THE AUSTRALIAN INDUSTRY GROUP

SUBMISSION RESPONDING TO RECOMMENDATIONS OF THE QUEENSLAND PARLIAMENTARY FINANCE AND ADMINISTRATION COMMITTEE

REVIEW OF THE OPERATION OF THE QUEENSLAND'S WORKERS' COMPENSATION SCHEME

28 JUNE 2013

AUSTRALIAN INDUSTRY GROUP

Response to Recommendations of the QLD Parliamentary Finance and Administration Committee's review of the Operation of the Queensland's Workers' Compensation Scheme

The Australian Industry Group (Ai Group) strongly supports a fair and sensible workers' compensation scheme that provides access to high quality care and support for the seriously injured and speedy recovery and return to work for all workers who have suffered a work related illness or injury. Most important a workers' compensation scheme needs to be efficient, cost effective and fair.

This submission presents a detailed response to recommendations of the QLD Parliamentary Finance and Administration Committee's review of the Operation of the Queensland's Workers' Compensation Scheme released on 24 May 2013.

Recommendation 1

The Committee recommends that the definition of worker contained in section 11 remain unchanged and amendments are made to Schedule 2 to strengthen who is or is not considered to be a worker.

It is Ai Group's view that this recommendation has become redundant with the recent amendments to the definition of contractors that were passed on 6 June 2013, as part of the *Industrial Relations (Transparency and Accountability of Industrial Organisations) and Other Acts Amendment Bill 2013*

Ai Group notes the comments in the report that the changes made in this legislation place reliance on the definitions contained within the Taxation legislation, and subsequently on guidance provided by the ATO (Australian Taxation Office). Ai Group has accessed this guidance material and believes it should be supplemented by WorkCover Qld so that employers and contractors can read the guidance in the context of WorkCover Qld rather than in relation to tax and superannuation obligations.

Recommendation 2

The Committee recommends that Schedule 2 be amended to include crews of fishing vessels, who are paid a percentage of catch as remuneration, as workers.

Ai Group does not have a view on this issue.

Recommendation 3

The Committee recommends that the Department undertake an extensive awareness education and compliance campaign to assist employers and workers understand their rights, obligations and responsibilities with regard to workers compensation coverage.

Ai Group strongly supports the need for ongoing awareness education programs supported by appropriately targeted enforcement campaigns that **assist** employers to understand their obligations with regard to workers compensation coverage. In undertaking enforcement activity it is particularly important to recognise that misunderstandings about necessary coverage are driven by both the complexities of the scheme and also the "myths" associated with who is and who isn't a contractor.

Education and enforcement should focus on increasing understanding and achieving compliance, rather than applying penalties for misunderstandings. This is particularly important when

considering commentary surrounding recommendation 4 which indicates that WorkCover is not always able to make clear assessments. Education should include a set of "myth busters" to aid understanding.

Ai Group is regularly involved in advising employers in relation to this issue and is well placed to provide input into the many misconceptions and misunderstandings associated with determining who is a worker.

Recommendation 4

The Committee recommends that the Department prepare for and distribute guidance material to assessors to ensure that decisions are made in a clear and consistent manner.

On page 37 of the report, it is stated that "*the Committee is concerned that employers are reporting that WorkCover is unable to assist them in determining who are workers and that even subsequent to decisions being made, WorkCover are continuing to investigate these instances".*

It is Ai Group's view that this is totally unacceptable and WorkCover must be able to provide clear advice on which an employer could rely for the purposes of paying premium.

Ai Group strongly supports this recommendation and sees this as an urgent need.

Recommendation 5

The Committee recommends that the Department monitor the WorkCover policy for Queensland jockeys to ensure that it continues to include secondary income for jockeys and apprentice jockeys in the future.

Ai Group does not have a view on this issue

Recommendation 6

The Committee recommends that the current definition of injury be retained in its current form with the exception of psychological injuries which are addressed separately in section 4.4.

It is Ai Group's view that the current definition of injury, and the courts' interpretation of that definition, will always be problematic in any situation which does not involve a clearly identifiable physical injury from a traumatic incident.

Accordingly, Claimants with aggravations of previous physical injuries or exacerbations of degenerative conditions must be required to demonstrate a clear and direct linkage to the work undertaken. For this reason Ai Group continues to strongly advocate that work must be *the major contributing factor for* all injuries.

Irrespective of whether there is a change to the definition, WorkCover and Q-Comp must regularly review the outcome of the types of claims mentioned above with the view to identifying if there are any emerging trends that need to be addressed.

Recommendation 7

The Committee recommends that the definition of injury be considered at the next review subsequent to the roll out of "*DisabilityCare Australia*" formerly known as the National Disability Insurance Scheme (NDIS) and the National Injury Insurance Scheme (NIIS).

Ai Group notes the work that is currently underway through Safe Work Australia to identify the minimum requirements for workers' compensation schemes to meet the requirements of the NIIS.

Ai Group supports the recommendation to further consider the definition of injury once this work is completed and implemented.

Recommendation 8

The Committee recommends that the current provisions relating to journey claims be retained.

In 2004 the Productivity Commission Inquiry into National Workers' Compensation and Occupational Health and Safety Frameworks (PC Inquiry) 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*", (page 187).

In relation to journey claims most jurisdictions have adopted this approach and Queensland should also act to remove compensation for journey claims.

Whilst it is recognised that individual employers do not pay additional premium for journey-related claims, the total cost of the scheme is impacted and funded by the total employer population.

It is Ai Group's view that the WorkCover Qld scheme should not be liable for the costs associated with such claims.

Accordingly, Ai Group does not support the recommendation that journey claims be retained.

Recommendation 9

The Committee recommends that education programs incorporate journey claims as a topic when informing employers about workers' compensation rights and responsibilities.

Ai Group supports the provision of education and information that assists employers, and workers to understand the scheme.

If journey claims are retained it is our view that the major focus of information would be to clearly distinguish the circumstances in this context which impact on premium from those which do not.

Recommendation 10

The Committee recommends that psychological injuries be included under separate provisions within the legislation

Ai Group supports this recommendation.

Other issues associated with psychological claims which should be addressed.

Clear psychological disorder

We note that the report states, at page 85, "*the Committee agrees that what should be compensable is a properly diagnosed psychological injury or disorder, not a short-lived disappointment or resentment*". It is Ai Group's view that this should be addressed in the separate provisions to address psychological injury; such a diagnosis should be confirmed by a Psychiatrist, a Clinical Psychologist or a General Practitioner who has completed appropriate mental health training.

Ai Group has also not identified any recommendation which relates to this conclusion. .

Secondary psychological injuries

Ai Group is disappointed that whilst real concerns from industry about the management of secondary psychological injuries were highlighted in the report, the commentary and related recommendations do nothing to address this concern with the report simply stating the obvious by noting that "*the Act does not refer to secondary psychological claims and they are treated the same as any other injury*" (page 75).

Secondary psychological injuries often extend, delay or comprehensively overtake a relatively short term primary physical injury. For this reason they should be subject to rigorous scrutiny and justification on the part of injured worker, the treating practitioners and WorkCover Qld. As a minimum WorkCover Qld, and possibly Q-Comp, should be monitoring the occurrence and management of such secondary injuries by ensuring they are initially assessed appropriately and facilitating specialised return to work interventions in a timely manner when these issues arise.

Recommendation 11

The Committee recommends that the definition of psychological injuries be amended to include the two types of psychological injury identified as category A and B above in section 4.5

Categories A and B are defined in the report as follows:

> A. *Where a psychological injury is attested to by medical evidence and it results from an event or series of events that deliver such significant trauma that it would reasonably be expected it would impact adversely in the short, medium and long term on a significant proportion or the majority of the population to such significant events.*

Examples of such events would include serious work related assault occasioning bodily harm and in particular residual physical disability. Other events, that if supported by medical evidence of ongoing psychological injury, may include people exposed to severe physical threat such as hold-up, work place invasion such as robberies or where workers are exposed to victims of road and rail incidents in the course of their employment.

> B. *All claims other than those identified above. This would include claims such as workplace harassment and those types of clams where it is anticipated it would only produce a lasting psychological injury to people whose pre-existing psyche is vulnerable. This type of claim is more difficult to assess because the events around them are likely to be influenced by non-work psychological issues such as substance abuse, pre-existing depression, personality disorder, bipolar disorder etc.*

The Committee considers the level of proof required for acceptance of a claim under the second type of claim should be quite high.

Ai Group supports the concept that there are different types of psychological claims.

Category A identifies circumstances in which psychological injury claims are relatively easy to determine. Ai Group accordingly acknowledges that acceptance of such claims are likely to be relatively uncontroversial no matter how "*injury*" is defined.

Ai Group however strongly supports the concept that the level of proof for Category B claims should be "*quite high*" and for this reason believes that the test for all Category B claims should be that work was "*the major significant contributing factor*". Also see Ai Group's comments in relation to recommendation 12 earlier.

It is noted that when considering the definition presented in Category B, Ai Group did not immediately identify that the category was intended to capture two specific and separate types of claims, that is, claims related to clearly identified inappropriate behaviour in the workplace such as harassment or bullying where the concept of a vulnerable psyche would not be considered, and

claims that arise purely from the normal day to day activities of work which is where the issue of vulnerability would arise.

In order to achieve acceptance of the concept of a Category B claim it is Ai Group's view that it is important to clearly articulate these two sub-categories as different types of claims. Without this clarity it may be that some commentators will interpret the category to mean that inappropriate behaviours in the workplace (including harassment and bullying) only create psychological impacts if the worker has a vulnerable psyche. Subsequently if these recommendations are adopted it may be better to describe the Category B claims as separate categories even if they attract the same tests for acceptance.

Recommendation 12

The Committee recommends that the current exclusion for reasonable management action be removed and be replaced with specific exceptions for normal work place practices such as:

a) where action is taken to transfer, demote, discipline, redeploy, retrench, or dismiss the worker provided that action is taken in a reasonable way;

b) where a decision is made not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment provided the decision is made in a reasonable way, and

c) action by the Authority or an insurer in connection with the worker's application for compensation.

AND the definition be amended to be "the major significant contributing factor" rather than the current "a major significant contributing factor" for category B type psychological injury claims.

Current Queensland legislation – Section 32

(1) An ***injury*** is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury.

(5) Despite subsections (1) and (3) ***injury*** does not include a psychiatric or psychological disorder arising out of or in the course of, any of the following circumstances –

(a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment
(b) the worker's expectation or perception of reasonable management action being taken against the worker;
(c) action by the Authority or an insurer in connection with the worker's application for compensation.

Examples of actions that may be reasonable management actions taken in a reasonable way –

- action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker
- a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment.

Ai Group notes that the application of provisions that exclude certain types of psychological injury have been the subject of much discussion and debate across jurisdictions in recent years. Through Ai Group's interaction with employers, workers' compensation regulators, scheme Agents/Insurers and those who have reviewed schemes, Ai Group has been privy to the many varied and often conflicting views about this issue.

Ai Group acknowledges that in a scheme which is based on a *no fault* entitlement to statutory benefits there is some tension in this area.

However it is crucial that a worker is not able to receive compensation for an illness or disorder of the mind when an employer is taking "*reasonable management action in a reasonable way*"; action which is not only necessary to effectively manage a business but may also be required to meet requirements of other legislation.

The current provisions in the Queensland legislation provide for the Authority or the Insurer to undertake an objective assessment of a range of circumstances to determine whether they apply to the general concept of management action with the list of examples identifying the sorts of action that are contemplated by the legislation.

They do not and should not provide an exhaustive list.

The recommendations that are presented in this report propose to significantly narrow the application of this exclusion by providing an exhaustive list which does not encompass all of the types of circumstances that should be part of this exclusion.

In the following paragraphs Ai Group considers the potential impact of the proposed words at paragraph (a): "*where action is taken to transfer, demote, discipline, redeploy, retrench, or dismiss the worker …"*

The proposed definition is very similar to that which was utilised in the Victorian *Accident Compensation Act* 1985 prior to amendments in April 2010; for this reason Ai Group will reflect on the experience of Victorian employers under such a provision.

The practical outcome of an exhaustive and limited list is to create a disconnect between the workers' compensation legislation 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 more formal disciplinary action without first initiating informal performance management and/or counselling approaches. In many cases to do so would likely be found by an industrial tribunal to have resulted in an outcome that, after taking account of all the relevant circumstances, was considered overall to be "*harsh, unjust or unreasonable*".

In Victoria under the previous laws there have been very narrow interpretations of disciplinary action with employers being advised that claims that are made in the context of performance management activities cannot be denied because they did not meet the criteria in section 82(2A)(a) of "*disciplinary action*" nor the requirements of section 82(2A)(c) of creating an "*expectation of the taking of such action*".

Notably, as was previously the case in Victoria, the proposed exceptions do not include "*performance management*", although "*discipline*" is included.

It is therefore important to point out that "performance management" (both informal and formal) is more often a constructive and remedial process that does not include disciplinary action.

Accordingly, 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.

Consistent with good HR practice as commonly advised to companies, the member is advised to deal with the issue initially via informal supportive counselling and monitoring with the view to implementing a more formal performance management process in due course if necessary.

Subsequently the worker who becomes distressed (i.e. suffers some form of decompensation or psychological injury) by this reasonable process undertaken in a reasonable way lodges a WorkCover claim supported by a medical certificate stating that the worker is stressed due to the actions of their manager.

A further call to Ai Group results in the member being advised that whilst they have done the correct thing their failure to also institute some form of disciplinary process (which would in itself have not been reasonable action taken in a reasonable way in a purely remedial context) leaves them in a situation where the worker is in fact able to claim compensation because they have become stressed by someone telling them they are not performing and attempting to assist them to improve.

The outcomes are that:

- *the worker has a successful WorkCover claim;*
- *the supervisor feels undermined in his/her ability to manage employees;*
- *other employees see this as a way to avoid being managed;*
- *the employer has incurred claims costs which impacts on their premium for three years (with a subsequent risk of a common law claim and further premium impact); 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 become stressed and possibly suffer a psychological injury because even the most benign performance management process is inherently stressful. However, they should not be entitled to seek workers' compensation provided the employer has taken reasonable action in a reasonable way.

Victoria has addressed this issue by amending their legislation in 2010 to adopt an approach similar to that currently operating in Queensland, that is, the words in the primary definition at section 82(2A) of the Victorian Act relate to "*reasonable management action, taken in a reasonable manner*" supported by a non-exhaustive list of examples.

The examples at 82(10) are broad and encompass a range of actions that an employer must be able to take without fear of a claim being accepted.

Current Victorian legislation – Section 82

(2A) There is no entitlement to compensation in respect of an injury to a worker if the injury is a mental injury caused wholly or predominantly by any one or more of the following—
(a) management action taken on reasonable grounds and in a reasonable manner by or on behalf of the worker's employer; or
(b) a decision of the worker's employer, on reasonable grounds, to take, or not to take any management action; or
(c) any expectation by the worker that any management action would, or would not, be taken or a decision made to take, or not to take, any management action; or
(d) an application under section 81B of the **Local Government Act 1989**, or proceedings as a result of that application, in relation to the conduct of a worker who is a Councillor within the meaning of section 14AA.

10 ***management action***, in relation to a worker, includes, but is not limited to, any one or more of the following—
(a) appraisal of the worker's performance;
(b) counselling of the worker;
(c) suspension or stand-down of the worker's employment;
(d) disciplinary action taken in respect of the worker's employment;

(e) transfer of the worker's employment;
(f) demotion, redeployment or retrenchment of the worker;
(g) dismissal of the worker;
(h) promotion of the worker;
(i) reclassification of the worker's employment position;
(j) provision of leave of absence to the worker;
(k) provision to the worker of a benefit connected with the worker's employment;
(l) training a worker in respect of the worker's employment;
(m) investigation by the worker's employer of any alleged misconduct—
(i) of the worker; or
(ii) of any other person relating to the employer's workforce in which the worker was involved or to which the worker was a witness;
(n) communication in connection with an action mentioned in any of the above paragraphs;

This non-exhaustive list of examples specifically identifies at (a) and (b) the intention to include a range of performance management issues.

The example at (m) is important as it encompasses the reasonable investigation of an employee's alleged misconduct which is a crucial obligation of employers in relation to a broad range of issues - including breaches of safety requirements and complaints of bullying and harassment.

It would be nonsensical for an employer to be required to bear the costs of a workers' compensation claim and the subsequent premium impact because they reasonably undertook action that they are required by a range of laws to undertake.

Furthermore, if the worker was being investigated for misconduct or serious misconduct (and there was a reasonable expectation of being found culpable) the laws would encourage the worker to lodge a workers' compensation claim during the investigation process (which is not excluded) rather than wait until they were disciplined or dismissed (which is excluded).

Ai Group also notes the concerns raised by the Bar Association of Queensland as cited on page 75 of the report as "*The Bar Association of Queensland also identified that section 32(5)(a) applies only in relation to reasonable management action taken in a reasonable way by a worker's employer. With the increasing prevalence of labour hire arrangements, this provision will not apply if management action in relation to a worker is taken by an entity other than the employer (e.g. a host employer or contractor).*"

Ai Group supports these concerns and notes that this has also been addressed in the Victorian 2010 amendments via the reference to "*on behalf of the employer*".

Summary

Ai Group recognises that some work situations lead to a worker developing a psychological injury in which employment was "*the major contributing factor to the injury*". These workers should be fairly compensated and provided with the necessary support to return to their pre-injury employer or some other host employer if this is the best option for them.

However, the WorkCover Qld scheme should not be responsible for psychological injuries which are mostly contributed to by other non-work related factors.

Further, it must be recognised that even in a *no fault* system it is not appropriate for a person to be compensated for a psychological injury that occurred during reasonable management action particularly in circumstances where the employer is responsible for and sometimes legally obligated to address that worker's inappropriate behaviour in the workplace.

Ai Group does not support the recommendation to modify the psychological injury exclusion as proposed.

Ai Group's position is that:

- The definition should continue to be a broad description supported by a list of examples.
- The list of examples should be expanded to ensure that the exclusion encompasses performance management and investigation of alleged misconduct
- If an exhaustive list is subsequently adopted it must be a longer list than that proposed and incorporate at least performance management and investigation of alleged misconduct.

Contribution by employment

We note that whilst this recommendation includes the words "*the major significant contributing factor*", the alternative words proposed on page 84 of the report do not include the word "*major*":

"A suggested alternative for the new definition might be:
An accepted psychological injury is a psychiatric or psychological disorder arising out of, or in the course of, employment if the employment is ***the significant contributing factor to the injury****.* [our emphasis] "

Ai Group supports the proposal to amend the definition to ensure that in the case of psychological injuries work must be "*the major significant contributing factor*"; noting that the current requirement under the Qld Act is for work only to be "*a significant contributing factor*".

Further, Ai Group submits that the proposed definition should be applied to all work related injuries not just those described as Category B psychological injuries.

Recommendation 13

The Committee recommends that the Queensland Mental Health Commission be directed to undertake a research study regarding the impact of the legislative changes if they are adopted and that this study must directly inform the next review of the Workers' Compensation Act.

In the commentary preceding this recommendation the report states "… *in making the above recommendations, the Committee remains concerned that it may inadvertently preclude legitimate claimants*" (page 85).

The Queensland Mental Health Commission was established to drive improved performance, coordination and transparency in the delivery of mental health services in Queensland.

It is a cornerstone the Government's ongoing commitment to provide a recovery-oriented, high quality and consistent mental health system for all Queenslanders.
The establishment of the Queensland Mental Health Commission will support further transformation and reform of Queensland's mental health system. It will position Queensland to better respond to emerging priorities, pressures and opportunities and to drive ongoing reform locally and nationally. As an independent body, the Commission will provide strong leadership and advocacy, and ensure mental health is recognised as one of Queensland's most critical challenges. The Commission will promote the recovery and human rights of people with mental illness, taking into account the full spectrum of issues affecting mental health and mental illness. It will play pivotal roles in policy development, the allocation of funding and streamlining the mental health system.

Fact Sheet: http://www.health.qld.gov.au/mentalhealth/abt_us/qpfmh/commission-fs1.pdf

It is not clear what form of research is proposed and what the focus of the research would be. It is also unclear whether this research would occur before or after the proposed legislative changes.

Ai Group acknowledges that mental health issues are a concern for the community as a whole and that the Mental Health Commission has a role in promoting better outcomes. However, it is important to recognise that WorkCover Qld has been established to deal with work related injuries and illnesses.

If there are flaws in the general health system which lead to suboptimal outcomes these need to be addressed. It would not be appropriate to utilise WorkCoverQld as a means to address the pitfalls of other schemes.

Recommendation 14

The Committee recommends that the Attorney-General should initiate a review of the *Work Health and Safety Act 2011* with a view to considering whether recompense to victims of workplace bullying could be made through mechanisms in that Act rather than through the Workers' Compensation Scheme.

Ai Group strongly rejects this recommendation.

The *Work Health and Safety Act* is about obligations and structures for the elimination or minimisation of risk so far as is reasonably practicable. Breaches of this Act and its Regulations attract serious penalties. Inspectors can issues notices to address a range of issues and *persons conducting a business or undertaking* can be prosecuted for breaches that include workplace bullying.

It is not appropriate to attempt to provide recompense for any work related injury through this legislation because that is the role of workers' compensation schemes.

It is even less appropriate to single out workplace bullying for this level of attention when other injuries/illnesses are not addressed this way.

While it is acknowledged that there is a set of provisions within the Act which establish a right to take civil action (for compensation or reinstatement) these relate to a worker being discriminated against (e.g. having their employment terminated or a promotion denied) in relation to powers, functions or roles under the Act. It is not designed as a recompense for injury.

Recommendation 15

The Committee recommends that WorkCover review its psychological claims assessment processes, including a review of the reasons claims are set aside or varied upon review, with a view to reducing this ratio.

It is stated in the report that "*the Committee also has concerns regarding the disproportionate number of rejected claims, the number asking for a review and the number of reviews where the decision is either set aside or varied …. If a significant number of rejected claims are later either set aside or varied upon review, then the conclusion is that the initial assessment was flawed*", (page 85).

Ai Group agrees that the outcomes of reviews may be an indication of inappropriate decisions being made in the initial determination process and may illustrate a systemic failure by WorkCover Qld to consider the outcome of Q-Comp review decisions. However the outcomes may also be simply the result of WorkCover claim managers being subject to limited timeframes in which to decide to accept or reject a claim.

However, despite the occasional issue in relation to unrealistic timeframes being imposed on employers with regard to providing WorkCover with their initial report on a new injury claim, it is Ai Group's experience that the WorkCover Qld approach to psychological claims, especially those where the reasonable management action exclusion is being considered, generally provides both

the employer and the Claimant with a more transparent process than occurs in some other jurisdictions. Accordingly Ai Group would not like to see these advantages lost as the result of any review.

It is unclear whether the recommendation to review WorkCover's psychological assessment processes is intended to be a one-off review or an ongoing QA assessment. In any event Ai Group would support the introduction of both.

It is noted that WorkSafe Victoria has a detailed "stress eligibility process" which has been in place since 2005, based on the legislative provisions in place from time to time.

A key part of this process is that WorkSafe Victoria as the Regulator (loosely equivalent to Q-Comp) has a targeted review process for "stress" claims to ensure valid decisions are made on these claims. Approximately 30% of stress claims are reviewed, either due to their level of complexity or through a referral from the Agent (loosely equivalent to WorkCover Qld). This review is undertaken before a decision is made on eligibility, thus avoiding the need to modify a decision at a later stage.

Since August 2012, all stress claims that are disputed have been tracked to determine the final outcomes; noting that employers cannot initiate a review in Victoria, it is only the ultimate outcomes of rejected claims that can be considered. The outcomes of these disputes are then utilised to enhance the systemic decision making approach for stress claims.

AiGroup submits that this may be an appropriate model for WorkCover to consider.

Ai Group supports the recommendation and would be keen to participate in further consultation on the nature and processes of the review(s).

Recommendation 16

The Committee recommends that WorkCover undertake a review of its psychological claims management to include the following:

- **ensure that there is provision for flexibility for claimants to provide necessary information;**
- **inclusion of a specialist unit with suitably qualified assessors;**
- **incorporation of a mentoring style approach to psychological claims management to help reduce anxiety levels for claimants;**
- **incorporation of mental health and wellbeing into education and awareness processes; and**
- **incorporation of consideration and analysis of employer claims history into claims process.**

Ai Group broadly supports a review of WorkCover Qld's psychological claims management.

In particular Ai Group is keen to see arrangements put in place that ensure timely referral to an appropriately qualified Psychologist or Psychiatrist to ensure that the worker is getting the necessary treatment and support. Ai Group also suggests that the Mental Health Plan process followed by General Practitioners under Medicare might be worthy of consideration as a model in this context.

However, Ai Group is very concerned about the suggestion that the employer claims history should be considered in determining the application of the *reasonable management action* exclusion.

On page 85 of the report it is stated that "*the Committee questions how management action can be considered to be reasonable if a particular employer has several similar claims made against them. The Committee considers that employer history needs to be considered as part of the process even if it is found at the end of that process that their actions were reasonable. It should be noted that employer history involves both proven and unproven claims".*

Ai Group does not believe that the employer's claim history should be considered in determining an individual claim because:

- an employer who has an employee who makes a successful claim for psychological injury associated with performance management or disciplinary action will often review their systems and processes and upgrade them if they are found to be lacking;
- a finding of unreasonable management action may be due to the inappropriate actions of an individual supervisor, possibly when put under pressure by a difficult employee, and such an occurrence does not mean the whole organisation has problems especially if the organisation is large or diverse;
- it is relatively easy for a worker to lodge a claim and this can occur when poor-performing individuals feel they are backed into a corner and facing termination of employment;
- the above situations should not influence decisions on future claims especially if the claim has ultimately been rejected;
- in times of difficult organisational change or uncertainty employers may find themselves the target of a range of actions by anxious workers including via the lodgement of WorkCover claims which are not based on clear eligibility to workers' compensation, and
- even if the proposed consideration is limited to accepted claims, it is important to note that the manner in which the exclusionary provision is presently written in the Qld Act means that onus is on the employer to demonstrate that *reasonable management action was undertaken in a reasonable way* in relation to any "factors" identified by the worker as allegedly causing their stress or decompensation; for this reason a psychological injury claim may presently be accepted simply because one of the identified "factors" was found on the balance of probabilities by WorkCover to be *a significant contributing factor* to the injury – possibly among numerous other more significant non work related contributing factors.

Recommendation 17

The Committee recommends that the Attorney-General and Minister for Justice facilitate the progression of a consistent national approach to latent onset claims.

Ai Group notes that Safe Work Australia is currently undertaking work to develop an up to date list of *deemed diseases* for the purposes of streamlining access for diseases which are known to be related to exposures which are predominantly in the work environment.

However, it should be noted that this work may not address the specific issues raised in the report related to solar claims. It will certainly not address issues of apportionment across jurisdictions.

It is Ai Group's view that the issue of solar claims should be addressed at a national level and that this specific issue should be raised for consideration at an upcoming meeting of Safe Work Australia members

Recommendation 18

The Committee recommends that provisions be included in the Act to enable the Minister to grant premium relief in certain circumstances.

Ai Group supports this recommendation with some caution.

It is not clear whether the recommendation is proposing a structured approach to provide a safety incentive to small employers or whether it is a discretion that can be applied in individual cases of extreme impact.

If the recommendation relates to providing a safety incentive to small employers the combined safety and return to work discount that has been introduced in New South Wales with effect from 1 July 2013 could be an appropriate model to consider.

As indicated in Ai Group's submission to this review there are some extreme cases where significant disadvantage is created. For example, an employer who has successfully expanded and changed their predominant business activity so that it is fundamentally different from that in which they were engaged in recent years, may nevertheless experience the negative impact of the claims history of the previous smaller business in terms of current calculation of premium. The same situation may also apply to an employer who has been forced to drastically scale back and reorient their business activity. However, it is important to recognise that any relief granted to an individual employer will be paid for by the scheme and therefore effectively by all employers under the scheme.

Ai Group cautions the government to ensure only the most deserving of cases are granted such relief and that there is a transparent reporting and review process to ensure that other employers are not being inappropriately disadvantaged.

Recommendation 19

The Committee recommends that the WorkCover/Q-COMP undertake an examination of its industry rate groupings with a view to ensuring that they more accurately reflect current industry size and risk exposure.

As noted in the report, the industry classification system for WorkCover premium in Queensland is based on the Australian and New Zealand Standard Industry Classification (ANZSIC 2006). ANZSIC codes have been the basis of workers' compensation classification systems for many years and the move to the 2006 version has been supported in principle by all jurisdictions.

In applying the ANZSIC 2006 codes to the WorkCover premium system there are 559 industry classifications available.

Allocation to an industry classification is first done by identifying the *predominant activity* of a business and then allocating the business to an industry classification to which the predominant activity is allocated.

The concerns for businesses mostly occur due to:

- difficulties identifying a matching predominant activity;
- disagreements about what determines predominant activity (e.g. if manufacturing is undertaken this will generally be the default classification, even if the major staffing/cost is technology development), or
- being grouped with businesses that are perceived to have different risks.

Ai Group has extensive experience assisting employers to identify the appropriate classifications and to apply to reclassification where appropriate.

Ai Group recognises the difficulties and the frustrations associated with this process for all concerned.

Ai Group is pleased to see that the report recognises the difficulties. However Ai Group does not believe that an evaluation of the industry rate groupings will solve the issues associated with individual organisations or industries that just don't fit the standard classification system. It is important also to recognise if an industry classification is too small (by number of employers or size of remuneration) the history utilised to calculate the industry rate will not be statistically valid and the industry rate could be subject to extreme volatility.

Ai Group notes that large employers have a much greater ability to reduce their premium by demonstrating better performance through application of the Experience Based Rating (EBR) system. For this reason whilst the industry rate is relevant to the starting point of the premium calculation, good performance will enable the employer to move away from the industry rate.

Hence small employers are more significantly impacted by the difficulties of classification. It may be that discounts such as those outlined above would assist at this end of the spectrum.

It is noted that the Government Gazette that details the premium formula and industry classifications in Queensland, provides only a list of the industry classifications by title. New South Wales and Victoria include a full description listing in their annual premiums orders, which include a list of predominant activities and *references and exclusions*. South Australia provides access to this level of detail through an online system accessible through the WorkCover SA website. It may be that providing employers with this level of information would assist them to better understand their industry classifications, and to better understand which industries have been grouped together.

Recommendation 20

The Committee recommends that the Department investigate options to enable them to provide employers with a self-audit tool so they can assess whether they are complying with the requirements of the Act.

As this recommendation is made in the section related to premium Ai Group has assumed that such a self-audit tool would relate to the premium related parts of the scheme, i.e. classification, remuneration and contractors.

In principle Ai Group supports this recommendation but would be concerned about any conflicting perceptions by employers and WorkCover Qld about what the status of such an assessment would be. If this recommendation is progressed Ai Group would be keen to participate in further consultation as work progresses.

Recommendation 21

The Committee recommends that the Department undertake a review of its processes to ensure that decisions, including reasons, are communicated to all parties in a clear, concise and a timely manner.

Ai Group strongly supports this recommendation. The WorkCover Qld scheme is a complex one and many employers and workers will only engage with it once. Clear explanations for decisions can greatly assist all parties to accept a decision even if they are not happy with it.

Recommendation 22

The Committee recommends that the legislation be amended to refer all allegations of fraud-related offences relating to WorkCover to Q-COMP for investigation and, if necessary, prosecution, consistent with the management of self-insurer fraud referrals.

Ai Group strongly supports this recommendation. It is relevant for the regulator to be the organisation to undertake such activities.

Recommendation 23

The Committee recommends that a psychological specialty medical assessment tribunal be included on the list of specialty medical assessment tribunals under section 118A of *Workers' Compensation and Rehabilitation Regulation 2003.*

Ai Group strongly supports this recommendation.

Recommendation 24

The Committee recommends that the legislation be amended to include a requirement that employers must have a RRTWC where statutory claims totalling 15 or more work days lost in any year and wages in Queensland for the preceding year totalling $2.146 million or more.

The current and proposed requirements for the appointment of RRTWC (Rehabilitation and Return to Work Coordinators) are summarised below:

		Wages less than $2.146m	Wages between $2.146m and $7.049m	Wages greater than $7.049m
Current	Low risk employers	Not required	Not required	Required
	High risk employers	Not required	Required	Not Required
Proposed	All employers	Not required	Required where a statutory claims total of 15 or more working days is lost in any year	

It is clear from this table that low risk employers will have an increased obligation to nominate a RRTWC whilst high risk workplaces will have a decreased obligation.

Ai Group supports the introduction of some flexibility and welcomes the proposed reduction in red tape especially as extensive training is required for nominated RRTWCs.

However the criteria that has been suggested does not seem to be the most appropriate measure. A large employer could have a number of small claims that result in a total of 15 days off work without any of those claims requiring RRTWC. However a smaller employer may need significant RRTWC intervention with a single claim that results in less than 15 days off work in the year.

See also Ai Group's comments in relation to recommendation 25 which may provide an alternative way to reduce the red tape associated with training RRTWCs who may never need to participate in the development of a return to work progam.

Recommendation 25

The Committee recommends that the Department implement an accreditation system for RRTWC.

The proposed accreditation system appears to be designed to recognise that people may be nominated to the role of RRTWC with sufficient skills to undertake the role. These roles are identified in the report as including allied health providers, rehabilitation counsellors etc. As such they will generally be engaged by large employers.

Ai Group supports the recommendation that the skills these people bring to these roles should be recognised through accreditation. However it does need to be recognised that RRTWCs also require an understanding of the WorkCover legislation and employer obligations; this should be reflected in any accreditation system.

It is Ai Group's view that the recommendations do not reflect the other end of the continuum where RRTWCs are required to be nominated either through the application of current thresholds or those proposed. In these circumstances the RRTWC often undertakes one or more other roles in the organisation and will call on external resources to assist them in the return to work process.

It is Ai Group's view that this group of RRTWCs do not require and do not benefit from attending a three day prescribed RRTWC course with 3 yearly renewals through further training of professional development.

It is Ai Group's strong view that the legislation should be modified to state that the RRTWC must be competent. This would enable Q-Comp to establish guidelines as to competence:

- allied health professionals could be accredited subject to demonstrating knowledge of the Queensland WorkCover legislation;
- RRTWCs undertaking the role on a regular basis could attend the prescribed 3 day course, and
- RRTWCs who are unlikely to participate regularly in the process could be expected to understand the key legislative obligations and how to seek assistance when needed.

Recommendation 26

The Committee recommends that the legislation be amended to make it mandatory for insurers to refer injured workers to an accredited return to work program if they are making a common law claim for future economic loss on the basis that they are unemployed except where the worker can demonstrate they are unable to participate in a return to work program.

Ai Group strongly supports this recommendation.

Recommendation 27

The Committee recommends that the existing provisions relating to access to common law be retained.

Ai Group are disappointed to see that introduction of a minimum impairment threshold for common law claims has not been supported by the Committee. This will continue to be a significant area of concern for employers. An extract from our original submission to the Parliamentary Committee outlining our concerns regarding existing provisions follows:

> *Ai Group is aware of the various compelling arguments that were previously submitted in the responses to the 2010 discussion paper in relation to the implementation of a common law threshold and note that this is a very complex matter, including with regard to the*

contentious distinction between whole person impairment (WPI) vs work related impairment (WRI) assessments.

Ai Group also respectfully notes that the Plaintiff lawyer lobby would be expected to argue that the present situation where all workers who have had an accepted statutory claim are potentially eligible to lodge a common law damages claim (subject of course to the limits imposed in relation to the acceptance of statutory offers on the closure of statutory claims) should be maintained.

At present in QLD even where a worker has been assessed as having a zero permanent work related impairment percentage on the closure of their statutory claim, and despite the worker having returned uneventfully to their previous duties (or even to another more lucrative position), they are presently not barred from being able to also seek damages at common law in due course. While it is understood in this regard that WorkCover QLD is reporting an increase in NIL settlements of common law claims it is also reported by members that the expectation held by most common law claimants in this context appears to rely on the pragmatism of the respective parties to the effect that more often than not a confidential "go away" offer is made and accepted.

Ai Group submits that because of the prospect of common law damages being potentially open to the majority of injured workers, employers often experience extreme frustration and difficulty with engaging injured workers in the rehabilitation and return to work process. The employment relationship in terms of the mutual trust and confidence is also frequently undermined by workers verbalizing common law damages expectations (unfortunately often over inflated with reference to the subsequent reality of the compulsory settlement conferences) very early in the statutory claims process. When coupled with the employer's exasperation with certain aspects of the process, return to work with the same employer is frequently unable to be sustained in the longer term. In view of this Ai Group requests that WorkCover QLD gather more specific information than presently available on the impact of common law damages expectations particularly with reference to the number of workers who were able to return to their pre-injury employer and who remain with their pre injury employer up to 12 months after return to work.

In the premises Ai Group submits that a working group should be established to consider the above issues and the matter of a common law threshold in more depth and to particularly determine what threshold should be introduced (e.g. 0-15 percent?).

It is also noted that previously WorkCover QLD suggested the implementation of a threshold of 10 percent but now appear to have resiled from that position.

Recommendation 28

The Committee recommends that the Attorney-General and Minister for Justice investigate the issues of 'no-win-no-fee' arrangements and the '50/50 rule' with a view to curtailing the speculative nature of some claims.

Ai Group strongly supports this recommendation

Recommendation 29

The Committee recommends that the Attorney-General and Minister for Justice investigate the issue of portability of records associated with the 'no-win-no-fee' arrangements.

While Ai Group notes this recommendation, the issue does not appear to be canvassed in the report. Accordingly Ai Group reserves any comment until such time as further details are provided in this regard.

Recommendation 30

The Committee recommends that the legislation be amended to give the Minister flexibility to grant an extension of self-insurance arrangements for a further period for existing self-insurers.

Ai Group strongly supports this recommendation.

Recommendation 31

The Committee recommends that, given potential for numerous unintended consequences, the Attorney-General and Minister for Justice investigate Q-COMP's 'red tape reduction proposal' before any consideration is given to implementation of the proposal.

Ai Group welcomes recommendations that are focused on red tape reduction. However Ai Group does support the recommendation that further investigation is undertaken prior to implementation to ensure that there are no unintended consequences.

Ai Group would be keen to participate in further consultation on the proposals.

Recommendation 32

The Committee recommends that the Attorney-General and Minister for Justice investigate the financial implications of the suggested alternative methods offered before addressing this anomaly.

The issue being considered in this recommendation relates to the interactions and liabilities associated with common law claims involving third parties. In the report it is identified that it is a particular issue for the construction industry. However it is also relevant to any employer that utilises other organisations to undertake work on their behalf or on their sites via labour hire arrangements, contractors, and transport companies etc.

Ai Group has extensive experience in considering this issue in other jurisdictions where similar principles are applied to recoveries initiated by the Regulator.

In these circumstances we have stated:

> Ai Group believes that there is a role for *third party* liabilities (or 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, when employers engage labour through third parties (i.e. 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 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 when *third party* liability is involved, a small business, possibly consisting of a tradesperson who has engaged a labour hire or group training worker, in addition to being joined by WorkCover via a contribution notice in any common law injury claim process may also be exposed to a separate personal injuries damages claim under the *Personal Injuries Proceedings Act* .

Many host employers are also holding public liability policies with an excess which may be significantly higher than the damages claimed or as agreed upon as their contribution at a compulsory settlement conference. Hence they may also be required to engage their own legal representation and to bear the ultimate liability.

Employers are also advising that some insurers are refusing to provide host employers with public liability coverage for labour hire or group training workers, or contractors.

We would be keen to engage in discussions on how this issue can be resolved.

ENDS.