NSW Workers Compensation Scheme

Issues Paper
Purpose of this Issues paper

There are many indications that the current Workers Compensation Scheme is failing the people of NSW, and urgent action is required.

The NSW Government is responding to the deteriorating performance of the Workers Compensation Scheme and is acting urgently to ensure its long term sustainability to provide injured workers with the support they deserve while remaining affordable, fair and competitive for NSW.

The premiums paid by New South Wales employers are estimated to be between 20 and 60 per cent higher than equivalent employers in our competitor states and the scheme actuary projects that the continued deterioration in the scheme deficit will require an eventual increase of up to 28 per cent in premium rates if no changes are made to the scheme. The Insurance Premium Order which sets premium rates is gazetted each year to commence at 4pm on 30 June, therefore decisions about premium rates need to be made at the latest at the end of May 2012.

An increase of this size would impact current and future jobs in NSW, flowing through to reduced state revenues such as payroll tax and would further exacerbate the State’s lack of competitiveness as compared to our most comparable competitor States (Victoria and Queensland). Given these risks, increasing premium is not an acceptable solution.

The NSW Government is canvassing a number of suggested solutions to the problems currently being experienced in the NSW Workers Compensation system, with particular reference to other State workers compensation systems.

These solutions for the Scheme deliver effectively on seven reform principles:

1. enhance NSW workplace safety by preventing and reducing incidents and fatalities;

2. contribute to the economic and jobs growth, including for small businesses, by ensuring that premiums are comparable with other states and there are optimal insurance arrangements;

3. promote recovery and the health benefits of returning to work;
4. guarantee quality long term medical and financial support for seriously injured workers;

5. support less seriously injured workers to recover and regain their financial independence;

6. reduce the high regulatory burden and make it simple for injured workers, employers and service providers to navigate the system; and

7. strongly discourage payments, treatments and services that do not contribute to recovery and return to work.
1. **Priorities for New South Wales**

The NSW Government has set out five priorities for NSW. These are to:

- rebuild the economy;
- return quality services;
- renovate infrastructure;
- strengthen our local environment and communities; and
- restore accountability to Government.

The workers compensation system is a critical component of the NSW economy. Employers and workers are entitled to expect a workers compensation system that is efficient, cost effective and offers fair, timely assistance to employers and workers.

### 1.1 The need to reform the NSW Workers Compensation Scheme

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

1. The premiums paid by New South Wales employers are estimated to be between 20 and 60 per cent higher than equivalent employers in our competitor states and if the Scheme continues to deteriorate the difference will increase starkly. The insurance arrangements offered to businesses are not optimal insurance arrangements reflecting risk;

2. The system is difficult to navigate for all participants with a lot of red tape;

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

4. Recovery and the health benefits of returning to work are not effectively promoted as there are perverse financial incentives for workers to remain off work and there is not effective work capacity testing;
5. Less seriously injured workers are not encouraged effectively through financial incentives and the system to recover and regain their financial independence; and

6. WorkCover has limited power to strongly discourage payments treatments and services that do not contribute to recovery and return to work.

Because the NSW Scheme does not do these things well, it costs far more to get a claimant back to work in NSW than it does in Queensland or Victoria and costs are increasing at an unsustainable rate.

The NSW Government is proposing a suite of reforms that will focus the NSW Workers Compensation Scheme on these critical principles.

1.2 Guiding Principles

As a guiding principle the object of the workers compensation legislation is to provide income support, medical assistance and rehabilitation support for workers injured during the course of their employment.

The best workers compensation systems are designed to:

1. enhance NSW workplace safety by preventing and reducing incidents and fatalities;
2. contribute to the economic and jobs growth, including for small businesses, by ensuring that premiums are comparable with other states and there are optimal insurance arrangements;
3. promote recovery and the health benefits of returning to work;
4. guarantee quality long term medical and financial support for seriously injured workers;
5. support less seriously injured workers to recover and regain their financial independence;
6. reduce high regulatory burden and make it simple for injured workers, employers and service providers to navigate the system; and

7. strongly discourage payments, treatments and services that do not contribute to recovery and return to work.

Schemes that align to the above principles are fair, affordable, efficient and financially sustainable. International research has consistently found a correlation between early return to work and improved health outcomes. Long term absence and work-disability are harmful to physical and mental health and wellbeing. Recovery and return to work should be the key objects of any workers compensation system.

The premiums paid by New South Wales employers are estimated to be between 20 and 60 per cent higher than equivalent employers in our competitor states and if the Scheme continues to deteriorate the difference will increase starkly.

The Independent Scheme actuary projects that an increase of 28% in premium rates would be required if no changes are made to the Scheme. An increase of this size would impact current and future jobs in NSW, flowing through to reduced state revenues such as payroll tax and would further exacerbate the State’s lack of competitiveness as compared to our most comparable competitor States (Victoria and Queensland). Given these risks, increasing premium is not an acceptable solution.

It has been suggested that the goal of any reform package should be to:

- adopt the most effective workers compensation measures from around Australia
- simplify benefit calculation,
- make workers’ entitlements more transparent and easier for workers and employers to understand
- workers whose injuries are less serious should have greater incentives and support to return to work, while more seriously injured workers should receive improved weekly benefits and lump sum compensation entitlements.
1.3 Financial Background

The financial sustainability of the Workers Compensation Scheme is deteriorating. An independent valuation of the Scheme’s outstanding claim liabilities is undertaken every six months (for the periods ending 30 June and 31 December). The most recent valuation is for the period ending 31 December 2011. The executive summary of the valuation is attached as Appendix A. The valuation has been Peer reviewed and the Peer review report is attached as Appendix B. A table of jurisdictional comparisons to the current benefit regime in NSW is attached as Appendix C.

As at 31 December 2011, the Independent Scheme Actuary calculated the Scheme’s deficit at $4.083 billion, a deterioration of $1,720 million in six months. Its funding ratio is 78%, a deterioration of 7% in six months.

This is the worst financial result incurred since the Scheme commenced in 1987.

The Scheme’s net outstanding claims liability (inflated and discounted, and including claims handling expenses (CHE)) was $14.378 billion ($16.104 billion when a 12 per cent risk margin is added). The risk margin ensures that, if the Scheme’s ultimate liability is greater than estimated, there is a 75 per cent probability that there will be sufficient assets to cover all claims.

<table>
<thead>
<tr>
<th>Outstanding Claims Liability</th>
<th>Jun-11</th>
<th>Dec-11</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross claim payments</td>
<td>$m</td>
<td>$m</td>
<td>$m</td>
</tr>
<tr>
<td>less Recoveries</td>
<td>12,225</td>
<td>13,679</td>
<td>1,454</td>
</tr>
<tr>
<td>Net central estimate (before CHE)</td>
<td>11,816</td>
<td>13,246</td>
<td>1,431</td>
</tr>
<tr>
<td>plus Claim handing expense allowance</td>
<td>923</td>
<td>1,132</td>
<td>209</td>
</tr>
<tr>
<td>Net central estimate (with CHE)</td>
<td>12,739</td>
<td>14,378</td>
<td>1,639</td>
</tr>
<tr>
<td>Risk margin</td>
<td>1,529</td>
<td>1,725</td>
<td>197</td>
</tr>
<tr>
<td>Provision</td>
<td>14,268</td>
<td>16,104</td>
<td>1,836</td>
</tr>
</tbody>
</table>

The financial sustainability of the Scheme, at current premium levels, is expected to deteriorate further in future years. This is not good for business or injured workers.
In New South Wales, there are 269,562 policies held by employers and 3 million workers are covered by the Scheme. To provide a view of the quantum of the deficit, the deficit is equal to an amount of $15,146 per employer and $1,326 per every worker that is covered by workers compensation insurance. The growth in the Scheme deficit from June 2011 to December 2011 cost NSW more than $9 million per day. The cost of compensating workplace injury is borne by employers through workers compensation insurance premiums.

1.4 Outstanding Liability categories

Weekly payments, medical treatment and Work Injury Damages liabilities are the largest three contributors to the Scheme’s outstanding claims liability. They are also the main contributors to the $2.1 billion increase in claims liability since 2008.

Together they account for:

- 76% of estimated gross Scheme costs in 2012/13;
- 81% of the total gross outstanding claims liability; and
- 95% of the total ($2.1 billion) deterioration in claims experience incurred since June 2008.

### Estimate of Discounted Outstanding Liability by component, as at 31 December 2011

<table>
<thead>
<tr>
<th>Benefit Type</th>
<th>Outstanding claims liability</th>
<th>Impact of A v E experience and changed actuarial assumptions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commutations</td>
<td>$m</td>
<td>$m %</td>
</tr>
<tr>
<td>Weekly</td>
<td>290</td>
<td>5 2%</td>
</tr>
<tr>
<td>Workplace Injury Damages</td>
<td>5,912</td>
<td>48 1%</td>
</tr>
<tr>
<td>Legal Costs</td>
<td>1,771</td>
<td>148 8%</td>
</tr>
<tr>
<td>Permanent Injury (Section 66)</td>
<td>433</td>
<td>-2 0%</td>
</tr>
<tr>
<td>Pain and Suffering (Section 67)</td>
<td>590</td>
<td>28 5%</td>
</tr>
<tr>
<td>Medical</td>
<td>237</td>
<td>14 6%</td>
</tr>
<tr>
<td>Medical</td>
<td>3,339</td>
<td>-117 -4%</td>
</tr>
<tr>
<td>Investigation</td>
<td>383</td>
<td>15 4%</td>
</tr>
<tr>
<td>Rehabilitation</td>
<td>236</td>
<td>-11 -5%</td>
</tr>
<tr>
<td>Death</td>
<td>81</td>
<td>-4 -4%</td>
</tr>
<tr>
<td>Other Payments</td>
<td>143</td>
<td>6 4%</td>
</tr>
<tr>
<td>Pre-WorkCover Liability</td>
<td>1</td>
<td>0 -20%</td>
</tr>
<tr>
<td>Asbestos</td>
<td>155</td>
<td>14 9%</td>
</tr>
<tr>
<td>ULIS - Gross</td>
<td>106</td>
<td>-8 -8%</td>
</tr>
</tbody>
</table>

**Total Gross Outstanding Claims Liability** 13,679 135 1%
The cost of the Scheme, in adjusted dollars, on current projections for 2012/13 will be $2,601 million, which means that the premium collected at the current rates won’t be enough to cover the ongoing cost of the Scheme.

Breakdown of 2012/2013 breakeven premium rate (excl GST)

<table>
<thead>
<tr>
<th>Benefit Type</th>
<th>PPCI (Constant $)</th>
<th>Annual Cost (Adjusted $)</th>
<th>% of Wages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commutations</td>
<td>$289</td>
<td>$24.3</td>
<td>21.0</td>
</tr>
<tr>
<td>Weekly</td>
<td>12,030</td>
<td>1,013.0</td>
<td>875.9</td>
</tr>
<tr>
<td>Common Law</td>
<td>3,494</td>
<td>294.2</td>
<td>254.4</td>
</tr>
<tr>
<td>Legal</td>
<td>1,132</td>
<td>95.3</td>
<td>82.4</td>
</tr>
<tr>
<td>S66 - permanent impairment</td>
<td>2,023</td>
<td>170.3</td>
<td>147.3</td>
</tr>
<tr>
<td>S67 - pain &amp; suffering</td>
<td>734</td>
<td>61.8</td>
<td>53.4</td>
</tr>
<tr>
<td>Medical</td>
<td>7,958</td>
<td>670.0</td>
<td>579.4</td>
</tr>
<tr>
<td>Investigation</td>
<td>1,035</td>
<td>87.2</td>
<td>75.4</td>
</tr>
<tr>
<td>Rehabilitation</td>
<td>1,277</td>
<td>107.5</td>
<td>93.0</td>
</tr>
<tr>
<td>Death</td>
<td>569</td>
<td>47.9</td>
<td>41.4</td>
</tr>
<tr>
<td>Other payments</td>
<td>454</td>
<td>38.2</td>
<td>33.1</td>
</tr>
<tr>
<td><strong>Gross cost</strong></td>
<td><strong>30,995</strong></td>
<td><strong>2,609.8</strong></td>
<td><strong>2,256.7</strong></td>
</tr>
<tr>
<td>Excess recoveries</td>
<td>-87</td>
<td>-7.3</td>
<td>-6.4</td>
</tr>
<tr>
<td>Tax recoveries</td>
<td>-274</td>
<td>-23.1</td>
<td>-20.0</td>
</tr>
<tr>
<td>Other recoveries</td>
<td>-1,029</td>
<td>-86.7</td>
<td>-75.0</td>
</tr>
<tr>
<td><strong>Net cost (excl expenses &amp; levies)</strong></td>
<td><strong>29,604</strong></td>
<td><strong>2,492.7</strong></td>
<td><strong>2,155.4</strong></td>
</tr>
<tr>
<td>Expenses and Levies</td>
<td>6,117</td>
<td>515.1</td>
<td>445.4</td>
</tr>
<tr>
<td><strong>Net cost</strong></td>
<td><strong>35,721</strong></td>
<td><strong>3,007.8</strong></td>
<td><strong>2,600.8</strong></td>
</tr>
</tbody>
</table>

1.5 Workers Compensation System, Insurance, Premium, Benefit and Regulatory Systems

The Scheme operates under the *Workers Compensation Act 1987*, *Workplace Injury Management and Workers Compensation Act 1998*.

*Insurance policies*

All NSW employers must have a workers compensation insurance policy if they pay more than $7500 in wages per annum, employ an apprentice or trainee, or are part of a group for premium purposes.
Insurance cover can be obtained in the following ways:

- The Workers Compensation Scheme – provides workers compensation insurance through contracted Scheme Agents to employers operating in New South Wales, and is responsible for underwriting risk, funds management, and premium setting.
- SICorp (through the Treasury Managed Fund) – underwrites workers compensation, administration and financial liability for most public sector employers except those who are self-insurers.
- Self insurers – organisations with enough capital to underwrite, pay and manage their own claims may be licensed to self-insure (there are currently 60 self-insurers).
- Specialised insurers – seven NSW insurers are licensed to underwrite workers compensation insurance risk for specific industry classes. The specialised insurer license category has been closed to new entrants.

The Scheme is funded by the insurance premiums paid by employers. The amount payable is based on a number of factors, including:

- the industry in which the employer operates (the industry premium rate takes into account the costs of compensation claims that have occurred in the industry);
- the amount of wages the employer pays to its workers;
- the costs of any claims made by their workers (for employers with a basic tariff premium greater than $10,000 and with wages greater than $300,000);
- the dust diseases levy, paid by employers whose businesses may expose workers to the risk of contracting a dust disease; and
- the mine safety premium adjustment (for mining industry employers).

Premiums fund financial and medical support to injured workers and cover the costs of dispute management and administration of the schemes.
Benefits

The NSW Workers Compensation system is one of the most generous benefit systems in the nation providing unlimited ‘no fault’ protection to workers and their employers in the event of a work-related injury or disease.

An injured worker may be entitled to claim a range of compensation benefits. The Scheme’s actuary has estimated the total number of claims incurred over the life of the Scheme (as at 30 June 2011) to be 2,600,316.

The amount and type of benefit available to an injured worker broadly depends on the type, nature and severity of their injury, the period they are unable to work, and the date of their injury and claim lodgement.

Types of benefit under the Scheme include:

- weekly incapacity payments in lieu of lost income (including up to 12 months post-retiring age), which:
  - vary depending on: whether the injured worker’s level of capacity is total (unfit for any work), or partial (partially fit for work); whether or not the worker’s pre-injury earnings are paid under an award, industrial or enterprise agreement; and whether the period is within the first 26 weeks of incapacity or after (at which point a ‘step down’ occurs in the amount paid); and
  - are also capped (the maximum amount from 1 April 2012 to 30 September 2012 is $1838.70);

- medical, hospital and allied health costs for an indefinite period of cover. The Scheme is liable for all ‘reasonable and necessary’ medical treatment, with limited power to refuse to meet the costs of treatment;

- lump sum permanent impairment payments for non-economic loss (and pain and suffering, where applicable) – the amount of compensation depends on the degree of impairment;¹

¹ i.e. if the degree of impairment is:
• intensive rehabilitation assistance;
• employer and employee legal expenses;
• death compensation (funeral costs, lump sum and dependency payments);
and
• commutation of statutory entitlements to a lump sum.

Injured workers also have limited access to negligence-based, lump-sum damages for economic loss (of past and future earnings) at common law (Work Injury Damages claims), which are made when the injured worker takes legal action against their employer. These claims are heard in the District Court.

To make such a claim, the following legislated criteria must be met:

• the work injury is a result of employer negligence;
• the injured worker must have at least 15 per cent whole person impairment;
• a claim can only commence at least six months after the worker gave notice of the injury to the employer; and
• court proceedings cannot be commenced more than three years after the date on which the injury was received, except with the leave of the Court.

Successful Work Injury Damages claims are paid out of the Scheme.

The worker must have received all statutory lump sum entitlements for permanent impairment and pain and suffering (non-economic loss) to which they are entitled under the Scheme before the Work Injury Damages claim can be settled. The settlement cancels all further entitlements to benefits under the Scheme.

In addition, the amount of weekly compensation that has already been paid to the worker must be repaid out of the amount awarded. The amount awarded can also be reduced if the worker’s own negligence contributed to the injury.

\[
\begin{align*}
\text{not greater than 10 per cent, the amount is: } & \text{Degree} \times 1375; \\
greater than 10 per cent but not greater than 20 per cent, the amount is: } & 13370 + [(\text{Degree} - 10) \times 1650]; \\
greater than 20 per cent but not greater than 40 per cent, the amount is: } & 30250 + [(\text{Degree} - 20) \times 3850]; \\
greater than 40 per cent but not greater than 75 per cent, the amount is: } & 85250 + [(\text{Degree} - 40) \times 3850]; \text{ and} \\
greater than 75 per cent, the amount is: } & 220000.
\end{align*}
\]
WorkCover’s regulatory role

WorkCover is responsible for regulating the System by:

- managing the Workers Compensation Scheme on behalf of the Nominal Insurer, which is the public sector legal entity responsible for the management of the Workers Compensation Insurance Fund;
- assisting workplaces to prevent work-related injury and disease;
- promoting prompt and efficient management of work-related injuries;
- licensing self and specialised insurers; and
- oversight of service providers.

1.6 Premium Levels

The cost to employers of premiums in New South Wales does not encourage investment in the NSW economy and is not competitive with other jurisdictions.

The target premium collection rate for the Scheme in 2011-12 is 1.68 per cent of wages, which is:

- less than the rate required to cover the expected cost of claims for the year based on risk free investment returns; and
- marginally higher than the break even rate based on long term expected investment returns.

While there has been a cumulative 33 per cent reduction in average workers compensation premium rates since 2005 (with resulting savings for employers of around $1 billion per annum), NSW premiums remain higher than those in Victoria, Queensland and Western Australia. This has consequences for the costs of NSW businesses, and their competitiveness in relation to businesses in jurisdictions with lower premiums.
1.7 Key differences compared to schemes in other jurisdictions

1.7.1 Scheme Premium Jurisdictional Comparisons

The actual premium paid by an employer in New South Wales varies according to the size and claims experience of the employers.

Premium rates are generally pooled across similar risk profile groups. This allows employers who share a common set of risks to spread the risk across their industry type. Across the schemes, there are hundreds of specified premium rates for industry types.

The examples below compare the basic tariff premium rates for several employers with the corresponding Queensland and Victorian rates.

They also include a projection of the potential increases in premium, being 28% on average that may be required if no action is taken to reduce the spiralling costs of the Scheme.

<table>
<thead>
<tr>
<th>Employer</th>
<th>Annual wages</th>
<th>NSW current premium</th>
<th>Vic comparison</th>
<th>Qld comparison</th>
<th>NSW if premiums increase by 28%</th>
</tr>
</thead>
<tbody>
<tr>
<td>A wooden structural component manufacturing company</td>
<td>$1,000,000</td>
<td>$42,540 (4.25%)</td>
<td>$23,110 (2.31%)</td>
<td>$35,230 (3.52%)</td>
<td>$54,451 (5.45%)</td>
</tr>
<tr>
<td>A residential construction company</td>
<td>$250,000</td>
<td>$12,600 (5.04%)</td>
<td>$2,570 (1.03%)</td>
<td>$6,983 (2.79%)</td>
<td>$16,128 (6.45%)</td>
</tr>
<tr>
<td>A regional café with 11 staff</td>
<td>$326,126</td>
<td>$8,613 (2.64%)</td>
<td>$1,957 (0.60%)</td>
<td>$4,103 (1.26%)</td>
<td>$11,025 (3.38%)</td>
</tr>
<tr>
<td>A regional club employing 467 people</td>
<td>$19,096,377</td>
<td>$595,616 (3.12%)</td>
<td>$206,623 (1.08%)</td>
<td>$361,876 (1.89%)</td>
<td>$762,388 (3.99%)</td>
</tr>
<tr>
<td>A road freight transport company</td>
<td>$140,000</td>
<td>$9,138 (6.53%)</td>
<td>$4,361 (3.12%)</td>
<td>$6,927 (4.95%)</td>
<td>$11,696 (8.35%)</td>
</tr>
<tr>
<td>A small cleaning company</td>
<td>$151,589</td>
<td>$10,681 (7.05%)</td>
<td>$3,709 (2.45%)</td>
<td>$4,901 (3.23%)</td>
<td>$13,672 (9.02%)</td>
</tr>
</tbody>
</table>
1.7.2  Injured Worker Benefit Jurisdictional Comparisons

NSW benefits regime has not been comprehensively reviewed for over 10 years. The key differences from other jurisdictions are summarised in Appendix C but some of the detail follows:

i)  Journey claims

In NSW workers are covered for injuries which occur on their journey between home and work. Victoria, Western Australia and Tasmania exclude such claims. The Commonwealth scheme generally excludes journey claims except in exceptional circumstances. South Australia covers journeys only where there is real and substantial connection between the journey and the industry. Queensland allows journey claims unless there is a substantial delay not connected to employment.

ii) Weekly benefits for total incapacity

Workers in NSW receive 100% of their pre-injury average weekly earnings for the first 26 weeks of total incapacity, if they are paid under an award. Non award workers receive 80% of their pre-injury average weekly earnings. Benefits are capped at a statutory amount.

From week 27 onwards, all workers who have total incapacity receive the statutory rate, plus allowances for dependants. This amount is currently $432 per week. These payments may continue until 12 months after retiring age.

Some jurisdictions have weekly benefit schemes which incorporate ‘step downs’, or reductions, after 13 weeks, to encourage workers to return to work. This approach is in line with research which indicates the longer a worker is away from work, the less likely they are to return.
In Victoria, the calculation of benefits for award and non award workers is simpler and more consistent. Average weekly earnings are calculated on the basis of the rate paid for the ordinary working hours of the worker. If the worker has no base rate, the calculation is made on the basis of the actual earnings of the worker. Workers receive 95% of their pre-injury average weekly earnings for the first 13 weeks of total incapacity and 80% from week 14 onwards. Workers undergo work capacity tests at specified points throughout the claim, and at least once every 2 years. After week 130, workers receive benefits for total incapacity only if they have no work capacity and are likely to have no work capacity for an indefinite period.

South Australia’s calculation method is similar to that of Victoria. Injured workers receive 100% of their pre-injury earnings for weeks 1-13, with step downs to 90% from weeks 13-26 and 80% from week 26 onwards. Like Victoria, South Australia has work capacity tests, once workers have passed or are approaching 130 weeks of benefits. Workers are subject to annual reviews to assess their work capacity.

In Western Australia, workers are subject to a step-down after 13 weeks through a recalculation of their benefit, to exclude payments for pre-injury overtime, bonuses, and regular over-award payments.

Queensland, Tasmania and the Commonwealth ComCare scheme do not have step downs at 13 weeks and do not specifically provide for work capacity testing.

**iii) Weekly benefits-partial incapacity**

In NSW, a worker who has partial incapacity, who is working at less than their pre-injury capacity or who is looking for work, can receive a benefit up to the amount of the benefit the worker would have received if the worker was receiving benefits for total incapacity. The worker is eligible for this benefit as well as the actual earnings from their employment. This means that the worker’s benefit, combined with their actual earnings, can add up to the worker’s pre-injury average average.
weekly earnings. These arrangements apply even if a worker is only working a few hours each week.

These arrangements act as a disincentive for workers to return to their pre-injury employment. Most other jurisdictions provide for injured workers who have partial capacity to receive benefits which, combined with their actual earnings, are up to the amount received by a worker who has total incapacity. These arrangements ensure that workers who have partial incapacity have a financial incentive to return to their pre-injury employment.

For example, in Victoria, workers who have partial incapacity during the first 13 weeks of a claim, receive 95% of their pre-injury average weekly earnings, less what they are actually earning. For the period from weeks 14-130, workers receive 80% of their pre-injury average weekly earnings, less 80% of what they are actually earning.

After week 130, a worker can only receive benefits for partial incapacity if the worker has returned to work, is working at least 15 hours each week and is earning at least $166 per week. The worker must also demonstrate that because of their injury, they are likely to remain physically and mentally incapable of working beyond their current level, in any job.

In South Australia, workers who have partial capacity are paid 100% of their pre-injury earnings, less any amount they are fit to earn in suitable employment. This means they receive the same amount as a worker who has total incapacity from weeks 1-13. From week 14-26 they receive 90% of their pre-injury earnings, less any amount they are fit to earn in suitable employment. From week 27 onwards, workers are paid 80% of their pre-injury earnings, less any amount they are fit to earn in suitable employment. This is the same amount as workers who have total incapacity.

In Tasmania, a worker who is working less than 50% of their pre-injury hours receives the same benefit as a worker having total incapacity, less their actual
earnings. However, if a worker is working over 50% of their pre-injury hours the worker can receive up to 100% of their pre-injury earnings.

**iv) Duration**

**Weekly benefits**

There is no limit on the duration of weekly benefits (except the retiring age plus 12 months) in New South Wales and no effective cap on medical and related expenses.

Several jurisdictions limit access to workers compensation based on the length of time benefits are received or a financial cap. Victoria ceases payment of weekly benefits after 130 weeks unless an injured worker has no current work capacity and that is likely to continue indefinitely. Queensland limits payments of weekly benefits to 5 years or a cap of $200,000, whichever arrives first. Western Australia has no cap on duration but does have a weekly benefit cap, which means entitlement to weekly benefits stops once the claimant reaches a total cumulative payment amount of $190,700.

Tasmania has a staggered scheme for the duration of benefits, depending on the degree of whole person impairment of the worker. The duration cap is 9 years for a worker having less than 15% whole person impairment; 12 years for a worker whose whole person impairment is between 15 and 19%; 20 years for a worker whose whole person impairment is between 20% and 29% and retirement age for a worker whose whole person impairment is more than 30%.

**v) Medical expenses**

In practice, NSW workers compensation insurers must meet the cost of all medical and related treatment provided to injured workers, with no cap on cost or duration, provided the treatment relates to a work injury. Treatment costs are met after retirement age.
Most other schemes cap medical and related treatment for work injuries by duration or cost.

In Victoria, the workers compensation scheme is liable for the costs of medical and related treatment provided while weekly benefits are paid and for one year after the cessation of weekly benefits. In Queensland a cap of 5 years applies to the payment of weekly benefits and benefits for medical and related treatment.

In Tasmania, a cap on the duration of benefits for medical and related treatment applies in the same way as it does for weekly benefits.

vi) Lump sum benefits

The threshold for claiming a lump sum for whole person impairment in New South Wales is 1%. Whole person impairment is medically assessed applying The *WorkCover Guides* are based on the American Medical Association’s (AMA) *Guides to the Evaluation of Permanent Impairment*, fifth edition..

Many claims for whole person impairment result in small assessments. Workers frequently make successive, or ‘top-up’, claims for deterioration following on from the work injury. These claims can increase their overall assessment to 15%, the threshold for a work injury damages claim.

Damages of up to $50,000 are also available for pain and suffering. Pain and suffering damages are not awarded using objective measures but are awarded on the basis of a percentage of a most extreme case.

Other jurisdictions generally have higher thresholds for whole person impairment and do not have separate awards for pain and suffering. In South Australia and Tasmania the threshold is 5% and in Victoria and the Commonwealth ComCare scheme the threshold is 10%.
Other jurisdictions do not have a separate category of ‘pain and suffering’ statutory compensation. Most jurisdictions have a single table of lump sum compensation for permanent impairment or specific injuries.

Some other jurisdictions, including Victoria, permit only one claim to be made for whole person impairment, rather than allowing successive or ‘top-up’ claims. The ComCare scheme permits a further claim only if there is a deterioration of more than 10%.

vii) Work Injury damages

Workers in New South Wales can make work injury damages, or common law claims. Common law claims are subject to modified damages provisions set out in the workers compensation legislation.

The general law governing civil liability was reformed in 2002 following the enactment of the Civil Liability Act 2002. The Act codifies the principles governing the law of negligence and other specific areas and was enacted following a comprehensive review of the law of negligence, conducted by an expert Panel appointed by Ministers from the Commonwealth, State and Territory Government. The review was in response to community perceptions that the law of negligence as it was applied in the courts was unclear and unpredictable and it had become too easy for plaintiffs in personal injury cases to establish liability for negligence on the part of defendants.

However, the provisions of the Civil Liability Act dealing with the law of negligence do not apply to work injury damages claims made under the workers compensation legislation. As a result, the principles used to determine negligence in workers compensation Common Law matters are those which applied to the law of negligence prior to 2002 and now diverge from the general law.

Regulatory framework for health providers
The obligation of the workers compensation scheme to meet the costs of reasonable and necessary medical treatment in NSW means in practice there is virtually no limitation on the liability of insurers to meet the costs of medical or other treatment provided to injured workers.

Other schemes generally also have few effective controls on the provision of medical and related treatment to injured workers. However, the Victorian scheme does exercise more control over treatment provision, especially limitation on treatment with poor evidence base and capacity to respond to over servicing and poor billing practices.

viii) Commutations

The availability of commutations in NSW is limited to workers whose whole person impairment is assessed at more than 15%, who have received lump sum compensation for whole person impairment and for whom return to work opportunities have been exhausted. Commutations can only be made with the agreement of the worker and the insurer.

There are a number of workers who do not meet these criteria, but who would benefit from the commutation of their claims, such as workers receiving small weekly benefits or whose claims remain open in case future medical treatment is required.

Some other jurisdictions have greater flexibility for the commutation (or redemption) of workers compensation claims. These include Victoria, where the criteria for commutations can be related for specified time periods for particular classes of claims.

2. Options for Change

A suite of options for comment have been developed, having regard to the guiding principles set out above. The options are intended to promote recovery and health
benefits for injured workers of returning to work while guaranteeing long term income support and treatment for severely injured workers and ensuring the costs of the workers compensation system are sustainable.

1. Severely injured workers

A key plank of any reforms should to improve the benefits for severely injured workers.

It has been suggested that reforms should provide for severely injured workers, who have an assessed level of whole person impairment of more than 30%, to receive improved income support, return to work assistance where feasible, and more generous lump sum compensation.

2. Removal of coverage for journey claims

It has been suggested this would provide a closer connection between work, health and safety responsibilities and workers compensation premiums through eliminating workers compensation costs arising in circumstances over which employers have limited control.

The object of the workers compensation legislation is to provide income support, medical assistance and rehabilitation support for workers injured during the course of their employment.

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

There is recognition of the profound impact of the tragic event of fatality from workplace injury.

In 2008 amendments to the workers compensation legislation increased the lump sum death benefit and made it more widely available. When a deceased worker leaves no dependants the lump sum death benefit is payable to their Estate. The distribution of the lump sum is in accordance with the Family Provision Act and
therefore relatives of the deceased entitled under the Family Provision Act will receive part of the lump sum death benefit.

Legal costs associated with these injuries are not regulated by workers compensation legislation and can be substantial, therefore following the death of a worker the workers compensation scheme pays:

- the lump sum death benefit ($481,950),
- weekly benefits to dependants;
- any common law liability under the Compensation to Relatives Act;
- civil liability for nervous shock to family members, and
- associated regulated and unregulated legal costs.

Arguably an employer’s liability for the psychological injuries to family members following the serious injury or death of a worker does not fall within the objects of the legislation and it has been suggested that such claims should no longer be allowed.

It has been suggested this would provide a closer connection between work, health and safety responsibilities and workers compensation premiums through eliminating workers compensation costs arising in circumstances over which employers have limited control.

Consistent with the principles of the Act workers who witness the workplace death of a colleague and suffer psychological injury would still able to make a claims under the legislation.

4. Simplification of the definition of pre-injury earnings and adjustment of pre-injury earnings

It has been suggested the current arrangements should be updated to more closely reflect changes in employment arrangements in NSW.
Stakeholders have argued the existing arrangements for determining weekly benefits are overly complex, anachronistic and fail to deliver consistent outcomes for injured workers.

The current system was designed in an era where employment was characterised by permanency and regulated via industrial instruments, while such arrangements still exist there are an increasing number of workers who are employed under more flexible arrangements. Casualisation is increasing, in 2009 around 20 percent of the workforce in Australia was employed under casual arrangements; this had increased from 17% in 1992\(^2\).

By creating a single measure for pre-injury earnings, the existing disparity between benefits paid to award and non award workers would be removed and administration of benefit arrangements would be simplified.

Changes to weekly benefits would remove the difficult and confusing provisions that currently exist to determine the amount of weekly benefits that an injured worker would receive and thereby reduce disputation over weekly benefits. A new simplified measure more closely aligned to workers actual pre-injury earnings would be welcomed.

In Australia, New South Wales is the only State that does not take regular overtime and allowances into account when calculating a totally incapacitated worker’s weekly payment.

Finally, these arrangements would ensure that weekly benefits more closely reflect a worker’s actual earnings prior to their injury.

5. Incapacity payments-total incapacity

Step downs feature in all workers compensation jurisdictions in Australia. Currently in the NSW model the first step down occurs at 26 weeks. It has been suggested that consideration be given to aligning weekly benefit payments more closely with other jurisdictions and to an earlier step down with capacity testing.

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would align with clinical recovery patterns. This may create more appropriate and effective point for a financial return to work incentive to commence. For example, most fractures have a healing period of within six weeks and the many other injuries have a healing period within 13 weeks.

An earlier step down would harmonise NSW arrangements with Victoria, South Australia and Western Australia.

6. Incapacity payments - partial incapacity

It has been suggested that the NSW arrangements for incapacity payments for partial incapacity do not encourage recovery and return to full employment.

In other jurisdictions, including Victoria and South Australia, financial disincentives are utilised to prevent long term dependency.

This benefit arrangement for partially incapacitated workers would put into practical effect the object of the workers compensation legislation of rehabilitation and return to work. By increasing benefits as workers increase their hours of work, all participants; workers, employers and treatment providers have a clear and simple objective.

7. Work Capacity Testing

It has been suggested that work capacity testing at specific points could assist injured workers on long term weekly benefits in transitioning from weekly benefits back into paid employment. In the lead up to undertaking a work capacity test, injured workers would need to be supported by appropriate rehabilitation to make them as work ready as possible.

There is a concern that continuing to pay weekly benefits for workers’ many years after a work place injury reinforces the perception that they are still ‘injured’. Ceasing weekly benefits after a certain period for workers with a work capacity would assist injured workers to move forward from their workplace injury to focus on their future employment prospects.
Such a reform as well as the changes to weekly benefits could act together in reducing weekly benefit liabilities of the scheme in therefore improve the overall performance of the scheme. Such changes may be more consistent with the objects and principles of the workers compensation legislation in that they support a workers return to work and rehabilitation.

8. Cap weekly payment duration

There is a concern that paying weekly benefits many years after a worker’s workplace injury, for those workers a lower level of permanent impairment, reinforces the perception that the worker is still injured.

It has been suggested that capping weekly payment duration to within a certain timeframe and thereafter ceasing payment of weekly benefits would give workers a fixed timeframe during which they know they need to work toward a certain level of work readiness.

9. Remove “pain and suffering” as a separate category of compensation

The lump sum payment for pain and suffering was a subjective measure of the financial impact of a worker’s injury and was originally inserted to replace common law provisions in the 1987 Act. While common law provisions were restored and modified in 1989, the lump sum payment for pain and suffering was not removed. It has been argued that this is an anomaly within the statutory scheme and one that creates significant disputation and legal costs.

It has been suggested that the incorporation of this provision into lump sum payments for injuries with Whole Person Impairment greater than 10% would reduce disputation and reduce administration costs.

Such changes would also ensure that statutory lump sum compensation aligns with an objective measure of the worker’s physical impairment following a workplace injury rather than a subjective measure of the worker’s ‘loss’.

10. Only one claim can be made for whole person impairment
It has been suggested that such a measure might ensure that workers injuries are stabilised providing them with appropriate compensation. It may also reduce the ability of fraudulent or exaggerated injuries to meet the meet thresholds.

11. One assessment of impairment for statutory lump sum, commutations and work injury damages

The current Guidelines provide objective criteria for assessing whole person impairment. It has been suggested that there is no reasonable rationale for obtaining multiple reports and it can be distressing for injured workers and contributes to their feeling of being ‘injured’. It does not enable them to focus on recovery. Having one assessment of impairment for statutory lump sum, commutations and work injury damages might reduce scope for new disputes about level of whole person impairment in the course of determining commutation applications or work injury damages and thereby reduce medical, legal, red tape and administrative costs in the Scheme.

12. Strengthen work injury damages

The provisions of the Civil Liability Act dealing with the law of negligence do not apply to work injury damages claims made under the workers compensation legislation. As a result, the principles used to determine negligence in workers compensation common law matters are those which applied to the law of negligence prior to 2002 and now diverge from the general law. It has been suggested that this situation compromises the ability of insurers and employers to defend work injury damages claims.

Legislation similar to the Civil Liability Act was enacted in other Australian jurisdictions. These provisions also do not apply to workers compensation common law claims in those jurisdictions. It has been suggested there is no reason to exclude workers compensation common law claims from the principles of the law of negligence which apply to other damages claims and it has been proposed the Civil Liability Act provisions dealing with the law of negligence should apply to those claims.

13. Cap medical coverage duration
There would be the potential for capping medical benefits as they do in other States.

There is currently no cap on benefits for medical and related treatment and many workers have access to medical treatment many years after their date of injury.

The most recent national data available, the Comparative Performance Monitoring Report (CPM) for the 2009-10 financial year, shows NSW has the highest expenditure on ‘services to workers’ which encompasses medical treatment, rehabilitation, legal costs, return to work assistance, transportation, employee advisory services and interpreter costs that are used to assist employees recover from their injury and return to work.

14. Strengthen regulatory framework for health providers

Increases in medical costs over the last five years have been significant and it may be desirable to strengthen the regulatory framework for health providers to ensure that scheme resources are directed to evidence-based treatment with proven health and return to work outcomes for injured workers rather than on treatments that maintain dependency.

15. Targeted commutation

Targeted commutation would allow commutation thresholds to be relaxed for specific classes of claim on a time limited basis. The Scheme Actuary and industry experts have advised against broadening access to commutations and such a measure would need to be limited to very specific classes of injury/claim.

16. Exclusion of strokes/ heart attack unless work a significant contributor.

It has been suggested this would provide a closer connection between work, health and safety responsibilities and workers compensation premiums through eliminating workers compensation costs arising in circumstances over which employers have limited control.
Covering liability for strokes and heart attacks is arguably inconsistent with the principles of the workers compensation legislation as the principles of the legislation are to provide income support, medical assistance for workers injured as a result of a workplace injury. Whilst tragic for all concerned, causation of strokes and heart attacks are not normally associated with workplace injuries and the factors that impact on rehabilitation and return to work are not typically workplace issues.

**Why change is needed**

The workers compensation system is a critical component of the NSW economy. It should not hinder productivity but should enhance the growth of jobs.

Workers compensation has to be affordable and efficient and allow New South Wales to be competitive with our most comparable States of Victoria and Queensland.

Employers and workers are entitled to expect a workers compensation system that is efficient, cost effective and offers fair, timely assistance to employers and workers.

It has been suggested that the goal of any reform package should be to adopt the most effective workers compensation measures from around Australia, to simplify benefit calculation, to make workers’ entitlements more transparent and easier for workers and employers to understand. Workers whose injuries are less serious should have greater incentives and support to return to work, while more seriously injured workers should receive improved weekly benefits and lump sum compensation entitlements.
Glossary

ACS average claim size

actuarial projection – an actuarial estimate - usually an estimate of outstanding claims liabilities, inflated and discounted to a particular date, based on the estimates for future premiums collected, investment returns, and future claims obligations and related expenses.

actuarial valuation – actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer – prepared six monthly (as at 31 December and 30 June)

agent – (Scheme Agent) entities providing workers compensation claim and policy services under contract with the Workers Compensation Nominal Insurer. Does not refer to an agency relationship in the legal sense.

arithmetic average – for Scheme valuation purposes, a method for selecting and testing the continuance rate assumptions

B

breakeven premium rate – the percentage of wages required to be sufficient (together with expected investment income) to meet the expected cost of claims arising during the coming 12 month policy year.

C

CED case estimation development

chain ladder method - the Chain Ladder Ratio (CLR) method is typically used by the Scheme actuary when preparing the Scheme valuation to project claim numbers. It looks at patterns in the development of claim numbers from one development period to the next. The selected ratios of development (the chain ladder ratios) are multiplied with the current level of claim numbers to project future numbers. See also triangulation.

claims experience – an employer's claims history, including claims frequency and total payments made.

CHE claims handling expense – an allowance in the Scheme accounts for claim administration costs

common law claim – a claim that has resulted in legal action for negligence being taken against an employer in relation to a work related injury. Referred to as Work Injury damages in NSW legislation.

commutation – the process of settling a claim with a lump-sum payment to buy out future payment streams.
**continuance rates** – a measure of claim duration or more specifically, how the number of active claims changes from one period to the next

**costs of claims** all payments made by the insurer in respect of the claims and the estimated costs of all future payments arising from the claims

D

**discounted values** – Accounting and actuarial standards require the Scheme outstanding claims liability to be paid in future years to be discounted to the valuation date using “risk free” returns on Commonwealth Government Bonds

F

**front end claims** - workers compensation claims for injuries incurred in the most recent accident years – usually the most recent two years

**front end continuance rates** continuance rate is essentially the ratio of how the number(s) of active claims change from development period to development period. Front end continuance is the behaviour of claims in the first two years.

**fully funded** – when a scheme’s current assets are sufficient to cover the liability associated with all incurred claims and related expenses

**funding ratio** Scheme total assets divided by total liabilities - commonly used as an indicator of the Scheme’s overall financial position/ funding adequacy.

**funding ratio projections** - estimate of the funding ratio at future points in time (see funding ratio)

**funds management** – the investment and oversight of the Scheme’s assets.

G

**geometric average** – for Scheme valuation purposes, a method for selecting and testing the continuance rate assumptions

I

**incapacity benefit** – the payment made under a workers compensation claim to compensate an injured worker for lost income.

**inflated values** - The future cashflows projected in the Outstanding Claims Liability valuation are inflated to the expected date of payment based on an assumption about future rates of inflation
journey claims - claims for injuries that occur while travelling between the claimant's home and place of employment

long-tail claims – refers to active claims from over a certain age – usually three years

long term gap assumptions - a set of economic assumptions used by the Scheme Actuary to estimate outstanding claims liabilities. Specifically the difference between the discount rate and inflation rate (the 'real' inflation rate) – projected over the long term. Essential for converting long term liabilities into an as at date value.

loss ratio - the measure of incurred claims cost divided by premia earned

managed fund scheme - the structure of the current WorkCover Scheme. It is an underwriting structure where a statutory pool of assets exists to fund future claim liabilities

net central estimate –The Scheme valuation uses central estimates, in the sense that they represent the actuary's best estimate of the liability for outstanding claims, with no deliberate bias towards either over- or under- statement. They are, however, uncertain and the amount which eventually turns out to have been required to provide for the liability may be more or less than the central estimate. The central estimate of claims incurred is the mean of all possible values of outstanding claims liabilities as at the reporting date

non-economic loss measure of the impact of an injury on a worker's lifestyle, such as pain and suffering, disfigurement and reduced expectation of life, normally associated with permanent impairment

PCE - Projected Case Estimates

PPAC - payments per active claim

PPCI – payments per claim incurred
premium - the payments made by an employer to an insurance provider to buy, and maintain, a policy

probability of adequacy – the likelihood that the central estimate will be adequate to meet all future claims payments

projected solvency trajectory  projection/estimate of the amount of time required for the Scheme to return to full funding

R

return-to-work management - the process of physical and workplace rehabilitation of an injured worker to enable his/her successful reentry into the workforce. This can also include job modification

risk margin - a 12% risk margin is factored into the Scheme accounts and ensures that if the Scheme’s ultimate liability turns out to be greater than estimated, there is a 75% probability that there will be sufficient assets to cover the difference. This 75% probability of adequacy is based on the Australian Prudential Regulatory Authority’s requirement for private insurer risk margins and has been applied to the Scheme valuation since 2007. In the absence of a risk margin, the probability of adequacy would fall to 50%.

S

self-insured employer - an employer that is licensed to carry its own workers compensation liability and is responsible for managing its own workers compensation claims

superimposed inflation the tendency for claims costs to increase at a rate that is usually greater than wage inflation

T

top up payments - an informal term, which may refer to:
1 – where a claimant returns to work, but as a result of their injury now earns less, weekly incapacity “top up” payments make up the difference between their pre and post injury earnings. Generally paid under section 40 of the 1987 Act.

2 – claimants who have received a lump sum payment for permanent impairment may subsequently claim additional lump sums for deterioration in their condition. In some cases claimants make multiple “top up” claims over many years. Generally paid under section 66 of the 1987 Act

triangulation - reserving for future claims by comparing the emergence of claims year by year for each underwriting year, the relevant data being set out in triangular arrays.
Work Injury Damages NSW legislative term for common law claims – see common law

yield curve - accounting and actuarial standards require the Scheme’s outstanding claims liability to be discounted to a present value based on observable market yields from Commonwealth Government securities. Where yields fall, claim liability values increase.
4. List of appendices

1. Executive Summary WorkCover NSW Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer at 31 December 2011
2. External peer review of outstanding claims liabilities of the Nominal Insurer at 31 December 2011
3. Table of jurisdictional comparison of current benefit regime in NSW