Submission No. 147 and 153 with the exception of the name and other identifying information which are to remain confidential.

2.4.3. Confidential submissions

Resolved, on the motion of Mr Green: That Submission Nos 24, 52 and 149 remain confidential.

2.4.4. Shoalhaven City Council submission
Resolved, on the motion of Mr Green: That the Committee authorise the publication of Submission No. 148 with the exception of the attachment which is to remain confidential.

2.5. Publication of documents tendered during the 21 May 2012 hearing
Resolved, on the motion of Mr Khan: That the Committee accept and publish the following documents tendered during the public hearing of 21 May 2012:

- Letter from Mr Playford to Ms Aplin dated 16 May 2012, providing an observation on bond rates since the December 2011 valuation of insurance liabilities, tendered by Mr Playford
- Workers Compensation Nominal Insurer (trading as the NSW WorkCover Scheme), Audit Opinion, tendered by Mr Achterstraat.

2.6. Meeting to consider Chair's Draft report 11 June May 2012
Resolved, on the motion of Mr Green: That the deliberative meeting to consider the Chair's Draft report on Monday 11 June 2012 commence at 8.30 am.

2.7. Additional questions on notice
Resolved, on the motion of Mr Speakman: That the additional questions on notice provided by him for the Workcover witnesses be forwarded to WorkCover.

3. Public hearing
The witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses from the Insurance Council of Australia were sworn and examined:
- Mr David Krawitz, Chair, National Workers Compensation Committee
- Ms Vicki Mullen, General Manager, Consumer Relations & Market Development.

The evidence concluded and the witnesses withdrew.

The following witnesses from Unions NSW were sworn and examined:
- Mr Mark Lennon, Secretary
- Ms Emma Maiden, Deputy Assistant Secretary.

The evidence concluded and the witnesses withdrew.

The following witness from the United Services Union was sworn and examined:

- Ms Casey Young, Senior Industrial Officer

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Ms Rita Mallia, State President, Construction, Forestry, Mining and Energy Union
- Mr Ivan Simic, Partner, Taylor & Scott Lawyers
- Ms Jodie Wormleaton, Spouse of injured worker, Mr David Wormleaton.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Australian Industry Group were sworn and examined:

- Mr Mark Goodsell, NSW Director
- Ms Genevieve Vaccaro, Senior Advisor, Workplace Relations Policy.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Australian Manufacturing Workers Union were sworn and examined:

- Mr Tim Ayres, NSW State Secretary
- Mr David Henry, NSW Workplace Health & Safety Officer.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Australian Society of Orthopaedic Surgeons were sworn and examined:

- Mr Stephen Milgate, National Coordinator
- Dr John Harrison, Member and past President.

The evidence concluded and the witnesses withdrew.

The following witnesses from the NSW Nurses' Association were sworn and examined:

- Mr Stephen Hurley-Smith, Industrial Officer
- Ms Velma Gerbach, Organiser
- Ms Emily Orchard, Member.

The evidence concluded and the witnesses withdrew.

The following witnesses from the National Disability Services (NSW) were sworn and examined:

- Ms Joanne Maxwell, Injury Management Advisor
- Ms Susan Smith, Project Manager – Disability Safe
- Mr Daniel Kyriacou, National Communications Manager.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Australian Rehabilitation Providers Association were sworn and examined:

- Ms Annette Williams, National President
- Ms Nikki Brouwers, NSW President.

The evidence concluded and the witnesses withdrew.

The following witnesses from the NSW Farmers Association were sworn and examined:

- Ms Gracia Kusuma, Industrial Relations Manager
- Ms Fiona Simson, President.

The evidence concluded and the witnesses withdrew.

Mr Daley left the meeting.

Mr Green left the meeting.

The following witnesses from the Housing Industry Association were sworn and examined:

- Ms Melissa Adler, Executive Director, Workplace Relations
- Mr David Humphrey, Executive Director, Business, Compliance and Contracting

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 5.55 pm. The public and the media withdrew.

4. Deliberative meeting

4.1. Additional questions on notice

Resolved, on the motion of Mr Green: That Members provide any additional questions on notice for the witnesses appearing at the hearing on 25 May 2012 to the Secretariat by 12.00 pm Tuesday 29 May 2012.

4.2. Media filming public gallery

The Committee noted that the Secretariat was required to speak to two film camera operators to inform them of the Broadcasting Guidelines which state that events in the public gallery are not part of the proceedings and excerpts of those events must not be used.

5. Adjournment

The Committee adjourned at 6.00 pm until Monday 28 May 2012 at 8.45 am.

Rachel Callinan
Clerk to the Committee

Minutes No. 5
Monday 28 May 2012
Joint Select Committee on the NSW Workers Compensation Scheme
Macquarie Room, Parliament House, at 8.45 am

1. Members present

Mr Borsak *(Chair)*
Mr Speakman *(Deputy Chair)*
Mr Blair
Mr Daley
Mr Green
Mr Khan
Mr Searle
Mr Stokes

2. Deliberative meeting

2.1. Correspondence

The Committee noted the following items of correspondence:

Received

- 24 May 2012 – From Mr Peter Achterstraat, NSW Auditor-General to the Committee, providing an answer to a question on notice

- 24 May 2012 – From Ms Denise Fishlock, Chairperson, NSW Worker's Compensation Self Insurer's Association to the Committee, providing answers to questions on notice
- 24 May 2012 – From Mr Richard Cox, Economic Strategy Branch Director, NSW Treasury to the Committee, providing answers to questions on notice
- 24 May 2012 – From Australian Lawyers Alliance to the Committee, providing answers to questions on notice
- 24 May 2012 – From Ms Carmel Donnelly, General Manager-Strategy and Performance, WorkCover, to Committee Director, providing a copy of the Appendices of the WorkCover NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compnesation nominal Insurer at 31 December 2011 on CD
- 25 May 2012 – From Mr Hayden Stephens, General Manager, Slater & Gordon to the Committee, providing a replacement Appendix to its submission.

2.2. Submissions

2.2.1. **Public submissions**

The Committee noted that Submission No.155, 157, 158, 164, 165, 166, 169, 170, 172, 173, 174, 175, 179, 180 and 181 were published by the Committee Clerk under authorisation of an earlier resolution.

2.2.2. **Partially confidential**

Resolved, on the motion of Mr Daley: That the Committee authorise the publication of Submission Nos 156 and 163, with the exception of the name and other identifying details of the author which are to remain confidential.

2.2.3. **Confidential submissions**

Resolved, on the motion of Mr Daley: That Submission Nos 154, 159, 162, 167, 168, 171, 176, 177 and 178 remain confidential.

2.2.4. **Public submission with confidential attachment**

Resolved, on the motion of Mr Daley: That the Committee authorise the publication of Submission 161 with the exception of the attachments which are to remain confidential.

2.3. In camera witnesses

Resolved, on the motion of Mr Blair: That the last two witnesses appearing at today's hearing be heard in camera.

3. Public hearing

The witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses from the Australian Medical Association were sworn and examined:

- Ms Fiona Davies, Chief Executive Officer
- Dr Michael Gliksman, NSW Councillor
- Dr Peter Burke, Member specialist.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Dr Yvonne Skinner, Chair, NSW Branch Faculty Forensic Psychiatry, Royal Australian and New Zealand College of Psychiatrists
- Mr David Stokes, Executive Manager Professional Practice, Australian Psychological Society

- Ms Agnes Levine, Chair NSW State Committee, Australian Psychological Society
- Mr Bo Li, Senior Policy Advisor Professional Practice, Australian Psychological Society.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:
- Mr David Castledine, CEO (NSW Branch) Civil Contractors Federation.

The evidence concluded and the witness withdrew.

The following witnesses from the NSW Master Builders Association were sworn and examined:
- Mr Brian Seidler, Executive Director
- Mr Peter Glover, Director.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:
- Ms Roshana May, Practice Group Leader, Slater & Gordon Lawyers
- Mr David Nagle, Solicitor, Slater & Gordon Lawyers.
- Mr Hayden Stephens, Solicitor, Slater & Gordon Lawyers.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:
- Dr Kevin Purse, Senior Research Fellow, Central Queensland University.

The evidence concluded and the witness withdrew.

The following witnesses from Allianz Insurance were sworn and examined:
- Mr Mike Siomiak, General Manager, NSW Workers Compensation
- Mr Nicholas Scofield, General Manager, Corporate Affairs
- Mr David Krawitz, Chief General Manager.

The evidence concluded and the witnesses withdrew.

The following witnesses were examined on former oath:
- Mr Michael Playford, Consulting Actuarial & Analytics Leader, PWC
- Mr Peter McCarthy, Partner, Ernst & Young.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Australian Physiotherapy Association were sworn and examined:
- Mr Tamer Sabet, NSW Branch President
- Mr Chris Winston, Manager, NSW Branch
- Mr Cameron Bulluss, Compensable Bodies Portfolio, NSW Branch Council.

The evidence concluded and the witnesses withdrew.

The following witnesses from Shoalhaven City Council were sworn and examined:
- Mr Stephen Crerar, Manager, Human Resources
- Ms Angela Keating, Workers Compensation Coordinator.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Police Association of NSW were sworn and examined:
- Mr Patrick Gooley, Vice President
- Mr Peter Remfrey, Secretary
- Ms Kirsty Membreno, Senior Coordinator, Legal Services
- Insp. Toby Lindsay, Member
- Det Snr Constable Melissa Kilminster, Member.

Mr Remfrey tendered two documents:
- *The Duty to Accommodate in the Canadian Workplace: Leading Principles and Recent Cases* (2008) Michael Lynk.
- *Confidential.*

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:
- Mr Peter Windle
- Mr John McPhilbin
- Ms Lorraine Fordham
- Mr Ronald Smith
- Ms Michelle Burgess, Injured Persons Support Network.

The evidence concluded and the witnesses withdrew.

The Chair requested the public and the media to withdraw.

The public and the media withdrew.

The Committee proceeded to take *in camera* evidence.

Persons present other than the Committee: From the Secretariat: Ms Rachel Callinan, Ms Teresa McMichael, Ms Shu-Fang Wei, Ms Vanessa Viaggio, Ms Julie Langsworth, Mr Maurice Rebecch and Hansard reporters.

A witness was sworn and examined in camera. A support person accompanied the witness.

The evidence concluded and the witness and support person withdrew.

A second witness was sworn and examined in camera. Three support people accompanied the witness.

The evidence concluded and the witness and support people withdrew.

The hearing concluded at 5.45 pm.

4. Deliberative meeting

4.1. Transcripts of in camera evidence

The Committee noted that the Secretariat would contact each of the witnesses heard *in camera* to seek their views on the publication of the transcript of their evidence before making a decision regarding the publication of the transcripts.

4.2. Report
Discussion of Member's views on the issues and the possible content of the report.

5. Adjournment
The Committee adjourned at 6.00 pm until Wednesday 30 May 2012 at 1.00 pm.

Rachel Callinan
Clerk to the Committee

Minutes No. 6
Thursday 31 May 2012
Joint Select Committee on the NSW Workers Compensation Scheme
Room 1254, Parliament House, at 10.30 am

1. Members present
Mr Borsak *(Chair)*
Mr Speakman *(Deputy Chair)*
Mr Blair
Mr Khan
Mr Searle
Mr Stokes

2. Apologies
Mr Daley
Mr Green

3. Draft Minutes
Resolved, on the motion of Mr Blair: That the Minutes Nos 4 and 5 be confirmed.

4. Correspondence
The Committee noted the following items of correspondence:

Received

- 25 May 2012 – From Mr Justin Dowd, President, The Law Society of NSW, to the Chair, providing answers to questions on notice
- 25 May 2012 – From Mr A McConnachie, Deputy Executive Director, NSW Bar Association, to the secretariat, providing answers to questions on notice
- 25 May 2012 – From Mr Greg Pattison, General Manager Workplace Solutions, NSW Business Chamber, providing answers to questions on notice
- 25 May 2012 – From Mr Garry Brack, Chief Executive, Australian Federation of Employers and Industries, to the Chair, providing answers to questions on notice
- 25 May 2012 – From Ms Rita Mallia, State President, Construction Forestry Mining and Energy Union NSW Branch, providing additional information to the Committee in relation to the proposition of an increase in the WPI percentage to 30 percent
- 25 May 2012 – From Mr Michael Georgeson, Manager National Operations, Accommodation Association of Australia, requesting to appear before the Committee at one of public hearings
- 28 May 2012 – From Mr Robert Lloyd, Manager, Strategic Projects, NSW Self Insurance Corporation, to the committee secretariat, providing answers to questions on notice

- 28 May 2012 – From Ms C Donnelly, GM, Strategy & Performance Division, WorkCover, providing answers to questions on notice from the 21 May hearing.

5. Supplementary questions

Resolved, on the motion of Mr Searle: That Members provide any further supplementary questions to the Secretariat by 1.00 pm today.

6. *In camera* transcripts

Resolved, on the motion of Mr Khan:

- That the Committee authorises the publication of the transcript of *in camera* evidence given on Monday 28 May 2012 by Mr Colin Fraser, with the exception of information that identifies a third party on page 3 of the transcript.
- That the Committee authorises the publication of the transcript of *in camera* evidence given on Monday 28 May 2012 by the second witness, with the exception of the witnesses identifying information and information that identifies third parties.

7. Adjournment

The Committee adjourned at 10.40 am until Monday 11 June 2012 at 8.30 am, Room 1153 *(Report deliberative).*

Rachel Callinan
Clerk to the Committee

Draft Minutes No. 7
Monday 11 June 2012
Joint Select Committee on the NSW Workers Compensation Scheme
Room 1153, Parliament House, at 9.30 am

1. Members present

Mr Borsak *(Chair)*
Mr Speakman *(Deputy Chair)*
Mr Blair
Mr Daley
Mr Green
Mr Khan
Mr Searle
Mr Stokes

2. Draft Minutes

Resolved, on the motion of Mr Green: That Minutes No. 6 be confirmed.

3. Correspondence

3.1 Correspondence

The Committee noted the following items of correspondence:

Received

- 1 June 2012 – From Ms Justine Hall, Senior Policy Advisor, Insurance Council of Australia, providing answers to questions on notice

- 1 June 2012 - From Ms Sue Smith, Disability Safe Project Manager, National Disability Services, to committee secretariat, providing answers to questions on notice
- 1 June 2012 – From Ms Melissa Adler, Assistant Director, Housing Industry Association Ltd, to the Committee, providing answers to questions on notice
- 1 June 2012 – From Mr Mark Lennon, Secretary, Unions NSW, to the Committee, providing answers to questions on notice
- 1 June 2012 – From Ms Annette Williams, President, ARPA National, to the Committee, providing answers to questions on notice in three documents, two of which are marked commercial in confidence
- 1 June 2012 – From Mr Peter Remfrey, Secretary, Police Association of NSW to the Committee, providing answers to questions on notice
- 3 June 2012 – From Dr Yvonne Skinner, Chair, NSW Branch Faculty Forensic Psychiatry, Royal Australian and New Zealand College of Psychiatrists, providing answers to questions on notice
- 4 June 2012 – From Mr Allan Kidson, Workers Compensation Claims Manager, Essential Energy, seeking clarification of parliamentary procedure in relation to a correspondence sent to the Essential Energy from the United Services Union
- 4 June 2012 – From Ms Gracia Kusuma, Industrial Relations Manager, NSW Farmers to the Committee, providing answers to questions on notice
- 4 June 2012 – From Ms Roshana May, Practice Group Leader, Slater & Gordon, to committee secretariat, providing answers to questions on notice
- 4 June 2012 – From Mr Stephen Crerar, Human Resources Manager, Shoalhaven City Council to the Committee, providing answers to questions on notice
- 4 June 2012 – From Mr David Castledine, Chief Executive Officer, Civil Contractors Federation, providing answers to questions on notice
- 4 June 2012 – From Mr Christopher Winston, Manager, NSW Branch, Australian Physiotherapy Association, providing answers to questions on notice, including one confidential document
- 4 June 2012 – From Ms Fiona Davies, Chief Executive Officer, Australian Medical Association, providing answers to questions on notice
- 5 June 2012 – From Ms Briet O'Sullivan, WorkCover Liaison and Quality Manager, Allianz Australia Workers' Compensation (NSW) Ltd., to the Committee, providing answers to questions on notice
- 5 June 2012 – From Ms Denise Fishlock, Chairperson, NSW Worker's Compensation Self Insurer's Association, to the Committee, providing answers to additional supplementary questions on notice
- 5 June 2012 – From Mr Mark Lennon, Secretary, Unions NSW, to the Committee, providing answers to supplementary questions on notice
- 5 June 2012 – From Ms Roshana May, Practice Group Leader, Slater & Gordon Lawyers, to the Committee, providing answers to supplementary questions on notice
- 5 June 2012 – From Ms Melissa Thompson, Legal/Industrial Secretary, United Services Union, to the Committee, providing answers to questions on notice
- 5 June 2012 – From Mr Peter Glover, Director Construction, Master Builders Association of NSW, providing answers to questions on notice
- 5 June 2012 – From Ms Annette Williams, President, ARPA National, to the Committee, providing answers to additional supplementary questions
- 5 June 2012 – From Mr Bo Li, Senior Policy Advisor Professional Practice, The Australian Psychological Society Limited, to the Committee, providing answers to supplementary questions on notice
- 5 June 2012 – From Mr David Castledine, Chief Executive Officer, Civil Contractors Federation, providing answers to questions to supplementary questions on notice
- 5 June 2012 – From Mr Justin Dowd, President, The Law Society of New South Wales, providing answers to additional supplementary questions on notice

- 6 June 2012 – From Mr Tony Carneiro, General Manager, Holiday Inn, expressing his concern for the current state of the workers compensation scheme and supporting the issues paper presented to the Parliament on 2 May 2012
- 6 June 2012 – From Mr David Sagar, Managing Director, IPAR Rehabilitation Pty Ltd, expressing his concern for the current state of the workers compensation scheme and supporting the issues paper presented to the Parliament on 2 May 2012
- 6 June 2012 – From Mr Tim Ayres, State Secretary, Australian Manufacturing Workers Union, providing answers to questions on notice and additional supplementary questions
- 6 June 2012 – From Ms Genevieve Vaccaro, Senior Adviser - Workplace Relations Policy, The Australian Industry Group, providing answers to questions on notice
- 7 June 2012 – From Mr Ron Moore, General Manager, Blacktown City Council, to the Committee, commenting on inquiry process and timeframe and its observation on the submission to the Committee made by the NSW Workers Compensation Self Insurers Association
- 7 June 2012 – From Ms Justine Hall, Senior Policy Advisor, Insurance Council of Australia, providing answers to additional supplementary questions on notice
- 7 June 2012 – From Ms Carmel Donnelly, General Manager Strategy & Performance Division, WorkCover NSW, providing answers to additional supplementary questions on notice
- 7 June 2012 – From Mr Greg Pattison, General Manager - Workplace Solutions, NSW Business Chamber, providing answers to additional supplementary questions on notice
- 8 June 2012 – From Mr David Melville, to the Committee, providing information to committee members
- 8 June 2012 - From Ms Carmel Donnelly, General Manager Strategy & Performance Division WorkCover NSW to the Committee, providing answers to questions on notice.

3.2 Consideration of correspondence from Essential Energy

Resolved, on the motion of Mr Green: That the Chair write to Essential Energy to advise of parliamentary procedure in relation to correspondence sent from the United Services Union.

4. Answers to questions on notice

Resolved, on the motion of Mr Blair: That the Committee agreed to requests from the following organisations to have part of their answers to questions on notice remain confidential:

- Australian Rehabilitation Providers Association – two commercial-in-confidence documents
- Australian Physiotherapy Association – a case study.

5. Submissions

5.1 Public submissions

The Committee noted that Submission Nos 134, 251, 252, 253, 254, 255, 256, 258, 259, 261, 262, 264, 266, 268, 270, 283, 284, 285, 286, 287, 288, 289, 290, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 306, 308, 309, 310, 312, 313, 317, 318, 321, 322, 324, 326, 327, 328, 330, 332, 333, 334, 335, 339, 345, 346, 347, 348, 349, 350, 351 and 352 were published by the Committee Clerk under authorisation of an earlier resolution.

5.2 Partially confidential submissions

Resolved, on the motion of Mr Stokes: That the Committee authorise the publication of Submission Nos 257, 263, 265, 267, 271, 273, 274, 276, 279, 280, 281, 282, 305, 315, 316, 323, 338 and 343, with the exception of the name and other identifying details of the author which are to remain confidential.

5.3 Confidential submissions

Resolved, on the motion of Mr Stokes: That Submission Nos 260, 269, 272, 275, 277, 278, 291, 304, 307, 311, 314, 319, 320, 325, 329, 331, 336, 337, 340, 341, 342, 344 and 353 remain confidential.

5.4 Submission from Coal Services Pty Ltd

Resolved, on the motion of Mr Searle: That Submission No. 272 from Coal Services Pty Ltd, which was previously confidential, be made public, with the agreement of the author.

6. Chair's draft report

The Chair tabled his draft report entitled *New South Wales Workers Compensation Scheme*, which having been previously circulated, was taken as being read.

Chapter 1 read.

Resolved, on the motion of Mr Khan: That Chapter 1 be adopted.

Chapter 2 read.

Resolved, on the motion of Mr Searle: That paragraph 2.1 be amended by omitting the words 'as either common law damages or under the statutory workers compensation scheme' after the word 'available', and inserting instead the following words:

'under:

a) the statutory workers compensation scheme, or
b) through common law actions for damages where fault or negligence can be established on the part of the employer and a worker sustains injury that exceeds 15 per cent Whole Person Impairment ('WPI').'

Resolved, on the motion of Mr Searle: That paragraph 2.7 be amended by omitting the words 'and has a total asset worth of approximately $14 billion' after the words 'in premiums', and inserting instead the following words: 'Scheme assets are estimated by the Scheme actuary to be between $14.057 and $14.719 billion.' [Footnote: *WorkCover NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011,* Appendix V, p 1.]

Resolved, on the motion of Mr Speakman: That the heading 'Actuarial findings' before paragraph 2.10 be omitted, and the following words inserted instead: 'Position as at 31 December 2011'.

Resolved, on the motion of Mr Khan: That the following paragraphs and table be inserted after paragraph 2.10:

'The following table shows the financial position of the Scheme from June 1997 to June 2011. There are two measures: net assets, and ratio of assets to liabilities (which is known as the funding ratio).

	Net assets ($m)	**Funding ratio (%)**
1997	-789	87%
1998	-1,675	77%
1999	-1,636	78%
2000	-1,639	80%
2001	-2,756	70%
2002	-2,801	67%
2003	-2,982	66%
2004	-2,353	73%
2005	-1,396	80%

2006	+85	101%
2007	+812	107%
2008	+625	105%
2009	-1,482	89%
2010	-1,583	89%

The table shows that the Scheme deficit increased between 1997 and 2003, before improving and moving into a surplus between 2006 and 2008. After 2008, however, the Scheme has been in deficit and this deficit has been growing.' [Footnote: The figures in this table were taken from WorkCover NSW annual reports from 1997/98 to 2010/11, cited at footnote 77 in L Roth & L Blayden, E-brief: *Workers Compensation: An update*, NSW Parliamentary Library Research Services 10/2012, pp 7-8.]

Resolved, on the motion of Mr Khan: That paragraph 2.13 be amended by omitting the words 'Mr Achterstraat said: '[I]f the Scheme is to continue either the assets need to be increased or the liabilities need to be reduced' after the word 'million' and inserting instead the following words:

'During his opening remarks at the Inquiry hearing on 21 May 2012, the NSW Auditor General, Mr Peter Achterstraat, said:

> If an organisation is in a situation where liabilities are greater than assets and the liabilities are increasing at a greater rate than the assets then eventually there will not be sufficient funds to meet everyday business. So one needs to either increase the assets or reduce the liabilities. The assets here, as I have pointed out, are returning an adequate return, above the benchmark; that is, the income from the assets. The premiums are another source of income to help supplement the assets. On the liabilities, there are three elements to the liabilities. The gross liabilities are determined by the entitlements that can be made and also determined by the expenses from WorkCover, et cetera, but they are also determined by the discount rate used.' [Footnote: Mr Peter Achterstraat, NSW Auditor General, Evidence 21 May 2012, p 38]

Resolved, on the motion of Mr Khan: That paragraph 2.14, which reads: 'In response to questioning as to whether there was any practical impediment to the Scheme's ability to pay its actual liabilities as and when they fall due, Mr Peter McCarthy, Partner, Ernst and Young, replied: 'In the short term, no, but long term, yes' be omitted and replaced with the following:

'During questioning of Mr Peter McCarthy, Partner, Ernst and Young by the Hon. Adam Searle (ALP), the following exchange occurred:

> The Hon. ADAM SEARLE: Returning to what Mr Playford said earlier about the difference between publicly underwritten schemes and private insurance, there is no immediate danger of the scheme becoming insolvent though, is there?
> Mr McCARTHY: Depends on your definition of insolvent.
> The Hon. ADAM SEARLE: There is $14 billion worth of assets under investment, is that correct?
> Mr McCARTHY: In insurance the typical definition of a solvent organisation would be that assets are greater than liabilities. In this case the assets are actually $4 billion less than the scheme liabilities.
> The Hon. ADAM SEARLE: But at the present time there is no practical impediment to the scheme's ability to actually pay its liabilities as and when they fall due, is there?
> Mr McCARTHY: In the short term, no, but long term, yes.'

Resolved, on the motion of Mr Speakman: That paragraph 2.19 be amended by omitting the word 'noted' after the word 'union' and inserting instead the word 'stated'.

Resolved, on the motion of Mr Stokes: That paragraph 2.20 be amended by omitting the words 'We actually have great concerns about this talk of a deficit ...' from the beginning of the quote.

Resolved, on the motion of Mr Khan: That paragraph 2.21, which reads: 'Mr McManamey added that: "Properly accounted, this actually would be accounted as a pay as you go scheme because that is what it is, and it has never been accounted in that way"', be omitted.

Resolved, on the motion of Mr Searle: That a new paragraph be inserted after paragraph 2.21 to read: 'This is consistent with the evidence of the Scheme actuary, Mr Playford, who stated that 'we have allowed for a payment stream that continues for 40 or 50 years plus into the future.' [Footnote: Mr Michael Playford, Evidence, 28 May 2012, p 47.]

Resolved, on the motion of Mr Speakman: That the heading above paragraph 2.22, which reads 'Economic assumptions and discount rates', be omitted.

Resolved, on the motion of Mr Speakman: That paragraph 2.24, which reads: 'This point was illustrated by Mr McManamey of the Australian Lawyers Alliance, who told the Committee: 'If you wanted to produce a report that had this Scheme $10 billion in surplus on its projections versus $10 billion in deficit, the way you go about setting assumptions either way, you can achieve that outcome', be omitted.

Resolved, on the motion of Mr Speakman: That paragraph 2.25 be amended by omitting the word 'observed' after the word 'NSW', and inserting instead the word 'stated'.

Resolved, on the motion of Mr Speakman: That paragraph 2.27 be amended by:

- omitting the word 'noted' after the word 'Alliance' and inserting instead the word 'stated'
- omitting the words 'In this regard' after the word 'assumptions'.

Resolved, on the motion of Mr Speakman: That the following paragraphs be inserted after paragraph 2.28:

'Nevertheless Ernst and Young were able to state:

> We have reviewed the actuarial methods for suitability in the circumstances and against current actuarial practice, and conclude that they are suitable, or if not, we have considered materiality of the difference and find them immaterial…"

And:

> We have reviewed the assumptions for consistency with the available experience and trends, and conclude that they are consistent, or if not, that there are valid reasons or valid materiality considerations surrounding the assumptions used, and conclude that they are suitable or the difference is immaterial ... [Footnote: Ernst & Young, WorkCover Authority of NSW - External Peer Review - Outstanding Claims Liabilities of the Nominal Insurer as at 31 December 2011, 22 March 2012, p 3.]

In addition, PricewaterhouseCoopers stated:

> (a) That statement by Ernst and Young was also a clear requirement of the Actuaries Institute Professional Standard for undertaking an external review (PS315 External Peer Review of General Insurance Liability Valuations).
> (b) The NSW Audit Office also has a separate actuarial firm, Cumpston Sarjeant, carry out an external review of our valuations every 30 June. Cumpston Sarjeant's scope of work also includes considering the reasonableness of the valuation assumptions and makes a statement to that affect. Their review is also performed in compliance with the Actuaries Institute Professional Standard for undertaking an external review.' [Footnote: Answers to supplementary questions 25 May 2012, Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers Actuarial, Question 10(h), p 8.]

Resolved, on the motion of Mr Speakman: That paragraph 2.29 be amended by omitting the words ', which utilised different assumptions' after the word 'valuation'.

Resolved, on the motion of Mr Speakman: That the following paragraphs be inserted after paragraph 2.31:

'Calculating the net position of the Scheme as at 31 December 2011 involved, among other things, valuing the liabilities of the Scheme. Because those liabilities are, for the most part, not immediately payable, the methodology used was to discount the nominal amounts of future liabilities by a discount rate and then to increase the nominal amounts of future liabilities by an inflation rate. No submission received by the Committee appeared to challenge that basic approach, although there were disputes by some lay witnesses about the appropriate rates to use.

PricewaterhouseCoopers described their valuation methodology as follows:

> The future cashflows projected in the Outstanding Claims Liability valuation are inflated to the expected date of payment based on an assumption about future rates of inflation and then discounted by 'risk-free' investment return rates back to the valuation date.

Some submissions suggested that use of a risk free discount rate was overly conservative. However, this was what was required by relevant professional standards. As PricewaterhouseCoopers noted:

> Accounting Standard, AASB 1023, and Actuarial Standard, PS 300, state how discount rates should be derived for use in valuations.
>
> AASB 1023 states that outstanding claims liability shall be discounted 'using risk-free discount rates that are based on current observable, objective rates that relate to the nature, structure and term of the future obligations.' Furthermore, in the explanatory notes to the standard it states that 'typically, government bond rates may be appropriate discount rates for the purpose of this Standard, or they may be an appropriate starting point in determining such discount rates'. [Footnote: Full Actuarial report, p 245]
>
> PS 300 of the Actuarial Standards states that 'discount rates used must be based on the redemption yields of a Replicating portfolio as at the valuation date, where reasonably practicable'. A 'Replicating Portfolio' means a notional portfolio of current, observable, market-based, fixed-interest investments of highest rating, which has the same payment profile (including currency and term) as the relevant claim liability being valued. However, if projected payment profile cannot be replicated (such as extended long tail classes of business) then discount rates consistent with the intention of the above must be used. [Footnote: PricewaterhouseCoopers, *WorkCover Authority of NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, p 245.]

Mr Achterstraat gave oral evidence as follows:

> Mr ACHTERSTRAAT: …Under the accounting standards, the standards require that a discount rate be used of a government bond rate. That is what accounting standard 10.23 says. The Treasury circular says that it is to be the Commonwealth government bond rate rather than the State one. The Commonwealth one of course is lower generally than the State one…
>
> The Hon. ADAM SEARLE: Do you understand the rationale of using the Commonwealth bond rate rather than the State Treasury rate?
>
> Mr ACHTERSTRAAT: I think that is the case in all States…
>
> … the Australian accounting standard says a high quality government bond rate is to be used. Treasury circular 2011/17 says the Commonwealth bond rate is to be used. So it is a policy decision from Treasury. (emphasis added) [Footnote: Mr Peter Achterstraat, NSW Auditor General, Evidence, 21 May 2012, p 38.]

Further, Mr Playford's response to a question on notice included the following statement:

> I note that using NSW Treasury Bond yields would not meet the requirements of the Accounting and Actuarial standards as representing 'risk free'. [Footnote: Answers to supplementary questions 25 May 2012, Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers Actuarial, Question 9, p 4.]

While Accounting Standard AASB 1023 and Actuarial Standard PS 300 state how discount rates should be derived for use in valuations, accounting, actuarial and prudential standards are silent on how future inflation assumptions should be derived for use in valuations. [Footnote: PricewaterhouseCoopers*, WorkCover Authority of NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, p 245]

Against that background, PricewaterhouseCoopers described its methodology of using a fixed 'long term gap' between interest and inflation as follows:

> The methodology for selecting the future economic assumptions was changed at the December 2008 valuation. The key change was to fix the 'long term gap' between interest and inflation assumptions
>
> …
>
> Especially in setting long term assumptions, the difference between the discount rate and inflation rate (the 'real' inflation rate) is itself more important than the individual discount rate and inflation assumptions.
>
> The longest dated bond is only 12 years (with effective shorter maturity date when allowance is made for the payment of regular coupons). Beyond that we have no replicating portfolio.
>
> Most inflation forecasts do not extend beyond 3-4 years … and are made less frequently and with only an indirect reference to the market.
>
> One possible solution to this is to use a fixed 'long term gap' between interest and inflation. The advantage of this approach is that it significantly reduces the volatility of the liability and the calculation of the break-even premium rates to economic assumptions. In our view, this assumption should be reviewed infrequently. This approach is also used by other Accident Compensation Schemes in Australia and New Zealand and other long tail liabilities such as Asbestos.
>
> In our view, the revised approach of selecting a 'gap' assumption for the determination of long term economic forecasts is compliant with AASB 1023 and Australian actuarial standards. [Footnote: PricewaterhouseCoopers*, WorkCover Authority of NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, pp 245-246.]

In calculating a fixed 'long term gap' between interest and inflation, the labour price index was used as the measure of inflation. Some lay submissions suggested that the use of the labour price index as a measure of inflation was inappropriate. Mr Playford gave the following oral evidence about use of the labour price index (with which Mr McCarthy agreed):

> Mr MARK SPEAKMAN: Why do you use that rather than some other index like the consumer price index?
>
> Mr PLAYFORD: The reason is that a large proportion of the liabilities is related to the weekly benefits and weekly benefits are indexed every six months in the legislation via the labour price index.
>
> Mr MARK SPEAKMAN: For how long as a scheme actuary have you been using the labour price index as the measure of inflation?
>
> Mr PLAYFORD: The labour price index, or its equivalent, going back throughout my involvement in the scheme back to 1997 …
>
> Mr MARK SPEAKMAN: What do other publicly underwritten workers compensation schemes around Australia use as a measure of inflation?
>
> Mr PLAYFORD: It will vary from jurisdiction to jurisdiction depending on is there an indexation rate defined in the legislation, but, typically, schemes where the benefits are related to wages it will be either average weekly earnings indexes or labour price indexes. Some schemes and some actuaries will also blend it a little bit so there is an element of consumer price index inflation to the extent that some of the services purchased by these schemes may be related to consumer price index inflation. Examples of that might be some elements of medical costs probably should be related to medical inflation indices. So in the sense the inflation rate we use is guided by the

> labour price index because the majority of the liabilities or a significant proportion of the liabilities are related to weekly benefits, but we also consider the likely indexation rates of other benefits that are payable under the scheme, like medical benefits. [Footnote: Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers, Evidence, 21 May 2012, p 7.]

In valuing liabilities as at 31 December 2011, PricewaterhouseCoopers used a 'risk margin' of 12 per cent. Mr Playford gave the following oral evidence about this risk margin:

> (a) Accounting, actuarial and APRA regulatory standards of APRA all "require that an explicit risk margin be added to the central estimate liability to create an insurance provision that goes into the liabilities or the insurer of the scheme".
> (b) The size of the risk margin is ultimately a decision for the board.
> (c) The WorkCover board made a decision at its board meeting several years ago that it would like to set a risk margin that provided a 75 per cent probability of adequacy.
> (d) The 12 percent risk margin is what needs to be added to provide that level of increased security for claimant entitlements.
> (e) The 75 per cent probability of adequacy "has become the commonly adopted standard across accident compensation schemes in Australia". [Footnote: Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers, Evidence, 21 May 2012, p 9.]

Mr McCarthy agreed and added that 75 per cent was the figure in federal insurance regulations administered by APRA [Footnote: Peter McCarthy, Partner, Ernst and Young, Evidence, 21 May 2012, p 10] (although APRA does not regulate WorkCover).
Mr Mark Lennon, Secretary, Unions NSW, has been a member of the board of directors of WorkCover NSW since 2007. He gave the following oral evidence:

> Mr MARK SPEAKMAN: And each financial year since you joined the WorkCover board have you voted to adopt the annual financial statements of the WorkCover scheme for that year?
>
> Mr LENNON: I have.
>
> Mr MARK SPEAKMAN: And each year since you joined the WorkCover board have you voted in favour of a board resolution to declare that in the opinion of the directors of WorkCover the financial statements and the notes thereto for that year give a true and fair view of the financial position and performance of the WorkCover scheme as at or over the relevant time?
>
> Mr LENNON: I have.
>
> Mr MARK SPEAKMAN: And on each occasion before you voted did you read the financial report for that year and satisfy yourself that it exhibited a true and fair view?
>
> Mr LENNON: I did.
>
> Mr MARK SPEAKMAN: If you need to see the annual report I will provide you with a copy, but you know that in the case of the financial statements as at 30 June 2011 the accumulated net deficit was shown as $2.36 billion approximately?
>
> Mr LENNON: I accept that that is the figure.
>
> Mr MARK SPEAKMAN: And you were satisfied to say that the deficit as at 30 June 2011 gave a true and fair view?

Mr LENNON: Yes. [Footnote: Mr Mark Lennon, Secretary, Unions NSW, Evidence, 25 May 2012, p 21.]:

Specifically, Mr Lennon agreed that each year when he had voted as a board member on the annual accounts, he had satisfied himself that a 12 per cent risk margin was 'appropriate' and that 'using [the] risk-free rate [of return on Commonwealth Government bonds] g[a]ve a true and fair view of the WorkCover Scheme's financial position'.' [Footnote: Mr Mark Lennon, Secretary, Unions NSW, Evidence, 25 May 2012, pp 21-22.]

Resolved, on the motion of Mr Searle: That there then be inserted the following new paragraphs:

'Mr Lennon also gave the following oral evidence:

Mr MARK SPEAKMAN: Each time you have voted to adopt the accounts you have understood, other things being equal, that the lower the discount rate, the greater the outstanding claims liability?

Mr LENNON: Yes.

Mr MARK SPEAKMAN: And you have voted each year to adopt accounts that have included calculations made by the scheme actuary?

Mr LENNON: Yes.

Mr MARK SPEAKMAN: And each year you have known that the discount rate being used was a risk-free rate of return on Commonwealth Government bonds?

Mr LENNON: Yes.

Mr MARK SPEAKMAN: And you have never complained at board meetings about that approach?

Mr LENNON: No, I have questioned it.

Mr MARK SPEAKMAN: Notwithstanding that, you have satisfied yourself that accounts that have been arrived at using that risk-free rate give a true and fair view of the WorkCover scheme's financial position?

Mr LENNON: Yes, in accordance with the practices.

Mr MARK SPEAKMAN: Not only does it accord with the practice, you have decided and you have voted in favour of resolutions adopting financial accounts that use that risk-free rate of return as giving a true and fair view of WorkCover's position?

Mr LENNON: Yes.

Mr MARK SPEAKMAN: Do you agree with this? The Unions NSW submission now appears to advocate not adopting a risk-free rate of return and using—I withdraw that. The Unions NSW submission challenges the use of a risk margin of 12 per cent and challenges using a risk-free rate of return, is that correct? Am I characterising the submission properly?

Mr LENNON: That is right.

> Mr MARK SPEAKMAN: Do you agree that that is quite different from the position you have adopted as a WorkCover board member year after year in voting for accounts that use that risk margin and use a risk-free rate of return?
>
> Mr LENNON: Yes. [Footnote: Mr Mark Lennon, Secretary, Unions NSW, Evidence, 25 May 2012, pp 22-23]

Mr Lennon further said:

> Mr MARK SPEAKMAN: Do you say on your oath that you have not adopted the view year after year that the financial statements of WorkCover give a true and fair view of the position of the WorkCover scheme?
>
> Mr LENNON: I accept that that is the fact in accordance with present accounting practices and actuarial practices, but understand that some of the actuarial practices we have adopted at WorkCover have been ones that of course were brought into place for better regulation of the private sector but have been adopted by WorkCover even though we are a public entity.
>
> Mr MARK SPEAKMAN: The size of the deficit is based on outstanding actual liabilities, albeit that opinions can differ about how you measure those liabilities, do you agree with that?
>
> Mr LENNON: I am sorry?
>
> Mr MARK SPEAKMAN: The size of the deficit is based on outstanding actual liabilities, albeit that opinions can differ about how you quantify those actual liabilities?
>
> Mr LENNON: That is right, yes.' [Footnote: Mr Mark Lennon, Secretary, Unions NSW, Evidence, 25 May 2012, pp 24-25.]

Mr Speakman moved: That there then be inserted the following new paragraph:

> 'Notwithstanding those last two cited pieces of evidence, the fact remains that the approaches taken as to discount rate, inflation rate and risk margin has had the agreement of Mr Lennon in his role as a member of the board of directors of WorkCover. As such, he approved the accounts of, among others, the WorkCover Scheme contained in each annual report of WorkCover since he was appointed to the board.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Resolved, on the motion of Mr Speakman: That there then be inserted the following new paragraph: 'Some non-actuarial witnesses criticised assumptions made by the Scheme Actuary.'
Mr Speakman moved: That there then be inserted the following new paragraphs:

> 'These included witnesses from the Law Society of New South Wales. However, Mr Concannon, a witness for the Law Society and one of the three or four authors of its submission [Footnote: Mr Timothy Concannon, Member, Injury Compensation Committee, Law Society of New South Wales, Evidence, 21 May 2012, p 46.], conceded that he had strayed

outside his area of expertise in opining about appropriate discount rates. [Footnote: Mr Timothy Concannon, Member, Injury Compensation Committee, Law Society of New South Wales, Evidence, 21 May 2012, p 46.] The focus of the attack by Law Society witnesses on the Scheme Actuary's assumptions was figures under the heading "Modelled Ultimate Intimations" concerning work injury damages [Footnote: PricewaterhouseCoopers report, p 174.], which those witnesses had taken to have been used by the Scheme Actuary in calculating liability for work injury damages. [Footnote: Mr Timothy Concannon, Member, Injury Compensation Committee, Law Society of New South Wales, Evidence, 21 May 2012, p 43; Ms Roshana May, Member, Injury Compensation Committee, Law Society of New South Wales, Evidence, 21 May 2012, pp 49-50.]

However in answer to questions on notice the Scheme Actuary made it clear that the impugned figures had not been used for that purpose. [Footnote: Answers to supplementary questions 25 May 2012, Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers Actuarial, Question 10, pp 6-8.]

Witnesses from the Australian Lawyers Alliance asserted that PricewaterhouseCoopers had mistreated classification of commutation and Workplace Injury Damages liabilities, with the potential for double counting of liability with the weekly and medical liabilities.

However, that was rebutted by PricewaterhouseCoopers as follows:

> There is no basis for this assertion and it is not factually correct. There is no 'double counting' of liability. The Weekly and Medical liabilities have been assessed only including an allowance for weekly and medical benefits up until the expected timing of commutation and WID lump sum payments. The actual commutation and WID lump sum payments are modelled separately both to improve the quality of the analysis and because it is critically important for the governance of the Scheme to be able to monitor and identify trends in lump sum payment patterns.' [Footnote: Answers to supplementary questions 25 May 2012, Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers Actuarial, Question 10(h), p 9.]

The Australian Lawyers Alliance asserted that 'WorkCover or others on its behalf provided the actuaries with assumptions upon which to base their report'. [Footnote: Submission 122, Australian Lawyers Alliance p 5.]

However, that was rebutted by PricewaterhouseCoopers as follows:

> This is factually incorrect and shows a lack of understanding as to how PwC has performed the valuation of the outstanding claims liabilities. PwC has undertaken an independent and impartial review in compliance with the Actuaries Institute Code of Conduct and the relevant Professional Standard. PwC selects its all of its own assumptions based on its interpretation of the emerging trends in the claims and payment experience. The exception is the discount rate which is selected based on the accounting and actuarial standard requirements. PwC has in no way been influenced by WorkCover in any aspect of the valuation, the selection of assumptions or received any direction as to the valuation results.' [Footnote: Answers to supplementary questions 25 May 2012, Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers Actuarial, Question 10(h), p 10.]

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Searle moved: That there then be inserted the following new paragraphs:

'Also important is the "long term gap" between interest and inflation assumptions (the "real" inflation rate) which is said to be "more important than the individual discount rate and inflation assumptions."
The longest bond-rate is only 12 years. Most inflation forecasts do not extend beyond 3-4 years. A solution to this problem is to use a fixed 'long-term gap' between interest and inflation. The advantage of this is that it significantly reduces the volatility of the liability and the calculation of the break-even premium rates to economic assumptions. This approach is used by other accident compensation schemes in Australia and New Zealand and other long tail liabilities such as Asbestos.

Such an approach is appropriate for portfolios "which have long tail insurance liabilities which extend for many years into the future." As the NSW Workers Compensation Scheme has such features, it is unclear why this approach in not used here, although the Scheme actuary indicates it has "considered long term gap assumptions adopted by other accident compensation schemes" but has not adopted such an approach.

Long-tail government sector schemes utilizing the 'long term gap' approach includes the Victorian workers compensation scheme, as well as the NSW Lifetime Care and Support Authority ("LTCS"), Victorian Transport Accident Corporation, NZ Accident Compensation Commission and the NSW Dust Diseases Board.

In addition, the NSW LTCS has its liabilities assessed using a different accounting standard: AASB137. The key differences of using this standard are

i. No requirement to maintain a risk margin (currently 12% or $1.725 billion);
ii. The liabilities can be discounted based on an assumption as to the expected long-term rate of return rather than a risk-free rate of return; and
iii. No requirement to maintain an unearned premium reserve or premium deficiency reserve.

The Scheme actuary states that "From an accounting perspective the LTCS Scheme is not treated as insurance (as no policies are issued). Rather it is funded via a levy." Further, that "Given WorkCover issues policies to employers it is difficult to see how the WorkCover Scheme could be reclassified under an alternative accounting standard."

However, the LTCS levy is on insurance premiums and paid when compulsory third-party insurance premiums are paid and taken out. Therefore it would seem to be part of the overall insurance arrangement. This is conceded by the Scheme actuary. Accordingly, the distinction sought to be drawn by the Scheme actuary does not appear to be made out. For the same reason, it is unclear why the NSW workers' compensation scheme should not be regarded the same way as the LTCS.

According to the Scheme actuary, using the NSW Treasury Bond rate rather than the Commonwealth Government Bond rate "would have the effect of reducing the outstanding claims liability by almost 7 %."

The Committee was informed on 8 June 2012 that as at 31 December 2011, the Scheme liabilities were assessed as being $18.802 billion with assets being $14.719 billion, leaving a deficit of $4.083 billion. A 7% reduction in liabilities would reduce the liabilities to $17.872 billion. The deficit would also be reduced to $3.153.

However, as recently as 12 March 2012 Scheme liabilities were estimated as being $16.104 billion as at 31 December 2011. This includes a Claims Handling Expenses allowance of $1,132 billion and a Risk Margin of $1,724 billion. If this starting point is used, the deficit would be $1.385 billion. Applying the NSW Treasury Bond rate, the liabilities would be reduced to $14.976 billion, resulting in a deficit of $257 million.

Again, the the Committee was informed by the Scheme actuary that on 8 June 2012 that applying both AASB137 and the NSW Treasury Bond rate to the NSW Workers Compensation Scheme would result in an alternative assessment of the outstanding claims liabilities of $3.980 billion. This calculation assumed liabilities to be $18.696 billion which would appear inconsistent with the Scheme actuary's prior of 25 May 2012 advice, quoted above, that using the NSW Treasury Bond rate would reduce liabilities by 7 %. This requires further explanation, particularly as the asset valuation has not altered.

However, applying AASB137 and the average rate of return actually achieved on Scheme investments over the last decade (5.63% p.a.) reduces Scheme liabilities down to $16.990 billion with assets of $14.672 billion. This results in a Scheme deficit of $2.323 billion and an assessed deterioration of $2.291 billion rather than the $4.7 billion currently assessed by the Scheme actuary.

What the above shows is that, depending upon the assumptions used, the assessment of where the Scheme is financially can differ very markedly. While each approach discloses a deterioration in the Scheme, the information set out in 2.45 or even 2.47 places the discussion about possible reform to the Scheme in a very different context.'

Question put.

The Committee divided.

Ayes: Mr Daley, Mr Searle
Noes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes

Question resolved in the negative.

Mr Khan moved: That there then be inserted a new committee comment to read:

Committee comment

'Having regard to the evidence of the Scheme Actuary, Mr Michael Playford of PricewaterhouseCoopers, supported by the evidence of Mr Peter McCarthy of Ernst and Young, the Committee accepts that about $4.1 billion is the best estimate of the deficit as at 31 December 2011.'

Mr Daley moved: That the motion of Mr Khan be amended by inserting the words 'but in the absence of independent actuarial advice to the Committee' after the word 'Young'.

Amendment put.

The Committee divided.

Ayes: Mr Daley, Mr Searle, Mr Green
Noes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes

Amendment resolved in the negative.

Original question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Searle

Original question resolved in the affirmative.
Mr Speakman moved: That paragraph 2.33 be amended by omitting the words 'However, due to the significant time constraints imposed on the Inquiry, the Committee was not in a position to obtain actuarial advice of its own' after the words 'this suggestion', and inserting instead:

'However, the significant time constraints imposed on this Inquiry made this difficult to implement. In any event, the Committee considers that it does not need actuarial evidence additional to that from PricewaterhouseCoopers and Ernst and Young in order to reach the conclusions and recommendations in this report:

(a) In the end there was no serious challenge to the calculations or methodology of the Scheme Actuary PricewaterhouseCoopers.
(b) They were calculations and methodology which had been peer reviewed by leading firm Ernst and Young.
(c) The methodology had the imprimatur of the NSW Auditor-General, assisted by another actuarial firm Cumpston Sarjeant.
(d) The methodology reflected, and to a large extent was mandated by, accounting and actuarial standards.
(e) In Mr Lennon's opinion the methodology had resulted in a "true and fair view" in past years.
(f) The methodology reflected common practice interstate.
(g) Purported criticisms were from unqualified witnesses.
(h) Attacks on particular assumptions effectively evaporated.
(i) There was no reason to doubt the professional competence and integrity of those giving actuarial evidence.
(j) The NSW Bar Association was invited to consider obtaining its own actuarial evidence, but did not proffer any to the Committee.
(k) The Law Society of NSW had (late) access to data used by the Scheme Actuary and beyond the Scheme Actuary's report, but did not proffer any actuarial evidence to the Committee.
(l) Sensitivity analysis was available.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Searle

Original question resolved in the affirmative.

Resolved, on the motion of Mr Speakman: That there then be inserted the following new heading and paragraphs to read:

Position since 31 December 2011

'The PricewaterhouseCoopers report as at 31 December 2011 contained a sensitivity analysis of the effect of changed discount rates and inflation assumptions on the valuation of the net central estimate. For example, a reduction of one percent in the discount rate would increase the valuation by $564.3 million (before claims handling expense and 12% risk margin) and a reduction in projected inflation rate of one percent per annum for the next five years would increase the valuation by $536.4 million (before claims handling expense and 12% risk margin). [Footnote: PwC report pp 283-284.] In his oral evidence Mr Playford agreed, in effect, that these sorts of figures could be pro-rated where there where greater or lesser proportional changes. [Footnote: Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers, Evidence, 21 May 2012.

Between 31 December 2011 and 21 May 2012, when Messrs Playford and McCarthy had given their initial oral evidence to the Inquiry:

(a) the risk free interest rate on government securities had fallen by 50 basis points, and
(b) the budget papers for the federal budget showed for 2012-13 and 2013-14 a labour/wage price index forecast of 3.75 per cent [Footnote: BUDGET STRATEGY AND OUTLOOK BUDGET PAPER NO. 1 2012-13 Commonwealth Government 8 May 2012 p 2-11], which is 0.25 per cent lower than the 4 per cent figure used by PricewaterhouseCoopers.

Mr Playford's oral evidence (with which Mr McCarthy agreed) was that:

(a) the fall in the risk free interest rate to yields as at 15 May 2012 increased the liabilities of the Scheme, and therefore the deficit, by $335 million, [Footnote: Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers, Evidence, 21 May 2012, p 8.]
(b) the fall in the labour price index forecast reduced the liabilities of the Scheme, and therefore the deficit, by roughly $300 million, [Footnote: Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers, Evidence, 21 May 2012, p 8.] and
(c) broadly speaking, (a) and (b) cancelled each other out [Footnote: Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers, Evidence, 21 May 2012, p 8.].

However, after the oral evidence of Messrs Playford and McCarthy, on 5 June 2012 there was a further decrease of 25 basis points in interest rates. This increases the liabilities of the Scheme, and therefore the deficit, by $200 million to $250 million. [Footnote: Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers, Evidence, 21 May 2012, p 8.]

There are other factors pointing to a likely increase in the Scheme's liabilities, and therefore its deficit, since 31 December 2011.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Resolved, on the motion of Mr Speakman: That there then be inserted the following new paragraphs:

'In its peer review, Ernst and Young observed:

All things being equal the Scheme's history in NSW suggests it is likely that adverse trends will continue in the claims experience and lead to further increases in Scheme liabilities unless an intervention or circuit breaker is applied (i.e. legislative changes). [Footnote: Ernst & Young, WorkCover Authority of NSW - External Peer Review - Outstanding Claims Liabilities of the Nominal Insurer as at 31 December 2011, 22 March 2012, p 4]

And:

… in respect of s 66, s 67 and WID, in our view, plausible alternative assumptions could be adopted which are not particularly pessimistic and could increase the Scheme's liabilities by more than $500m. [Footnote: Ernst & Young, WorkCover Authority of NSW - External Peer Review - Outstanding Claims Liabilities of the Nominal Insurer as at 31 December 2011, 22 March 2012, p 6.]

And:

> The base scenario for the funding projection [by PricewaterhouseCoopers] could be considered optimistic as it assumes no further deterioration in the outstanding claims liability, although such deterioration has been a feature of the scheme for the past four years.' [Footnote: Ernst & Young, WorkCover Authority of NSW - External Peer Review - Outstanding Claims Liabilities of the Nominal Insurer as at 31 December 2011, 22 March 2012, p 9]

Mr Speakman moved: That there then be inserted the following new paragraph and quote:

> 'Mr McCarthy gave the following oral evidence:
>
> > The projections in Mr Playford's report … assume that there is no further deterioration in the scheme's claims experience. History over the past three or four years shows that there is continued deterioration in the scheme. So, if a scheme continued to deteriorate at the rate it has over the past few years, that deficit is going to increase not decrease.'" [Footnote: Peter McCarthy, Partner, Ernst and Young, Evidence, 21 May 2012, p 14.]

Mr Speakman moved: That there then be inserted the following new committee comment:

> ***Committee comment***
>
> 'The Committee accepts that the Scheme deficit has significantly increased from about $4.1 billion as at 31 December 2011. The increase is at least $200 million dollars; it is probably much more.'

Mr Searle moved: That the motion of Mr Speakman be amended by inserting the words ', to the date of this report,' after the words 'The increase', and that the word 'much' be omitted.

Amendment put and passed.
Original question, as amended, put and passed.

Resolved, on the motion of Mr Khan: That there then be inserted the following new paragraph:

> 'The Committee accepts the need for urgent and effective action by the NSW Government to correct the current poor financial position of the Scheme.'

Mr Khan moved: That paragraph 2.37 be amended by omitting the words 'While the Committee has been unable to provide an exhaustive analysis of each factor due to the short timeframe, it has provided a summary of the key factors below' after the word 'interrelated'.

Mr Stokes moved: That the motion of Mr Khan be amended by replacing the omitted words with 'The Committee has provided a summary of the key factors below'.

Amendment put and passed.

Original question, as amended, put and passed.

Resolved, on the motion of Mr Speakman: That paragraph 2.39, which reads: ' In addition to the impact of the global financial crisis, WorkCover noted that recent cuts to interest rates set by the Reserve Bank will have a further negative impact on the Scheme's performance. This was illustrated by Mr Playford of PricewaterhouseCoopers who told the Committee that if interest rates were reduced for example by 25 basis points in June 2012, the Scheme's outstanding liabilities would like increase by around $200 - $250 million' be omitted.

Resolved, on the motion of Mr Khan: That paragraphs 2.41 and 2.42, which read as follows, be moved to Chapter 3 and inserted after paragraph 3.15:

> '2.41 Some stakeholders argued that given the significant proportion of the deficit attributed to external factors it was unreasonable for the Government to develop a reform package that concentrated on reducing workers' benefits. For example, the NSW Nurses' Association cited

the impact of external factors as a reason not to cut benefits: 'It would be wrong to ask injured workers to bear the brunt of any changes.
2.42 The same point was echoed in a submission from the Injury Support Network Inc, where Network member LHD Lawyers referred to the impact of the global financial downturn and poor returns on investments and stated: 'If this is the case, it seems highlight inappropriate to punish injured workers by reducing/removing entitlements simply to rectify the mistakes of the [WorkCover] authority.'

Mr Khan moved: That paragraphs 2.45 and 2.46, which read as follows, be omitted:

'2.45 That there has been an increase in work injury damages claims was supported anecdotally by the Australian Industry Group, which suggested that there has been an increased interest in (and ability to) access Work Injury Damages for less serious injuries.
2.46 However, the extent of the increase in Work Injury Damages claims was questioned by Mr Tim Concannon, Member, Injury Compensation Committee, Law Society of New South Wales, who said: 'We find it impossible, based on our own experience of cases that have developed over the last 12 to 18 months, to believe that such an explosion [of Workplace Injury Damage claims] has occurred.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Resolved, on the motion of Mr Stokes: That paragraph 2.52 be amended by inserting the words 'in claims management experience' after the word 'deterioration'.

Resolved, on the motion of Mr Stokes: That paragraph 2.57 be amended by inserting the words 'in deteriorating claims management experience' after the words 'The fourth factor'.

Resolved, on the motion of Mr Khan: That the following new paragraphs, quote and table be inserted after paragraph 2.75:

'In answers to questions on notice, Ms Aplin, on behalf of the WorkCover Authority, noted:

The maximum expense shown in the WorkCover Scheme accounts, which was $683 million in the year to June 2006, arose because of expenses relating to prior year services, going back to 2001, which had not previously been recognised in the accounts.
For services provided in the 2011 calendar year, Scheme agents earned remuneration of $332 million. The most agents have earned in single calendar remuneration year over the last six years was $362 million for 2008.
Scheme performance was positive at this time and the remuneration paid to Agents includes a performance based component.
Australian Prudential Regulation Authority statistics indicate public insurers average underwriting expenses accounted for around 18 per cent of net payments in the 2010/11 financial year.
The New South Wales Scheme figure in 2011 was 17 per cent of net payments, which is certainly not out of alignment with other public insurers.
In addition, the SafeWork Australia Comparative Performance Monitoring Report shows that New South Wales insurance operation costs, as a proportion of total Scheme expenditure, are less than in Victoria, Western Australia and Tasmania.
The total of the costs of running Workcover and agent remuneration in 1999 on the same basis as that applying in 2010/11 is $319 million. In 2010/11, these costs have

increased to $584 million, which given cost increases over this period, represents a modest increase." [Footnote: Answers to questions taken on notice during evidence 21 May 2012, Ms Geniere Aplin, Question No. 8, p 22-23.]

The WorkCover Authority provided a table from the independent Scheme Actuary of the Scheme's valuation as at 31 December 2011. [Footnote: Answers to questions taken on notice during evidence 21 May 2012, Ms Geniere Aplin, Question No. 8, p 24.] The table shows that Agent remuneration has actually fallen since 2006 on an inflated basis.

Insurer/Agent remuneration

2002-2012 Year	**Original values ($m)**	**Inflated values ($m)**	**Inflated net payments ($m)**	**Insurer remuneration as a percentage of net payments**
2001-02	$166	$241	3,673	6.6%
2002-03	$255	$358	3,197	11.2%
2003-04	$278	$375	2,455	15.3%
2004-05	$281	$367	1,859	19.7%
2005-05#	$203	$254	903	28.1%
2006	$337	$411	1,770	23.2%
2007	$339	$398	1,695	23.5%
2008	$362	$410	1,757	23.3%
2009	$300	$328	1,966	16.7%
2010	$303	$318	1,969	16.1%
2011*	$332	$338	1,989	17.0%
2012*	$368	$362	1,989	17.0%

a six month payment period due to change to calendar year remuneration under the Agent contracts from 1/1/06.
*Assuming no improvement post June 2012.'

Resolved, on the motion of Mr Khan: That after paragraph 2.76 the following new heading and paragraphs be inserted:

Committee comment

The available evidence indicates large increases in insurer remuneration from 2001 to 2005 and, although the percentage rates have fallen since 2005, they are still much higher than in 2001.This is particularly so given that the large increases in insurer remuneration has occurred in an environment of falling claims numbers.

Having regard to these figures, the Committee accepts the need for further investigation into the overall management of the Scheme and in particular, the management of agents, including their remuneration.'

Resolved, on the motion of Mr Searle: That the following paragraphs be inserted after paragraph 2.84:

'The submission made by Coal Services Pty Ltd, the company which owns and operates the monopoly coal mines insurer, Coal Mines Insurance Pty Ltd, pursuant to the *Coal Industry Act 2001* (NSW), demonstrates this clearly. In the last ten years (from 2001/02 to 2001/12), the target premium collection rate has decreased by 71.4 per cent, from 11.29 per cent to 3.24 per cent of wages. In this same time period, the number of workers covered has increased by 143 per cent, from 10,813 to 26,393. The claim rate has fallen by 71 per cent, from 26.4 per cent in June 2002 to 7.23 per cent at March 2012. In 2001/02, one in four employees in the coal mining industry would receive an injury. At 31 March 2012, this has reduced to seven in 100.

This significant improvement is said to have a number of foundations. Firstly, there has been significant investment in preventative measures and the involvement of employers and employees in their implementation, the impact of which 'cannot be underestimated.'

In what can only be described as a significantly different approach to the rest of the New South Wales Workers Compensation Scheme, 'CMI has a suite of performance reporting which allows for real time monitoring of performance with adjustments made as necessary. Additionally, Coal Services Pty Ltd has implemented strong management processes and procedures to ensure our employees have the proper technical skill set to appropriately manage injured workers and get them back to health.'

This has been possible because 'Coal Services Pty Ltd invested heavily in the technology to support claims management. There was also a significant investment in training and development of employees responsible for claims management. More recently Coal Services Pty Ltd has invested in performance analysis tools; allowing the claims management teams to appropriately manage their claims portfolios and to early identify emerging trends.'

This has been achieved in an environment where workers in coal mining continue to receive permanent impairment benefits in accordance with the Table of Maims as opposed to Whole Person Impairment; have access to common law rather than Work Injury Damages; and have unrestricted access to commutations.

The Coal Services submission makes some key points which are salutary when it comes to considering the options in the Issues Paper: 'The options for change do not offer any initiatives which strike at the root cause of the need for a workers' compensation system. … the key task is to prevent injuries and incidents from occurring in the first place … None of the identified options for change examine the effectiveness of the premium model and whether it drives the right behaviours. The premium model is an important driver to achieving the performance objectives of any workers compensation scheme.'

Other areas suggested for consideration should include the link between the regulatory authority and industry regarding injury prevention and a review of the premium model in the light of the behaviour it encourages.'

Resolved, on the motion of Mr Searle: That the final dot point of paragraph 2.86 be amended to read: 'total payments by the Scheme to injured workers fell nearly 20 per cent between 2002 to 2010.' [Foonote: 'Submission 133, The Law Society of New South Wales, p 5; Submission 126, Slater and Gordon, p 22[

Resolved, on the motion of Mr Khan: That a new committee comment be inserted after paragraph 2.86 to read:

Committee comment

'The Committee is satisfied that there has been a substantial increase in the costs of managing the Scheme by the WorkCover Authority.

The Committee believes that further investigation of these increased costs is warranted, and believes that this warrants further oversight and investigation by the Parliament.'

Resolved, on the motion of Mr Speakman: That paragraph 2.92 be amended by omitting the words 'this area' after the words 'deteriorating performance in' and inserting instead the words 'return to work'.

Mr Searle joined the meeting.

Resolved, on the motion of Mr Searle: That the following paragraphs be inserted after paragraph 2.102:

'The evidence before the Committee was clear that more needed to be done to improve return to work rates. Any reform measure must be developed in the light of hard information. In this regard, the information collected by WorkCover is important.

WorkCover reports that for persons who are injured and off work between 5 days and 30 days, suitable work was provided by only 34 per cent of employers in 2008/09; 38 per cent in 2009/10 and 42 per cent in 2010/11.

For persons who are injured and off work more than 30 days, the figures are 37 per cent in 2008/09; 39 per cent in 2009/10 and 39 per cent in 2010/11.

Unions NSW in its submission stated that 'NSW WorkCover does not provide published data on the number of workers who have their employment terminated while in receipt of compensation payments.' The comparable figures from South Australia are that in 2008-90 4.6

per cent of workers who lodged lost time claims had lost their job within six months; 13.5 per cent by nine months; 27 per cent at 12 months and 48.5 per cent at 18 months.

WorkCover was asked on notice: 'What are the equivalent figures for New South Wales at each point in time? That is at 6 months, 9 months, 12 months and 18 months?' WorkCover appears not to have answered the question actually posed.

However, WorkCover has provided the following information in responses to questions taken on notice on 8 June 2012 at pp 12-13, that 'the rolling three-month Return To Work rates for the different measures at 30 April 2012:

6 month measure – 89.88 per cent
9 month measure – 93.27 per cent
12 month measure – 94.50 per cent
18 month measure – 93.70 per cent.'

Resolved, on the motion of Mr Khan: That the following paragraph and table be inserted after paragraph 2.119:

'A Safe Work Australia report presents standardised average premium rates for the schemes in all Australian jurisdictions. To facilitate comparisons, the report adjusts the average premium rates published by each jurisdiction to take account of scheme variations (e.g. employer excess). The standardised average premium rates in 2009/10 for the five mainland States were as follows:

	Average premiums (% of payroll)
Queensland	1.12
Western Australia	1.22
Victoria	1.39
New South Wales	1.82
South Australia	2.76

[Footnote: Safe Work Australia, *Comparative Performance Monitoring Report: comparison of work health and safety and workers' compensation schemes in Australia and New* Zealand, 13th edition, October 2011, pp 23-24, taken from footnotes 97 and 98 in L Roth & L Blayden, E-brief: *Workers Compensation: An update*, NSW Parliamentary Library Research Services 10/2012, p 13.]

Resolved, on the motion of Mr Khan: That the following paragraph and quote be inserted after paragraph 2.120: 'In a part of its submission sourced from NSW Treasury, the WorkCover Authority stated (omitting footnotes):

The impact on employment of lower premiums depends on how New South Wales labour demand and supply respond to changes in employment costs and wages. The available evidence suggests that each 1 per cent fall in labour costs may, in assisting the competitiveness of New South Wales businesses, lead to a 0.8 per cent increase in labour demand in the long run (i.e. the long run price elasticity of labour demand is 0.8), and each 1 per cent increase in wages may ultimately lead to a 0.3 per cent increase in labour supply across New South Wales.' [Footnote: Submission 144, WorkCover Authority, p 24.]

Resolved, on the motion of Mr Speakman: That there then be inserted the following new paragraph and quote:

'The NSW Business Chamber said that it conducted a state-wide survey, which had just over 500 respondents, immediately following the announcement of this Committee. 83.8 per cent of respondents said that a 28 per cent increase in premiums would have employment effects; 58.4 per cent of respondents said there would be employment impacts if premiums were to rise by 10 per cent. [Footnote: Submission 129, NSW Business Chamber pp 5-6.] The NSW Business Chamber extrapolated from these survey results as follows:

> For a premium increase of 28% more than 400 members told us that they would reduce their number of employees. This represents 4½% of the Chamber's membership. Applying that same percentage to approximately 280,000 workers compensation policy holders in NSW would result in 12,600 businesses reducing employment opportunities. Assuming a very conservative one employment opportunity lost per company that would mean 12,600 employment opportunities would be lost. The majority of these job losses would still occur under a 10% premium increase, where the corresponding number would be 8,120 policy holders and lost job opportunities.
>
> In manufacturing where employers face not only the imposts of increased costs but also imports and a strong currency the impact will be even more profound. Ninety-five percent of manufacturers said a 28% increase would have an impact on employment, and 74% said a 10% increase would have an effect. Respondents indicated the likely response would be to relocate overseas. Those job losses will be permanent.' [Footnote: Submission 129, NSW Business Chamber p 6.]

Mr Khan moved: That paragraphs 2.127 and 2.128, which read as follows, be omitted:

'2.127 The Law Society of New South Wales agreed that employer premiums are not easily comparable between different states:

> The operational risks and the like between employers in different States are entirely different. The wages structures are not identical in many situations and the commercial practices of companies are not the same. Moreover, the law varies from State to State. Comparing one employer in one State with one employer in another is an interesting but not useful exercise.

2.128 The NSW Nurses' Association also cautioned against comparing premiums across different jurisdictions, stating: '[We] would expect that the dollar amount of premiums would be higher in New South Wales simply because of the higher wages and cost of living in this state.' The Association reflected that making face value comparisons of premiums across different jurisdictions without taking into account the differences in legislation was misleading.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

The Committee adjourned for lunch at 1.00 pm.

The Committee resumed at 2.05 pm.

Resolved, on the motion of Mr Khan: That a new committee comment be inserted after paragraph 2.130 to read:

Committee comment

'The Committee accepts the conclusion of Safe Work Australia that New South Wales has the second highest premium of the mainland States.'

Mr Khan moved: That there then be inserted the following new paragraph: 'In the light of high premiums compared with other States, the Committee accepts that premium increases must be avoided.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Khan moved: That there then be inserted the following new paragraph: 'The Committee further accepts that if premiums were raised (even by, say, 10 per cent instead of 28 per cent), it would result in many thousands of job losses in New South Wales. Some submissions which advocated premium increases, to avoid restructuring benefits, appealed to notions of fairness and equity. But there is nothing fair and nothing equitable about pursuing premium increases which would put so many workers out of a job.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Searle moved: That a new paragraph be inserted after paragraph 2.130 and before the 'Committee conclusion' to read: 'If such premium discounts had not been implemented, an additional $7 billion would have been paid into the Scheme since 2005. Even on the assessment of Scheme deterioration by the Scheme actuaries, this would have resulted in the Scheme still being around $3 billion in surplus. While some employer associations have indicated that their members to not believe they have received any reductions in premiums, it is empirically clear on the evidence that employers in New South Wales have collectively benefitted from a reduction in premiums collected by around $1 billion annually since 2005.'

Question put.

The Committee divided.

Ayes: Mr Daley, Mr Searle
Noes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes

Question resolved in the negative.

Mr Searle moved: That a new paragraph be inserted after paragraph 2.130 and before the 'Committee conclusion' to read: 'What is entirely missing in this area of discussion is any proper, detailed analysis regarding accident and injury rates, comparable wage levels, each by industry/insurance sector, and benefit levels between jurisdictions. Only with such information can any meaningful discussion be held regarding whether the level of premiums in New South Wales really are 'too high' or what the appropriate level should be.'

Question put.

The Committee divided.

Ayes: Mr Daley, Mr Searle
Noes: Mr Borsak, Mr Blair, Mr Khan, Mr Green, Mr Speakman, Mr Stokes

Question resolved in the negative.

Mr Searle moved: That a new paragraph be inserted after paragraph 2.130 and before the 'Committee conclusion' to read: 'New South Wales with 30.5 per cent of all employees in Australia nevertheless has 34.5 per cent of all serious injury claims in Australia. [Footnote: Submission 146, Australian Manufacturing Workers Union, p 8.] According to the Australian Bureau of Statistics report of November 2011, 8.8 per cent of NSW workers were employed in manufacturing compared to 11.1 per cent of Victorian workers. For 2009/10 there were 24.3 serious claims per 1000 workers in manufacturing in New South Wales and 17.1 serious claims in manufacturing in Victoria, according to the National Data Set for compensation statistics. [Footnote: Answers to questions taken on notice during evidence 25 May 2012, Mr Tim Ayres, NSW State Secretary, Australian Manufacturing Workers Union, p 2.] This indicates that the serious accident rate for manufacturing in New South Wales is more than 42 per cent higher than in Victoria.'

Question put.

The Committee divided.

Ayes: Mr Daley, Mr Searle
Noes: Mr Borsak, Mr Blair, Mr Khan, Mr Green, Mr Speakman, Mr Stokes

Question resolved in the negative.

Mr Searle moved: That a new paragraph be inserted after paragraph 2.130 and before the 'Committee conclusion' to read: 'It should be borne in mind that having regard to the standardised average premium rates from 2004/05 to 2009/10 for each of New South Wales, Victoria and Queensland, New South Wales is in a more 'competitive' relative position than in previous years. [Footnote: Submission 126, Slater and Gordon, p 24]

Question put.

The Committee divided.

Ayes: Mr Daley, Mr Green, Mr Searle
Noes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes

Question resolved in the negative.

Mr Searle moved: That a new paragraph be inserted after paragraph 2.130 and before the 'Committee conclusion' to read: 'Furthermore, none of the identified options for change examine the effectiveness of the current premium model and whether it drives the right behaviours. The premium model is an important driver to achieving the performance objectives of any workers compensation scheme. [Footnote: Submission 126, Slater and Gordon, p 24]
Question put.

The Committee divided.

Ayes: Mr Daley, Mr Searle
Noes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes

Question resolved in the negative.

Mr Searle moved: That a new paragraph be inserted after paragraph 2.130 and before the 'Committee conclusion' to read: 'Only around 12 per cent of employers have their claims experience factored into their premiums.'

Question put.

The Committee divided.

Ayes: Mr Daley, Mr Searle
Noes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes

Question resolved in the negative.

Mr Searle moved: That paragraph 2.131 be amended by omitting the word 'significant' after the words 'there are'.

Question put.

The Committee divided.

Ayes: Mr Daley, Mr Searle
Noes: Mr Borsak, Mr Blair, Mr Khan, Mr Green, Mr Speakman, Mr Stokes

Question resolved in the negative.

Mr Khan moved: That paragraph 2.134 be amended by inserting the word 'urgent' before the word 'reform'.

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Khan moved: That paragraph 2.134 be amended by omitting the words 'which has been decisively rejected by the NSW Government in its Issues Paper (as well as rejected by many stakeholders)' after the words 'premium rates,' and inserting instead the words 'an approach which the Committee considers undesirable because of its impact on employment in New South Wales'.

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Searle moved: That the following paragraph be inserted after paragraph 2.134: 'It is noted that on the assumption of a $4.083 billion deficit, the Scheme actuary proposes possible premium rises of either 28 per cent for five years or 8 per cent for 10 years to return the Scheme to full funding. [Footnote:

PricewaterhouseCoopers, WorkCover NSW Executive Summary: Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011, p 3.] It is further noted that either approach would still leave premium levels lower than the 33 per cent premiums have been discounted since 2005. If the Scheme deficit is lower, corresponding lower increases only would be needed. In the past, Scheme reform has involved premium increases as part of any package.'

Question put.

The Committee divided.

Ayes: Mr Daley, Mr Searle
Noes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes

Question resolved in the negative.

Chapter 3 read.

Mr Speakman moved: That paragraph 3.9 be amended by omitting the words 'independently and' after the words 'not been'.

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Green, Mr Searle

Question resolved in the affirmative.

Mr Speakman moved:

- that paragraph 3.9 be amended by omitting the words: 'For example, Mr David Krawitz, representing the Insurance Council of Australia in evidence to the Committee, stated: "We support in principle reform options set out in the New South Wales Government's issues paper. However, we submit that a proper financial analysis should be conducted of any reform proposals, to allow the New South Wales Government and stakeholders to make informed decisions about the proposed reforms that are most likely to effectively address the deteriorating performance, and to ensure an affordable and fair scheme for all"'
  and inserting instead the words:
  'However, those submissions (such as from the Insurance Council of Australia [footnote: Mr David Krawitz, Chair, National Workers Compensation Committee, Insurance Council of Australia, Evidence, 25 May 2012, p 2] and the NSW Business Chamber [footnote: Submission 129, NSW Business Chamber, p 129] were made prior to the Committee's receipt of costings from PricewaterhouseCoopers, which are Appendix 6 to this report.'
- and that paragraph 3.10, which reads: 'Similarly, the Business Chamber of NSW qualified its support for the reform options in the Issues Paper on the basis that they are not costed: "The proposals for reform contained in the Issues Paper are not accompanied actuarial advice as to their impact on the scheme, claimants and employers. The Recommendations contained in this submission to the Committee are being made on the basis of the anticipated impact. The organisations making this submission reserve their right to change their views in the light of actuarial advice which may be forthcoming."' be omitted.

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Green, Mr Searle

Question resolved in the affirmative.

Mr Speakman moved: That paragraph 3.13 be amended by omitting the words 'legal and medical' after the word 'unions', and inserting instead the words 'and legal'.

Question put.

The Committee divided.

Ayes: Mr Blair, Mr Borsak, Mr Green, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Resolved, on the motion of Mr Speakman: That the order of paragraphs 3.17 and 3.18 be reversed.

Resolved, on the motion of Mr Speakman: That paragraph 3.19 be amended by omitting the words 'However, due to the timeframe within which the Committee has to complete the Inquiry, not all sixteen options outlined in the Issues Paper have been examined. Rather, an analysis of individual options, and the various stakeholder responses to them, has been undertaken' after the words 'lump sum benefits'.

Resolved, on the motion of Mr Khan: That paragraph 3.24 be amended by omitting the last two sentences, which read: 'The Issues Paper included two other reform options that proposed removing coverage for particular claim types: Option 3, which proposes preventing relatives or dependants of deceased or injured workers from lodging nervous shock claims; and Option 16, which proposes to exclude stroke and heart attack injuries from coverage under the Scheme unless work is a significant contributing factor. These options are not examined in this Report, however the Committee notes that stakeholder responses to these options and the rationale for them largely reflected the position and rationale given by stakeholders in respect of the proposal to remove coverage for journey claims.'

Mr Khan moved:

- that the following new paragraphs be inserted after paragraph 3.54:
  'The Committee accepts the philosophy that the core circumstances with which a workers compensation and injury management scheme should deal are those over which the employer has (at least limited) control.
  The Committee accepts there are competing arguments whether a workers compensation and injury management scheme should extend to the ancillary circumstances of journeys to and from work. However, the Committee believes that, given the Scheme's poor financial position, a conservative position must be taken at the present time with respect to benefits available under the Scheme and that therefore journey claims should be largely abolished.'
- that paragraph 3.55, which reads: ' The Committee notes evidence that particular groups of workers, including police and other emergency service personnel, nurses and construction workers may, as result of the nature of their work, be disproportionately impacted by proposals to remove coverage for journey claims' be omitted and replaced with the following words: 'The Committee, however, notes the unique circumstances of members of the NSW Police Force who are, in effect, always "on duty".'
- that paragraph 3.56, which reads: 'The Committee also acknowledges that removal of coverage for journey claims would result in hardship for individual workers and their families who are injured on the way to or from work' be omitted.

- that a new paragraph be inserted after paragraph 3.56 to read: 'The Committee notes that any abolition of journey claims would not preclude claims for injuries suffered by a worker while travelling anywhere on work duties. Nor, as the Committee understands it (although this should be confirmed by legal advice), would abolition of journey claims preclude claims for injuries suffered while performing work duties on the way to or from a place of work. [Footnote: Section 4 of the Workers Compensation Act defines "injury" to mean "personal injury arising out of or in the course of employment". Section 9(2) provides that "[c]ompensation is payable whether the injury was received by the worker at or away from the worker's place of employment".]
- that a new recommendation be inserted after paragraph 3.57 to read:

  Recommendation

  'That except for police officers, workers compensation for journey claims be abolished.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Green, Mr Searle

Question resolved in the affirmative.

Mr Khan moved: That the following new heading, paragraphs, committee comment and recommendation be inserted after paragraph 3.57:

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

'The Issues Paper describes benefits presently payable in respect of nervous shock claims by relatives or dependants of deceased or injured workers.

The Issues Paper proposes the abolition of that present liability.

The Committee has received competing submissions on this proposal. Most employers favour it. On the other hand, unions, the Law Society of NSW and the NSW Bar Association oppose it.'

Committee comment

'The Committee considers that self-evidently injured workers are the main focus of a workers compensation and injury management scheme.

The Committee accepts there are competing arguments whether a workers compensation and injury management scheme should extend to the ancillary circumstances of nervous shock claims by relatives or dependants. However, the Committee believes that, given the Scheme's poor financial position, a conservative position must be taken at the present time with respect to the benefits available under the Scheme and that therefore nervous shock claims by relatives or dependants should be abolished.'

Recommendation

'That the entitlement of dependants of deceased or injured workers to make nervous shock claims under the Scheme be abolished.'

Question put.

The Committee divided.

Ayes: Mr Blair, Mr Borsak, Mr Green, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Khan moved: That paragraph 3.78 be amended by omitting the words 'The Issues Paper does not identify the timeframe for such a cap on weekly benefits' after the word 'readiness'.

Question put.

The Committee divided.

Ayes: Mr Blair, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Borsak, Mr Daley, Mr Green, Mr Searle

Question resolved in the negative on the casting vote of the Chair.

Resolved, on the motion of Mr Khan: That a new paragraph be inserted after paragraph 3.78 to read:

> 'The position in other jurisdictions is as follows:
> (a) In Victoria, there is no time cap on weekly benefits (but there is stricter work capacity testing and the payment of medical expenses ceases 12 months after the last payment of weekly benefits).
> (b) In Queensland weekly benefits are payable for a maximum of five years, or until reaching an indexed financial cap, currently standing at $273,055.
> (c) In Western Australia, while there is no duration cap, there is a financial cap of $190,700 on total benefits payable.
> (d) In Tasmania the maximum time period for weekly payment entitlements depends on the worker's degree of whole person impairment (WPI). If WPI is less than 15 per cent, weekly benefits are payable for up to nine years. If WPI at least 15 per cent but less than 20 per cent, weekly payments are payable for up to 12 years. If WPI at least 20 per cent but less than 30 per cent, benefits are payable for up to 20 years. If WPI is greater than 30 per cent, benefits are payable up to retirement age.
> (e) In South Australia and under the Commonwealth scheme, weekly benefits terminate upon the worker reaching Commonwealth retirement age. [Footnote: Issues Paper appendix 3 Comparison with other Australian jurisdictions row 9.]'

Resolved, on the motion of Mr Speakman: That paragraph 3.79 be amended by omitting the words 'This proposal' from the beginning of the paragraph and inserting instead the following words: 'The proposal to place a time cap on weekly benefits'.

Mr Khan moved: That paragraph 3.88 be amended by omitting the words: 'One injured worker, who sustained a shoulder injury resulting in permanent severe disability in that shoulder, stated: "I … continue to rely on the statutory payment to go a small way toward compensating me for the work hours I'm no longer able to manage and the promotions I'm no longer able to gain … the proposed changes would result in me losing these benefits … this would obviously have a major impact on me and my family… I have already been told by a number of specialists that I will not be able to work to retirement age, in fact most are surprised that I am able to work at all. When this time comes we well be dependent on that small statutory payment. If this payment was to cease we would be forced to live in poverty.'"

Question put.

The Committee divided.

Ayes: Mr Blair, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Borsak, Mr Daley, Mr Green, Mr Searle

Question resolved in the negative on the casting vote of the Chair.

Mr Khan moved: That paragraph 3.89, which reads as follows, be omitted:

> 'One barrister explained the circumstances of one of his clients, a 'typically disadvantaged young apprentice worker crippled at work at a factory in far western Sydney.' In explaining how his client sustained spinal injuries resulting in incomplete paraplegia after being directed by his negligent employer to drive, on an unsuitable surface, a forklift for which he was unlicensed and untrained, the barrister described the impact of the injury and his client's subsequent reliance on workers compensation. In particular, he notes the inadequacy of weekly benefits to appropriately provide for and compensate his client:
>
> > He can, after 3 years rehab, walk but only to a limited extent, with the aid of expensive leg splints costing about $150 pw alone to maintain and replace and likely to cost more in the future as he ages and his needs become more pronounced and the technology improves. He has additional expenses for treatment and care of perhaps $350 pw. Estimated conservatively his ongoing expenses for treatment and needs are about $500 pw for life, another 60 odd years.
> >
> > He previously earned about $600 pw net and was about to complete his apprenticeship as a cabinet maker and would have been earning about $1000 pw net plus by now, in future he would probably have done better still. He receives his s. 40 weekly benefits of about $450 pw and is losing about $500 pw in wages … He cannot work in his trade. He has limited skills and real barriers in terms of location and mobility and mental and physical stamina in gaining new ones.'

Question put.

The Committee divided.

Ayes: Mr Blair, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Borsak, Mr Daley, Mr Green, Mr Searle

Question resolved in the negative on the casting vote of the Chair.

Mr Khan moved: That paragraph 3.90, which reads as follows, be omitted:

> 'The barrister explained that his client has few viable options that will adequately compensate for his injury:
>
> > If he sues in damages, he will receive only his economic loss to age 67, discounted by his residual capacity if any, vicissitudes, and, the 5% factor. He does not receive, as he would if he had had a motor accident, by for example, rolling the forklift on the driveway receive damages for his treatment expenses, domestic and personal care, and all the other special needs of a paraplegic including his splints. Nonetheless in a catastrophic case a substantial sum, perhaps $650,000.
> >
> > However on obtaining his judgement against his obviously negligent employer he loses his s 60 treatment expenses, which in 20-25 years will have exceeded the sum awarded.
> >
> > His options for compensation are to either take maybe $650,000 now and run out of money in a few years, or survive on $450 pw and have his medical needs met.
> >
> > At 25 he has become a pensioner through no fault of his own as a result of gross negligence by his trusted employer. He will never realise even a fraction of his economic potential and that loss will go substantially uncompensated throughout his life. If properly compensated he could employ carers, as it stands his mother bears this burden. She also has no right to be compensated.'

Question put.

The Committee divided.

Ayes: Mr Blair, Mr Khan, Mr Speakman, Mr Stokes

Noes: Mr Borsak, Mr Daley, Mr Green, Mr Searle

Question resolved in the negative on the casting vote of the Chair.
Mr Searle moved: That the following paragraph be inserted after paragraph 3.93: 'There already exist 'step downs' in payments to injured workers in New South Wales. For the first 26 weeks, injured workers receive 100 per cent of any award or enterprise agreement wage. This does not include any shift loading or other allowance they may usually receive, occasioning an immediate reduction in pay while on workers compensation benefits. Furthermore, outside the public sector the vast majority of workers covered by awards are paid more than the base award rate. For these workers, being on workers compensation payments at award rates constitutes an immediate significant reduction in earnings even before the loss of any shift loadings or other allowances. While non-Award workers are said to receive 80 per cent or pre-injury earnings, with the advent of Modern Awards under the *Fair Work Act 2009* (Cth) the vast majority of workers would now be covered by some industrial instrument. After 26 weeks, there is a further 'step down' to the statutory rate of $450 per week. The Committee considers that this constitutes sufficient 'incentive' for workers to leave benefits and return to work if they can. The proposals contained in the Issues Paper constitute a cost-cutting measure only and should be rejected.'

Question put.

The Committee divided.

Ayes: Mr Daley, Mr Searle
Noes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes

Question resolved in the negative.

Mr Speakman moved: That paragraph 3.94, which reads as follows, be omitted: 'As discussed in Chapter 2, the Committee received limited evidence of the precise financial impact of the proposed reform options regarding weekly benefits, but notes that WorkCover submitted that they comprised one of three main cost drivers of the Scheme.'

Question put.

The Committee divided.

Ayes: Mr Blair, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Borsak, Mr Daley, Mr Green, Mr Searle

Question resolved in the negative on the casting vote of the Chair.

Resolved, on the motion of Mr Speakman: That the following paragraph and recommendation be inserted after paragraph 3.95:

> 'The Committee supports the simplification of the earnings base from which to calculate weekly income benefits viz a measure of average actual pre-injury earnings over, say, the previous 12 months. There is no reason of logic or fairness to treat award workers differently from than non-award workers. The Committee expects that a uniform measure would simplify the administration of benefit arrangements. It would also improve benefits by taking into account regular overtime.
>
> **Recommendation**
>
> That the weekly income benefits of both award and non-award workers be determined by reference to one measure of average actual pre-injury earnings.'

Mr Speakman moved that there then be inserted the following new paragraph and recommendations:

'The Committee agrees that step downs should occur at 13 weeks rather than 26 weeks. Among other things, this has the advantage of some harmonisation with the Victorian model. More importantly, this would more closely mirror clinical recovery outcomes (especially with work capacity testing) and incentivise return to work.'

Recommendation

That in cases of total incapacity, workers receive weekly income benefits on the Victorian model, namely (broadly speaking) 95 per cent of their pre-injury average weekly earnings for the first 13 weeks of total incapacity, and then 80 per cent from week 14 onwards.

Recommendation

That in cases of partial incapacity, workers receive weekly income benefits on the Victorian model, namely (broadly speaking) 95 per cent of their pre-injury average weekly earnings for the first 13 weeks of total incapacity and then 80 per cent from week 14 onwards (in each case less certain amounts).'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green.
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Khan moved that there then be inserted the following new paragraphs and recommendation:

'The Committee accepts the need to cap the duration of weekly income benefits for less seriously injured workers.

First, given the Scheme's poor financial position, a conservative position must be taken at the present time with respect to the benefits available under the Scheme.

Secondly, after, say, five years less seriously injured workers should be back in the workforce.

The Committee therefore believes that an approach similar to Queensland's is appropriate for less seriously injured workers.

The Committee considers that for an intermediate category of injured worker, it would be appropriate for the Government to provide a more generous time cap of, say, nine years. For the most seriously injured workers there should be no time cap, except that benefits would cease at the Commonwealth retirement age.'

Recommendation

That the *Workers Compensation Act 1987* be amended to impose a time cap on weekly income benefits of no less than five years for less seriously injured workers, with a more generous time cap for an intermediate category of injured worker and ultimately no time cap (except the Commonwealth retirement age) for the most seriously injured workers.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green.
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Khan moved that there then be inserted the following new paragraph and recommendation:

'Unlike South Australia and the Commonwealth, in New South Wales weekly payments are payable until 12 months after reaching the Commonwealth retirement age. Given the Scheme's poor financial position, the Committee considers that this aspect of the Scheme should be changed.

Recommendation
That in addition to any other caps, the absolute end date for the payment of all weekly benefits be the Commonwealth retirement age.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green.
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Khan moved: That that there then be inserted the following new heading and paragraphs:

Cap medical coverage duration
'Proposal 13 in the Issues Paper is a cap on the liability of the Scheme for medical costs.
In other jurisdictions the position on capping is as follows: [Footnote: Issues Paper appendix 3 Comparison with other Australian jurisdictions row 15.]
(a) In Victoria and Tasmania, the liability for costs of medical and related treatment is capped at one year after the cessation of weekly benefits.
(b) In Queensland there is a cap of five years.
(c) In Western Australia there are monetary caps viz reasonable expenses covered up to a cap of $57,319, then up to $50,000 on the order of an arbitrator and then $250,000 in some cases.
(d) In South Australia and in the Commonwealth scheme, there are no dollar or time caps.
The Issues Paper notes that the most recent national data available, in the comparative performance monitoring report for 2009/10, show that New South Wales has the highest expenditure of service to workers which encompasses medical treatment, rehabilitation, legal costs, return to work assistance, transportation, employee advisory services and interpreter costs.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green.
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Khan moved: That there then be inserted the following new committee comment:

Committee comment
'The Committee accepts that given the Scheme's poor financial position, a conservative position must be taken at the present time with respect to benefits available under the Scheme.
The WorkCover scheme should provide a level of reasonable coverage of medical and related treatment, but it is not unreasonable that that coverage be proximate to the date of injury and time off work by the worker. Australia has a comprehensive safety net of medical and hospital coverage for all Australians under Medicare. Injured workers whose workers compensation medical benefits expire after a time cap are not suddenly put on the "scrap heap". They will enjoy the benefits of the Medicare system like everyone else, including those whose serious

accidents were never covered by any accident compensation scheme (e.g. because they were not in a motor accident or they were outside the work place) and those born with serious disabilities.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green.
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Khan moved: That the following recommendation be inserted after the new committee comment section:

Recommendation

'That the Workers Compensation Act 1987 be amended to cap reasonable and necessary medical and related treatment expenses to those incurred whilst weekly benefits are paid and for one year after the cessation of those payments.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Searle moved: That the following paragraph be inserted after paragraph 3.129: 'No submission or witness before the Committee advanced any detailed model regarding how such an idea would be implemented. The Minister's Issues Paper did not do so. In the absence of any real detail, the Committee cannot support such a proposal.'

Question put.

The Committee divided.

Ayes: Mr Daley, Mr Green, Mr Searle
Noes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes

Question resolved in the negative.

Mr Speakman moved: That paragraphs 3.127, 3.128 and 3.129, which read as follows, be omitted:

'3.127 Several stakeholders noted that there are currently provisions available under sections 40A and 38A of the Workers Compensation Act 1987 that enable testing of an injured worker and under which entitlements can be suspended. The Committee acknowledges the views of stakeholders both opposing and supporting the option, that these provisions are currently misapplied, inconsistently applied or ineffective.

3.128 The Committee notes comments from stakeholders supportive of the reform that determinations under those sections are not binding, and acknowledges the position of business, employer and insurance organisations who, in supporting the proposal, advocate for independent, accredited and binding assessments of work capacity. These stakeholders also argued that work capacity testing encourages return to work and worker rehabilitation.

3.129 The Committee notes the views of stakeholders opposing this option that work capacity testing is used as a mechanism to stop or cut payments to injured workers, as opposed to being a tool to assist in the rehabilitation and return to work process.'

Question put.
The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Speakman moved: That the following paragraphs and recommendation be inserted in place of paragraph 3.129:

'The Committee supports the concept of mandatory, independent, binding work capacity testing at defined intervals.

The Committee rejects any suggestions that this is somehow unfair. Rather it is self-evidently logical and fair, as a matter of both encouraging return to work and cost control, that a claim based on work incapacity should be tested in this way. There is nothing inherently unfair about using work capacity testing to remove a claimant from the system if that testing shows the claimant has the requisite work capacity. Further, if there is work capacity, return to work should not be dependent on the current employer providing suitable duties.
The Committee accepts the commentary of the Civil Contractors Federation noted above.
Recommendation
That the *Workers Compensation Act 1987* be amended to require mandatory, independent, binding work capacity testing at defined intervals.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Speakman moved: That there then be inserted the following new heading, paragraphs, committee comment and recommendation:

Remove 'pain and suffering' as a separate category of compensation
'The Issues Paper notes that the lump sum payment for pain and suffering was a subjective measure of the financial impact of a worker's injury which was originally inserted into the *Workers Compensation Act 1987* in substitution for common law rights.
In 1989, an entitlement to pursue common law rights was restored in a modified form, however the lump sum payment for pain and suffering was retained in the Act.
The Issues Paper notes arguments that this is an 'anomaly' and that it 'creates significant disputation and legal costs'.
The Issues Paper notes a suggestion that the entitlement to compensation for pain and suffering be incorporated 'into lump sum payments for injuries with whole person impairment greater than 10 [per cent]' and that this 'would reduce disputation and reduce administration costs'.
The Issues Paper notes a further suggestion that the proposed incorporation of compensation for pain and suffering into the lump sum payments for whole body impairment 'aligns with an objective measure of the worker's physical impairment ... rather than a subjective measure of the worker's "loss".'

According to material appended to the Issues Paper, the position in other jurisdictions is as follows: [Footnote: Issues Paper appendix 3 Comparison with other Australian jurisdictions row 9.]

(a) Victoria and South Australia – 'incorporated in non economic loss – not a separate category'.
(b) Queensland, Western Australia and Tasmania – 'Not specified. Common law for pain and suffering is available'.
(c) Commonwealth scheme – "Workers can elect [between] common law and compensation for non economic loss including pain and suffering".

In its submission to the Inquiry, the NSW Bar Association did not oppose the incorporation of compensation for pain and suffering into lump sum payments, and acknowledged that the "removal of this separate head of claim could result in administrative savings to the [S]cheme".

Committee comment

'The Committee accepts the attractiveness of changes to reduce disputes and administration costs, especially given the comparatively modest amounts of compensation available as compensation for pain and suffering (a maximum of $50,000).'

Recommendation

'That the *Workers Compensation Act 1987* be amended to incorporate payments under s 67 for pain and suffering into s 66 lump sum payments for injuries.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green.
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Speakman moved: That there then be inserted the following new sub-heading, paragraphs, committee comment and recommendation:

Only one claim can be made for WPI and 'One assessment for statutory lump sum, commutations and work injury damages'

'In relation to proposal 10, the Issues Paper notes a suggestion that permitting only one claim for whole person impairment "might ensure that [workers'] injuries are stabilised providing them with appropriate compensation" and that it "might reduce the ability of fraudulent or exaggerated injuries to meet the thresholds".

In relation to proposal 11, the Issues Paper notes that current WorkCover guidelines provide objective criteria for assessing whole person impairment. The Issues Paper notes suggestions that there is no reasonable rationale for the obtaining multiple reports, that such an approach can be distressing for injured workers and that this may contribute to feelings of being 'injured'.

The Issues Paper states that having only one assessment of impairment for statutory lump sum payments, commutations and work injury damages might reduce disputes as well as medical, legal and administrative costs of the Scheme.

In its submission to the Inquiry, the NSW Bar Association expressed concern that these proposals may encourage injured workers to delay a WPI assessment "for an extended period of time until all conservative and surgical measures have been exhausted". The Association argued that such a delay may result in unnecessary uncertainty with adverse implications for the Scheme tail.

The Bar Association proposed that an approach similar to that in s 62 of the *Motor Accidents Compensation Act 1999* be adopted. This provision allows an additional assessment or claim in circumstances where the injured worker's condition has deteriorated in a material way.'

Committee comment

'The Committee accepts there are benefits in limiting the number of assessments which a worker may obtain. This will reduce medical, legal and administrative costs of the Scheme. The Committee however believes that in some isolated cases, an injustice may be done if there were a limit of one assessment where there has been a significant deterioration in a worker's condition. The Committee proposes that where a worker has suffered a deterioration of whole person impairment at least 5 per cent, then the worker should be entitled to further reassessment for the purposes of s 66 lump sums, commutation and work injury damages. A worker should be limited to no more than two further reassessments.'

Recommendation
That after the determination of a claim for whole person impairment, only up to two further claims be permitted and in each case only if there has been a deterioration of whole person impairment of at least 5 per cent since the last determination.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Speakman moved: That the sub-heading 'Lump sum benefits' and paragraphs 3.130 to 3.134, which read as follows, be omitted:

'3.130 The NSW Workers Compensation Scheme provides for injured workers to receive lump sum payments in some circumstances. These include statutory compensation payments for permanent impairment and pain and suffering; work injury damages, which allows injured workers to sue for damages where their injury arises as a result of employer negligence; and commutations, which are agreements where a workers compensation claim is 'bought out' in a lump sum that is paid to the injured worker.

3.131 There are thresholds and other criteria that an injured worker must meet to enable them to pursue lump sum payments in the nature of those above.

3.132 This section considers reform options 1, 15 and 12 in the Issues Paper, which relate to severely injured workers; targeted commutation and work injury damages respectively. Reform options 9, 10 and 11, dealing with proposals to remove 'pain and suffering' as a separate category of compensation; providing that only one claim can be made for whole person impairment; and providing for a single assessment of impairment for statutory lump sum, commutations and work injury damages, also relate to lump sum payments but have not been examined due to time constraints.

3.133 Under the Scheme, workers who are severely injured are able to claim lump sum compensation provided they are assessed as meeting a requisite level of 'whole person impairment'. The minimum levels are one per cent or greater whole person impairment, except in the case of primary psychological or psychiatric injuries, where the threshold is 15 per cent.

3.134 The Issues Paper proposes that the assessed level of 'whole person impairment' be increased to 30 per cent, on the basis that it would assist the Scheme to provide adequately for those workers suffering the most severe injuries. It is not clear whether the proposal is to apply to physical and psychological/psychiatric injuries or both. The Issues Paper frames the option as follows:

> A key plank of any reforms should to improve the benefits for severely injured workers. It has been suggested that reforms should provide for severely injured workers, who have an assessed level of whole person impairment of more than 30%, to receive improved income support, return to work assistance where feasible, and more generous lump sum compensation.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Searle moved: That the following sentence be inserted after paragraph 3.152: 'There should be no further restrictions to workers accessing lump sum benefits under ss 66 and 67.'
Question put.

The Committee divided.

Ayes: Mr Daley, Mr Searle
Noes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green

Question resolved in the negative.

Resolved, on the motion of Mr Khan: That the heading 'Severely injured workers' and paragraphs 3.135 to 3.152 be moved to follow paragraph 3.22.

Resolved, on the motion of Mr Khan: That paragraph 3.134, which had previously been omitted, be replaced with the following: 'Option 1 in the Issues Paper is entitled "Severely injured workers". The Issues Paper states that a key plank of any reforms to the workers compensation scheme should be to improve the benefits for severely injured workers. The Issues Paper notes a suggestion that reforms should provide for severely injured workers who have an assessed level of WPI of more than 30 per cent "to receive improved income support, return to work assistance where feasible, and more generous lump sum compensation". Option 1 in the Issues Paper does not specify the detail of extra support.'

Resolved, on the motion of Mr Speakman: That paragraph 3.140 be amended by inserting 'and Hawkesbury City Council' after the words 'Shoalhaven City Council', and by inserting an additional footnote: 'Submission 184, Hawkesbury City Council, p 5'.

Mr Khan moved: That paragraph 3.149, which reads 'The Committee heard conflicting evidence as to the adequacy of the current 15 per cent whole person impairment threshold, and the proposal to increase that threshold to 30 per cent' be omitted, and replaced with the following paragraph: 'The Committee received conflicting submissions about the appropriateness of setting the threshold at 30 per cent, or whether it should be a lower (or even higher) figure.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Khan moved: That paragraph 3.152, which reads 'There was strong opposition to the proposal by unions, lawyers and injured workers who contended that the current 15 per cent threshold already failed to capture many injure workers who would be considered by the community to be severed disabled. To

this end, they argued that an increase in the threshold to an assessed level of 30 per cent whole person impairment would be catastrophic to many severely injured workers' be omitted and replaced with the following paragraph: 'The Committee believes it is appropriate, irrespective of the level of WPI, to consider the effect of being severely injured on a person under the Scheme.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Khan moved: That the following recommendations be inserted after the new paragraph 3.152:

Recommendation
'That a worker assessed as severely injured be subject to work capacity testing but with the Workers Compensation Commission able to suspend or to waive the requirement for the severely injured worker to undergo work capacity testing.'

Recommendation
'That any time cap on payment of weekly income benefits and medical expenses (apart from the Commonwealth retirement age) not apply to appropriately defined severely injured workers.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Khan moved: That the following new sub-heading, paragraphs, committee comment and recommendation be inserted after paragraph 3.188:

Exclusion of strokes/heart attack unless work a significant contributor

'The Issues Paper states that covering liability for covering strokes and heart attacks "is arguably inconsistent with the principles of workers compensation legislation, as the principles for the legislation are to provide income support [and] medical assistance for workers injured as a result of a workplace injury".

The Issues Paper states that "causation of strokes and heart attacks are not normally associated with workplace injuries and the factors that impact upon rehabilitation and return to work are not typically workplace issues".

An annexure to the Issues Paper notes that:

(a) in Victoria, strokes and heart attacks are excluded,
(b) in Tasmania, heart diseases, aneurisms or prescribed injuries are non-compensable unless employment contributed to a substantial degree, and
(c) in other Australian jurisdictions there are no provisions dealing specifically with heart attacks and strokes.

The Committee received submissions that some "lifestyle" and degenerative illnesses (such as arthritic changes) are presently the subject of claims in circumstances where the workplace commonly has only limited connection with the illness.

The Committee also received submissions that there should be a tightening of s 9A of the *Workers Compensation Act*. Section 9A(1) provides (emphasis added):

> No compensation is payable under this Act in respect of an injury unless the employment concerned was a substantial contributing factor to the injury.

The Committee received submissions that the connection test of "a substantial contributing factor" should be replaced by a connection test of "the substantial contributing factor".

Also relevant is the definition of "injury" in s 4 of the *Workers Compensation Act*. That section provides (emphasis in paragraph (b) added):

> In this Act:
> injury:
> (a) means personal injury arising out of or in the course of employment,
> (b) includes:
>
> (i) a disease which is contracted by a worker in the course of employment and to which the employment was **a** contributing factor, and
>
> (ii) the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was **a** contributing factor to the aggravation, acceleration, exacerbation or deterioration, 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.'

Committee comment

'The Committee considers that eligibility to make claims for strokes and heart attacks should be tightened, but not altogether abolished. There will be some cases where work (e.g. a particularly demanding or stressful job situation) is the main cause of a stroke or heart attack.

A change of the kind proposed to s 9A of the *Workers Compensation Act* would not only affect "lifestyle" and degenerative illnesses, but all injuries. In no other Australasian jurisdiction is the general connection test as narrow as "the substantial contributing factor". A change this broad was not the subject of detailed submissions and the Committee prefers that it be examined in further periodic review of the Scheme.

The Committee considers that a more focused change would be one to the definition of "injury" in s 4 of the *Workers Compensation Act*.

The Committee considers that the definition of "injury" should be amended so far as it relates to diseases - not just strokes and heart attacks but others e.g. diabetes.'

Recommendation

'That the definition of "injury" in s 4 of the *Workers Compensation Act 1987* be amended so that a disease is only included if the employment was the main contributing factor to the contraction, aggravation, acceleration, exacerbation or deterioration of the disease.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Resolved, on the motion of Mr Speakman: That paragraph 3.188, which reads 'The Committee has not had the benefit of being informed of the historical background and context regarding the limited use of

commutations in the Scheme. On this basis, and noting the qualified views of most stakeholders, the Committee is of the view that a cautious approach should be taken' be omitted, and that the following paragraph and recommendation be inserted instead:

> 'The Committee is not convinced that liberal availability of commutations leads to a "lump sum culture". It has considerable sympathy for the views of the NSW Self-Insurers Association and the NSW Bar Association on this point. Any "culture" is more likely to stem from the size and scope of the underlying benefits, rather than from an ability to commute them. Commutations have the potential to reduce ongoing administrative costs. If they release an injured worker from the "system", he or she has a greater incentive to return to work than if kept on a "drip feed". The Committee considers that commutations should be much more freely available. They should be generally subject to the proviso that the injured worker has obtained independent legal and financial planning advice before agreeing to a commutation'
>
> **Recommendation**
> 'That the availability of commutations be liberalised, should be generally subject to the proviso that the injured worker has obtained independent legal and financial planning advice before agreeing to a commutation.'

Resolved, on the motion of Mr Speakman: That paragraph 3.199 be amended by omitting the word 'fiduciary' after the words 'reflective of the'.

Mr Speakman moved: That paragraph 3.215, which reads as follows, be omitted:

> 'In describing the human impact of the reform option with respect to the assessment of whole person impairment threshold, Ms Mallia gave the following in evidence to the Committee:
>
> > All these men had part of their leg amputated as a result of a crane accident at work. No normal, reasonable person could possibly say that these men do not have serious injuries or deny them the right to claim work injury damages for their loss of earning capacity. The alternative is a paltry weekly sum until the age of 66, or for two years if at the end of the day benefits are cut off.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Searle moved: That the following sentence be inserted after paragraph 3.216: 'In these circumstances, the Committee does not support any further restriction to workers accessing Work Injury Damages.'

Question put.

The Committee divided.

Ayes: Mr Daley, Mr Searle
Noes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green

Question resolved in the negative.

Mr Khan moved: That paragraphs 3.216 to 3.219, which read as follows, be omitted:

> '3.216 The Committee notes a lack of specificity in the Issues Paper as to the rationale underpinning the proposal and the expected impacts of the reform.

3.217 The Committee notes the divergence of views on this reform option, and acknowledges that there was some confusion in submissions received which reflected the vagueness of the option in the Issues Paper.

3.218 The Committee notes that this option received broad support from across the insurance, business and industry sectors, which supported the concept of uniformity across the law of negligence in NSW.

3.219 The Committee acknowledges the views of some stakeholders who asserted the reform as framed in the Issues Paper, which suggests that the principles underpinning work injury damages diverge from those applicable under the Civil Liability Act and would benefit from harmonisation, is misleading. The Committee also acknowledges that some of these stakeholders have suggested that to attempt to align them would, in fact, result in a divergence between the law applicable to work injury damages and general negligence claims.'

and that the following paragraph and recommendation be inserted instead:

'The Committee considers that the provisions of the *Civil Liability Act* should extend to include work injury damages claims. However, the Committee considers that, as suggested by the NSW Bar Association, the application of the *Civil Liability Act* to work injury damages claims should be modified by inclusion of some additional sections dealing with the workplace, in particular inherently dangerous activities and obvious risks.'

Recommendation

'That the *Civil Liability Act 2002* be extended to work injury damages claims, but modified by inclusion of some additional sections dealing with the workplace – in particular inherently dangerous activities and obvious risks.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Resolved, on the motion of Mr Speakman: That paragraph 3.224 be amended by omitting the words 'The Reform Costing Report does not give an indication of what impact the reform package would have on the Scheme's $4.1 billion deficit' from the beginning of the paragraph.

Resolved, on the motion of Mr Speakman: That paragraph 3.247 be amended by inserting the words 'for the most part' after the words 'acknowledges that'.

Mr Speakman moved: That paragraph 3.248 be amended by omitting the first sentence which reads: 'The Committee considers that there is insufficient evidence of the financial impact of reform options to enable it to make an appropriate finding or recommendation with respect to the adoption or otherwise of particular reform options proposed in the Issues Paper'.

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Speakman moved: That paragraph 3.249 be amended by inserting the words 'at a high level' after the words 'The sixteen reform options outlined', and by omitting the second sentence which reads: 'However, the Issues Paper itself did not provide a great deal of detail about each reform option, how it would work in practice, or indeed the problems it was attempting to resolve.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green.
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Resolved, on the motion of Mr Speakman: That paragraph 3.252 be amended by inserting the word 'precise' before the words 'financial impact'.

Resolved, on the motion of Mr Speakman: That paragraph 3.252 be amended by omitting the word 'highly' before the word 'qualified'.

Mr Speakman moved: That paragraph 3.252 be amended by omitting the words 'on the information contained within the PricewaterhouseCoopers report, *Inquiry into the NSW Workers Compensation Scheme – benefit package costing'* after the word 'caveats'.

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Speakman moved: That paragraph 3.252 be amended by omitting the words 'Even some stakeholders who supported the reforms qualified their support on the basis that they have not been costed' from the end of the paragraph.

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green.
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Speakman moved: That the following words be inserted at the end of paragraph 3.252: 'Nevertheless the costings provided by PricewaterhouseCoopers provide reasonable guidance to the likely cost savings of implementing a reform package.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Resolved, on the motion of Mr Speakman: That paragraph 3.253 be amended by omitting the first sentence, which reads: 'It is clear, however, that many of the reforms will result in cost savings.'
Mr Speakman moved: That the fifth bullet point in paragraph 3.255, which reads 'The uncertainty as to the impact of the reform package contained in the Issues Paper on the Scheme's deficit' be omitted.

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Speakman moved: That the following paragraphs be inserted after paragraph 3.255:

> 'The Committee has taken all these considerations into account in reaching its recommendations in this report.
>
> Given the (understandably) urgent time frame that the Committee has been given, the Committee's recommendations have concentrated on reversing the Scheme's poor financial position, by recommending changes to the Scheme for which it is possible to forecast a quantifiable effect, albeit indicatively and not precisely. Cost savings may well be possible, and return to work performance improved, by changes to WorkCover's general operations, including guidelines, claims handling, Scheme Agents structure and the like. However most of the evidence which the Committee received on those topics (while often passionate and forceful) was impressionistic, unquantified, unquantifiable and often disputed. The serious concerns expressed in these areas warrant further review and investigation, but the Committee can have no confidence that changes in those areas would produce the major cost savings needed in order to avoid cost savings instead through restructuring benefits.
>
> The Committee expects that some people will object to its recommendations as being "harsh" or "unfair". But workers compensation should not be an open ended welfare scheme. When considering "harshness" and "unfairness", the reader needs to compare the position of workers under the proposed benefit reforms with the position of many people who have accidents each year outside the workplace or who are born with serious disabilities. Those people are commonly limited to social security (including Medicare) unless they are privately insured. Workers have, and will continue to have, preferential treatment in accident compensation.
>
> Unlike damages for a civil wrong at general law, workers compensation is not intended to place a worker fully in the position he or she would have been but for the injury. It is a no fault scheme which has to be affordable and, like insurance generally, therefore subject to realistic limits and exclusions.
>
> Restructuring of benefits is not a matter of "blaming" workers for the Scheme's current financial predicament. Rather it is a function of the Scheme having to live within its means. An alternative of premium increases would have an unacceptable effect on the NSW economy and jobs. Complementary or alternative measures in the form of operational and administration changes may well be worthwhile, but at the moment they have no measurable assurance of cost savings.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green.
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Speakman moved: That Chapter 2, as amended, be adopted.
Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green.
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Stokes moved: That Chapter 3, as amended, be adopted.

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green.
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Chapter 4 read.

Resolved, on the motion of Mr Khan: That the first sentence of the second unnumbered paragraph on page 81 be amended by omitting the word 'an' after the word 'prohibits' and inserting instead the words 'a detailed', and that the words 'all of' be inserted after the words 'the merits of'.

Resolved, on the motion of Mr Khan: That the final sentence of the second unnumbered paragraph on page 81, which reads as follows, be omitted: 'While the Committee has not attempted to examine each of the proposals, a small number that drew particular attention during the hearings are briefly examined.'

Mr Khan moved: That paragraph 4.1 be amended by inserting an additional dot point after the second dot point on page 81 to read 'The prudential requirements of self insurers', and by inserting the words '(see discussion below)' after the word 'only' at the end of the fifth dot point on page 82.

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Green, Mr Khan, Mr Speakman, Mr Stokes
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Resolved, on the motion of Mr Khan: That paragraph 4.9 be amended by omitting the word 'notes' after the words 'The Committee' and inserting instead the word 'accepts'.

Resolved, on the motion of Mr Khan: That a new recommendation be inserted after paragraph 4.10 to read as follows:

Recommendation

'That the New South Wales Parliament establish a joint standing committee of the Parliament:

- to conduct ongoing oversight of the New South Wales Workers Compensation Scheme by undertaking annual reviews of its operation, management and performance,
- to conduct an extensive review (see Recommendation [X] below), and
- with the capacity to engage actuarial expertise to assist it to perform its functions.'

Resolved, on the motion of Mr Khan: That Recommendation 1 be deleted following paragraph 4.68 and inserted instead after the new recommendation inserted after paragraph 4.10, as follows:

Recommendation

'That the NSW Government commence an extensive, detailed review of the New South Wales Workers Compensation Scheme to develop a comprehensive strategy aimed at addressing the long term viability of the Scheme and enhancing the management and administration of the Scheme. In conducting the review, consideration should be given to statutory and non-statutory reforms that reflect the breadth of the Scheme, including, although not limited to:

- Improvements in WorkCover's management and administrative systems
- Feasibility of permitting more specialised insurance for certain industries, particularly those industries considered 'high risk'
- Establishing a centralised information and technology system within the Scheme
- Feasibility of establishing an independent medical assessment service
- An examination of workers compensation schemes in other jurisdictions, particularly the Victorian model.'

Resolved, on the motion of Mr Khan: That paragraph 4.21 be amended by omitting the word 'notes' after the words 'The Committee' and inserting instead by the word 'accepts'.

Resolved, on the motion of Mr Khan: That a new recommendation be inserted after paragraph 4.23 to read:

Recommendation

'That the New South Wales Government re-open the opportunity for specialised insurance arrangements, with appropriate prudential supervision and safeguards.'

Resolved, on the motion of Mr Khan: That the seventh dot point in paragraph 4.24 be amended by inserting the words '(see discussion below)' after the words 'no dependents'.

Mr Khan moved: That paragraph 4.24 be amended by inserting a further dot point after the seventh dot point to read: 'Introduce a higher threshold for whole person impairment lump sums (see discussion below).'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Resolved, on the motion of Mr Khan: That paragraph 4.24 be amended by inserting the words '(see discussion below)' after the words 'recess claims' in the ninth dot point.

Mr Khan moved: That the following new heading, paragraphs and recommendation be inserted after paragraph 4.24:

Removal of payment of death benefits where there are no dependants

'The NSW Bar Association submitted that "[d]eath benefits should not be payable unless they go to dependants of the worker that died". [Footnote: Submission 77, NSW Bar Association, p 2.]

Mr Jeremy Gormly, Chair, Common Law Committee, New South Wales Bar Association expanded on this in oral evidence: [Footnote: Mr Jeremy Gormly SC, Chair, Common Law Committee, New South Wales Bar Association, Evidence, 21 May 2012, p 56.]

> On the death claims, our objection to that is not so much that it affects a lot of people. I do not think it does. But the objection is that it is just absurd to have a workers compensation system where a chunk of money goes into someone's estate when they have no dependants. If they have left their entire estate to the cat home, then the money, the nearly half million dollars, is going to be buying cat food. Where is the logic in that? It is completely inconsistent with the compensation scheme. It is just absurd.

The Committee agrees with these observations of Mr Gormly, and various other witnesses. The payment of death benefits from the Scheme where there are no dependants is not a core function of a workers compensation and injury management scheme. It is particularly inappropriate to have such benefits in the Scheme's current financial circumstances.'

Recommendation

'That the *Workers Compensation Act 1987* be amended to remove the entitlement of the estate of a worker to receive a death benefit where the worker had no dependants.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Khan moved: That there then be inserted the following new heading, paragraphs, committee comment and recommendation:

Thresholds for Permanent Impairment Lump Sums

'In New South Wales the current thresholds for accessing statutory permanent impairment lump sums are 1 per cent for general whole person impairment (WPI), 6 per cent WPI for binaural hearing loss and 15 per cent WPI for psychological injury. [Footnote: Issues Paper appendix 3 *Comparison with other Australian jurisdictions* row 13.]

The Issues Paper notes:

> Many claims for whole person impairment result in small assessments. Workers frequently make successive, or 'top-up', claims for deterioration following on from a work injury….

In South Australia and Tasmania there is a general threshold of 5 per cent WPI. In the Commonwealth scheme the general threshold is 10 per cent WPI. In Victoria there is a 10 per cent WPI threshold for physical impairment and 30 per cent WPI threshold for psychiatric impairment.' [Footnote: Issues Paper appendix 3 *Comparison with other Australian jurisdictions* row 13.]

Committee comment

'Consistent with the approach of attempting to reduce dispute, administration and legal costs, the Committee favours increasing the general threshold from 1 per cent WPI to 10 per cent

WPI for lump sum payments for permanent impairment. This would place NSW in the same position as two other large schemes, Victoria and the Commonwealth. The claims excluded by increasing the threshold would be fairly modest (less than $13,750 and as little as $1,375). The Committee considers however that all savings achieved by raising the threshold for permanent impairment should be "redistributed" to those exceeding the threshold and particularly those workers defined as severely injured.'

Recommendation

'That the *Workers Compensation Act 1987* be amended to increase the thresholds for permanent impairment lump sums under s 66 of the Act from the current 1 percent WPI (general) and 6 per cent WPI (binaural hearing loss) to 10 per cent, but on the basis that savings be "redistributed" in the form of higher permanent impairment lump sums for those with at least 10 per cent WPI and particularly those workers defined as severely injured (with a 15 percent WPI threshold to be retained for psychological injury.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Khan moved: That there then be inserted the following new heading, paragraphs, committee comment and recommendation:

Removal of Recess Claims

'The Committee received evidence of anomalies arising from the availability of entitlements arising from injuries sustained during recess breaks at work. Amongst those to address this issue were the NSW Workers Compensation Self Insurers Association and NSW Farmers.

Mr Paul Macken, Legal Advisor, New South Wales Workers Compensation Self Insurers Association explained the position to the Committee as follows:

> Mr MICHAEL DALEY: So you support it nonetheless. Could you explain a [recess] claim to me? On page 5 your submission states:
>
> > The Association supports the removal of coverage of workers compensation for journey claims and says further that coverage for "recess" claim should also be removed.
>
> I have not heard that expression.
>
> Mr MACKEN: Journey claims are covered under section 10, [recess] claims under section 11. If somebody takes an ordinary recess from work that they take away from work and they sustain an injury, they are still covered even though the employer has no particular responsibility or ability to oversee what happens in that situation. Visiting that on the employer we say philosophically is a bad decision. [Footnote: Mr Macken, Legal Advisor to the New South Wales Workers Compensation Self Insurers Association, Evidence, 21 May 2012, p 31.]

Similarly, when giving evidence to the Inquiry, Ms Fiona Simson, President of NSW Farmers Association, said:

> Our employers provide, and are very focused on providing, a safe workplace. If the employees in their recess do something that is potentially unsafe, which is very easy to do on a farm—and there is a celebrated case of shearing contractors in the Central West with the fish hook in the eye—that sort of activity then, clearly, we do not see as a worker's compensation issue, if they choose to do that sort of thing in their breaks.'

[Footnote: Ms Fiona Simson, President, NSW Farmers Association, Evidence, 25 May 2012, p 91.]

Committee comment

'The Committee accepts the philosophy that the core circumstances with which a workers compensation and injury management scheme should deal are those over which the employer has (at least limited) control.

The Committee accepts that there are competing arguments whether a workers compensation and injury management scheme should extend to the ancillary circumstances of recesses. However, the Committee believes that, given the Scheme's poor financial position, a conservative position must be taken at the present time with respect to benefits available under the Scheme and that therefore recess claims should be restricted.'

Recommendation

'That the Scheme's liability for injuries sustained by workers during recess be limited to circumstances where the employment has been the significant contributing factor.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Resolved, on the motion of Mr Searle: That paragraph 4.25 be amended to insert a new bullet point after the fifth bullet point to read: 'A review of the premium model in the light of the behaviour it encourages. [Footnote: Submission 272, Coal Services Pty Limited, p 7] This is consistent with the evidence of employer interests generally: "premium should reflect … historical level of risk." [Answers to questions taken on notice during evidence 25 May 2012, Mr David Humphrey, Senior Executive Director, Business Compliance and Contracting, Housing Industry Association, p 2.]'

Resolved, on the motion of Mr Khan: That the following new heading, paragraphs and recommendation be inserted after paragraph 4.25:

Improving competition in the market

'The Committee received various submissions regarding deficiencies in competition between Scheme Agents. Mr David Castledine, Chief Executive Officer of the New South Wales Branch of the Civil Contactors Federation gave evidence including the following: [Footnote: Mr David Castledine, CEO New South Wales Branch, Civil Contactors Federation, Evidence, 28 May 2012, p 18.]

> The Hon. ADAM SEARLE: A lot of your submission … is very critical of the role of the scheme agents. What measures do you think could be put in place that would actually turn that performance around because it seems to me that a lot of what you say is wrong with the system, they are the sort of gatekeepers for a lot of those issues?
> Mr CASTLEDINE**:** I would say a sizeable portion but it is by no means only the agents; there are some significant structural problems and those problems go to the heart of I think the first major problem with the scheme and that is how the structure builds the relationship between employer and employee. But going to your question, it is very difficult for me to answer because I do not understand the contractual relationship, so the first question we must ask is: Is there enough legislative power for WorkCover to control agents? Is there enough contractual power for WorkCover to control agents? Does WorkCover have the skills and experience to control agents? Is

there the will to control agents?
If those questions are asked then we come back to one final question, and that is, is transparency ever a good thing in these sorts of arrangements and I think it is but we cannot see that. When my members come to me and say, "Which are the best agents?" I refer to a three-page report I pulled from the WorkCover website which is extremely difficult to follow and I then refer to WorkCover and ask them the question, and you see in my response the answer which they are obliged to provide under their current contract.

The Committee is persuaded that the level of information available to employers is presently inadequate. Performance by individual Scheme Agents will be improved by various mechanisms, however the Committee accepts that a significant contributor to Scheme Agent performance will be the willingness, or otherwise, of employers to take out policies with individual Scheme Agents.'

WorkCover Premium Calculation
'The Committee notes that the WorkCover premium system provides for experience rating of employers with a basic premium in excess of $100,000. This represents 12 per cent of employers.

Employers with premiums of less than $100,000 are not experience rated.

The Committee accepts that an experience rated system provides incentives to employers, both with respect to a achieving and maintaining a good safety record and also as an inducement to employers to accept workers back into the workplace on suitable duties.

The Committee accepts the recommendation of the Business Chamber that there is a the need to develop a new premium system which is fair and balanced and rewards employers who make little use of the system and motivates those who need to improve their safety performance.'

Recommendation
'That the New South Wales Government review the WorkCover premium system to extend the experience rating system to create incentives for employers both with respect to safety performance and return to work of injured workers.'

Mr Khan moved: That a new paragraph and quote be inserted after paragraph 4.33 to read:
'Dr Michael Gliksman, NSW Councillor, AMA gave the following evidence:
Dr GLIKSMAN: Coming back to where the resources could be found in terms of the powers, as well as the resource to which [Dr] Peter [Burke] made mention—the AMS [approved medical specialist] and the assessors with the Motor Accident Authority in relation to that—the specialist colleges, including the College of General Practitioners would be more than willing, I believe, to provide independent expertise in that regard. I make mention of the College of General Practitioners particularly—I am not a general practitioner, I might add— because general practitioners by and large feel left out of decisions in the system and yet are responsible for a great deal of the effort provided. A college input into issuing guidelines would be of great value to general practitioners who would require the back up of their college. I think it would be a well worthwhile step.
May I address the other issue that Peter mentioned, and that is of causation? Both [Dr] Peter [Burke] and I work on both the Workers Compensation Commission and the Motor Accidents Authority. In the Motor Accidents Authority the medical assessor addresses both causation and percent impairment. To access the system does not require there to be an established motor vehicle related injury.

> Causation is determined by the medical practitioner. In the workers compensation system that is not the case. To gain access to the system under the Act causation needs to be shown beforehand and that causation is decided by a non-medical practitioner—qualifications, possibly legal. Once that is accepted as being an accident – ...
> Dr GLIKSMAN: … It really is outside the expertise of those who make a decision on causation but that is done to allow access to the system. Once it is done the assessor, the AMS, cannot change it. It is cause. It has been determined that this problem has been caused by this particular work-related event. All we can decide on is per cent impairment. In my view, and I think Peter has given a good example of it, there are some ludicrous things that get through that would not get into the Motor Accidents Authority scheme. My off-the-cuff estimate is about a third of the cases that are accepted in the workers compensation system and then proceed through impairment assessment would not get to first base in the Motor Accidents Authority scheme.' [Footnote: Dr Michael Gliksman, NSW Councillor, AMA, Evidence, 28 May 2012, pp 4-5.]

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Mr Searle moved: That a new sentence be inserted at the end of paragraph 4.38 to read: 'It is noted that unions and legal groups do not support such an idea. In the absence of any detailed proposal that can be properly considered, the Committee cannot support this idea.'

Question put.

The Committee divided.

Ayes: Mr Daley, Mr Searle
Noes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green

Question resolved in the negative.

Mr Khan moved: That the following new paragraph and recommendations be inserted after paragraph 4.38:

> 'The Committee is alarmed by the evidence given by AMA representatives that about a third of cases referred for impairment assessment are not work related.'
>
> **Recommendation**
> 'That the *Workers Compensation Act 1987* be amended to allow greater use of medical assessors to determine questions of causation.'
>
> **Recommendation**
> 'That the *Workers Compensation Act 1987* be amended to adopt a model of medical assessment for injured workers similar to that used within the Motor Accidents Scheme.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.
Resolved, on the motion of Mr Searle: That the following new paragraph and recommendation be inserted after paragraph 4.41:

> 'Given the financial and other impacts on workers of not returning to work, the Committee recommends that each of the ideas contained in paragraph 4.40 be fully explored by the proposed joint standing committee.'
>
> **Recommendation**
> 'That, given the financial and other impacts on workers of not returning to work, the New South Wales Government ensure that each of the ideas contained in paragraph 4.40 be fully explored by the joint standing committee proposed at Recommendation X.'

Resolved, on the motion of Mr Searle: That the following paragraph and recommendation be inserted after paragraph 4.43:

> 'We note that in its peer review, Ernst and Young stated at p5 that "In our experience it is possible to arrest deterioration and improve the claims experience by improving claims management and WorkCover guidelines" and that "a very high priority needs to be given to these issues." The Committee agrees and recommends that the functions, behaviour and powers available to Scheme agents, and the guidelines to them from WorkCover, be reviewed to achieve better claims management outcomes.'
>
> **Recommendation**
> 'That the functions, behaviour and powers available to Scheme agents, and the guidelines to them from WorkCover, be reviewed to achieve better claims management outcomes.'

Resolved, on the motion of Mr Searle: That, paragraph 4.59 be amended by omitting the words 'may be some' after the words 'that there' and inserting instead the word 'is'.

Resolved, on the motion of Mr Searle: that the following paragraphs be inserted after paragraph 4.59:

> 'The Scheme actuary stated in his oral evidence to the Committee on 28 May 2012 that in his view WorkCover as an institution had not been properly invested in since it was created in 1987 to the level required in terms of capacity and capability. He cited the IT situation as well as the observation that, in his view, the number and caliber of people employed in the Victorian WorkCover Authority it larger proportionally compared to the NSW WorkCover Authority. [Footnote: Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers, Evidence, 28 May 2012, p 51] He said: "Its ability to do the things that you suggested is hamstrung by the extent that it has the right number of people and the right caliber of people to do that. If you want to set WorkCover up for success in the future, that needs to be considered." [Mr Michael Playford, Consulting Actuarial and Analytics Leader, PricewaterhouseCoopers, Evidence, 28 May 2012, p 51]'
>
> This is consistent with the submission from the Public Service Association, that when expenditure per worksite is compared the Victorian regulator has nearly twice as many resources as in NSW. [Footnote: Submission 174, Public Service Association, pp 12-13] This would have an impact on a range of functions, not only insurance but also safety inspections, enforcement and quite likely premium collections.'

Mr Searle moved: That the following paragraph and recommendation be inserted after paragraph 4.61:

> 'The Committee notes that despite the first reform principle in the Minister's *Issues Paper* being to "enhance NSW workplace safety by preventing and reducing incidents and fatalities" not one of the proposals put forward by the Government touches on how workplaces can be made safer and the rate of incidents or injuries can be reduced. This is a serious shortcoming that

reflects badly on the Government. The Committee further notes the halving of serious incidents over the last ten years in NSW and that this has occurred in an environment of vigorous prosecution of the strictest occupational health and safety laws in Australia. The Committee recommends that options to prevent and reduce workplace injury be a priority for both government and the joint standing committee proposed.'

Recommendation
'The Committee further notes the halving of serious incidents over the last ten years in NSW. The Committee recommends that options to prevent and reduce workplace injury be a priority for both government and the joint standing committee proposed.'

Mr Speakman moved: That Mr Searle's amendment be amended by omitting the first two sentences and by omitting the following words after the word 'NSW' in the third sentence: 'and that this has occurred in an environment of vigorous prosecution of the strictest occupational health and safety laws in Australia'.

Amendment put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Amendment resolved in the affirmative.

Original question, as amended, put and passed.

Resolved, on the motion of Mr Khan: That paragraph 4.65 be amended by omitting the words 'In addition, the review should consider workers compensation schemes in other jurisdictions, in particular the Victorian model' from the end of the paragraph.

Resolved, on the motion of Mr Khan: That paragraph 4.66, which reads as follows, be omitted: 'While limited evidence was taken on this matter during the Inquiry, the review should also consider allowing further specialisation of insurance to suit specific industries. It is possible that the current Scheme is too large and cannot effectively target benefits and support to injured workers across a broad range of industries and businesses.

Mr Speakman moved: That the following new paragraphs be inserted after paragraph 4.68:

'The Committee has been asked to review the NSW workers compensation system in urgent circumstances and in a tight frame. The Committee has made recommendations largely triggered by the Scheme's poor financial position. The Committee recognises that in the medium to long term, the Scheme should not be looked at in isolation. It should be examined as a part of a project to harmonise, so far as possible, accident compensation across different "systems" (eg work injury, motor accidents, "public liability") and across different Australian jurisdictions. The diversity of workers compensation across Australia, and indeed accident compensation across Australia, is a "dog's breakfast". A comprehensive harmonisation project has been beyond the reach of the present inquiry.
But it must happen in the future.'

Question put.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green

Noes: Mr Daley, Mr Searle

Amendment resolved in the affirmative.
Resolved, on the motion of Mr Stokes: That a new recommendation be inserted at the end of the chapter:

Recommendation

'That the New South Wales Government consider a comprehensive examination of opportunities to harmonise compensation schemes in New South Wales.'

Resolved, on the motion of Mr Searle: That the following paragraphs and tables be inserted after paragraph 4.39:

'This is supported by the submissions of the Australian Rehabilitation Providers' Association who gave evidence regarding the delays in injured works being referred by Scheme agents to rehabilitation providers, sometimes up to 31 months after the injury. [Submission 128, Australian Rehabilitation Providers Association, p 3.] ARPA also gave evidence of the significantly greater cost to the Comcare scheme when there is delay getting injured workers into appropriate rehabilitation and the savings achieved from early referral and treatment. [Footnote: Submission 128, Australian Rehabilitation Providers Association, p 2]

A 2011 study conducted by Cortex for ARPA discloses that return to work outcomes are more likely where referral of rehabilitation occurs within 12 months of injury, compared to after this time where successful return to work outcomes are greatly diminished. The study found 55 per cent of cases were referred to a rehabilitation provider after 2 years of injury. Nearly a third (31 per cent) were referred to a rehabilitation provider after years of injury. Nearly a quarter (24 per cent) of cases were referred to a rehabilitation provider between 6 months and 2 years of injury. 12 per cent of cases were referred between 3 months and 6 months of injury. A third (33 per cent) of cases were referred within 3 months injury. The study found that better return to work rates were achieved where referral occurred sooner:

Table 1 Referrals to rehabilitation for same employer services (where the worker is assisted in returning to their pre-injury employer) [Footnote: Submission 128, Australian Rehabilitation Providers Association, p 4.]

Delay to referral	Return to work Rate
0 – 6 months	80%
6 – 18 months	76%
18 months – 3 years	76%
➢ 3 years	60%

Total number of referrals: 8,747
Average delay to referral: 25.77 weeks

Table 2 Referrals to rehabilitation for new employer services (where the worker is assisted in returning to the workforce with a new employer) [Footnote: Submission 128, Australian Rehabilitation Providers Association, p 5.]

Delay to referral	Return to work Rate
0 – 6 months	50%
6 – 18 months	35%
18 months – 3 years	24%
➢ 3 years	19%

Total number of referrals: 7,857
Average delay to referral: 149.49 weeks

The ARPA evidence states that some 15 per cent of claims account for 85 per cent of claims costs. The reasons for this phenomenon require further investigation if there is to be a response

that is effective and fair.' [Footnote: Submission 128, Australian Rehabilitation Providers Association, p 5.]

Resolved, on the motion of Mr Khan: That Recommendation 2 following paragraph 4.68 be omitted:

Recommendation 2
'That the NSW Government seek to establish a joint standing committee of the Parliament of New South Wales to:

- conduct the extensive review (Recommendation 1); and
- conduct an ongoing oversight of the New South Wales Workers Compensation Scheme by undertaking annual reviews of its operation, management and performance.

The committee should have the capacity to engage actuarial and other expertise to assist it to perform its functions.'

Mr Khan moved: That Chapter 4, as amended, be adopted.

The Committee divided.

Ayes: Mr Borsak, Mr Blair, Mr Khan, Mr Speakman, Mr Stokes, Mr Green
Noes: Mr Daley, Mr Searle

Question resolved in the affirmative.

Resolved, on the motion of Mr Green: That the Committee Secretariat may correct any typographical errors and make necessary stylistic changes.

Resolved, on the motion of Mr Green: That the draft report, as amended, be the report of the Committee and that the Committee present the report to the House, together with transcripts of evidence, submissions, tabled documents, answers to questions on notice and to supplementary questions, minutes of proceedings and correspondence relating to the inquiry, except for any *in camera* evidence that has not been made public by the Committee and documents kept confidential by resolution of the Committee.

Resolved, on the motion of Mr Searle: That dissenting reports be provided to the Committee Secretariat by 4.30 pm on Tuesday 12 June 2012.

7. Adjournment

The Committee adjourned at 6.30 pm. *Sine die.*

Rachel Callinan
Clerk to the Committee

Appendix 8 Dissenting statements

BY MR MICHAEL DALEY MP

On 3 February 2012 the Minister for Finance and Services the Hon Greg Pearce MLC stated that the Government would *"fast track"* urgent reforms said to be necessary to the NSW Workers Compensation Scheme. It took the Government three months (2 May) to propose a parliamentary committee at which time matters were said to be so urgent it had to report in a matter of weeks.

Other comparable select committees have been afforded much longer periods of time. We believe the future of workers compensation in NSW is as important as those matters and that more time should have been given.

Had the Minister acted in February, the Committee would have had more time to develop a fairer, more balanced set of recommendations.

On 23 April 2012 the Minister released an *Issues Paper* which has been the focus of evidence and recommendations. The Minister stated that without *"substantial reform"* NSW businesses could face an immediate increase in workers compensation premiums of an average of 28%. This is despite the Scheme actuary PricewaterhouseCoopers stating that the Scheme could be brought back into full funding within 10 years by an average premium increase of only 8%. Premiums for employers have been discounted by $1 bn a year since 2005, a total of $7 bn to date.

The timeframe imposed upon the Committee was inadequate to do justice to the many submissions received and witnesses heard.

On 30 May 2012, the Minister confirmed that despite the committee process still being underway Parliamentary Counsel had been instructed to commence drafting legislation to modify the Workers Compensation Scheme.

We believe this is a breach of good faith by the Government and suggests the delay in establishing the Committee was deliberate and that the Committee process itself was just a device.

We reject the vast majority of the Committee recommendations.[494] Having regard to the terms of reference set for the Committee, one was the performance of the Scheme in promoting better health outcomes. Neither the Minister's *Issues Paper* nor the Committee recommendations has dealt with this. Although the Committee considered the evidence about return to work outcomes for injured workers and had something to say about that, the Committee has not proposed any definite course of action to improve this crucial area of scheme underperformance.

A further term of reference was to review the functions and operations of the WorkCover Authority. The Committee has not dealt with this subject matter at all.

Despite the first reform principle in the Minister's *Issues Paper* being to *"enhance NSW Workplace safety by preventing and reducing incidents and fatalities"*, not one of the proposals put forward by the Government, or the Committee, touches on how workplaces can be made safer and the rate of incidents or injuries can be reduced.

[494] Other than 2, 5, 16-18, 22, 25-27

We note the halving of serious accidents over the last decade and that this has occurred in an environment of vigorous prosecution of the strictest occupational health and safety laws in Australia, which is in the process of being undone by the present Government, commencing with the passage of the *Work Health and Safety Act* by the Parliament last year.

The Minister's *Issues Paper* is extremely thin and unpersuasive, lacking detail. It proposed only cuts to benefits of injured workers. It did not address the main identified cost drivers in the system. Half the scheme deterioration is due to external economic factors. The Government received actuarial advice that it was possible to arrest deterioration and improve the claims experience of the Scheme by improving claims management and WorkCover guidelines, and that a very high priority needs to be given to these issues. Neither the *Issues Paper* or the Committee recommendations deal with this.

The *Issues Paper* gave no indication of how and in what way the ideas contained within it would be implemented. During the Committee deliberations the Committee heard evidence which expressed a range of views from different stakeholders including unions, legal groups, injured worker groups, insurance and employer interests. However, even where employer and insurance interests indicated general support for one or more of the ideas in the *Issues Paper* it was qualified by the need to have such proposals fully developed and costed. The costings provided by the Scheme actuary can be seen as indicative only.

Time and space constraints do not permit us to discuss in any depth or detail the reform proposals, either as proposed in the *Issues Paper* or in the recommendations of the Committee. We note that they are being driven by the deteriorating financial situation of the Scheme including the assessment by the scheme actuary that the scheme is presently in a deficit of $4.083 bn.

However, we also note that the Scheme actuary accepts that these liabilities will be paid over many years, 40-50 years plus. That is not to deny the fact that the Scheme has significant liabilities or that there has been a deterioration in Scheme finances. However in the past whenever changes have been necessary for the Scheme, when benefit levels have been addressed, it has always been in the context also of movement in premium rates. The ruling out by the Committee of <u>any</u> premium increases is harsh and unfair. Any of the premium increase scenarios proposed in the actuarial report to bring the Scheme back into balance would still leave premium collections below 2005 levels.

The Committee decision on premiums has been fuelled by the fact that premiums in NSW are the second highest in Australia and they are *"too high"*. What is entirely missing in this area of discussion is any proper analysis regarding accident and injury rates, comparable wage and cost of living levels, and benefit levels between jurisdictions. Only with such information can any meaningful discussion be held regarding about whether the level of premiums in NSW really are too high or what the appropriate levels should be.

For example, NSW with 30.5% of all employees in Australia nevertheless have 34.5% of all serious injury claims in Australia. For 2009/10 there were 24.3 serious claims per 1000 workers in manufacturing in NSW and 17.1 serious claims in manufacturing in Victoria according to the National Data Set for Compensation Statistics. This indicates that the serious accident rate for manufacturing in NSW is more than 42% higher than in Victoria. This may well contribute significantly to the premiums in NSW being higher. We believe that premiums need to be set an appropriate level having regard to the actual evidence of the rate at which workers in industry are being injured. We note the evidence of employer interests generally accepts premiums should reflect risk.

BY HON ADAM SEARLE MLC

I agree and note the assessment by the Scheme actuary as to Scheme finances and the deficit. We accept that the approach and methodology used by the Scheme actuary has been conducted consistently over a significant period of time and accepted by previous governments. However, a number of the assumptions used by the Scheme actuaries in their deliberations were not able to be properly explored or tested given the way in which the evidence was taken and the extremely compressed timeframe. Most of the useful evidence in this regard came through answers to questions on notice rather than through oral evidence.

We note that the scheme actuaries use a particular standard whereas the NSW Lifetime Care and Support Authority has its liabilities assessed using a different accounting standard. The reasons advance by the Scheme actuary as to why WorkCover should not use the same accounting standard as the LTCS is unpersuasive and needs further examination.

A key factor in assessing the present value of future liabilities for the scheme is of course the use of a *"discount rate"*. The accounting standards require that a Government bond rate be used.

We understand that by a policy decision from NSW Treasury that it is the Commonwealth bond rate that is used. We do not understand, because we have not had the opportunity to investigate properly, why the Commonwealth Bond rate is "risk free" (and able to be used) whereas the NSW Treasury Bond rate is not. According to the Scheme actuary if the NSW Treasury bond rate was used it *"would have the effect of reducing the outstanding claims liability by almost 7%"*.

Applying the same accounting standard as applies to the LTSC and the average rate of return that has actually been achieved on scheme investments over the last decade (5.63% per annum) results in a scheme deficit of $2.232 bn. There are other lower possible estimates.

What the above shows is that depending on the assumptions used the assessment of where the scheme is financially can differ very markedly. While each approach discloses a deterioration in the scheme, the information set out above places the discussion about possible reforms to the scheme in a very different context.

We do not claim an actuarial expertise or purport to give any alterative valuation of the scheme liabilities, only to indicate that having regard to the totality of the evidence from the Scheme actuary appears to indicate that there are alternative criteria by which the schemes finances could be assessed. The time constraints has meant that we have not been able to explore these matters with the Scheme actuary further.

The Scheme actuary discloses that half the deterioration in the scheme finances is due to external economic factors. The evidence taken by the committee overwhelmingly indicates that the role of the scheme agents (insurers) has been a key factor in the deterioration of the scheme through claims management functions and failures to get injured workers into appropriate rehabilitation sufficiently soon.

All important stakeholders and the committee accept that there needs to be a thorough review of the Scheme and the role played by the Scheme agents and we believe that this should occur rather than embarking upon wholesale slashing of the benefits to injured workers. We note in this regard that compensation payments to injured workers have fallen by almost 20% from 2002 to 2010.

We believe that in particular having regard to the significant reduction in premiums over the last 7 years, modest premium increases could occur to stabilise the scheme while a more thorough review of needed systemic reforms such as the role played by scheme agents and their performance can be reviewed and developed. We note that actuarial evidence that scheme deterioration could be arrested and improved by improving claims management and WorkCover guidelines, and that a deterioration in the performance of at least some scheme agents has contributed significantly to the deterioration in scheme performance and, therefore, finances.

We are not blind to the need for the scheme to be properly financed and for the scheme to live within its means. When changes are needed all stakeholders must play their part. The Committee recommendations place the whole burden on the backs of injured workers only.

The evidence before the committee was clear that not nearly enough employers are able to or do provide for injured workers to return to work. Premiums have reduced by $1 bn a year since 2005, leading to a reduction in costs for employers in the State by some $7 bn. It is unnecessary, as well as harsh and unfair, that the entire burden of reform should fall upon those who are most vulnerable: namely the injured workers.

Any benefit reductions (such as cessation of benefits after some period, or the ending of medical benefits) should not occur in isolation but (if at all) only in the context of how persons who continue to be in need of support may be graduated to the proposed new National Disability Insurance Scheme.

These issues are manifold and complex and should be addressed in a mature and considered fashion, not a bonfire of the rights of injured workers. The delay in establishing the Committee by the Government and the fact they have commenced drafting legislation prior to the Committee's deliberation, indicates the Government lacks *bona fides* in this process.