ASU/USU Submission

First Review of the Workers' Compensation Scheme

NSW Government
Standing Committee on Law and Justice

Submitter:	David Smith, National Secretary, Australian Services Union Graeme Kelly, General Secretary, United Services Union
Organisation:	Australian Services Union, United Services Union.
Address:	Level 8, 321 Pitt Street Sydney NSW 2000
Phone:	02 9283 9280
Fax:	02 9283 9270
Email:	rpotter@asu.asn.au
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The Hon. Shane Mallard MLC
Chair
Standing Committee on Law and Justice

By email: lawandjustice@parliament.nsw.gov.au

Dear Mr Mallard,

First Review of the Workers' Compensation Scheme

We refer to the above matter and write to you in your capacity as Chair of the Standing Committee on Law and Justice (***"the Committee"***).

We understand that the Committee is currently undertaking a review of the workers' compensation scheme in New South Wales including matters relating to the:

1. Workers' Compensation Scheme;
2. Workers' Compensation (Dust Diseases) Scheme;
3. Motor Accidents Scheme
4. Motor Accidents (Lifetime Care and Support) Scheme

The Australian Services Union, along with its state branch the United Services Union, represents more than 120,000 workers in New South Wales and would like to be heard on certain matters falling within the Committee's jurisdiction.

We should note that in 2012 the United Services Union made an extensive submission to the Joint Select Committee on the proposed NSW Workers Compensation Scheme. A copy of this submission is enclosed for your reference.

A number of the issues raised in the earlier submission persist with the current scheme and warrant revisiting as part of this review.

This is particularly the case given the scheme's apparent funding windfall which is predicted to grow to as large as $5 billion by 2019.

This windfall was brought about by excessive and short-sighted cuts in response to a specific 'point-in-time' economic climate arising towards the end of the last decade. This climate has since improved resulting in the abovementioned surplus.

Despite this surplus injured workers continue to feel the devastating effects of the 2012 changes, and we strongly submit that this act as the catalyst of a 'root and branch' evaluation of the current scheme and its inability to meet the practical needs of injured workers.

In particular, we point to the following key areas of improvement which we say could quite easily be addressed, resulting in practical benefits to injured workers engaging with the scheme.

a. **The definition of 'suitable employment' –** Under s 32A of the *Workers Compensation Act 1987* (***"the Act"***), 'suitable employment' is to be defined as 'work for which the worker is currently suited.' The assessment of whether there is 'suitable employment' available for an injured worker is directly linked to the determination of weekly benefit payable (see s 35 of the Act). However, this assessment cannot factor in a number of matters which would ordinarily form part of the assessment suitable employment, these include:

    i. Whether the work or employment is available;
    ii. Whether the work or the employment is of a type or nature that is generally available in the employment market
    iii. The nature of the worker's pre-injury employment;
    iv. The worker's place of residence.

    In practical terms this means that an injured worker may have his benefits reduced based on a finding that the worker is able to earn money in suitable employment despite the fact that this so-called suitable employment is not available in a location near the injured worker or may not even be available anywhere.

    This poses a significant problem for regional workers, who may have their benefits reduced based on a finding that there is suitable employment that they could undertake in a metropolitan centre many hundreds of kilometres away.

    This absurd result underpins a number of issues with the current scheme which seems to have little to no appreciation for the practical difficulties faced by injured workers.

    As a simple measure to improve benefits payable to injured workers deserving of support, it is submitted that the factors that are taken into consideration in assessing suitable employment be expanded to include questions about whether, from a practical standpoint, that work is actually available to the worker incorporating issues of geography and travel amongst others.

b. **Limit on permanent impairment claims** – Section 66(1A) restricts an injured worker from making more than one claim for compensation in respect of a permanent impairment. This means that once an employee make a permanent impairment claim in relation to an injury they are locked out from the compensation scheme in respect of that injury forever.

    The obvious difficulty that this creates is that often injuries will worsen over time and/or the medical assessment of an injury may change. Injured workers (and their advisers) are then placed in an entirely artificial position of determining when the best time to make a claim is. Instead of compensating an injured worker for their level of impairment, the practical effect of s 66(1A) is to force an injured into doing one of the following:

    i. Delay making a claim in case the injury worsens, thus denying them compensation in the present for a very real workplace injury; or
    ii. 'Gambling' that their present injury will not worsen in order to obtain the requisite level of compensation.

    Neither of these options represent an 'organic' method for assessing permanent impairment claims, rather it introduces an artificial restriction on the *number* of claims that can be made resulting in unjust outcomes for injured workers.

c. **Time limit for compensation payments** – Injured workers are denied compensation payments for medical treatments or services undertaken as a result of a workplace injury where that injury falls outside of specific time frames (two years from date of claim for less than 10% WPI, and 5 years from date of claim for 10-20% WPI).

   In light of the matters raised in section (b) above, this relatively short time frame in which medical expenses are covered places injured workers in the unenviable situation of being forced to determine whether to make a claim to meet growing medical expenses in the short term, or to delay making a claim to mitigate the risk of the injury worsening and to avoid being locked out of the compensatory scheme.

While there are a number of fundamental issues with the current scheme (see USU submissions from 2012), the above represent three relatively procedural changes which would result in substantively better outcomes for injured workers. These changes, alongside significantly greater compensation amounts flowing from the scheme's surplus, would reverse some of the damage brought about by the 2012 changes.

In summary, the Union submits:

1. The amendments to the Workers Compensation Act affected in 2012 were draconian and unfair to the workers in New South Wales.
2. The amendments affected in 2015 offered very limited relief from the 2012 amendments.
3. There needs to be a substantial revisiting of the operation of the 2012 amendments.
4. This submission has a narrow focus however that is not to say there are not a wider range of considerations that need to be addressed.

In responding to the Committee, some further matters the Union wishes to address are:

1. The liability of the workers compensation system to pay reasonably necessary medical expenses for injured workers.
2. Work capacity decisions generally, including the inherent unfairness and artificiality of the definition of suitable duties within Section 32A.
3. The inherently unfair restriction on impairment assessments and entitlements in a system where access to other compensation benefits by level of impairment.

In our view, cornerstone features of the work capacity decision process include:

1. The Workers Compensation Commission (the Commission) is excluded from determining work capacity decisions.
2. Injured workers are precluded from paying for legal services and considering disputing and disputing any work capacity decisions.
3. WIRO is precluded from giving Grants of Aid to solicitors to give legal advice to injured workers in relation to work capacity decisions.

There is a fundamental power imbalance between individual unrepresented workers and insurers in the current system and that power imbalance is not remedied by:

1. A 'fair notice' letter.
2. Internal reviews.
3. Merit reviews.
4. Procedural issues.

All of these review processes are undertaken against the background of a complex regulatory framework in which the insurer has access to resources beyond the scope of a worker. This imbalance extends to commissioning evidence and is exacerbated by unrealistic time periods to respond to evidence. The injured worker has limited resources or capacity to comprehend such wide ranging issues and limited capacity to identify what alternative evidentiary material could have been submitted.

The artificiality of the definition of "suitable work" produces a contrived and unrealistic result as to what is happening in the labour market in the real world irrespective of whether you were an injured worker or are fully fit.

In our view, having a system which creates an inherently unfair and biased assessment, is one which does not have regard to:

1. Whether the work or the employment is available;
2. Whether the work or the employment is of a type or nature that is generally available in the employment market;
3. The nature of the workers' pre-injury employment;
4. The workers place of residence;

As we have outlined above, workers who have limited educations, limited vocational skills or live in regional or remote areas of New South Wales and/or have limited access to public transport are automatically disadvantaged.

That disadvantage operates such that entitlement to weekly compensation is extinguished without any reference to suitable work in their labour market.

The remedies of this injustice are to:

1. Amend the legislation such that work capacity decisions can be addressed before the Commission and to allow multiple injuries to be considered when determining a workers residual work capacity.
2. Extend WIRO Grants for legal representation.
3. Delete sub-clause (b) from the definition of suitable employment within Section 32A.

This Union has many members some of whom unfortunately have been injured and have faced chronic long term restrictions in their capacity to work and are not able to engage in their pre-injury employment.

They reside throughout New South Wales generally and the current statutory provisions need urgent attention to stop the bias against employees in more remote locations and/or in locations where the range of employment opportunities are limited.

Medical expenses

59A

Whilst the amendments to 59A in 2015 were of some assistance, in the Union's view there is still a completely artificial disconnect between:

1. The need for reasonably necessary medical treatment and factors such as:
    a. The level of whole person impairment.
    b. The date they suffered injury and/or the date they were last incapacitated for work.

2. Issues of incapacity as distinct and separate from issues of reasonably necessary medical treatment.

These contrivances operate unfairly against a wide range of injured workers who are excluded from having long term security in terms of their medical management by the operation of Section 59A.

The Union strongly supports a position to return the provisions dealing with reasonably necessary medical treatment to what was in place immediately prior to the 2012 amendments.

Use of the WPI to determine the extent of entitlement to coverage for medical treatment and incapacity payments is contrived and necessarily unfair.

This unfairness is compounded when a worker is prevented by s66(1A) WCA and s322A of the WIM Act from having more than one claim or one assessment of their WPI.

The nature of injuries is often of a gradual deterioration and a rigid and artificial restriction on access to permanent impairment compensation and a WPI assessment deprives injured workers of any prospect of recognition and coverage for injuries.

This problem is most obviously demonstrated in a 'catch 22' situation where an injured worker requires surgery at a later date. Their WPI will (usually) be greater after a surgery, however if they do not proceed with an impairment claim now their coverage for medical expenses will expire 2 years after their date of injury or when they last received weekly payments.

Alternatively, if they do proceed with an impairment claim now, they deprive themselves of any subsequent WPI assessment (and potentially enhanced access to medical coverage) if this condition worsens.

The Union supports an amendment of s66(1A) and s322A to delete restrictions on impairment assessments and entitlements.

The Union would welcome an opportunity to discuss these issues or to be heard further on these issues as primary position remains one of restoration of the range of compensation available prior to the 2012 amendments. However, against that background the aforesaid matters are raised as issues of priority and are matters which can be the subject of comparably straight forward proper amendment.

Should you wish to discuss any of the matters raised herein please do not hesitate to contact Acting Assistant National Secretary Robert Potter on 0448 203 392.

Yours faithfully,

Robert Potter
Acting Assistant National Secretary
DP/CY

Submission from

New South Wales Local Government, Clerical, Administrative, Energy, Airlines & Utilities Union

To

Joint Select Committee on the NSW Workers Compensation Scheme

New South Wales Local Government, Clerical, Administrative,
Energy, Airlines & Utilities Union
(United Services Union)
Level 7, 321 Pitt Street, Sydney NSW 2000
Ph: 02 9265 8211
Fax: 02 9261 2265

10 May 2012

Authorised by Graeme Kelly, General Secretary

RESPONSE TO NSW WORKERS COMPENSATION SCHEME ISSUES PAPER

Preliminary Observation

The Scheme allegedly faces a range of issues, not least of which is due to the global financial crisis and the consequences thereof.

Those consequences should be viewed at a comparatively short term nature and should not be utilised as a basis for making longterm changes to the scheme.

It is not accepted that the assertions made in the Issues Paper as to the financial circumstances of the Fund are correct.

It appears that the auditors have not acted on the basis of conducting their own fact finding investigation but have been given a series of assumptions and based upon those assumptions have offered an opinion.

The rationale utilised by the Auditors is not transparent and whilst there may be corroboration for their methodology by peer review, that does not make it clear or transparent.

The current Scheme arises out of significant legislative amendments and procedures in part implemented in 2002 and such legislative amendments included:

1. Taking away Common Law rights from a wide range of injured workers.

2. Creating a new statutory scheme of compensation for whole person impairment and non economic loss, noting that such schemes were of far less value to injured workers than what was available under the Table of Maims, prior to 1 January 2002.

3. Such whole person impairment compensation having only been increased on one occasion despite 10 years of inflation. The purchasing power of claims pursuant to Section 66 and Section 67 has been compromised for nearly a decade.

4. A radical alteration to the manner in which disputes were to be addressed including the abolition of the relevant Court and the creation of a Commission.

5. Processes whether by way of direction or guidelines that limited the capacity of the insurers and the injured workers from negotiating a resolution to claims including pursuant to Section 66 in that if there was a difference of medical opinion there was no scope for compromise and the matter would simply be referred to an Approved Medical Specialist (AMS), allocated by the Commission.

6. A blind faith, which has not been substantiated that the training program for medical practitioners to work within the guidelines would obviate the potential for disagreement regarding Section 66 assessments.

This has not been the case and it is quite clear that there is a legitimate potential divergence of view and questions of medical assessment, the operation of the guidelines and interpretation.

To that end even when dealing with an AMS opinion from the Commission there has been a system of seeking leave to appeal, and then as appropriate appealing and this has also left open the scope for administrative law provision applications in the Supreme Court.

This has proved in many circumstances to be a cost penalty process in the Supreme Court and it should be common ground that the insurers have the money for such appeals rather than the workers.

There appears to be no cogent or compelling review of other costs referrable to the operation of the system including the bureaucracy associated with Workcover which is understood is funded out of the premiums, and how those costs may have varied. For instance where is the information as to what those costs were as at 1 July 2008 and how they have moved to date? Was that in accordance with the expectations or projections?

What monies are being paid to the various insurers to act as managers and again what have been the movements in those figures since 1 July 2008? Has the movement been in accordance with projections?

The only proposals appear to be about cutting benefits or potential benefits and it appears that there is a potential approach of robbing Peter to pay Paul.

If the contention is that there is a shortage of funds and there is a suggestion that an alleged serious injury of more than 30% should have an enhanced Section 66 payment, then that begs the question about where that money is to come from.

Injured workers have suffered enough with the implementation of the whole person impairment assessment and it is grossly inappropriate for their position to be further compromised and offended by having benefits for Section 66 of less than 30% reduced or eliminated.

It should be appreciated that having converted to a whole person impairment scheme that the impairment expressed in percentage terms may on its face appear to be quite modest e.g. 3%, 5% or 6%.

That does not translate into the underlying reality of how debilitating and/or incapacitating that impairment may prove to be.

It is naïve and superficial to suggest that automatically if you have a modest whole person impairment in percentage terms that you do not have a significant loss of economic capacity and/or a need for longer term medical management.

It is naïve or offensive or both to make generalisations about the motivation of injured workers.

If a worker is partially incapacitated and has a continuing work restriction, they do not simply resign to deliberately reduce their capacity to earn. Rather they are terminated.

There is no job sitting there waiting for them. They have to work very hard to try and find work as they are seen in the wider labour market as a potential liability. If the employer where they are injured is not prepared to make accommodations as to what constitutes reasonably practicable alternatives, it is bold to presume the open labour market will make such accommodations. There is every likelihood that their longterm capacity for work has been significantly impaired and restricted.

Submissions regarding Options for Change

It is difficult to address these possible Options in any detail as:

1. They are broad brush in character.

2. The costings are not included.

3. The source of the various suggestions is not identified and the rationale incomplete at best.

Having identified the alleged substantial and significant shortfall it should be appreciated that there is nothing intrinsically meritorious about any of the proposals.

Re: Item 1 – Severely injured workers

The number of workers in the State who would be assessed at 30% WPI on a per annum basis would be very modest indeed. Many solicitors would not see a client with that level of impairment from year to year.

Further it is undermining of the reality that you could be severely injured and have a whole person impairment of much less than 30%. Labelling someone as severely injured if they have a 30% WPI is simply "spin".

You could be a comparatively young worker who had had at least one spinal procedure and be less than 15%, yet you have a significant continuing disability and incapacity for work.

The picking of a figure of 30% is completely arbitrary, if such injured persons would have an increase in their income support the corollary is that some will suffer a loss.

Return to work assistance where feasible of course applies to every injury and as a general proposition you are referred to our observations above.

As to more generous lump sum compensation, on one view you are talking about coming off a very low base, to be more "generous".

Currently if you reach a 75% WPI you achieve the maximum of $220,000.00 and at 30% you are on $57,750.00.

It is not clear how the graduation on those scales would be varied however any worker who is 30% whole person impaired would have significant difficulties in returning to work. This is a specific example that raises the spector of robbing Peter to pay Paul.

Re: Item 2 – Removal of coverage for journey claims

This is a philosophical issue and it was under the Howard government that the journey claim benefits were taken from the Commonwealth scheme.

The obligation however is not simply during the course of employment but it is arising out of and/or in the course of the employment.

It should be recognised that there are circumstances where the insurers may have recoveries on behalf of the Scheme e.g. motor vehicle accidents where the injured worker is not at fault and there is a recovery from the CTP Insurer.

The coverage for journey claims is a longstanding provision and it is anticipated the actual net cost after recovery from third parties to maintain the existing provisions is comparatively modest. It is a provision that has been well tested and has been accepted bar for one short period as being in the public interest. There is no compelling argument for its removal.

Re: Item 3 - Prevention of nervous shock claims from relatives or dependants of deceased or injured workers

Again the propositions are advanced at a very broad level and there is no evidence that the legal costs are disproportionate or unreasonable particularly if we are dealing with a lump sum death benefit or weekly payments for dependents.

One would need to have the figures available from the WorkCover Authority to determine the extent of claim for psychological injury by relatives of deceased workers. The provisions would only have any applicability if the death of the deceased worker was brought about as a result of the negligence of the employer, which factor would reduce the total number. The proposition is vague and would need further evidence of the actual cost of such claims. From an objective point of view there seems little philosophical justification for disentitling the relatives of deceased worker killed as a result of his employer's negligence from bringing a claim for nervous shock arising from the death, as opposed to relatives of deceased persons killed in different circumstances.

Re: Item 4 – Simplification of a definition of pre-injury earnings and adjustments of pre-injury earnings

There should be no presumption that the calculations are inherently complex, rather it simply takes a degree of co-operation and one of the practical problems you can suffer is actually securing wage records from the employer to get a proper understanding of pre-injury earnings and/or patterns of earnings.

On the casualisation of the workforce is of limited relevance if any to the calculations of pre-injury earnings and adjustments for pre-injury earnings.

We still at the core of the industrial relations system have:

1. National employment standards including the protection of annual leave and long service leave and a range of other employment benefits.

2. Modern awards including a miscellaneous modern award that provides protection for national system employees.

3. A wide cross section of enterprise agreements which definitely must satisfy a better off overall test.

What is not clear is to what constitutes the "single measure of a pre-injury earnings".

Whilst there is always scope to argue simplicity, the difficulty we face with it is when the example is not given to you in a concrete form that you cannot address what they may or may not really be intended to cure and often the cure is worse than the disease.

Whilst the NSW Scheme does not take into account overtime and certain allowances when calculating total incapacity payments, it does take into account such payments for the purposes of average weekly earnings by reference to periods of incapacity beyond the first 26 weeks for partially incapacitated workers.

Further there is no guarantee that any such variation would lead to a closer reflection of the true position. Further there are many employees who simply work their allotted hours without overtime or penalties or other allowances.

Re: Item 5 – Incapacity payments – total incapacity

It is uncertain as to what the phrase "clinical recovery patterns" is meant to convey. It is not the glossary and whilst consideration could in theory be given to aligning with other systems, there is no presumption that the other systems have been aligned or developed for the purposes of clinical recovery patterns.

The suggestion that the initial six (6) month period of total incapacity payments as currently provided for by s.36 of the Act should be reduced to a lesser period so as to create "*an effective point for a financial return to work incentive to commence*" is bureaucratic waffle to obscure the thrust of such change to in effect starve the worker back to work. Whilst some simple fractures may have a healing period of between 6 and 13 weeks there are a vast number of workers who are still effectively totally incapacitated for work at the end of the first 26 weeks. 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.

Re: Item 6 – Incapacity payments – partial incapacity

This suggestion is rejected, partially incapacitated workers should not be presumed to be seeking to abuse the system. They are in a situation where the employers either refuse to provide them with suitable duties or terminated them or they are continuing to work with that employer but are not able to achieve pre-injury average weekly earnings. 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.

Typical examples include:

(a) An injured worker who is a longterm employee with a skillset focussing on working in a swimming pool environment who suffered an injury in 2007. Evidence was available that there was a 10% whole person impairment and the worker rather than maintaining that dispute accepted an alternative assessment of an 8% whole person impairment. The employer refused to provide suitable duties and the issue was taken before the Workers Compensation Commission without success in relation to the provision of such duties. The employer subsequently proceeded to terminate the employee on the basis they could not carry out their alternative duties and found no alternative role for the employee within the organisation.

That worker struggled on through their own initiative to find work and suffered a continuing substantial economic loss. In summary she would not have been able to meet her recurring commitments including house payments if she did not have the support of weekly payments of compensation which were resolved after some disputation. This worker was self supporting and had been a longterm employee.

(b) An injured worker who was a meat worker suffered a trauma to his hand in a saw. His whole person impairment was agreed at 7%. However he had a secondary psychological state and he was unable to maintain his pre-injury role. He was then restricted by two medical conditions in his capacity to compete on the open labour market and both the conditions regrettably were of longterm duration.

It is not the percentage of the impairment that determines the partial incapacity.

(c) There are many instances where people with impairments of greater than 15% have been able to return to pre-employment duties and pre-injury earnings.

(d) A butcher suffered an injury to his right shoulder when a carcass fell from a railing in 2008. He underwent surgery however he is unable to return to his pre-injury duties and is terminated. He has limited literacy skills or training and despite genuine efforts is unable to obtain alternative work and remains unemployed. His whole person

impairment was assessed at 3% even though he has a very significant loss of ,strength in his arm and inability to engage in repetitive or forceful work at or above shoulder height.

Financial disincentives is just a label and not a proposition of substance.

Re: Item 7 – Work capacity testing

This phrase is not defined in the glossary however there is already a process of assessment by periodic review with the treating doctor and the completion of Workcover Certificates. This includes liaising with the case manager from the scheme insurer and as appropriate the rehabilitation provider.

There is nothing magical about whatever a work capacity test may be and whether that will assist to be described as a functional assessment or described by some other manner. The reality is that there are workers who suffer longterm injuries and disabilities.

Ceasing weekly payments after a certain period for those with "a work capacity" is simply a way of saving money and does not assist anyone to move forward. Remember the only reason they are focussing on their future employment prospects is because they have already been terminated.

Whether you are dealing with total incapacity or partial incapacity the fact is that there is a real incentive in the system as it is currently devised.

If you are suffering a period of total incapacity and you are in the first 26 weeks, then you know as an injured worker you are only earning your base rate or broadly put your base rate and not a rate that includes overtime and penalties. Even worse if you are totally incapacitated beyond the 26 weeks, then you will go to the statutory rate which will vary subject to dependency.

Your incentive is to resume work albeit on a partially incapacitated basis where the workers compensation system will have regard to your average weekly earnings and this is the case whether it is within the first 26 weeks or thereafter. The incentive exists to endeavour to get back to a situation where you have security of employment, albeit with limited modifications if you have continuing restrictions earn your pre-injury earnings.

If you have been terminated, then the worker has experienced a period of uncertainty and dislocation. It is a matter of commonsense to be looking for certainty and earnings. Weekly compensation is significantly less than any workers pre-injury average weekly earnings.

Re: Item 8 – Cap weekly payment duration

If you have a long-term incapacity you should be entitled to longterm support. Simply because you have a lower level of whole person impairment does not mean you do not have a longterm and significant incapacity. It is not a reinforcement of perception. It is a reality.

It should be remembered in relation to all circumstances of incapacity that many employers look very seriously at terminating service and look only with great reluctance to rehabilitation into permanently modified duties or an alternative or different position. Indeed many employers will seek to rationalise that approach by reference to their obligations under workplace safety legislation.

They say it is not reasonably practicable to provide a safe working environment for a worker who suffered injury and accordingly to obviate the risk of prosecution, they terminate the employee.

Nowhere can it be seen in any part of the discussion paper where monies spent on rehabilitation have in fact been effective. That is not to say there should be no monies spent on rehabilitation however it is to say that rehabilitation and the expenditure of millions of dollars upon report writing is not of itself meritorious in getting injured workers back to work at any of the levels whether it is pre-injury or modified duties or an alternative role with a different employer. It is not about writing reports and arranging telephone conferences.

The New South Wales workers compensation system has always provided for long term payment of weekly compensation for either total or partial incapacity for work. Those arrangements have been in place since the inception of the Act in 1926. The only limitation upon the duration of weekly payments was made in 1985 when the Act was amended to limit the entitlement to weekly compensation for injuries received after 1 July 1985 to one (1) year after the worker's retirement age and eligibility for an age pension. Again, the notion that giving a total incapacitated worker a "*fixed*" timeframe during which they know they need to work towards a certain level of work readiness is simplistic and ignores the fact that many workers will never obtain a state of "work readiness", i.e. no loss of capacity to earn and/or no loss of earnings on a continuing basis.

Re: Item 9 – Remove "pain and suffering" as a separate category of compensation

The pain and suffering provisions of s.67 of the Act were introduced following upon abolition of common law entitlements via the 1987 amendments to the Act. The pain and suffering provisions were in many respects a token to compensate for loss of damages for pain and suffering at common law and it is generally acknowledged that the pain and suffering provisions fall well short of what would ordinarily have been payable to the same worker at common law for damages in respect of pain and suffering. To argue whilst that common law provisions were partially restored in 1989 and that lump sum payments for pain and suffering were not removed is disingenuous as the modified common law provisions only survived up until 2001. Since that date the common law provisions have been hugely narrowed and reduced allowing only workers with a 15% whole person impairment to be eligible to commence common law proceedings resulting in a situation where a vast number of workers injured through the negligence of their employer have no ability to bring

work injury damages proceedings and their only source of compensation for pain and suffering is the modest amount provided under s.67. To further reduce that already modest payment to such workers would represent a gross injustice consequential upon their inability to bring work injury damages proceedings for negligent acts no matter how carelessly or negligently occurring on the part of the employer. The notion of incorporation of pain and suffering into s.66 payments for persons having a whole person impairment of more than 10% does dramatically lose sight of the fact that the existing s.67 payment can be tailored to the particular needs of the individual injured worker whereas incorporation of an allowance for pain and suffering into s.66 would result in a "*one size fits all payment*" which would clearly be an injustice to particular workers where their particular injury has a greater impact upon them than a fellow worker.

There is already an objective assessment as to the monies that should be payable. It needs to be considered as against a "worse case" and regard is had to a number of objective variables which can vary from case to case. When you seek to bring the numbers together all you do is lower the potential for what the worker may recover. If you have a whole person impairment of 7% when you are 23 years of age do you really get the same pain and suffering money for someone who develops that whole person impairment when they are 63 years of age? The objective measure of physical impairment simply arises out of a manipulative political process which is the current whole person impairment scheme.

As advised there would be very few matters if any that are litigated to conclude solely on the basis of what is the Section 67 component.

Re: Item 10 – Only one claim can be made for whole person impairment

This again is treating a human being like a piece of machinery or a used factory part.

Injuries and the need for medical management can be addressed in the comparative short term by reference to maximum medical improvement however that test is not addressing the entire future of the injured worker.

Time and time again in reading medical reports when they are dealing with prognosis Doctors make the observation "guarded".

Many injuries by their very nature have longterm adverse consequences which involve:

(e) Regular medical review.

(f) The need for surgical intervention.

(g) Adverse consequences for the injured worker includes in terms of work capacity, early retirement and pain and discomfort.

Simple examples include:

1. A 25 year old suffering a fracture of the scaphoid. It is a classic moveable joint and there should be universal medical opinion to support the proposition that arthritic changes will develop in that joint due to the original fracture. It is virtually inevitable that there will be further surgery and you could well face a fusion of the wrist. This must increase the whole person impairment.

   This is not optional medical management or some lark in the park.

2. Back and/or neck injuries. Again doctors prudentially in their clients' interests assess the need for medical intervention including surgical intervention. It is not the first step, rather it is the last step. It could well be that the injured worker has sought to cope without surgery however the condition deteriorates such that there is a need for surgical intervention 5 or 7 years after injury. It is not a case it is not related to the injury rather it is a case of simply carefully and reluctantly coming to the need for surgery which manifests itself in greater whole person impairment.

3. An injured worker was established having suffered a 14% whole person impairment referrable to skin cancers. This assessment was made in 2009 with a diagnosis of premalignant and malignant skin lesions. That medical condition was signed off as having satisfied the maximum medical improvement by reference to having been medically stable for 3 months and unlikely to change substantially and/or by grading the 3% in the next 12 months with or without further medical treatment.

   However owing to the insidious nature of the condition ultimately further treatment was required in the form of significant surgery in 2011. Whilst that medical condition had not fully stabilised the injured worker has suffered a loss of sensation in the left ear, no sensation in the upper left side of the face and along the jawline together with a loss of the salivary gland on the left side and the removal of 28 nodes. In addition there is a loss of neck movement. To suggest this worker could not bring a further claim pursuant to Section 66 and Section 67 is grossly inappropriate.

4. A worker sustained a lower back injury in April 2008 and secured a whole person impairment of 6%. The worker was terminated because he was unable to perform pre-injury employment duties. He has been unable to find alternate employment. Required fusion surgery in late 2011 and clearly the impairment level has significantly increased although not stable.

5. A young lady sustained a neck injury in 2000. Surgery was performed in 2001. She was able to return to employment duties for a number of years. She suffered a deterioration in her condition and fusion surgery was required in 2011. She was terminated in her employment subsequent to second surgery.

6. Knee injury sustained in 2004. Meniscus repair was undertaken with a return to work. The worker suffered a gradual deterioration and knee replacement

surgery was required in 2010. The worker was unable to return to employment duties and was subsequently terminated.

7. A young man sustained a right knee injury in 2006. He has undergone 6 surgical procedures which have been largely unsuccessful in resolving his symptoms. He was advised he will require a total knee replacement however he is too young to proceed with this surgery. He is continuing to work with incapacity.

8. A labourer in the employ of a metropolitan council suffered an injury to his neck and knee when he fell from a truck in or about 2006. He was terminated as a result of his inability to return to his full pre-injury duties in 2007 and in 2008 he recovered monies pursuant to Section 66 based upon a 6% whole person impairment. His condition deteriorated and in 2010 he required a fusion and subsequently was assessed as having a whole person impairment of 18% together with clearly an entitlement to monies for pain and suffering (Section 67).

As soon as you recognise you are dealing with a human being the entire notion of limiting to a single assessment can be seen as a nonsense and grossly unjust.

Re: Item 11 – One assessment of impairment for a statutory lump sum, commutations and work injury damages

If we are dealing with one AMS to address 3 separate issues and subject to rights of appeal that the same AMS result will apply for work injury damages, commutations and/or statutory lump sum, then that may well be viable however it needs still to take on board and leave open:

1. Deterioration in the injury and disabilities.

2. Medical intervention.

3. Change in the Guidelines.

The notion of an impairment that is fixed in time to address multiple issues shows a lack of flexibility and failure to reflect reality.

Re: Item 12 - Strengthen work injury damages

The heading is a misrepresentation by failing to fully clarify what appears to be intended. From reading the notes accompanying the headline it is clear that what the headlines should in effect read is "*Strengthen an Employer's Defences to a Claim for Work Injury Damages*".

To seriously suggest that similar provisions that exist in the Civil Liability Act should become applicable to work injury damages situations shows a complete

misunderstanding of the relationship of employer/employee and a failure to grasp the essential rational behind the Civil Liability Legislation.

The Civil Liability Legislation was introduced in answer to the so called "*Insurance Crisis*" allegedly affecting Australia in 2001. The legislation was solely designed to reduce the instance of claims and reduce the cost of claims thereby hopefully creating a saving in insurance premiums. Many of the concepts contained in the Civil Liabilities Legislation cut across centuries of established common law principles dealing with the responsibilities of owners and occupiers of property, public authorities, roadway authorities and the like. The provisions of the Civil Liability Legislation were quite properly excluded from the operation of the Workers Compensation and the Motor Accidents Act.

There is a world of difference between the injury occurring to a person water skiing or jumping from a bridge into a river as opposed to an employee carrying out the lawful directions of his employer. In the former case the individual concern has complete control over his or her actions, in the later case the employee must comply with the employer's lawful demands and the terms and conditions of his employment. There is every reason to exclude the principles contained in the Civil Liabilities Legislation from the workplace.

The Civil Liability Act was a draconian and oppressive legislative reform which on balance is probably the worst outcome for any jurisdiction within Australia.

The general principles of tort law were departed from however there is nothing put in the submission that identifies the specific shortfalls nor any illustrations of where the ability of insurers and employers to defend the claims have been undermined.

Without more it is impossible to comment however the change can only be intended as an alleged cost saver and its intention is not clear.

What is not admitted is that if a worker recovers monies by way of a work injury damages claim there is no further claims for Section 66 or Section 67, medical expenses and/or weekly compensation. The settlement or judgment by way of damages operates as an automatic and final cap.

Within the executive summary prepared by Price Waterhouse Cooper when you look to Item 3.2 at page 16 dealing with lump sum payment for instance all you really have is an expression of a preference that is that some within the management of the scheme are opposed to lump sum payments, so they dress opposition up into a lump sum culture and as actuaries make generalisations about issues such as the whole person impairment being greater than 15%, proof of negligence and the 3 year statute of limitations etc.

The limitation period is not simply a strict 3 years and in fairness how could it be as the system already imposes constraints upon the injured worker commending proceedings including:

(a) They cannot commence such a claim within 6 months of the date of injury.

(b) They must have made a claim and recovered monies pursuant to Section 66 and Section 67 and this obviously involves a stability of a medical condition (one could imagine many circumstances where the medical condition is not stable owing to recurring medical management including surgical intervention for quite some time).

(c) Then there has to be particulars provided and a pre-filing mediation process before you even get to the District Court. All of those processes delay commencement and yet the way the document reads, the 3 year statute of limitations is intended to be used, as a threat hanging over the head of the worker.

Further there is nothing transparent or obvious about how these actuarial calculations have been prepared. Merely because two actuaries from different organisations agree does not lend credit to the proposition in the wider community. It is not known if these assessments are made by reference to actual payouts, demands or a combination of both.

In relation to the common law matters and the concern regarding the estimated fees date it should be appreciated:

1. It is not clear how this sum has been calculated and in that regard there are a wide range of variables that come into play including whether this figure has been calculated by:

   (a) Original letters of demand which is a necessary preliminary step; or

   (b) Actual payments; or

   (c) A combination of both.

   (d) Other

2. There would be many matters pending in the system which may only be at the demand stage and it needs to be understood:

   (a) A range of demands never proceed.

   (b) It is difficult to imagine any claim actually settling for the original demand figure.

Re: Item 13 – Cap medical coverage duration

Since all reasonably necessary medical expenses have to be satisfied this is simply a case of taking the cost of the medical services treatment out of the workers compensation system and moving it to either the public health system, the private health system (if a policy covers it) or out of the workers own pocket.

Alternatively if there is no system to support the worker for the treatment that is required they will face a long wait in the public health system and be left in a disadvantaged state.

If you are talking really about medical expenses that is one area, and it should not be lumped together with rehabilitation, legal costs etc.

Re: Item 14 – Strengthen regulatory framework for health providers

This is a big brother style provision and the looseness of the language does not assist to deal with what has been identified.

Evidence based treatment is not to be confused with what is reasonably necessary medical treatment and no doctor or health provider is going to identify their providing treatment with a view to maintaining dependency. It is the interventionist Workcover Authority that has reached a stage where they now want to tell the injured worker:

1. What surgery they should have.

2. What medication they should take.

3. Who should manage their medical condition.

A practical example of this intervention is an injured worker where there is initially a delay in accepting liability as there is controversy between insurers, broadly put and when liability is admitted a further controversy arises.

That controversy relates to the nature of the medical management required.

The worker and his treating orthopaedic surgeon propose significant surgical procedure. This has not been the first option and the decision has been reached that is the viable option.

The worker is flown to Sydney to see a specialist for the insurer and has a single short consultation. That specialist agrees that surgery is appropriate however wishes the worker to undergo a different surgical procedure.

The treating surgeon does not agree with this approach. In the meantime the worker continues to be in pain and discomfort.

Ultimately the insurer capitulates such that the worker can have the surgery recommended to him by his own surgeon and fortunately to date has had a good outcome in terms of symptomatic relief.

Re: Item 15 – Targeted commutation

It is not known who the industry experts are or the original of the alleged rationale of the Scheme however the reality is:

1. Many people are in receipt of longterm weekly payments of compensation and such payments are completely legitimate having regard to continuing incapacity.

2. Part of the complaints that are raised now are that there are too many longterm commitments.

Longterm commitments can be addressed by broadening access to commutation.

It does not need the paternal interventionist approach of the Workcover Authority, merely because the worker is injured does not mean he has lost his senses and subject to preserving the right to take independent legal advice and as appropriate financial advice, if the worker wishes to be out of the scheme by a process of commutation then so be it.

It is appropriate to utilise commutation and a greater flexibility is appropriate.

Re: Item 16 – Exclusion of strokes/heart attack unless work is a significant contributor

This is a poorly reasoned recommendation and the test already to be satisfied is quite strict namely there is a need to establish already that the injury arose out of or in the course of the employment and further that the employment was a substantial contributing factor. If those tests can be satisfied then the worker is entitled to compensation. Why set a higher threshold. There is no inconsistency, and it is simply a case of letting it be determined by the Commission as to whether it is a work related event or not, should liability be declined.

Re: Item 17 – Why change is needed

Workers compensation does not exist to enhance the growth of jobs.

Workers compensation is a statutory system of insurance to cover workers who suffered injury arising out of or in the course of their employment and it is a no fault system. Who would argue that compulsory third party insurance for your motor vehicle should enhance the growth of jobs. The short answer is no-one.

The affordability of workers compensation by reference to the premiums simply involves in this instance a race to the bottom when efforts are made to compare apples with oranges or different systems which have a different history of development. There is a fundamental misconception when thinking in terms of workers who are regarded as being less serious –v- more serious where the level of whole person impairment is pitched at 30%. That is absurd.

There is no incentive to return to work by simply capping weekly compensation for the allegedly less seriously injured. Rather there is a crude tool to limit the amount paid and to cap premiums.

Concluding Observations

Multiple factors may have led to the situation the Fund finds itself in at this stage, however that is not due to lazy, indolent workers who are not endeavouring to recover from their injuries.

Significant steps can be taken to enhance the capacity for productive employment for such injured workers who face longterm partial incapacities.

Such steps include:

Maintaining the Employment Relationship

Making it more difficult for the employer of the injured worker to simply terminate them in service and that is irrespective of whether it is after 6 months or 12 months or some longer period. Section 49 of the Workplace Injury Management and Workers Compensation Act is too often relied upon by the employer as a rationale for not providing work. A test of reasonably practicable should be an objective test which is totally transparent rather than the worker simply being provided with a conclusion there is no job and if an equivalent position is not available then at least the scope should be made available to explore whether there is a lower graded position or an alternative role that can reasonably be created to facilitate the worker maintaining the employment.

Indeed in certain environments the employer will argue there are barriers in offering an alternative position to the employee. For instance in local government the employer will argue that they simply cannot transfer the employee to another vacant position but rather they have to apply for the position and have it contested on the merits with either internal or as appropriate external applicants.

Training

Nor does the employer take steps to facilitate the injured employee having training and an opportunity to trial in the position before having to go through the merit based selection. The nature of retraining that is offered whilst in the employment, where the worker is injured tends to be very modest if any. The employer only wishes to offer training which relates to the pre-injury role and yet the worker may well realistically face an issue as to only being fit for a modified role.

Secondary Employment

The secondary employment scheme appears to have been very poorly utilised and/or grossly underutilised to provide the means by which injured workers can get a fresh start with alternative employers.

Alleged Workplace Safety Issues

Workplace Health & Safety laws should not be used as a battering ram for terminating injured workers. Too often it is heard that is not reasonably practicable to provide employment as there remains a risk of injury that the employer alleges cannot be managed.

Reinstatement

Reinstatement provisions for injured workers need to be enlivened such that workers are prepared to pursue such litigation if necessary. It is too easy for the employer to say no to an application for reinstatement in service of an injured worker within 2 years of the termination date. Once they have said no the worker has to take the matter to an Industrial Tribunal and does so in circumstances where there is no order for costs if he succeeds. These provisions should operate the same way as the Workers Compensation Commission operates that is if the worker is successful he will recover an order for costs. The worker is already under resourced in the contest to return to that workforce.

Rehabilitation

There needs to be a genuine targeting of the rehabilitation expenditure pattern rather than simply a bureaucratic tick a box approach. A genuine analysis is needed as to the effectiveness of the rehabilitation processes and whether it is cost effective.

Review of Workcover Guidelines

That the Guidelines that have been in place in and after 2001 as amended in and after 2007 be the subject of an open and transparent view to consider whether historically they have operated to facilitate the accepting of claims, including modified common law damages claims, without the appropriate analysis as to whether liability does arise and further inhibits decision making processes to review claims, as appropriate, to decline liability.

The Workcover Authority

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.

Premiums

A review of premiums, and indeed an increase in premiums should not be regarded as taboo. It has been asserted that there has been a loss of premium income in the order of 1 billion dollars per year. If this is correct, there needs to be a careful review of how this has occurred, and what is the appropriate approach to premium calculation.

Prospective Changes

Any changes to the Scheme should only operate prospectively and there should be true transparency as to the basis of the cost estimates to the Scheme, including the alleged savings associated with the Issues Paper.

Graeme Kelly

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Submission
No 32

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

Organisation: United Services Union

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