

Australian Industry Group

New South Wales First Review of the Workers' Compensation Scheme

Submission to
Parliament of New South Wales
Standing Committee
on Law and Justice

SEPTEMBER 2016

Ai
GROUP

FIRST REVIEW OF THE WORKERS' COMPENSATION SCHEME

SUBMISSION TO PARLIAMENT OF NEW SOUTH WALES; STANDING COMMITTEE ON LAW AND JUSTICE

Introduction

The Australian Industry Group (Ai Group) is a peak industry association and has been acting for business for more than 140 years. Along with our affiliates, we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our longstanding involvement with diverse industry sectors including manufacturing, construction, transport, labour hire, mining services, defence, airlines and ICT means we are genuinely representative of Australian industry.

We have ongoing contact with employers of all sizes, through the provision of membership, consulting and training services, with a strong focus on workplace relations, work health and safety and workers' compensation. This enables us to understand the key issues that employers are facing when managing these important issues which often overlap and interact.

An important part of our role is to develop strong relationships with governments and regulators across the country to provide a voice for employers when legislative and policy issues are being considered. Ai Group is a member of Safe Work Australia (SWA) and its related Strategic Issues Group – Workers' Compensation.

In the NSW context we are in regular contact with senior staff within the State Insurance Regulatory Authority (SIRA) and Insurance and Care NSW (iCare), and welcome the opportunities provided by them to have input into the ongoing management of workers' compensation in New South Wales.

This Review

This review is being undertaken within the following terms of reference:

1. That, in accordance with section 27 of the State Insurance and Care Governance Act 2015, the Standing Committee on Law and Justice be designated as the Legislative Council committee to supervise the operation of the insurance and compensation schemes established under New South Wales workers compensation and motor accidents legislation, which include the:
 - (a) Workers' Compensation Scheme
 - (b) Workers' Compensation (Dust Diseases) Scheme
 - (c) Motor Accidents Scheme
 - (d) Motor Accidents (Lifetime Care and Support) Scheme.
2. In exercising the supervisory function outlined in paragraph 1, the committee:
 - (a) does not have the authority to investigate a particular compensation claim, and
 - (b) must report to the House at least once every two years in relation to each scheme.

The media release of 15 August 2016, associated with this review, states:

The NSW Government ... introduced a suite of legislative reforms to the state's insurance and compensation schemes in 2015. Significantly, the WorkCover Authority was abolished and its functions assumed by three discrete new organisations: the State Insurance Regulatory Authority (SIRA) for workers compensation regulation; SafeWork NSW for work, health and safety regulation; and Insurance Care NSW (icare) for workers compensation insurance.

The Hon Shayne Mallard, Committee Chair, said: "This is the committee's first review of the scheme since the 2015 changes. The committee is eager to hear from stakeholders about the affordability, efficiency and sustainability of the scheme since we last looked at it in 2012, and is interested to hear about any impacts from the recent structural changes."

This information indicates to Ai Group that there are no specific areas of concern that the committee wishes to focus on. The lack of specific terms of reference means that submissions may highlight areas of focus that have not been come to the notice of Ai Group prior to this review.

Accordingly, it is hoped that stakeholders will have an opportunity to contribute to discussions about any major issues that are raised during this review, if the committee believes there is a need to make any significant recommendations for change. Ai Group would be pleased to provide further input to the committee on specific issues if this is required.

Structural Changes

In the context of workers' compensation, the separation of the WorkCover Authority into three separate bodies – SIRA, iCare and SafeWork NSW, has not had a significant impact on employers. As most of their engagement is with their scheme Agent, many employers would be unaware that these changes have occurred.

As a representative of industry, Ai Group has continued to have regular interaction with both SIRA and iCare. If anything, the level of consultation and engagement has increased as each body establishes its own identity and looks at ways to improve operations.

SIRA has initiated a number of reviews since their establishment and has also provided separate opportunities for Ai Group to meet with senior representatives of SIRA to discuss issues of concern to employers, and opportunities for improvement being considered by SIRA.

We have found that iCare has been consulting employers and their representatives in a very focused and engaging manner. An example of this is the review of the *retro-paid loss* scheme of insurance where iCare convened three co-design workshops to enable impacted employers, and their representatives, to have input and to some extent to make decisions about those improvements.

Workers' Compensation Premiums

The establishment of iCare closely coincided with significant changes to the premium system, and may be seen as being related to the structural separation.

These premium changes have resulted in some confusion for employers, particularly the removal of *estimates of future costs* from the claims costs used to calculate premiums; employers have seen a *reduction* in their reported claims costs, whilst some have also seen a significant increase in premium.

It is acknowledged that increases in premiums have been capped, by applying a 30% maximum increase on the *risk premium*, and this has been an important part of the transition process.

However, Ai Group has been contacted by a number of employers with increased premiums who view the new premium as being unfair. Amongst these employers there appears to be a perception that all employers have been negatively impacted by the changes, which is not the case; some employers will be far better off under the new approach.

Another key issue experienced during the transition was the significant delays involved in the notification of premiums to employers. Where the new premium resulted in significant increases, an earlier notification would have been beneficial.

Stability and Predictability

Stability and predictability in premium systems achieve two important outcomes. The most obvious of these is the ability of employers to budget for their workers' compensation premium in advance. A less obvious outcome, but possibly more important outcome, is the impact the premium can have on an organisation's approach to work health and safety (WHS) and return to work.

In addition to the premium system being designed to fund the delivery of compensation and services to injured workers, the premium system should also be signalling that good WHS preventative practices and timely return to work after injury will result in reduced costs for the employer.

The current premium calculation allows employers to predict their premium much more easily than the previous approach; they can also easily calculate their minimum and maximum premiums for planning purposes.

This certainty is dependent on the premium calculation method not changing drastically or unexpectedly from one year to the next.

Following a consultation process in April 2016, SIRA issued the *Market Price and Premium Guidelines (MPPGs)*; they are effective from 6 May 2016 to 1 March 2017 and apply to all policies issued on or after 30 June 2016.

The MPPGs specify:

- the minimum requirements for policies of insurance
- how insurers are to present premium filings to the Authority
- how the Authority will assess those filings

A key feature of these MPPGs was the continuation of stability, with insurers being required to mostly continue with a premium approach based on the 2015/16 Insurance Premiums Order (IPO).

It is Ai Group's understanding that consultation will take place with stakeholders prior to the establishment of the subsequent MPPGs that will need to be in place from 1 April 2017.

It is hoped: that this process is completed in a timely fashion; that iCare, and the specialised insurers, consult with stakeholder about the premium formulae; and iCare and the specialised insurers provide clear and concise information to employers about any changes and their likely impact well in advance of the next premium policy cycle.

In order to ensure that employers do not experience significant increases in premium from one year to the next, there should continue to be a provision within the premium calculation to apply a cap on the premium of 130% compared to the previous year's rate.

In future years, as the premium formulae will no longer be established by a government instrument (the IPO), iCare should produce a document which clearly explains to experience rated employers how the premium is calculated.

Other 2015 changes

The other changes that occurred in 2015 are summarised below:

Changes to time limits on entitlement to medical expenses.

Prior to the legislative changes, other than for workers with an incapacity > 30%, medical benefits ceased 12 months from the last payment of weekly compensation (or 12 months from injury if there is no weekly compensation).

The amendments resulted in the following “sliding scale”, based on degree of impairment (DI):

- DI up to 10% - 2 years
- DI 11% to 20% - 5 years
- DI > 20% - no maximum time period.

The changes also introduced some ongoing entitlements to expenses related to hearing aids, crutches, prosthetics and home and vehicle modifications.

Weekly benefits

Workers with a degree of impairment above 20%, who have a level of work capacity but have not returned to work, now have increased access to weekly compensation.

Workers with a degree of impairment above 30% are now entitled to a minimum weekly payment of \$788.32, indexed twice a year, being a combination of weekly compensation and earnings.

Workers who are injured before they retire now continue to be able to receive weekly compensation until 12 months after retirement age; restoring an entitlement that was removed by the 2012 amendments.

Return to work

To assist return to work, the legislation specifically allows for:

- access to training and education up to an amount of \$8,000; and
- a worker who changes employer, access to \$1,000 to cover the costs associated with taking on new employment.

Increase in lump sum payments.

Lump sum payments were increased for permanent impairment and death; the maximum amount payable for funeral expenses was also increased.

At the time the legislation was passed it was Ai Group’s view that most of the amendments seemed to strike a fair balance between support for injured workers and scheme costs. Ai Group, and our members, were particularly pleased to see that the unintended impact of the 2012 amendments on those approaching retirement age was retrospectively fixed with this legislation. We continue to have this view and have not received any specific feedback from employers concerned about the impact of these amendments.

Calculating Pre-Injury Average Weekly Earnings (PIAWE)

The 2012 amendments introduced a new way to calculate Pre-Injury Average Weekly Earnings (PIAWE), modelled on the approach taken in Victoria. PIAWE is used to determine the weekly compensation payable to an injured worker; commencing at 95% of PIAWE and reducing to 80% of PIAWE after 13 weeks of compensation.

Since that time there has been much discontent with the approach to PIAWE, which has been exacerbated by the adoption of a 95% compensation calculation, compared to 100% under the previous legislation.

It is important to note that PIAWE now includes shift penalties and overtime (averaged over the previous 12 months) which were not part of the previous calculation. Hence, many injured workers would find that 95% of PIAWE is more than 100% of the ordinary time earnings previously used in the calculation of weekly compensation amounts.

In response to concerns about PIAWE, SIRA initiated a consultation process in February 2016, with public comment accepted until 5 April 2016; a summary of submissions can be found on the [SIRA website](#).

Employers are keen for this work to progress as disputes over PIAWE often play out in the workplace, even though the decision is being made by the scheme Agent. These disputes can effect relations with the injured employee and their return to work trajectory, and with workplace colleagues who observe behaviour attributed to the benefit system.

As the PIAWE provisions in NSW are very similar to those in Victoria, it is hoped that SIRA will engage with WorkSafe Victoria to identify what issues they are also dealing with, and what solutions have been applied, so that a consistent response can be considered.

Scheme Management

Employers regularly provide us with insight into the key areas of scheme management that concern them. The feedback that we receive is relatively consistent across all jurisdictions, and focuses on: work-relatedness of accepted claims; Scheme Agent service and the role of treating practitioners.

Work-relatedness of accepted claims

The nature of workers' compensation legislation and related premium calculations often leave employers feeling that they are being "punished" for claims that are perceived to be mostly unrelated to work. This is particularly the case where the claim is for an injury or illness that has a degenerative component and claims for psychological injury.

It is essential that these claims are appropriately investigated and liability denied where appropriate. Where liability must be accepted, it is important that employers receive appropriate feedback to ensure that they understand the reasons for acceptance.

Scheme Agent service

It must be acknowledged that employers generally only contact us for advice in relation to workers' compensation when they are experiencing difficulties. Hence, we hear a lot more about poor service than we do about good service.

In addition to complaints about the acceptance of claims we also regularly receive feedback about: employers not feeling supported by the Agent during a difficult claim; employers having to constantly chase the Agent for answers; and the regular change of Claims Managers.

The following is a selection of feedback recently received from our members.

They [claims managers] have to be chased constantly. Their case loads are probably too big and you never receive any support in managing a claim - they just 'float' without any direction until we chase them and ask for updates.

The issue I have is the constant change of case managers. Example with this case we are on our 5th case manager in 10 months and 3 of them were changed in the first 8 weeks. This is very difficult to keep on top of and not beneficial to the worker or employer.

There is a real lack of communication from claims managers especially on complex claims. Claims Managers constantly change. When factual investigators are involved in a claim and findings support work is not a significantly contributing factor and the claim is still approved it shows the system works for the Injured Worker and not the Employer.

Conversely, as part of a survey of members to support this submission, we did receive some positive feedback.

I find the scheme very easy to work in. I also work in the Victorian scheme and the Victorian scheme is far more complicated. NSW have some very good processes that Victoria could follow to make the scheme easier to work in.

In the past we have not [got support from the Agent], however last year our insurer was changed and we have found the new insurer much more helpful.

It is easy to operate in the scheme, particularly when we can now involve rehabilitation consultants at no cost to our premiums. This has definitely assisted our branch with the more complex or difficult cases.

This feedback indicates that there is a lack of consistent support from the Scheme Agents in relation to managing claims and providing direction to employers. As mentioned above, this is not an issue unique to NSW. However, it is an area that needs to be addressed, as this lack of support for employers can translate into poor outcomes for injured workers and increased costs to the scheme.

It also highlights the importance of competition as a driver of agent performance. Barriers to the proper operation of a competitive and efficient market for agent services need to be continually reviewed.

The role of treating practitioners

Employers continually share their frustration about the lack of focus that treating practitioners have on return to work. This is in spite of recent work undertaken in most jurisdictions to educate treating practitioners, particularly GPs, on the [health benefits of work](#).

In order to appropriately support injured workers, and their employers, there must be a continuing focus on engaging with treating practitioners to assist them to contribute to recovery and return to work.

Compensation design

Based on previous consultation processes Ai Group anticipates that some submissions will call for a change in the structure of weekly compensation.

It is a fact that the change to weekly benefits in 2012 resulted in some increase in weekly compensation. However, this is rarely acknowledged, with the focus of complaints being on weekly compensation being set at 95%, and subsequently 80%, of PIAWE, rather than 100%.

As mentioned above, overtime and shift penalties are included in PIAWE for the first 52 weeks; this was not the case prior to the 2012 amendments.

There is a new step down from 95% to 80% of PIAWE after 13 weeks, for injured workers who are off work long term. However, this is much better than the significant reduction in benefits that previously occurred after 26 weeks of compensation. In addition, if an injured worker returns to work for at least 15 hours a week, their total earnings including compensation will increase to 95% of PIAWE.

Some stakeholders may seek the following:

- inclusion of overtime and shift penalties for the duration of the claim
- 100% of PIAWE for the duration of the claim
- Removal, or amendment, of the *capacity tests* that occur at 130 weeks and five years in order to determine ongoing entitlement to compensation.

It is Ai Group's views that the current approach to weekly compensation is a reasonable balance between providing fair compensation to injured workers, with a particular focus on those that have the *highest needs* (DPI > 30%), and providing an incentive to return to work for injured workers who have a work capacity.

Ai Group would not support any proposals to increase the weekly compensation amounts currently payable.