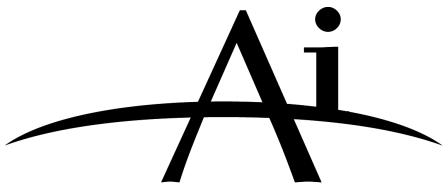
VICTORIA

REVIEW OF THE ACCIDENT COMPENSATION ACT AND RELATED LEGISLATION

SUBMISSION IN RESPONSE TO TERMS OF REFERENCE



AUSTRALIAN INDUSTRY GROUP

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		Page
1	INTRODUCTION	1
2	GENERAL CONTEXT	5
3	ENTITLEMENT AND EXCLUSIONARY PROVISIONS	8
3.1	Work-relatedness	8
3.2	Stress Related Injuries	11
3.2.1	*General application*	12
3.2.2	*Section 82(2A) exclusion*	13
3.2.3	*Onus of proof*	14
3.2.4	*Responses to management actions and decisions*	14
3.3	Journey and Recess Claims	16
3.4	Serious and Wilful Misconduct Exclusion	17
3.5	Hearing Loss Claims	17
3.6	Contractors – Deeming Provisions	18
3.7	Continued Entitlement to Benefits.	19
3.7.1	*Injured worker obligations to make every reasonable effort to cooperate and participate with rehabilitation and return to work.*	19
3.7.2	*Application of notional earnings*	20

Page

4 EMPLOYER COST ISSUES 22

4.1 Statistical Case Estimates 22

4.2 Section 138 – Indemnity by third party 23

4.3 Section 137 and 137A – TAC Recoveries 26

4.4 Section 125A – Employer Excess 27

4.5 The Cost of Poor Management by the Authorised WorkCover Agent 28

5 PROVISIONS RELATING TO REHABILITATION AND RETURN TO WORK 30

5.1 Provision of Suitable Duties 30

5.1.1 Period in which an employer is required to provide duties – 155A 30

5.1.2 Exemption clause – 155B 32

5.2 Rehabilitation and Risk Management Programs 33

5.2.1 Consultation when developing programs 34

5.2.2 Prescribing additional matters 34

5.3 Risk Management Program 34

5.4 Return to Work Plans 35

5.5 Return to Work Coordinators 37

5.5.1 The name 37

5.5.2 Skills and competencies 37

Page

5.6 Related Issues 39

5.6.1 The role of doctors – GPs and occupational physicians 39

5.6.2 The role of a section 113 medical certificate 40

6 ADMINISTRATIVE SYSTEMS 41

6.1 Understanding the Relationships, Responsibilities and Accountabilities 41

6.2 Conciliation Processes 43

6.2.1 The role of the employer 43

6.2.2 Introduction of new information 44

6.2.3 Transparency of conciliation outcomes 45

6.2.4 Genuine dispute certificates 45

6.3 Claim Lodgement 46

6.3.1 Medical and like expenses 46

6.3.2 Weekly compensation 46

6.4 Access to Information about the Claim 47

6.5 Section 114E – Interest 48

6.6 Section 114F – Recovery of payments 49

6.7 Incentives to Employ Long Term WorkCover claimants 49

Page

7 LEGISLATIVE STRUCTURE 51

7.1 Structure and Wording of the Act 52

7.1.1 Section 5A – Pre-injury average week earnings (PIAWE) 52

7.1.2 Section 93F – Compensation after retirement 52

7.1.3 Section 97(4) – Inability to sign away rights to future compensation. 53

7.1.4 Section 123 – Return to work 54

8 ALTERNATIVE LEGISLATIVE INSTRUMENTS 55

9 ISSUES ARISING FROM THE ADMINISTRATIVE REVIEW OF THE OCCUPATIONAL HEALTH AND SAFETY ACT 2004 56

9.1 Protecting Employees who Raise OHS issues 56

9.2 Return to Work inspectorate 57

10 DRAFTING THE NEW ACT 60

11 OTHER KNOW PROPOSALS 61

11.1 Proposals from Unions with Ai Group Comments 61

11.2 Proposals from Lawyers 70

11.3 Proposals from Others 73

12 REFERENCES 74

1 INTRODUCTION

The Australian Industry Group (Ai Group) is Australia's leading industry organisation representing 10,000 employers in manufacturing, construction, automotive, telecommunications, IT & call centres, transport, labour hire and other industries. Ai Group's members operate businesses of all sizes throughout Australia and represent a broad and expanding range of sectors. We provide comprehensive advice and assistance to help members run their businesses more effectively and to become more competitive on a domestic and international level.

Ai Group member companies operate businesses across New South Wales, Victoria and Queensland and we maintain strong partnerships with the Engineering Employers Association South Australia (EEASA) and the Chamber of Commerce and Industry in Western Australia (CCIWA).

Ai Group welcomes the opportunity to participate in the review of the Victorian Accident Compensation Act 1985 (the Act). Ai Group appreciates the inclusion of Tim Piper (Victorian Branch Director) in the Stakeholder Reference Group (SRG), and the opportunity for Tracey Browne (Manager, National OHS Policy and Membership Services) to participate as an observer at the SRG and to meet with members of the Review Secretariat throughout the course of the review.

It is pleasing to be participating in a review at a time when the scheme is in a good financial position. Over recent years it has been possible to both increase benefits to injured workers and provide four consecutive premium reductions of 10% each. The improvements in the scheme can be credited to the actions of the both the Victorian WorkCover Authority through improved management of the scheme and their Agents, and also to the efforts of industry who have continued to work toward safer workplaces, resulting in less claims.

The views expressed in this submission have been developed through a number of avenues:

- the knowledge of Ai Group's OHS and Workplace Relations Advisers who have extensive experience in the practical application of the Act, and its interaction with industrial instruments and other legislative provisions relating to the employment relationship, across a broad range of industries;
- views of members expressed through day-to-day contact with them as we provide membership advice, training and consulting services (it is educative to note that Ai Group Advisers respond to more than 100 queries related to workers compensation each month);
- from the issues and concerns raised by members during correspondence and meetings related specifically to this issue, following the announcement of the review; and
- through discussions with other key stakeholders in the scheme.

It is recognised that this submission is part of the initial stages of a consultative process which is to span a period of six months, including extensive discussion at the SRG and the opportunity to participate in the public comment phase of the process.

The Accident Compensation Act 1985, and its potential amendment, has been the subject of much stakeholder discussion and debate over recent years. This debate has led to a number of changes being made, which have largely been supported by both unions and employer associations.

These discussions have also highlighted a number of important areas where the views of employers, unions and the legal fraternity diverge. In this context, our submission will be raising areas of concern to employers where change is required, and also anticipating some of the issues which we expect unions to raise for discussion.

In making our submission to this review we acknowledge the Victorian Government's stated commitment to:

- maintaining a stable and competitive workers' compensation scheme that recognises and delivers positive outcomes for both workers and employers;
- ensuring injured workers receive the assistance and support they need;
- improving return-to-work outcomes for injured workers; and
- the efficient delivery of existing benefits.

We subsequently, make our comments in line with the terms of reference relating to the operation of the Accident Compensation Act 1985, and associated legislation. Specifically:

a. the need to provide fair and effective benefit and premium regimes, having regard to workers' compensation schemes in other jurisdictions and the need to secure long-term positive outcomes for injured workers;

b. the fundamental need to protect the operational and financial viability of the scheme;

c. identifying and resolving anomalies in the Act and in the operation of the scheme;

d. improving employer and employee understanding of the Act;

e. reducing the regulatory and administrative burden on employers, including through improved alignment, where appropriate, with related administrative arrangements both within the State of Victoria and with other jurisdictions; and

f. improving the usability of the legislation through the removal of inoperative, irrelevant or superfluous provisions.

2 GENERAL CONTEXT

In developing our submission, we have considered a range of other reviews and legislative change that have occurred over recent years, with particular focus on the Productivity Commission Inquiry into National Workers' Compensation and Occupational Health and Safety Frameworks (PC Inquiry), 2004.

We have also considered current provisions in other Australian jurisdictions, with the aim of enhancing our system and, where appropriate increasing harmonisation.

In addition we will be responding to the issues raised previously by other stakeholders, as outlined in the Authority's document entitled "External Stakeholder's Legislative Proposals", provided to the WorkCover Advisory Committee (WAC) in December 2007.

Ai Group's members consistently nominate workers compensation as a key area of business regulation that is in need of reform. Employers accept their responsibilities to employees who are injured at work and the social benefits of a modern workers compensation scheme, but there is significant dissatisfaction and cynicism from employers in dealing with these responsibilities. The dissatisfaction usually relates to the lack of an identifiable relationship between injury rates and premiums and concerns that the system is being unfairly accessed for injuries and illnesses that are not clearly work related or not related to the employment relationship that exists at their workplace.

The concern is not specifically about an individual worker having what might be seen as inappropriate access to compensation. The issue for employers can best be described as the conflict between:

- the "no-fault" entitlements of the scheme which, together with a perception that the costs are being borne by the scheme, can lead the courts to err on the side of the worker; and
- the nature of the premium scheme which is designed to provide incentives for return to work and improved health and safety, means that employers are penalised (often significantly) for the cost of claims made against them.

In brief, employers often see themselves as being punished for a claim for a condition over which they had no control, because the no-fault nature of the system results in claims being accepted in circumstances which employers often believe are inappropriate.

Further to employer concerns about the allocation of costs, acceptance of claims which employers perceive as being inappropriate, increases general scepticism about the scheme; this scepticism can lead to a casting of doubt on all claimants, with the some of the genuine and deserving claimants experiencing discrimination and social isolation.

A final concern repeatedly raised by employers is the feeling that they are not provided with the opportunity to be active players within the scheme. The reasons for this will be illustrated at various points within our submission.

In summary, they include an inability to be involved in decision making; limited (and in some cases no) access to information about how a claim was determined; no right to object to, or seek review of, a decision; and no ability to seek recompense for increased costs of premium which have been caused by the acts or omissions of the authorised Agents.

If our workers compensation system is to be seen as credible, and fair to all participants, the key issue of work-relatedness, and consistent application of this test, must be addressed. Further, the employers who are held accountable for claims through the premium scheme, must be given an active and transparent role in the process of claim determination and management.

A successful and sustainable workers compensation system must:

- provide fair and equitable compensation to those who have a work related injury or illness; and
- distribute the costs of that scheme fairly, equitably and transparently amongst employers.

3 ENTITLEMENT AND EXCLUSIONARY PROVISIONS

3.1 Work-relatedness

As indicated above, work-relatedness is one of the key issues raised by employers when identifying concerns with workers compensation schemes.

There is as sense of real annoyance in the case of:

- injuries where the circumstances have no clear contribution from a work activity;
- "gradual onset injuries" where it is not possible to clearly identify a specific incident;
- stress related injuries that are not directly attributable to a specific incident(s) in the workplace; and
- the recurrence, aggravation, acceleration, exacerbation or deterioration of underlying pre-existing injuries (including degenerative conditions), especially in relation to older workers.

In a recent meeting of Ai Group members many examples were provided to us highlighting issues around the test of work-relatedness. One such example, which occurred in late 2007, is summarised below:

> *Five minutes before the start of his shift, a worker experienced a back spasm whilst in the toilets. He was not able to move; he was transported to hospital via ambulance; and held overnight. The claim was initially rejected on the basis that "his claim did not arise out of or in the course of employment; his employment was not a significant contributing factor; his incapacity for work is not materially contributed to by an injury which entitles him to compensation." In response to an application for conciliation, the Agent withdrew the rejection notice and accepted the claim, on the grounds that employment had materially contributed to the claim.*

Concerns relating to work-relatedness were also reflected in the PC Inquiry, where extensive consideration was given to two important concepts, which in the Victorian context are "arising out of or in the course of employment" and the "significant contributing factor" test. At p.175 it was noted "if the criteria are too stringent, then is [sic] would involve cost shifting from employers to injured workers and to the Australian Government's Medicare and social programs. Conversely, if the criteria are too lax, then there would be cost shifting to employers for medical conditions that are minimally work-related".

Ultimately, the PC Inquiry recommended that whilst the significant contributing factor test should be a minimum legislative requirement, a more appropriate test is that work should be a major contributing factor. Further it was recommended that a uniform test of work-relatedness should apply to both disease and injury.

It is important to note that these recommendations were made after the High Court refused to grant leave to appeal the decision in Carlton and United Breweries and Anor v Hegedis [2002] VSCA 61 (9 May 2002).

In Hegedis it was found that, in spite of the legislative restrictions, that should have required work to be a "significant contributing factor" in order for a claim to be accepted, this qualifier did not apply in the case of a physical injury.

As outlined in Gorton (2004), earlier cases had determined that a sudden physiological change was an injury, and the need to determine that the underlying disease was "caused" by work was not necessary in order for compensation to be payable. Hence, as indicated by the Victorian WorkCover Authority (the Authority) during stakeholder consultation, any sudden physiological change (e.g. heart attack) would result in the Hegedis decision being applied, i.e. if the heart attack occurred at work, it was not necessary to prove any level of work contribution.

In the County Court case of Vitoratos v Victorian WorkCover Authority No. 8318 of 2001, 17 July 2003, it was stated in the decision that:

> *"In my opinion, it is clear …that there was a dramatic and sudden physiological change occurring in the Plaintiff's brain which caused the seizure at work … I am satisfied that the Plaintiff did suffer internal injury involving sudden physiological change for the worse whilst at work on 2 March 1999. I am satisfied that this caused the epileptic seizure involving contractions and violent muscular activity. I find this event is properly characterised as "physical injury" and accordingly the Plaintiff has established that she suffered "injury" within the meaning of the Act whilst at work on 2 March 1999".*

Subsequent legislative change in December 2003, had the following impact:

- the "significant contributing factor" test was removed from the overall statement of entitlement as defined in section 82(1) of the Act;
- the "significant contributing factor" test was inserted into section 82 (2B), and (2C) to create exclusions relating to:
    - heart attack injuries and stroke injuries;
    - diseases; and
    - a recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease.

Issues associated with other types of injury resulting from disease, such as the circumstances of Vitoratos (above), were not addressed.

Employers are dissatisfied with this approach as they support the view of the PC Inquiry that an employer should only be responsible for a disease or injury where the appropriate level of work contribution can be attributed. Hence, employers would like to see the work-related test incorporated into the primary entitlement provision, in a way that would allow the courts to interpret the Act the way in which the legislator intends.

If the preceding view is not adopted in legislation, the exclusion which currently applies only to heart attack injuries and stroke injuries should be applied to all circumstances in which a sudden physiological injury has occurred due to an underlying disease/illness, e.g. epilepsy.

Ai Group strongly believes that the response of the Government in 2003 to remove the reference to "significant contributing factor" in the principle entitlement section of the Act, was inappropriate and should be corrected as a result of this review.

Further, we believe that the recommendation of the PC Inquiry to apply a "major contributing factor" test in place of a "significant contributing factor" test should be adopted in the legislation.

3.2 Stress Related Injuries

We have previously referred to stress related incidents, in the context of determining work-relatedness. In this section we wish to raise two other issues related to stress. The first relates to concerns that the discomfort experienced by people at times of high work-load are diagnosed as "injuries" rather than recognised as normal physiological responses to pressure or challenge. The second relates to the exclusion, or otherwise, of psychological injuries under section 82(2A) of the Act.

3.2.1 General application

The World Health Organisation 2004, pp.3-4, states that "pressure at the workplace is unavoidable due to the demands of the contemporary work environment … when that pressure becomes excessive or otherwise unmanageable it leads to stress. Stress can damage your workers' health and your business performance".

It is clear from this definition that stress is not the injury; the injury is any subsequent damage that might follow the stress. Yet, our members regularly see claims lodged and accepted for "stress" and "anxiety", certified by a general practitioner and verified by a section 112 medical examiner following a relatively short consultation.

It is crucial that consideration is given, in the drafting of new legislation, to ensure that workers who suffer genuine injury as a result of work-related stress receive appropriate compensation, whilst those that are experiencing short term pressure or stress do not receive compensation. When considering this approach, it is important to recognise that work is often seen as the ultimate manifestation of stress when family and other external pressures are the most significant contributors.

Further, a worker should not receive compensation if they are stressed from undertaking normal work duties that the average person can undertake without experiencing a psychological injury.

However, in the case of Zlateska v Consolidated Cleaning Services Pty Ltd & Anor [2006] VSCA 141 (7 July 2006) it is stated at paragraph 11 that:

> *In determining whether the act or omission of the employer was a cause of the [psychological] injury, the employer must take the worker as it finds him/her. Any special susceptibility or vulnerability on the part of the worker may explain why the particular act or omission is of causal significance. The fact that the act or omission would not have caused injury to a worker who did not have the susceptibility or vulnerability of the injured worker does not alter the causal character of the act or omission*

Legislative change is required to ensure that employers are only required to bear the cost of claims where work has been a significant contributing factor to the stress related response.

3.2.2 Section 82(2A) exclusion

Section 82(2A) of the Act states:

> *Compensation is not payable in respect of an injury consisting of an illness or disorder of the mind caused by stress unless the stress did not arise wholly or predominantly from –*
> *(a) reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, redeploy, retrench or dismiss the worker; or*
> *(b) a decision by the employer, on reasonable grounds, not to award or to provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with employment, to the worker; or*
> *(c) an expectation of the taking of such action or making of such a decision.*

It is crucial that a worker is not able to claim compensation for an illness or disorder of the mind when an employer is taking "reasonable action in a reasonable manner". For this reason, we support the maintenance of this section of the Act and would strongly argue against the position of the union movement that the section should be removed.

However, it is our view that the current structure of the legislation is problematic in two ways, as outlined in the following sections.

3.2.3 Onus of proof

There has been considerable debate in the courts regarding the application of this provision, given the manner in which it has been written. It has been determined that the wording of section 82(2A) leads to the employer having to demonstrate that that the stress arose out of "reasonable action taken in a reasonable manner"; it is not up to the claimant to prove that the action, or the manner in which is was undertaken, was not reasonable.

Ai Group believes that this can be easily addressed by redrafting the provision in a way that requires the worker to demonstrate that the stress was not related to the exclusionary provisions.

3.2.4 Responses to management actions and decisions

The wording of the current provision is narrower than that in other jurisdictions where the exclusion covers performance appraisal (NSW, ACT), administrative action in conjunction with employment (SA, TAS, NT), appraisal or counselling (Comcare) or management action (QLD).

In addition, in Victoria, there have been very narrow interpretations of disciplinary action, with employers being advised that claims that occur during performance management activities can not be denied as they do not meet the criteria in 82(2A)(a) of "disciplinary action", nor the requirements of 82(2A)(c) of creating an "expectation of the taking of such action". Ai Group would argue that a person involved in a performance management process should reasonably have an expectation of disciplinary action if the performance does not improve. However, this argument has not been successful in the past.

The practical outcome of this approach creates a disconnect between the Accident Compensation Act and a fair and reasonable process to manage performance. In most cases it would not be fair and reasonable, nor good management practice, to progress directly to disciplinary action, without first initiating performance management and/or counselling approaches; in many cases to do so would be found by the industrial courts to have resulted in an outcome that was "harsh, unjust or unreasonable".

Consider an example, and the anticipated response of an Ai Group member:

> *A member, wanting to comply with all their legal obligations, seeks advice from Ai Group about the best way to manage a performance issue. The appropriate workplace relations advice is usually to initiate performance management in a supportive manner with the aim of resolving the issue without the need to enter the disciplinary process. Subsequently, the worker who is stressed by this reasonable process, undertaken in a reasonable manner, lodges a WorkCover claim, supported by a certificate stating that the person is stressed due to the actions of their manager. A further call to Ai Group, results in the employer being advised that whilst they have done the correct thing to manage the worker's performance, their failure to institute a disciplinary process (which would in itself have not been reasonable action in a reasonable manner) leaves them in a situation where the worker is able to claim compensation because they were stressed by someone telling them they were not performing. The outcomes are that the worker has a successful WorkCover claim; the supervisor feels undermined in their ability to manage employees; other employees see this as a way to avoid being managed; the employer has a high statistical case estimate (SCE) which impacts on their premium for three years; and organisations such as Ai Group and other professional advisers, which aim to help employers to comply with the law are unable to provide adequate advice to safeguard employer interests.*

Any worker who is being told that they are not performing will be stressed. However, they should not be compensated for it, provided the employer has taken reasonable action in a reasonable manner.

Ai Group believes that this exclusionary position should be modified to change the onus of proof and to ensure that the full range of reasonable management action is contemplated in the provision.

3.3 Journey and Recess Claims

The PC Inquiry (p. 187) recommended that, due to the lack of employer control, workers compensation schemes should not provide coverage for journeys to and from work, and that coverage for recess breaks and work-related events be restricted to those at workplaces and at employer sanctioned events.

At present the Victorian legislation does not provide coverage for journeys to and from work. However, section 83(1)(b) creates a specific entitlement to compensation for any person who is temporarily absent during an authorised recess, provided they do not subject themselves to abnormal risk.

This can create some very bizarre situations, e.g. a person who has an accident driving to work in the morning is not covered by the workers compensation scheme; yet if they go home for lunch they are covered for the duration of their absence, not only driving to and from home, but also whilst they are at home.

Once again, the concern is that the employer would bear the cost of the claim; firstly in initial expenses and then if the claim exceeds the employer threshold, through premium increases.

Ai Group supports the recommendation of the PC Inquiry and recommends that the provisions in section 83(1)(a) not be carried through to the new Act.

3.4 Serious and Wilful Misconduct Exclusion

Section 83(4) of the Act establishes that, in most circumstances, a person will not be entitled to compensation if an injury is attributable to the worker's serious and wilful misconduct, including "being under the influence of intoxicating liquor, or a drug within the meaning of the Road Safety Act 1986". Further section 83(4A)(c) clarifies that this exclusion applies if the person's blood alcohol level was above 0.24g/100ml. This exclusion is not consistent with the provisions of the Transport Accident Act 1986 which creates a reduction in compensation entitlements once the injured person exceeds the legal blood alcohol level of 0.05%, with complete exclusion at 0.24%.

Ai Group believes that the exclusionary provisions in the new Act should mirror that of the Transport Accident Act 1986. This was proposed by the Authority in 2003/2004, but did not proceed.

3.5 Hearing Loss Claims

If a worker lodges a hearing loss claim, the full cost is utilised in calculating the premium of the current, or most recent, employer. This occurs even if the current or most recent employer has results of pre-employment audiometric testing which indicates that the hearing loss had occurred in some previous exposure. This situation is best illustrated through example:

> *An employer engaged an older worker who had been working in heavy industry for more than 30 years. The new employer, which is using personal protective equipment to address noise issues in the workplace, undertook audiometric testing within 3 months of the new employee commencing employment (as required by the OHS regulations). The testing identified that the worker had a significant level of hearing loss; he lodged a claim which was accepted; the costs of this claim will be utilised in the premium calculation for the next three years. Having had this experience, the employer is now reluctant to engage workers who have had previous noise exposures.*

Consideration should be given to spreading the cost of the claim across known exposures. Given that employers are required under OHS regulations to undertake audiometric testing if they are using hearing protection to reduce exposure to noise, it should be relatively easy to identify varying levels of hearing loss.

3.6 Contractors – Deeming Provisions

The Act currently provides for the deeming, or otherwise, of contractors as workers, through sections 8,9,10 and 10A. These sections of the Act are important for the purposes of:

- determining whether a person has an entitlement to compensation, especially a sole trader; and
- determining which party is responsible for paying premium on the remuneration paid to the contractor.

These provisions are designed, rightly, to ensure that employers and contractors do not establish relationships which artificially put them outside the WorkCover scheme, either for coverage or premium. However, their application can be problematic, for a number of practical reasons:

- the provisions are written in a very legalistic manner and can be difficult for an employer to interpret;
- employers and contractors tend to start their assessment by considering whether the contractor has a WorkCover policy, which is specificied by section 10A of the Act as the last question that should be asked;
- bonafide contractors, who offer their services generally to the public, may ultimately be deemed to be workers because of the duration of their engagement with the principal;

- incorporated companies that employ only one person are often considered by employers to be contractors, due to that status. However, they ultimately find this not to be the case;
- sole traders and partners are unable to take out a WorkCover policy to cover themselves, and may ultimately be in a position of arguing their status as a "deemed worker" in order to get access to WorkCover payments; and
- where the contractor is a company and deeming is applied, there is the potential for double-dipping of premium; whilst the principal is required to pay premium for the monies paid to the contractor, the contractor will also be required to pay premium in relation to any salaries paid by the company.

Consideration of these issues must be an important focus for the Review.

3.7 Continued Entitlement to Benefits.

3.7.1 Injured worker obligations to make every reasonable effort to cooperate and participate with rehabilitation and return to work.

Sub-section (3) and (4) of sections 93CA, 93CB and 93CC, together with section 93D require an injured worker to do a range of things that can be described as "making every reasonable effort to participate in occupational rehabilitation and return to work processes". If a worker does not make every reasonable effort, their "…entitlement to weekly payments in respect of the injury shall thereupon cease and determine".

These provisions are a crucial part of the legislation which must be maintained, and used in appropriate circumstances to ensure the integrity of the scheme, and protect workers who are acting appropriately from being seen as malingerers.

Further, consideration should be given to the location of these provisions within the Act. At present they are included in the entitlement sections of the Act and "tagged on" to the sections which outline the percentages payable. We believe they should have higher prominence in the legislation. From a practical perspective this will result in employers and injured workers recognising the importance of these provisions.

3.7.2 Application of notional earnings

Sections 93CA, 93CB and 93CC establish that a workers benefits can be reduced by "notional earnings". Notional earnings include either what the worker is earning, or what the worker could earn, as determined by the self-insurer or the Authority.

The Authority's on-line claims manual outlines that notional earnings can be applied where:

- suitable employment has been offered to the worker and the worker does not accept the offer for reasons not related to the work related incapacity
- the worker ceases suitable employment for reasons not related to the work related incapacity
- the worker has returned to work in suitable employment and that employment has been terminated for reasons not relating to the work related incapacity.

Members are particularly unhappy that Agents are not generally proactively identifying circumstances in which notional earnings should be applied. Based on previous tripartite discussions, we are also aware that unions will be asking for this provision to be removed from the legislation.

It is our view that this provision should be maintained in the legislation and that it should be applied in circumstances where the worker:

- removes themselves from the return to work and/or rehabilitation process through resignation, moving interstate etc.;
- has their employment terminated due to performance related issues or misconduct; or
- has their employment terminated due to genuine redundancy, after returning to work on full time modified duties.

4 EMPLOYER COST ISSUES

4.1 Statistical Case Estimates

Statistical Case Estimates (SCEs) are the most controversial issues associated with the "Fairer, Simpler Premium" scheme that was introduced in 2004/05. During the review of the premium, there was strong support of the move toward an SCE, removing the process of negotiating agent estimates and removing F-Factors from the calculation.

However, the reality of SCEs has created much angst among employers, who see large estimates of future costs impacting on their premium when a worker has been off work for only a short period of time, or not at all.

SCEs are a very complex concept, and it is not possible to do justice to the concerns of employers within a submission which is attempting to highlight a broad range of issues. The issues raised by employers include:

- adequacy of comparison with others operating in the same industries;
- quantum of estimates used in the calculations;
- changes to estimates that occur, apparently without reason, at times other than the twice-yearly recalibration;
- the timing of use of SCEs in the premium calculation, particularly the first year a claim is included;
- using "on benefits" and "off benefits" as key determinants of the SCE, rather than incorporating further classification of the claim regarding the reason for the claimant going back onto benefits, e.g. treating a failed return to work the same as an absence for corrective surgery;
- rejected claims being included in the individual employer's estimate, rather than being spread across the whole scheme;

- subsequent claims for the same injury carrying a new estimate, whilst the estimate for the first claim also stays in the premium calculation;
- the manner in which information is provided about estimates, particularly the use of grouping estimates into a category of "estimated future costs for currently inactive claims listed above".

Ai Group believes it is important to discuss the specific issues around SCEs with the review team, and to provide detailed examples from members, to assist in the understanding of this incredibly complex issue.

The role of the premium system should be to provide tangible incentives for employers to improve OHS and return to work activities with a view to reducing their premium. However, with one of the major components of the premium scheme (SCEs) considered by employer to not be transparent, and treated with significant cynicism, it is difficult to realise the motiviational impact of premiums on improved safety and increased focus on return to work.

4.2 Section 138 – Indemnity by third party

Known generally as "third party recoveries" this long standing provision of the Act, enables the Authority to recover claim costs from negligent third parties.

It was not until the early 2000s that the Authority began to actively pursue recoveries, particularly from employers who were the "host employer" of staff engaged through labour hire companies and group training companies. At that time, the Authority advised stakeholders that they were obligated to pursue such recoveries, and could not make a policy decision to not pursue these recoveries.

Ai Group believes that there is a role for third party recoveries, predominantly in circumstances where there is no direct "employment" relationship between the three parties, e.g. a council who has not repaired a footpath, or a shopping centre with slippery floors.

However, the nature of the employment was very different in the early to mid 1980s and the provisions were not intended to be applied to the type of employment relationships which are regularly ustilised in Victorian workplaces today.

When employers engage labour through third parties (labour hire companies and group training organisations), the cost of premiums is directly incorporated into the costs to the host employer. This is also the case in contracting arrangements where the contracted services are predominantly related to the provision of labour. Subsequently, where there are long term relationships, as is the case in many circumstances, the host employer will be bearing the cost of increasing premiums that relate to injuries in their workplace.

The application of third party recoveries raises a number of questions for Ai Group and our members:

- A "no-fault" system gives the benefit of the doubt to the worker when it comes to determining whether a claim should be accepted and the determination of continuing entitlement to weekly compensation. This appears to be inconsistent with the ability of WorkCover to sue a third party for recoveries, particularly when the third party is engaging labour hire or group training workers to undertake "normal employment tasks".

- The WorkCover scheme "sizes" the impact of claim costs when calculating the premium, i.e. a small employer does not incur large increases on their WorkCover premium when they have a claim. However, in the recovery process a small business consisting of a tradesperson and a labour hire or group training worker would be required to pay the recoverable amount, irrespective of their size.
- Many employers are holding public liability policies with an excess for each claim of $100k, significantly higher than the recoveries being sought by WorkCover. Hence, when they receive notification of the action, their public liability insurer does not get involved; they are required to engage their own legal advice and pay for both representation and the ultimate recovery amount. Employers are also advising that some insurers are refusing to provide "host employers" with public liability coverage for labour hire or group training workers; it may be that this is due to the increased activity in relation to section 138 recoveries.
- Some contractors and labour hire companies are also being required by their clients to sign indemnity clauses which, if applied in the case of a s.138 recovery, will result in the employer having to cover the costs of any third party recovery.
- Whilst there are provisions which enable recoveries to be factored into the premium calculation for the employer, these are often delayed and do not fully compensate for the previously increased premium. Hence, third party recoveries are seen as revenue raising and double dipping.

In December 2007, in response to our requests for information, the Authority provided us with a summary of recoveries that were finalised from 2002/03 to 2006/07. In summary, there were 1513 finalised s.138 recoveries, amounting to $96.3m; of these 638 (42%) related to labour hire companies, for a total recovery amount of $29.1m (30%)

In 2006/07 total recoveries under s.138 were $19.5m, of which $5.6m related to labour hire arrangements. The total revenue and income for the Authority in 2006/07, as shown in the Annual Report of the Authority, was $3,214.6m. In this context the amount recovered under s.138, particulary the amount relating to labour hire arrangements, is relatively small. When considering the costs associated with initiating s.138 recoveries, and the discontent and cynicism it creates amongst employers, the continued operation of a recovery process needs to be reconsidered.

Ai Group believes this review will enable the concept of third party recoveries to be reconsidered in the light of current employment arrangements, and an appropriate provision developed which does not result in this unreasonable approach to labour hire, group training and contracting arrangements.

4.3 Section 137 and 137A – TAC Recoveries

The issue of recoveries from the Transport Accident Commission (TAC) are not as contentious as those associated with the broader range of recoveries. However, it is our understanding that the employer does not get the full premium benefit associated with the recoveries received.

It is Ai Group's view that these recoveries should be straight forward between two statutory bodies which administer statutory benefits. Employers should get immediate premium relief associated with statutory entitlements, and full benefit of any subsequent recoveries associated with negligence and any related common law claims.

4.4 Section 125A – Employer Excess

This section of the Act establishes the employer liability for payments during the first 10 days of weekly compensation and the first $546 (at 1 July 2007, indexed annually) of medical and like expenses. Section 125A(6) states that "subject to guidelines issued by the Authority and in accordance with the premiums order, an employer may elect to increase, reduce or eliminate the excess … by paying an adjusted premium".

At the time that this was included in the Act, effective 1 July 1994, employers welcomed the potential to have a system which enabled employers to increase their excess and pay a lower premium. However, guidelines have never been issued and, whilst the premium order enables an employer to remove its excess, through application of the buyout option, employers have not been given the opportunity to increase their excess.

Ai Group believes a provision such as this should be included in the new Act, and for the provision to be implemented by the Authority.

Alternatively, Ai Group believes that it may be valuable to consider an across the board increase in the employer excess, especially as it relates to medical and like expenses (MLE); with employers being able to utilise the buyout option if they do not want to carry the increased level of financial risk.

In today's environment, it does not take many medical bills to take the claim over the current MLE threshold, particularly as employers will generally pay the full invoice received from the treating practitioner, rather than the "schedule fee".

Elsewhere in this submission we discuss the concerns associated with Statistical Case Estimates (SCEs) and the need to ensure that they create the reality and perception of an equitable distribution of premium costs across the scheme. A number of Ai Group members believe other employers are not claiming reimbursement for "small" MLE claims because of the potential impact on premium through the allocation of SCEs. If this is the case, those employers which are claiming reimbursement at $546 are having their performance unfairly compared to the rest of the industry,as claims which should be in the calculation of the industry claims cost rate are not being taken into account.

An increase in the excess, well beyond the current level,would create a fairer system and allow large employers to elect to bear a greater level of direct financial risk. Of course, such an excess would need to be accompanied by a fairly priced buyout option.

4.5 The Cost of Poor Management by the Authorised WorkCover Agent

As outlined previously, the premium paid by an individual employer, especially a large employer, is significantly determined by the statistical case estimates applied to the claims incurred by the employer.

If the Agent makes an error in managing the claim, e.g. through accepting a claim which should not have been accepted, or through action which results in payments being made for a longer period than they should have been, the employer will pay the cost through increased premiums.

Between 1989 and 1993 section 120 of the Act allowed an employer to make an application to the Accident Compensation Commission (ACC), the Authority's predecessor, if any of the actions of an authorised agent listed within section 120 would or might have adverse financial consequences on the employer in relation to the employer excess or the bonus/penalty calculations made under the WorkCare scheme. Section 120 (1)stated:

> *If an employer considers that an authorised agent –*
> *(a) had no grounds or no power on which to make a decision; or*
> *(b) omitted to make a decision; or*
> *(c) accepted a claim for compensation that should not have been accepted –*

If the ACC allowed the objection, the ACC would take on the employer's liability and/or disregard the cost of the claim in calculating the bonus/penalty payable under the levy scheme.

The removal of this provision in 1993 has resulted in an employer having no financial recourse for an inappropriate act or omission of the agent.

It is recommended that the new Act create an ability for an employer to lodge an application to seek a review of an Agent's decision and/or to have the Authority consider whether there has been an act or omission on behalf of the Agent which has a negative financial impact on the employer.

One of the major flaws of the s.120 approach was that the Agent did not bear the cost of their acts or omissions. Any provisions included in the new Act to address this issue should ensure that the cost of the claim or the reduced premium impact would be borne by the Agent and not distributed across the scheme to be covered by the employer base.

5 PROVISIONS RELATING TO REHABILITATION AND RETURN TO WORK

Sections 155A and 155B establish the obligations for an employer to provide suitable duties to injured workers. Section 155A establishes that an employer must re-employ a worker if, within twelve months, the worker is able to return to either their pre-injury duties or "suitable employment". Section 155B outlines the circumstances in which an employer is exempt from these provisions, i.e. if to do so would create an unjustifiable hardship for the employer.

5.1 Provision of Suitable Duties

5.1.1 Period in which an employer is required to provide duties – 155A

Ai Group believes that assisting injured workers to return to work after an injury is an important part of our Accident Compensation scheme.

It is our understanding that other parties will be requesting that the 12 month period be extended. An extension of the time during which this obligation exists would be inappropriate, and may result in a reduction in return to work rates.

This view is supported by information provided in the *Return to Work Monitor 2006/07* (RTWM 2006/07), which is a survey of performance across Australian and New Zealand jurisdictions published annually by The Heads of Workers Compensation Authorities.

The RTWM 2006/07states (p.i) that "South Australia has consistently recorded the highest proportion of injured workers still receiving workers' compensation payments and well above the Australian national average". This performance is in spite of the fact that a higher proportion of injured workers in South Australia received a RTW plan; with fewer South Australian workers reporting "…that the plan was helpful or indeed were given help to do what was recommended in their RTW Plan" (p.ii).

Further, at p.1 of the RTWM 2006/07, a comparison of the overall return to work rate is illustrated, in response to the question "Would you please tell me whether you have returned to work at all since you put in your workers' compensation claim?" 77% of South Australian respondents stated yes, compared to 85% in Victoria and New South Wales, 86% in Queensland, and more than 90% in Tasmania, Northern Territory and Comcare.

The RTWM 2006/07 does not discuss the possible reasons for this significant variation, and it is not appropriate for this submission to look at this issue in length. However, we have received some anecdotal feedback from employers in South Australia that they are concerned about offering duties to injured workers unless they are confident that these duties will become long term sustainable duties. This concern is created by section 58B of the South Australian legislation which places no limitation on the time an employer must provide suitable employment. Employers are concerned that, having provided duties at the early stages of the claim, they will be required to continue to provide those duties, even if they are unproductive and unsustainable.

5.1.2 Exemption clause – 155B

An employer is not required to provide suitable duties under section 155A if it would cause the employer unjustifiable hardship. This provision has been in the Act since 2004 (previously the legislation stated "unless it is not possible to do so". Subsequently, some employers have made an "application" to the Claims Agent for an exemption to be granted. In response to this, the Authority has advised that they have received legal advice that the exemption clause can only be utilised as a defence when an employer is being prosecuted for failing to provide duties; an exemption cannot be proactively granted by the Authority or its agents.

Ai Group believes this is not an appropriate way in which to operate an exemption clause. Employers which have actively sought to find duties for a worker, should be able to seek and obtain certainty about whether their decision to not provide duties is a reasonable one, based on the documented exemptions.

In fact, if an employer was able to seek an exemption, the Agent (or the Authority) may be in a position to deny the exemption and subsequently facilitate a return to work that may otherwise not have eventuated.

Ai Group believes the exemption should be written in such a way as to facilitate an application and approval process, creating greater clarity and certainty for employers and potentially increasing opportunities for return to work.

Further the exemption provisions should include:

- the worker is an ex-employee who lodged their claim after employment ceased;
- the worker is a deemed worker under section 8 or 9 of the Act;
- the worker was a casual or engaged for a set period or particular task and that time is passed or the work is no longer required;
- the worker is one who would otherwise be redundant;
- the worker and their treating practitioner certify before the 12 month period that the worker can never return to that place of work;
- the worker having been engaged on suitable employment engages in conduct that results in a legal termination of their employment;
- the employer is a small employer and able to satisfy the Authority that sustainable suitable employment cannot be provided; and
- the worker was a key employee with rare skills and the employer is able to demonstrate that it was not possible to replace the worker with a temporary person with equivalent skills.

5.2 Rehabilitation and Risk Management Programs

The Act currently requires employers with remuneration above $1m to develop, in consultation with employees, a rehabilitation and risk management program.

The following comments are made regarding the practicability and usefulness of these programs.

5.2.1 Consultation when developing programs

The content of the programs are largely established by the Act. On this basis, the requirement to develop the programs in consultation with employees is problematic. Genuine consultation can not occur when so much of the program is prescribed. It would seem appropriate to reword the requirement to ensure that employees are made aware of the details of the program, rather than consulted on their development.

5.2.2 Prescribing additional matters

The Act provides an ability for the Authority to prescribe "additional matters" to be incorporated in rehabilitation programs. At present this is achieved through the inclusion of these matters within the *Return to Work Guide for Victorian Employers*. These should have higher visibility, and may be best addressed through an alternative statutory instrument, ensuring that there is appropriate scrutiny prior to their introduction (see the discussion later in this document)

5.3 Risk Management Program

The requirements of a risk management program are outlined in section 159 of the Act as providing for "… the steps to be taken after an injury has occurred in the workplace to, as far as is practicable, reduce the risk of subsequent injury of that kind."

This is inconsistent with the contemporary definition of risk management which is about the proactive identification and control of risks, prior to injuries occurring. In addition, the requirements duplicate, and possibly undermine, the obligations in the Occupational Health and Safety Act 2004.

As both Acts are now administered and enforced by the Victorian WorkCover Authority, it is no longer appropriate to have this provision in the Accident Compensation Act.

If the provision does remain in the Act, it should be given a title such as “incident investigation procedure” and should adopt the new terminology in the OHS Act of “reasonably practicable”.

5.4 Return to Work Plans

Ai Group supports the concept of early intervention and the development of an agreed process which will facilitate the workers rehabilitation and support effective and sustainable return to work.

However, the focus on the completion of paperwork can distract from the real intent of the process. As mentioned elsewhere in this submission South Australia has the highest level of documented return to work plans and the lowest level of return to work.

At present an employer can be compliant with the obligations to develop a return to work plan, whilst having made no real attempts to assist the person back to work. Alternatively, a person can be back at work as part of an effective and sustainable return to work, whilst the employer is technically in breach of the Act because there is no documented return to work plan.

A performance based approach to facilitating return to work, such as that utilised in OHS legislation, with the duty articulated with words such as "an employer must do what is reasonably practicable to assist an injured worker to resume sustainable employment" should be adopted. This would require an employer to demonstrate that it has complied with the obligation.

This approach would be consistent with WorkCover's current focus on segmenting their interaction with businesses, recognising that "one size does not fit all".

The focus on the concept of "return to work", rather than rehabilitation or injury management creates significant confusion amongst employers, which have difficulties understanding how they can develop a return to work plan (or in the proposed model have meaningful discussions about return to work) for a person who has "no current work capacity". This confusion arises as employers tend to think that the return to work plan is an offer of suitable employment.

The development of templates, which provide an explanation of the two documents has been of assistance. However, the name continues to create confusion

We recommend that the focus should be broader and utilise a terminology which clearly encompass the rehabilitation and return to work of injured workers.

5.5 Return to Work Coordinators

5.5.1 The name

Consideration should also be given to renaming return to work coordinators to reflect the broader role of rehabilitation and return to work.

5.5.2 Skills and competencies

There has been much debate over recent years as to whether there should be a requirement for return to work coordinators (RTWC) to undertake the two day course which is endorsed by the Victorian WorkCover Authority.

Ai Group was a major contributor to the development of this course (and now deliver the course) and we see it as a valuable addition to the range of training and skills development options for RTWCs. However, we believe that the mandating of specific training is particularly problematic.

Highly skilled and experienced RTWCs who have been undertaking the role for an extended period of time are unlikely to need additional training. Whilst they may get some value out of a refresher, our trainers have reported that it can be unnecessary to cover the base level information for these participants. This cohort would get greater benefit from attending a skills-enhancing seminar or conference. Unfortunately, their annual training allocation may be exhausted by this course.

At the other end of the continuum, RTWCs in small organisations do not benefit greatly from the experience of attending the endorsed program. In fact, the nature of the course requires a reasonable amount of experience if one is to participate effectively. Our trainers have reported that it is particularly difficult to deliver this course when all participants are new to the role of RTWC.

We have found that a ½ day seminar which outlines all the key legislative obligations associated with WorkCover, or one-on-one assistance when a claim occurs, is a much better approach for those RTWCs who work in organisations with a low level of claims.

It may be appropriate to mirror the provisions in the OHS Act associated with the nomination of a management representative to deal with OHS Issues, i.e. that the RTWC must have an "appropriate level of seniority, and be sufficiently competent" to undertake the role.

This approach may also overcome the tendency for some organisations to view the RTWC role as one that is focused on paperwork and therefore allocated to a person of relatively low seniority, with good administration and keyboarding skills.

5.6 Related Issues

5.6.1 The role of doctors – GPs and occupational physicians

There is a clear and enduring role for the General Practitioner within the treatment regime for injured workers. And workers should continue to have the right to choose their treating practitioner(s).

However, when it comes to determining whether a person is fit to return to a specific workplace and set of duties, it is not fair on the GP or their patient to ask them to make determinations in relation to work systems and environments to which they have had little, if any, exposure.

The new Act should include a provision which enables the Authority to establish Regulations or guidelines which will facilitate the introduction of referral systems for workers who have either a particular type of injury or a worker who has been off work for a certain period of time, to be referred to appropriately qualified occupational physicians, whose role it is to work with the injured worker and their treating practitioner to identify and facilitate appropriate duties in the workplace.

It is recognised that there are probably insufficient appropriately qualified practitioners at this point in time, and implementation would need to be phased

In the meantime, consideration should be given to options such as:

- Adopting an approach similar to that in NSW where the worker is required to select a "nominated treating doctor" (NTD). When providing a medical certificate the NTD signs a statement that says "I agree to be this worker's Nominated Treating Doctor and to assist in his/her return to work". It is our understanding that this approach is supported by specifically negotiated payments to NTDs in relation to their involvement in rehabilitation;
- Making higher payments to treating practitioners who participate in specific training aimed at increasing their knowledge and skills in relation to work-related injury schemes; and/or
- Making payments to doctors for participating in conference calls, meetings or on-site visits which are aimed at facilitating a more effective return to work.

5.6.2 The role of a section 113 medical certificate

Section 113 enables the Authority, self-insurer or employer to require a worker (not more than once every three months) to obtain a medical certificate from a medical practitioner nominated by the Authority, self-insurer or employer. We see this as a positive provision. However, the section does not provide any guidance as to what status this certificate has, or how it can be utilised to aid either claims management or rehabilitation and return to work.

This provision should be reworded to provide some clarity around its use, and create sufficient authority of any certificate issued under this section.

6 ADMINISTRATIVE SYSTEMS

6.1 Understanding the Relationships, Responsibilities and Accountabilities

There needs to be a far greater level of transparency about the role of Agents and the fact that WorkCover is a social support scheme funded by employers (some of whom pay more in premium than the cost of their claims) and not an insurance scheme.

When employers become involved in workers compensation issues, they generally refer to the Agent as an "insurer" and they expect the "insurer" will fight to dispute "dodgy" claims. They believe that the "insurer" is providing them with a service, and will represent the interests of the employer in any dispute, especially as most disputes are associated with an adverse decision made by the "insurer".

In reality the "insurer" is an Agent of the Authority and, as outlined in the claims manual, the Agent is required to "manage claims in accordance with the WorkCover legislation, the Agency Agreement and policies, procedures and standards set by the VWA"

Further, the claims manual outlines that, in the conciliation process, the Agent "must take all reasonable steps to settle disputes", with the following detail:

> This will be evidenced among other things by an agent:
> - providing all relevant information in its possession in a timely manner prior to the conference. If unable to provide information in a timely manner prior to the conference, the reasons for non compliance;
> - attending the conference;
> - meaningfully and genuinely discussing all relevant issues at conference; and
> - ensuring that it maintains only the decisions which have a reasonable prospect of success were they to proceed to court.

Yet most employers will expect that, when attending conciliation, the Agent's major focus will be to maintain the adverse decision that they previously made, and then upheld through the "senior officer review" process.

The confusion about the role of the "insurer", who is really an Agent of the Authority, is well-illustrated through the discussion an Ai Group Adviser had with a small employer which believed a claim should not have been accepted.

> *The employer rang Ai Group to complain about the fact that a claim had been accepted for an injury that was reported early on a Monday morning, by an employee who was well known in the town as a keen sportsman. The Ai Group Adviser asked the employer if they had completed the question on the claim form which asked the employer if there was any reason why the employer believed that they claim was not their responsibility. When the employer advised that they had not seen that question, the Ai Group Adviser suggested that this would have been the problem, because without that information, the "insurer" would have presumed that the employer was happy with the claim being accepted. The somewhat bemused employer responded that if he put in an insurance claim because he had a car accident, the insurer would not accept the claim, and pay him money for repairs, until they had arranged for an assessor to look at the car and determine the level of damage, and the appropriate insurance payout. He could not see how a claim for personal injury would not attract the same level of scrutiny.*

It would seem impossible to argue with the logic of this employer, particularly when the Authority refers to the WorkCover scheme as "insurance".

6.2 Conciliation Processes

Generally, Ai Group supports the concept that a streamlined dispute resolution system is an appropriate way to handle disagreements within the system. However, there are a number of difficulties associated with the current legislation and processes.

6.2.1 The role of the employer

Section 55 of the Act states that "any party to a dispute may refer the dispute for conciliation…" From this statement, it would be reasonable to expect that an employer could initiate conciliation action and that they could be an active party during the conciliation process. However, the Conciliation service does not recognise the employer as a party to a dispute, with the dispute being between the Agent (on behalf of the Authority) and the claimant. Hence, the employer is not seen as a party to any dispute and cannot initiate conciliation (see separate section regarding employer objections). At the same time, the role of the Agent in conciliation means that they are not there to advocate the position of the employer. During the conciliation conference, the employer has a very passive role and is unable to influence the outcome, other than through influencing the Agent advocate.

As outlined in the preceding section, employers often misunderstand the role of the Agent during conciliation. This should be clearly explained to them prior to conciliation, and they should be encouraged to seek advice from a third party if they believe they need assistance to understand the scheme and their role in conciliation, and the way in which they can influence outcomes.

6.2.2 Introduction of new information

The claims manual does allow for the Agent advocate to seek an adjournment of a conciliation hearing if new evidence is presented. However, it has been our experience that the process of conciliation is often so focused on "resolving" the issue that the clarification of facts is overlooked.

A member's example serves to illustrate this effectively.

> *A worker had received advice that a claim for stress had been rejected under section 82(2A); this was due to him stating in his claim form that the injury related to disciplinary action. During conciliation, which was attended by the employer representative, the representative of the claimant produced new evidence which claimed that the stress related to ongoing harassment by the manager, culminating in the disciplinary action being the "final straw". The Conciliation Officer contended that this meant that there was no basis for the rejection of the claim, and that the Agent should change their decision and accept the claim. Under pressure, this is what the Agent advocate did; the claim was accepted, the employer obligations and premium impact commenced and, most dammingly, the accused manager had no opportunity to defend the accusations.*

There should be a requirement that the presentation of additional material, which results in a "new" set of claimed circumstances, leads to a mandatory suspension of proceeding to enable the new circumstances to be investigated.

6.2.3 Transparency of conciliation outcomes

Most employers enter the conciliation process expecting that any resulting agreement will be binding on all parties. They often reach agreement or accept recommendations with belief that this will be the end of the matter. However,

- Employers are subsequently surprised when a claimant who has accepted an offer to receive12 weeks compensation without acceptance of liability lodges a subsequent application for conciliation; or
- Agreements that include a commitment by the employee to return to work become unenforceable when the worker, having received weekly payments, presents with a further certificate stating they have "no current work capacity".

Throughout business employers want certainty. Agreements should be binding. If they are not binding, this should be made clear to all parties at the time of the agreement.

6.2.4 Genuine dispute certificates

It is ironical that the issuing of a "genuine dispute" certificate can make an employer who wanted a claim rejected unhappy about the results of conciliation.

Those who work within the scheme understand that these certificates are issued when the parties cannot reach an agreement and the conciliation officer considers the dispute is genuine; the issuing of this certificate gives the parties (i.e. the worker) the right to bring the dispute to court.

However, an employer who believes a claim has been rightly denied, takes exception to the concept that the dispute is "genuine".

Consideration should be given to utilising different terminology to describe the situation where the Agent and Conciliation Officer have agreed that the claim should not be accepted.

6.3 Claim Lodgement

6.3.1 Medical and like expenses

The Act requires that claims for medical and like expenses, which remain below the employer threshold (currently $546), are submitted to the Agent on a quarterly basis.

There is no benefit in this process, and this requirement should be removed from the Act.

6.3.2 Weekly compensation

Prior to 2004 employers were required to forward claims for weekly compensation to the Agent within 10 days of the claim exceeding the employer threshold of the first ten days of compensation. Employers were required to submit claims that remained below the employer threshold on a quarterly basis (as is still the case with claims for medical and like expenses).

Since 2004 employers have been required to submit all claims for weekly compensation to the Agent within 10 days of a valid claim being lodged.

WorkCover proposed this change expecting that this would enable Agents to more effectively initiate and participate in rehabilitation and return to work activities.

A review should be undertaken as to whether this change has increased Agent activity with claims in this early stage, and whether such activity has increased the return to work rates.

6.4 Access to Information about the Claim

The Accident Compensation Act establishes a number of obligations and duties for employers when claims have been accepted.

In spite of these obligations and responsibilities, in the WorkCover scheme employers are not generally granted access to information that will help them to understand why a claim is accepted and/or assist them to manage their claims, either individually or collectively. Even in the case of a circumstances investigation, employers are not generally provided with the “facts” as reported to the investigator by the claimant. This means that any accusations levelled at the employer, or any individual within that employer, can go unchallenged and form the basis for the claim being accepted.

This is not a very equitable approach and it does not give employers any feeling that they have control of claims management. In relation to any individual that has been accused of acts or omissions, this information remains on a file which can be accessed by claims staff, the injured worker, and their representative.

The following example illustrates the inequities of this situation:

> *During investigation of a stress related claim, the claimant provides information to the circumstances investigator that they have been bullied and harassed at work by their supervisor. On this basis the claim is accepted and the employer's obligations to make payments, provide duties etc. commences. However, the employer also has obligations to investigate any such complaints and put preventative measures in place to ensure similar incidents do not occur in the future; without access to this information the employer is unable to take these actions. At the same time, the "accused" supervisor has no opportunity to respond to the allegations, which remain on the file of the Agent, and accessible by the worker's representative (who may be the local union organiser).*

The manner in which this type of information is handled within the scheme must be a matter for consideration during the review.

6.5 Section 114E – Interest

It is our understanding that, if a worker is entitled to receive interest on outstanding payments, interest is calculated on all outstanding payments from the day that the entitlement commenced. We have been advised, that this means that if a worker has an entitlement to receive 26 weeks backpay of weekly compensation they will receive 26 weeks interest on all outstanding payments.

This is inherently illogical. Interest should be paid, based on the period of time since the payment should have been paid, e.g. 26 weeks, 25 weeks, 24 weeks etc.

6.6 Section 114F – Recovery of payments

This section allows the Authority or a self-insurer to recover from "…a worker, an employer or any other person any payment of compensation or other amount to which the worker, employer or other person is not entitled".

It has been our experience, that Agents have not initiated this recovery when a worker has continued to receive payments from an employer due to the employer not receiving written advice that benefits should cease. In one case it was argued that the Agent had the ability to recover any over-reimbursment that had been made to the employer, but it was the responsibility of the employer to recover any over-payments they had made to the worker.

Whilst this might be a correct interpretation of the section it is not good law for the Authority to have the ability to recover any overpayment it makes to a worker, employer or other person, but not an overpayment the employer makes to a worker.

6.7 Incentives to Employ Long Term WorkCover claimants

This issue is pertinent to both the existing employer, and any potential new employer. In both cases the employer is concerned about the potential impact on their business of a new claim.

The existing employer does have legal obligations to provide suitable duties. However, an employer may delay the return to work for a range of reasons, two significant financial reasons are driven by the SCEs:

- An unsuccessful return to work will increase the SCE and hence have an impact on the premium payable in future years; and
- If the worker has a recurrence or aggravation of that injury, there is likely to be a new claim lodged and accepted, leading to two claims (and two SCEs) for the same injured body part.

For the potential new employer, there is also a concern that a recurrence or aggravation will have both a premium impact and will create a range of obligations such as the need to provide suitable duties.

Consideration needs to be given to ways that will encourage current and potential employers to take the “risk” of offering ongoing employment to injured workers.

7 LEGISLATIVE STRUCTURE

Over the 22 years since the Act was passed, the Accident Compensation Act has become very unwieldy. In spite of the size of the Act it does not provide the level of clarity for employers and employees which is necessary to efficiently provide the correct and appropriate benefits to injured workers.

The next level of information for employers and employees is the On-line Claims Manual. We are pleased that the manual, which was designed to guide agents in interpreting the Act, has been made publicly available; however, it does not provide the level of clarity and detail necessary to aid interpretation for employers and employees.

Further, whilst we have from time to time been involved in consultation around some detail in the Claims Manual, it is not open to the public scrutiny necessary to ensure the interpretations are correct.

Of particular difficulty is the interaction between workplace relations law and the Accident Compensation Act. For example, the definition of Pre-injury Average Weekly Earnings refers to the worker's "ordinary time rate of pay". This is a definition that can only be interpreted with reference to industrial instruments (Awards, EBAs and AWAs), and reference should be made to that source of information for guidance.

We do not seek a claims manual, or other tool, that provides industrial advice; it is not the role of the Authority or Agents to provide this advice to employers. However, some reference to the interaction between the Accident Compensation Act and other relevant legislation would be beneficial.

7.1 Structure and Wording of the Act

There are some specific provisions within the Act which have created difficulty in interpretation. These are highlighted in order that they can be rectified, during the drafting of the new Act.

7.1.1 Section 5A – Pre-injury average week earnings (PIAWE)

Section 5A(1) outlines that the workers PIAWE is the average weekly earnings during the 12 months preceding the relevant injury "calculated at the worker's ordinary time rate of pay for the worker's normal number of hours per week". Section 5A(6) then provides further clarity around the interpretation of 5A(1). However, 5A(1) is on page 39 of the Act and 5A(6) is on page 44, and there is no cross reference identified in 5A(1).

Hence, many employers read only 5A(1), and subsequently misinterpret its application; this can result in an employer advising of a lower PIAWE than they should, particularly if there has been a pay increase during the preceding twelve months.

7.1.2 Section 93F – Compensation after retirement

This section states "subject to sections 93E and 93EA, a worker is not entitled to weekly payments under this Part after attaining retirement age".

Section 93E then clearly states that compensation is payable for 130 weeks if the worker is injured within the period of 130 weeks before attaining retirement age or after attaining retirement age.

It has been our experience that, in spite of the cross reference in the section, many employers and some claims staff, read section 93F as a stand alone section and presume that a person injured after retirement will not be entitled to compensation.

We would suggest that the provisions in section 93F be included as part of the general entitlement provisions, rather than as a specific exclusion which can be easily misinterpreted.

7.1.3 Section 97(4) – Inability to sign away rights to future compensation.

Section 97(4) states:

> *Compensation under this Act is absolutely inalienable whether by way or in consequence of any sale, assignment, charge, execution, bankruptcy, attachment, legal process or by operation of law or any other means and no claim can be set off against compensation under this Act.*

It is not unusual to have an unfair dismissal or discrimination claim occurring at the same time as a workers compensation claim. Within these other jurisdictions the settlement document can include a statement that the claimant will not make any further claims. In finalising settlements in these other jurisdictions, some employers want to see this statement include a forfeiture of any future rights to workers compensation.

Due to the manner in which section 97(4) is written, many employers express doubt when Ai Group Advisers inform them that this section precludes them from having a sustainable exclusion of future claims in their settlement documents.

We would like to see this provision written more clearly.

7.1.4 *Section 123 – Return to work*

This provision requires an employer to advise the Agent when a worker who has been receiving benefits returns to work, or there is a change in the weekly earnings.

The section is currently located at the end of the divisions relating to "settlements", and should be included either directly after the provisions establishing an entitlement to compensation, or in the Part of the Act which deals with the rehabilitation and return to work obligations.

8 ALTERNATIVE LEGISLATIVE INSTRUMENTS

As mentioned previously, further clarity is required on some issues to assist employers and workers to more clearly understand entitlements and how they are to be applied. It is not appropriate to provide this level of detail in the Act; the focus of the claims manual is too assist Agents in the management of the claims and does not always provide the right level of detail and explanation to aid interpretation in the workplace, by employers and injured workers.

A new legislative instrument for workers compensation should be provided which mirrors the section 12 provisions in the OHS Act, enabling the development of guidelines which detail how WorkCover will interpret various provisions of the Act.

9 ISSUES ARISING FROM THE ADMINISTRATIVE REVIEW OF THE OCCUPATIONAL HEALTH AND SAFETY ACT 2004

In December 2007, the Victorian Government released a report entitled *A report on the Occupational Health and Safety Act 2004 Administrative Review.* Within this report Bob Stensholt MP identified two issues that should be referred for consideration in the review of the Accident Compensation Act. These issues are addressed in the following sections.

9.1 Protecting Employees who Raise OHS issues

In section 12 of the Review, Stensholt addressed the issue of "protecting employees who raise OHS issues". Within his consideration, reference is made, at page 61, to the ALP Policy released before the 2006 election, in which it was stated:

> "Labor recognises that workplace health and safety representatives play a crucial role in creating safer workplaces. Labor will legislate to provide enhanced protection from discrimination and dismissal for health and safety representatives and workers who raise safety issues, report injuries or make a claim, including the right for an individual to institute proceedings in relation to an alleged breach with remedies to redress the discrimination?"

Whilst the administration of current provisions in the OHS Act 2004 were considered by Stensholt in this review, he recommended that the Government should consider this issue "…explicitly in the forthcoming review of accident compensation with a view to harmonisation between Acts" (p.64).

Accordingly, the issue of discrimination, in relation to both OHS and workers compensation, are addressed in this submission.

The relevant provisions in the Accident Compensation Act are:

> Section 242(2) An employer must not dismiss a worker from employment by reason only that the worker complies with a request made under section 239 or 240 [these are requests by the Authority to provide information or assist with an inspection].
>
> Section 242(3) An employer must not … (b) dismiss a worker from employment because the worker has: (i) given the employer notice of an injury; or (ii) taken steps to pursue a claim for compensation; or (iii) given or attempted to give a claim for compensation to the employer, insurer or the Authority.

Ai Group is keen to participate in discussions about the best way to achieve a fair and equitable response to this issue. It is important that employees are protected from inappropriate employer behaviour. However, we would not want to see additional jurisdictions created when recourse is available through jurisdictions dealing with unfair dismissals, unlawful termination and EEO/discrimination issues. Further we would be concerned about any approach which implemented a standard of proof requiring the employer to prove they were not guilty of an offence.

9.2 Return to Work Inspectorate

In Appendix C of the Stensholt Report (pp.103 to 104) it is highlighted that "unions submit that WorkSafe should employ a team of inspectors that operates independently of the OHS inspectorate to ensure that rehabilitation and compensation legislation and guidelines are complied with." Mr Stensholt stated that this issue was outside the terms of reference of the review and that he has requested WorkSafe to refer the unions' comment to the review of the Accident Compensation Act.

The issue of the return to work inspectorate has been discussed in the tripartite forums for a number of years.

It is Ai Group's view that the WorkCover Agents have a key role in assisting employers to meet their obligations under the Accident Compensation Act 1985, and any subsequent legislation. They are able to seek a copy of the employer's Rehabilitation Program, and they are best placed to identify if employers are meeting their obligations to develop return to work plans and provide offers of suitable employment.

It is not appropriate to overlay an inspection process when Agents should be well-equipped to deal with the issues which are currently the focus of the inspectorate.

However, if there is to be an inspection regime, it would seem appropriate to enable the current OHS inspectorate to address RTW issues during their other compliance programs and activities.

OHS inspectors regularly attend workplaces to follow up on the employer's OHS response to a WorkCover claim, e.g. to identify whether the employer has met their obligations to review risk controls if a musculoskeletal injury occurs. These obligations are identical to the Risk Management obligations in the Accident Compensation Act, making it very easy for the OHS inspector to assess compliance. It would not take much more effort for the inspector to ask to see the Rehabilitation program and copies of return to work plans and offers of suitable employment. If the employer was found wanting in this latter area, they could be advised to seek assistance from their Agent, and/or the circumstances could be referred to the compliance branch of the Authority for investigation.

It is not appropriate to establish a separate RTW inspectorate, at a significant cost to the scheme, as it would result in the following outcomes:

- duplication of responsibilities between the Agents and the inspectorate;
- duplication of roles between the OHS inspectorate and the RTW inspectorate;
- confusion amongst employers and workers about what a WorkSafe inspector does; and
- increased expense to the scheme with little, if any, benefit to injured workers or employers.

10 DRAFTING THE NEW ACT

We understand that the major drafting of the new Act will be undertaken by Parliamentary Council. However, this is a piece of legislation which has the potential to create unintended consequences for injured workers and employers if the practical implications of specific provisions are not carefully considered.

For this reason Ai Group requests that the drafting of the legislation be undertaken in a very consultative manner, to enable the practical issues to be addressed prior to the passing of legislation.

It would seem appropriate to convene a working group, similar to the groups established for the drafting of the OHS Regulations, for each of the major categories of issue in the Act. This would enable the drafting instructions to clearly represent the views of all relevant stakeholders.

We would also request that an exposure draft be issued for public comment prior to the legislation being tabled in parliament. It should be highlighted, that an exposure draft was not provided prior to the OHS Act 2004 being tabled in parliament; this resulted in the need for stakeholders to be involved in significant consultation after the first reading speech to enable unintended consequences of the legislation to be addressed prior to the legislation being passed.

11 OTHER KNOW PROPOSALS

In December 2007, The Victorian WorkCover Authority provided members of the WorkCover Advisory Committee (WAC) with a list of items that have previously been put forward to them to consider for legislative change, in a document entitled "External Stakeholder's Legislative Proposals". Ai Group has taken the opportunity to utilise this information to summarise our views on these issues.

11.1 Proposals from Unions with Ai Group Comments

Title of Proposal	Date of Proposal	Summary	Ai Group Comment
Overtime / Shift Allowances	23/03/2007	All overtime, penalty rate payments and shift allowances should be used in the calculation of PIAWE. Periods of paid leave should not be included in the calculations for determining overtime/shift work amounts to be included in PIAWE.	Ai Group is comfortable with proposal to exclude periods of paid leave in the calculation, as it provides a fairer calculation of overtime and shift penalties. However, s.5A currently states that overtime and shift penalties are included if "… it is likely that the worker would have worked paid overtime at any time during the first 26 week period .." This means that if the worker would have worked overtime in one week only of the 26 week period, overtime is included – this should be modified to ensure that an injured worker is not receiving more in compensation than the colleagues who continue to work
No step down where employer fails to offer suitable employment (part 1)	23/03/2007	Section 93CB should be amended to provide for weekly payments at the rate of 95% of PIAWE to apply where an employer fails to provide the same or equivalent or suitable employment to a worker that has a capacity for such duty.	Ai Group does not support any increase in weekly benefits.

Title of Proposal	Date of Proposal	Summary	Ai Group Comment
No step down where employer fails to offer suitable employment (part 2)	23/03/2007	Further, employers who do not provide or fail to provide the same or equivalent or suitable employment to a worker that has a capacity to perform such duties are reimbursed at the rate of 60% thus imposing a penalty for failure to provide employment.	Ai Group believes that non-compliance with provisions relating to suitable employment should be dealt with through the current provisions of the Act. It is not appropriate to automatically penalise the employer financially, when the issue may be about the availability of suitable duties, not whether the employer is prepared to offer those duties
Termination of weekly payments	23/03/2007	The Act should be amended to reinstate the entitlement to weekly payments beyond the second entitlement period to the situation that existed prior to September 1985, i.e. a worker will be entitled to remain in receipt of weekly payments if he or she is incapacitated for work by reason of work-related injuries.	Ai Group does not support any increase in weekly benefits.
Partial Payments upon return to work	23/03/2007	Reduce the 15 hour requirement to 10 hours and the commensurate reduction in the minimum earning criterion and exempt claimants from the 'maximum capacity' requirement where the claimant remains employed by the employer, has sought employment at that capacity from the injuring employer and it has not been provided by that employer.	This issue requires further investigation to determine the value of such a change
Weekly Payment Rate	23/03/2007	The long-term weekly payment rate for injured workers should be lifted by 5% to 80% of pre-injury earnings including overtime, penalty rates, shift work allowances and superannuation.	Ai Group does not support any increase in weekly benefits.
Weighting partial Weekly Payments	23/03/2007	Those workers who have small partial payments e.g. $20-30 per week loses a full weekly payment for the purposes of the calculation of the primary period. A mechanism for a weighting of small partial payments is necessary, so that workers do not lose a fully weekly payment.	Ai Group does not support any change to the manner in which entitlement periods are calculated.

Title of Proposal	Date of Proposal	Summary	Ai Group Comment
Weekly Payments	23/03/2007	The 130 weeks of payment provision should be amended to 650 days.	Ai Group does not support any change to the manner in which entitlement periods are calculated.
Stress Claims	23/03/2007	Stress claims should be subject to the same requirement to establish a work relationship as any other category of injury and section 82(2A) should be repealed.	Ai Group strongly opposes this proposal. Our detailed position relating to section 82(2A) is outlined earlier in this submission.
Notional Earnings	23/03/2007	All references to notional earnings should be removed from the Act.	Ai Group strongly opposes this proposal. Our detailed position relating to notional earnings is outlined earlier in this submission.
Extension of Return to Work Obligations	23/03/2007	The Act should be amended to: • Provide injured workers with a right to take legal action where they have a capacity for work and where the employer has failed to offer suitable employment to the employee; • Allow the Court to make any orders for return to work consequential upon any decision that it makes in relation to liability to pay weekly payments of compensation; • Allow workers to access the Courts to seek orders for damages or reinstatement in circumstances where employers fail to meet legislative return to work requirements.	These issues can be dealt with in other industrial jurisdictions, through claims for unfair dismissal, unlawful termination and/or EEO/discrimination. It is not appropriate to introduce another avenue for injured workers to initiate action.
Offset – Removal of the requirement to reduce weekly payments after receipt of lump sum compensation	23/03/2007	The provisions should be removed or modified to: • Provide that the offset should only occur beyond the extent that is necessary to reduce the payment to the extent of the claimant's actual (not defined) pre injury earnings. • Disregard lump-sum superannuation payments.	Further information is required before Ai Group could comment on this proposal.

Title of Proposal	Date of Proposal	Summary	Ai Group Comment
Repeal of notice of injury rule	23/03/2007	The requirement to provide a notice of injury is harsh and unreasonable and should be repealed.	There are already provisions within the Act which enable the Agent to waive these reporting requirements. Ai Group believes it is important to create a requirement for timely reporting, to enable the employer and Agent to be able to determine the circumstances of an alleged injury within a reasonable timeframe
Reduction in time for Agent to determine claim	03/10/2006	Under the Act, an employer must forward a claim for compensation to the VWA/Agent within 10 days of receiving it and the VWA/Agent has 28 days to determine whether it is going to accept or reject the claim. This time should be collapsed, so that the total time for the employer to forward the claim, and the VWA/Agent to determine it, is reduced to 28 days.	Changes to the Act in 2004 provided a much more streamlined approach to the determination of claims; these changes, which created a fairer system for claimants, were supported by employers. Most claims do not enter into the realms of investigation by Agents, with employers accepting many claims and commencing payments without any delays. Where there is a requirement to investigate a claim, it is crucial that the Agent has sufficient time to organise an appropriate investigation, including a circumstances investigation and independent medical examination. Within the current timeframes it is often difficult to coordinate these activities. It is not appropriate to further decrease the time available for a full and proper determination of the claim. If the integrity and credibility of the claim determination process is reduced, the credibility of the scheme is put in jeopardy.
Mechanisms and processes regarding the termination of weekly payments	02/12/2004	Review the processes for terminating a worker's weekly payments with the aim of introducing fairer processes for the worker.	Ai Group agrees that the process for termination of benefits needs to be a fair one. We would be seeking further detail about what is considered "fairer processes" prior to making comment.

Title of Proposal	Date of Proposal	Summary	Ai Group Comment
Review employers' compliance with RTW obligations (part 1)	02/08/2004	This provision should be monitored closely by the VWA to ensure that employers are meeting their return to work obligations	Ai Group agree that the requirement to provide duties should be monitored by Agents, assistance provided where necessary, and compliance action taken against those employers who are not meeting their legal obligations.
Review employers' compliance with RTW obligations (part 2)		The legislation should be amended to extend the period of up to 12 months to up to 24 months.	Ai Group does not support the extension of these obligations beyond the current period of 12 months
Rehabilitation program for injured workers	03/12/2004	Introduce a requirement whereby employers are required to continue a rehabilitation program for injured workers even where the claim is disputed.	It is not appropriate for the Accident Compensation Act to mandate what an employer must do in relation to claims that are being investigated or are the subject of prolonged dispute. Ai Group do advise members that the development of a return to work plan and the provision of suitable duties is advisable whilst a claim is in dispute; however, it can not be mandated.
Claims suppression (part 1)	23/03/2007	The Act should be amended to prevent claims suppression.	Ai Group does not support employers who dissuade employees from lodging WorkCover claims. In fact, we encourage them to ensure a claim form is lodged prior to any WorkCover payments being made to the worker. However, it must also be recognised that many injured workers do not want to lodge a claim in the first instance; some employers then agree to make payments for the "one" medical bill or couple of days off without a form being raised. Any provisions that result in an employer being penalised for such arrangements, may lead to an employer being "punished" for assisting a worker by paying them without forms being completed. Careful consideration would need to be given to any such provisions.

Title of Proposal	Date of Proposal	Summary	Ai Group Comment
Claims suppression (part 2)	23/03/07	The amendment should provide that if a worker is dismissed, demoted or subjected to a detriment in employment by an employer or suffers threats from an employer to dismiss, demote or subject a worker to a detriment in employment following the worker reporting an injury or making a claim under the Act the employee may take legal action in respect of the dismissal, demotion or detriment. In such an action the onus will be upon the employer to satisfy the Court that the reporting of the injury or the making of the claim was not a reason for the dismissal, demotion or detriment. The first step in the process shall be referral to an alternative dispute resolution mechanism. The amendment should mirror the provisions of sections 76 to 78 of the OHS Act.	Ai Group has commented on this proposal earlier in the submission

Title of Proposal	Date of Proposal	Summary	Ai Group Comment
Provisional liability payments	23/03/2007	The Act should be amended to provide that weekly payments will start within 7 days of an injury being notified to an employer's insurance company on a 'without prejudice' basis. This is designed to reduce the impact of injury and illness, but does not mean an admission of liability by either the insurance company or the employer. If it is later determined that the claim was fraudulent, the worker may be ordered to pay a refund.	Provisional liability payments were introduced into the New South Wales scheme to address concerns around administrative obstacles and slow decision making by insurers. Whilst the introduction of provisional liability within NSW has had some positive effects on the scheme, our members report that most claims are being automatically accepted for up to 12 weeks or $7500, without the reviews that were intended to be in the system. Accordingly, it is now seen by many employers and workers that all small claims will be accepted. Within Victoria, the current timeframes ensure that claims can be dealt with in an effective and efficient manner; we do not need to introduce provisional liability to address issues of timeliness. We should not introduce a provision which would further reduce the perceived fairness and equity in the scheme. We note that the proposal includes a suggestion that monies could be refunded if the claim was fraudulent. From an employer's perspective it is not usually a question of fraud, only a question of entitlement, and a refund is unlikely to be forthcoming if it is determined that the claim was made in "good faith", but there was no entitlement.
Accident Compensation Conciliation Service (ACCS)	23/03/2007	Amend to provide Conciliation Officers' with enhanced dispute resolution powers including: • Conciliation and arbitration powers for Conciliation Officers', which can be appealed further but would stand until the substantive case was heard (or settled); • An unequivocal power of a conciliator to direct the calculated rate of a weekly payment; and • Provide for prescribed interest to be paid to injured workers when a 'recommendation' is made by an ACCS Conciliation Officer.	Earlier in our submission Ai Group has highlighted concerns about the conciliation process. Without a clearer understanding of this proposal, we are not in a position to make comment on this proposal. However, we do agree that there is a need to review the legislation provisions associated with conciliation and the operation of the Conciliation Service

Title of Proposal	Date of Proposal	Summary	Ai Group Comment
Return to Work Co-Ordinators	23/03/2007	Training should only be provided from training organizations registered by the Victorian WorkCover Authority.	Ai Group has made comments regarding this issue earlier in our submission. We do not believe that training should be mandated, and therefore could not support this proposal. However, if training was to be mandated, such training would need to be delivered by approved organisations.
Medical Opinion should be subject of appeal in all circumstances	03/12/2007	Section 68(4) provides that for the purposes of determining any question or matter, the opinion of a Medical Panel on a medical question referred to the Medical Panel is to be adopted and applied by any court, body or person and must be accepted as final and conclusive by any court, body or person irrespective of who referred the medical question to the Medical Panel or when the medical question was referred. This should be amended to allow for appeal.	This proposal requires further discussion and consideration before Ai Group could establish a position.
Statutory non-economic loss payments	23/03/2007	Minimum payment thresholds for psychiatric impairment should be the same as those for all other injuries ie 10%. The modification of an assessment score which applies to musculoskeletal injuries only should extend to all other physical assessments under the guides.	This proposal requires further discussion and consideration before Ai Group could establish a position.
Expedite compensation for pain and suffering to terminally ill workers		Amend the Act to provide that claims for compensation for pain and suffering under section 98C of the Act are expedited where the worker is terminally ill. This will provide that the worker receives the compensation amount in a timely fashion. This entitlement attaches to the worker only whilst they are alive. Provision would be similar to the now enacted section 134ABA – Actions by terminally ill workers.	This appears to be a reasonable proposal, presuming the entitlement to statutory benefits has already been established.

Title of Proposal	Date of Proposal	Summary	Ai Group Comment
Notice to workers for termination of medical and like expenses	23/03/2007	The Act should be amended to provide the worker with a minimum of 90 days notice of a decision to terminate or reduce compensation for medical and like services.	This proposal requires further discussion and consideration before we could establish a position. Whilst a period of 90 days may be appropriate for a long term claim, it would not appear to be relevant in the early stages of a claim.
Claims for medical and like expenses only	23/03/2007	Currently there is no time frame within the legislation for a decision to be made on medical and like expenses claims only. The legislation should be amended to require that time frames for a decision on these claims is the same as time frames for decision on weekly payment claims, and that a failure to make a decision within these time frames will result in the claim being deemed accepted.	It is appropriate to specify a timeframe. However, given the fact that claims for medical and like expenses do not have to be forwarded to the Agent until the employer excess has expired, it would not be appropriate to apply the same deeming provisions as exist in relation to claims for weekly compensation.
Medical Procedure Payments	23/03/2007	Workers who have received greater than 104/130 weeks of weekly payments of compensation are not entitled to receive a weekly payment in the event that it is necessary for them to cease work to undergo surgery. An entitlement to a payment is necessary to provide financial support to those who lose income during the period in which a procedure is performed.	This proposal may have some merit. However, it may create a potential for “gaming” the system, with workers delaying surgery until after they have exhausted their entitlement to 104/130 weeks.
Penalise Agents who fail to meet timeframes for payments	03/12/2004	Impose penalties on Agents where they fail to pass on weekly payments from employers to workers within 7 days of the due date.	We do not understand this proposal. In most cases, it is the employer who pays the worker, subsequently receiving reimbursement from the Agent.

11.2 Proposals from Lawyers

Ai Group will be seeking legal advice before determining our response to the issues documented below.

Title of Proposal	Date of Proposal	Summary
Payment of lump sum impairment benefits directly to workers	30/08/2006	To provide that the payment of the impairment benefit lump sum should be made by the VWA to the worker's representative, not directly to the worker.
Effects of the Eddy Decision	19/02/2007	*Eddy* abolished the common law entitlement to *Sullivan v Gordon* damages, i.e.. Damages that are awarded to compensate the care provided by the Plaintiff to dependants. Right to these damages should be reinstated by legislation.
Provisional Damages	19/02/2007	Amend to address the effect of *Strikwerda* and *Eddy* for victims of asbestos related diseases. Provisional damages should be introduced so if a Plaintiff goes on to develop mesothelioma, lung cancer or another asbestos related cancer they have a right to further damages. A claim for provisional damages needs to be specifically pleaded and more often than not claims are settled on a once-and-for-all basis which extinguishes a Plaintiff's right to further damages should they go on to develop a further condition.
Effects of the Raeburn decision	14/06/2007	The effect of the statutory offer process be reviewed to ensure no inequity occurs with the passage of time between the statutory offer process and judgment.
Streamlining of the common law and impairment benefit processes		The common law and impairment benefit processes should be streamlined so that they run concurrently. This would expedite the payment of compensation to injured workers.
Suspension of the limitations period		Once a serious injury application has been lodged, the limitation period should stop running, until such a time as a damages writ is lodged in Court. This would be more equitable towards the worker and allow them more time in the lodgment of their claim.

Title of Proposal	Date of Proposal	Summary
Effects of the Serdzeff decision		**Proposal 1** Amend section 92A which provides for compensation to dependants in the event of the death of a worker. The section provides that in determining the extent of dependency, no regard shall be had to any earnings of the surviving partner. The County Court held in the Serdzeff matter that disregarding the earnings meant that the surviving partner was in a neutral position and further evidence was required to prove actual financial support was necessary. This interpretation may serve to disentitle some surviving partners so the legislation should be amended to provide that in the absence of any other income, dependency is established and that mutual dependency exists irrespective of the formal disposition of a couple's income. Proposal 2 The Act should be amended to: • Re-establish the link between section 92A(2) and the definition of "dependant" in section 5(1), to restore a "one stage" analysis of dependency. • Re-cast the definition of "dependant" in section 6(2), so as to take account of partners' mutual dependence upon each other, not being restricted to financial dependence. • Refine the definition of "dependent" in section 5(1), so that dependence upon 'earnings' equates with dependence upon money that replaces earnings (for example WorkCover payments); and • Establish a rule, or a prima facie rule, that a surviving partner is deemed to be a dependant of a deceased worker.
Medical Panel questions and Referrals	03/12/2004	Amend section 5(1) regarding the definition of "medical question" to remove from the Panel's jurisdiction questions that could be construed as a mix of medical and legal issues. All questions which deal with the worker's incapacity for employment, and whether work is a "significant contributing factor" to the worker's condition should be removed from the definition. Also, it should not be compulsory for the Court to refer a "medical question" to the Medical Panel at the request of either party.
Change to 40% loss of earning capacity test	05/12/2006	In order to access Common Law, a worker is required to prove serious injury within the meaning of the narrative definition in section 134AB of the Accident Compensation Act 1985, unless deemed by virtue of an AMA Guides impairment of 30% or more. Under the WorkCover scheme, an additional requirement of proving at least 40% loss of pre-accident earning capacity is required in order to claim damages for past and future loss of earnings. This test is too harsh, discriminatory against low income earners and should be repealed or amended.

Title of Proposal	Date of Proposal	Summary
Reduction in scale of costs changed from 20%	05/12/2006	Currently, section 134AB(29) provides that for the purpose of the taxing of costs in proceedings to which the Accident Compensation Act 1985 applies, any applicable scale of costs has effect as if amounts in the scale were reduced by 20 per cent. This provision should be amended to reflect that: • No public policy rationale for dilution of the ordinary principle that the losing party pays the legal costs of the successful party; • Not applicable to any other litigation in Victoria; • The impact of the test is that workers have to pay a greater amount by way of solicitor/client costs; and • Workers are already subject to a costs penalty for successfully litigating a rejected Serious Injury Application by way of a reduced entitlement to their Ministerial costs. Workers should not be subject to any costs penalties if they win their case – they are presently subject to two costs penalties.
Application of threshold where more than one injury 98C and 104B	31/08/2007	Adopt a provision similar to section 48 of the *Transport Accident Act* 1986 which applies to persons injured in more than one transport accident. The section applies if a person is injured as a result of one or more transport accidents, the person has a total degree of impairment of 11% or more as a result of the accidents and the person is injured in a subsequent transport accident and the person's total degree of impairment is increased by 1% or more as a result of the subsequent accident. The person is then entitled to an impairment benefit as at the date of determination of the last relevant degree of impairment as though any part of the impairment is attributable to the last accident.
Gap Payments	29/11/2007	The Act should be amended to allow for some ongoing weekly payments for loss of earnings benefits to be made between the date of settlement of the common law claim and the date of receipt of funds by the claimant. Under the current system, even if not perpetrated by the claimant, this can sometimes result in severe hardship where the claimant and his/her family have no income at all.
Effects of the Taylor decision – "uplift"	29/11/2007	Spinal injuries need to be better compensated. An amendment to insert an impairment modifier to increase the impairment benefit for spinal injuries (similar to the impairment modifier under Chapter 3 of the AMA Guides) should be considered.

11.3 Proposals from Others

Ai Group does not currently have a view on the proposals outlined below.

Title of Proposal	Date of Proposal	Summary
Allow registered dentists to provide ongoing Certificates of Capacity	03/12/2004	Amend section 112(2)(a)(ii) of the Act to provide that registered dentists are able to provide ongoing certificates of capacity.
Status of Riders in Non-Racing Victoria Races	17/10/2007	Amend section 16 to deem the holder of the mixed sports gathering authorization to be the deemed employer and impose a special condition on mixed sports gathering authorizations requiring insurance coverage to match the protection and entitlements that would be applicable under WorkCover.
Allow occupational therapists to be independent medical examiners	23/06/2003	Amend the Act to include occupational therapists as IMEs.
Allow occupational therapists to provide certificates of capacity	26/06/2003	Section 111(2)(a)(ii) provides that a certificate of capacity must be in a form approved by the Authority given by a medical practitioner, registered physiotherapist, registered chiropractor or registered osteopath. Occupational therapists should be added to this list.
Amend the definition of "medical Service" to include occupational therapists	23/06/2004	The definition of medical service contained in section 5 of the ACA should be amended to include occupational therapists. Amendments should also be made to section 112 to provide that occupational therapists can provide ongoing certificates of capacity and can be independent medical examiners.
Coverage of Local/Municipal Councilors as workers 14(3)	16/10/2007	Remove the exemption that excludes local councilors from coverage under the Scheme and thereby entitle local councilors to workers compensation benefits. Local councilors are explicitly excluded from the definition of worker under section 14(3) of the Accident Compensation Act 1985.

12 REFERENCES

Gorton, Robin QC, March 2004, Life after Hegedis v CUB (2000) 4 VR 296.

Productivity Commission, 2004, Inquiry into National Workers' Compensation and Occupational Health and Safety Frameworks

World Health Organisation, 2003, Work Organisation & Stress