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Recent Changes to NSW Workers' Compensation 2012-14

Professor Ray Markey

CWF Reports for Unions NSW

- Stage 1 Report December 2013:

http://www.businessandconomics.mq.edu.au/faculty_docs/workforce_futures/1_Dec_The_Impact_on_Injured_Workers_of_Changes_to_NSW_Workers_.pdf

- Stage 2 Report February 2015:

http://www.businessandconomics.mq.edu.au/faculty_docs/workforce_futures/Report_no.2_-_December_2014_-_Final_2.pdf

The 2012 changes: cost shifting

- Possible to reduce weekly benefits according to insurers' unilateral perceptions of work capacity – WCDs independent of WCAs
- Termination of weekly benefits at 65 statutory retirement age
- Paid advice from legal practitioner regarding WCDs prohibited
- Restrictions on access to compensation for:
 - *medical expenses*: cease 12 months after weekly payments, pre-approval;
 - *journey injuries*; real & substantial connection with employment
 - *heart attacks and strokes*;
 - *nervous shock for families of severely injured workers*;
 - *lump sum claims & retrospective*.
- Increases to the statutory upper limits on weekly benefits
- WorkCover Independent Review Office (WIRO): review clarity of communication from insurers but not WCDs, research

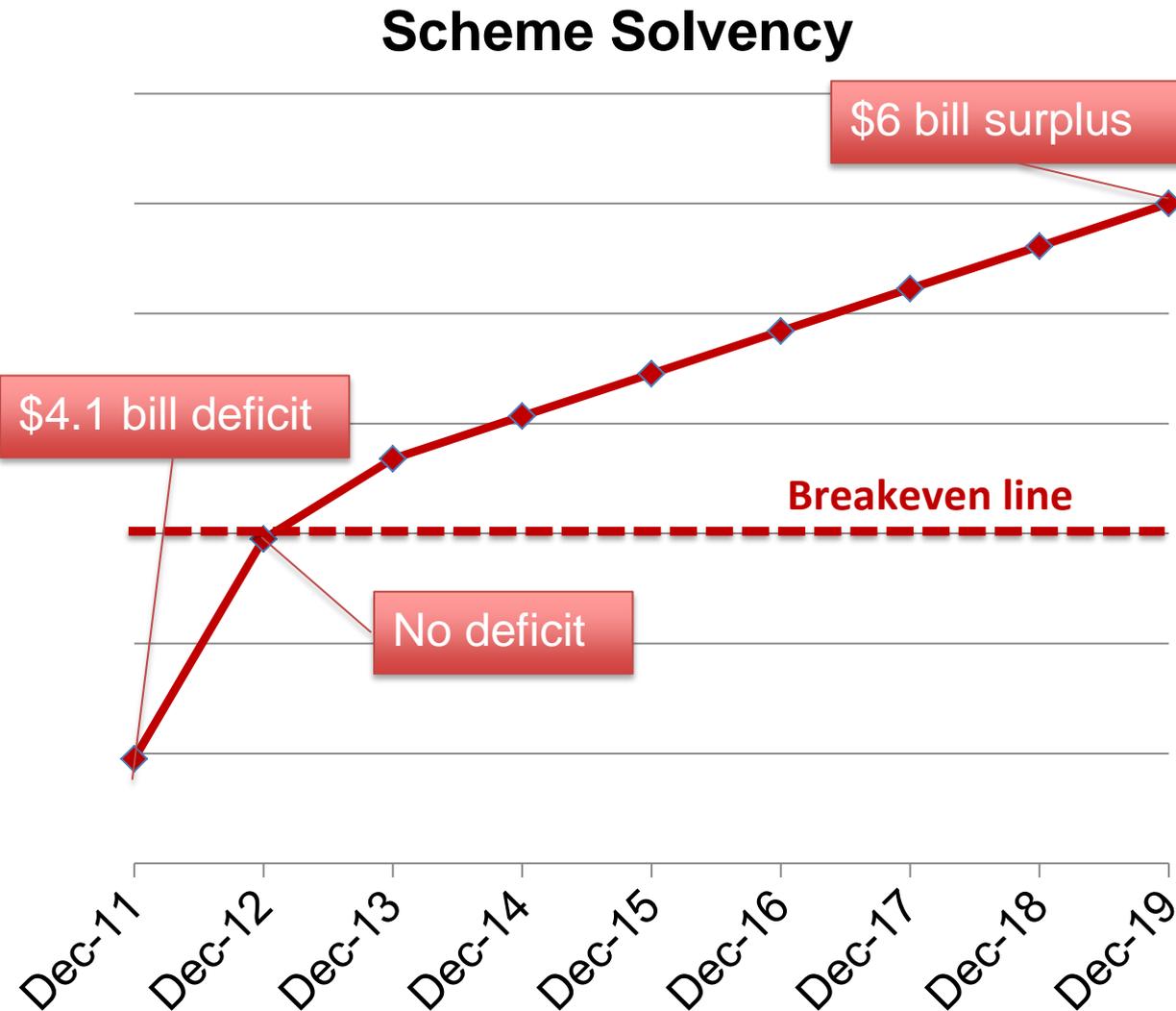
Impact of 2012 changes as of March 2015

- 24% reduction in active compensation claims
- 5,000+ workers had income entitlements terminated by WCD, at least 260 of these without suitable employment
- 20,000 with long term injuries lost medical coverage
- 30% whole person impairment (WPI) defined as serious injury: covered only 1,031 in scheme at August 2014 (1.8%) - reduction of WPI threshold to 20% would only add extra 1,326
- AMA Guidelines state *impairment %s “should not be used to make direct financial rewards or direct estimates of disabilities”*
- 240 of 250 WIRO procedural reviews find for workers & insurers not following procedures for WCDs
- 20%+ who returned to work had difficulties with provision of suitable duties – 56% asked by prospective employers if have made compensation claims ever
- NSW numbers spike for Sickness Allowance & Newstart

WorkCover's conflicting functions

- 3 main conflicts:
 - Nominal insurer & scheme regulator
 - Reviewer of merits of WCDs & financial responsibility for scheme
 - WHS adviser & regulator
- Downward trend in enforcement activities:
 - Infringement notices: 2006/7 726; 2012/13 124; 2013/4 69
 - Successful safety prosecutions: 300 2006/7 to 41 2013/4

Changes justified by projected unfunded liability



- Assumptions
- External GFC impact & prior premium reductions
- Deteriorating claims experience: governance of agents not addressed
- 2012 changes meant employer premiums could be **reduced**:
 - 7.5% 30 June 2013
 - 5% 1 January 2014
 - 5% 30 June 2014

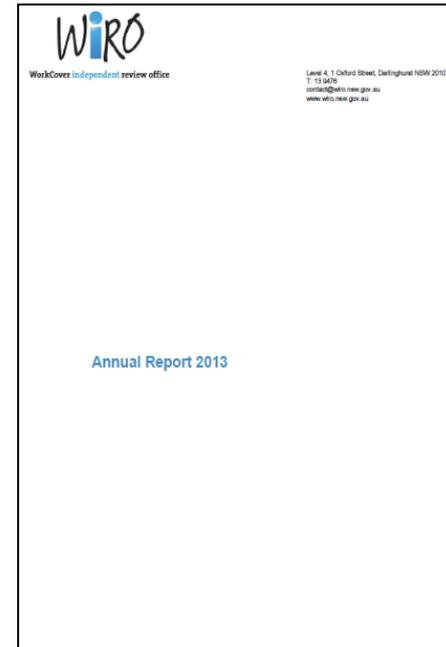
Since 2012

| Name | Date | Authors |
|---|---------------|---|
| Annual Report 2013 | 26 Nov. 2013 | WIRO WorkCover Independent Review Office |
| WIRO submission to Law & Justice Committee, Legislative Council | 7 Feb. 2014 | |
| Allegations of bullying in WorkCover NSW | 19 June 2014 | General Purpose Standing Committee No. 1, Legislative Council |
| Statutory review of Workers Compensation Legislation Amendment Act 2012 | 30 June 2014 | CIE (Centre for International Economics) |
| Review of the exercise of the functions of the WorkCover Authority | 17 Sept. 2014 | Standing Committee on Law and Justice |

WIRO Annual Report (2013) and Submission to Parliamentary Review

WIRO was critical of:

1. Legislation misapplied by WorkCover: e.g. advising insurers to conduct WCAs
2. Excluding workers from legal assistance with WCD reviews.
3. Missing Guidelines and inconsistencies between legislation and Guidelines.
4. Lack of enforcement of insurer and employer requirements – re return to work.
5. Significant delays in conducting Merit Review by WorkCover.
6. Conflicting roles of WorkCover as insurer and regulator.



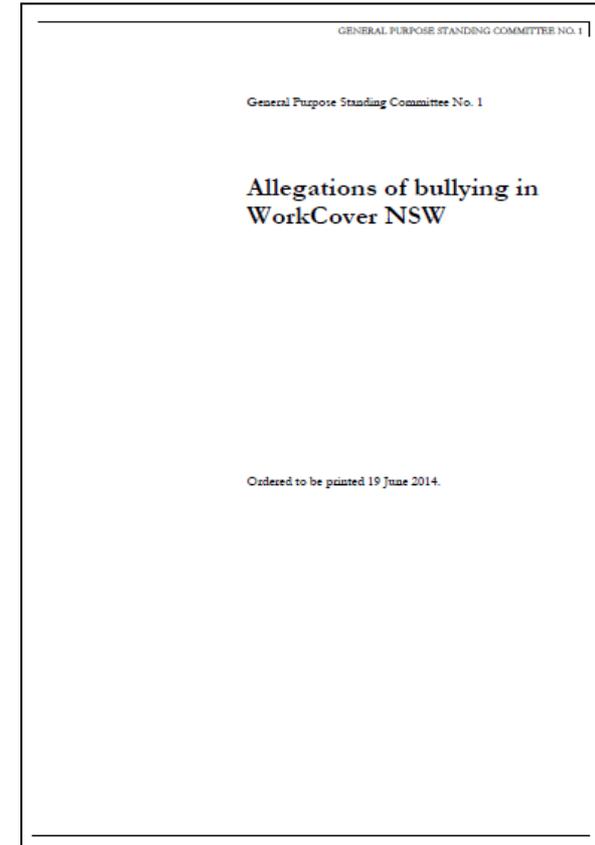
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Allegations of bullying in WorkCover NSW

This parliamentary inquiry received 98 submissions from the public, and found:

- WorkCover NSW has longstanding & significant organisational problem with bullying
- Problems are widespread, with impacts on:
 - WorkCover NSW employees
 - Other employees lodging complaints about bullying with the regulator (WorkCover NSW)
 - Injured workers.

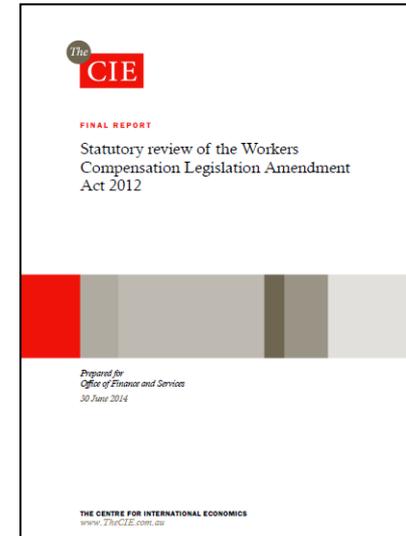


Statutory review of the Workers Compensation Legislation Amendment Act 2012

- Conducted by private company –CIE – with no experience in workers compensation policy.
- More than 400 submissions received from public.

The CIE wrote that:

there is little or no early evidence that the reforms have achieved some of the objectives of the workers compensation system. This is particularly the case with respect to injury prevention, reducing the regulatory burden, and supporting less seriously injured workers (mainly those with a WPI of 21-30 per cent) to recover and regain their financial independence. Various issues have also been raised around the fairness of reforms, which have the potential to detract from the spirit of the objectives. In many cases, these factors culminate in (unaddressed) barriers to return to work, limiting the extent to which the amendments can be said to meet the policy objectives.

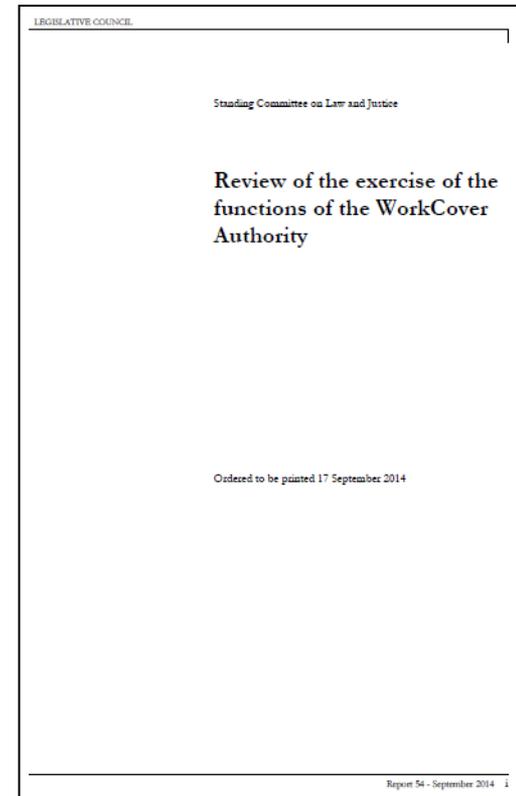


Statutory review recommendations

- Lower 'somewhat arbitrary' >30% threshold for serious injuries
- Restore medical benefits to support return to work
- Make WCDs more equitable & allow legal representation
- Taking workers' place of residence , work experience & training into consideration when making WCDs
- Remove discrimination against 64+ year olds with termination of weekly benefits

Review of exercise of functions of WorkCover Authority

- 43 submissions received
- Final report unanimously accepted by members of committee from major political parties
- 26 Recommendations - particularly:
 - Separate functions of WorkCover
 - Expand WIRO functions: hold WorkCover and the insurers more accountable.
 - Reinstatement of some workers' entitlements to restore more fairness to the scheme – restore full medical benefits
 - Allow payment of lawyers by employees
 - Improve transparency & consultation.



Changes to legislation

Five changes from 3 September 2014:

1. Pay for medical equipment & aids e.g. hearing aids & prostheses til 65.
2. Pay for medical costs if WPI between 21 – 30%.
3. No discrimination if injured close to retirement age.
4. Continue weekly benefits while WCD is being reviewed.
5. Extend entitlement to 'secondary surgery'.

These changes only apply to workers who were in receipt of weekly payments on 1 October 2012 or made claim before then.

Cost maximum of \$82 million a year.

1. Legal assistance with Work Capacity Decision Reviews

- Workers are simply giving up and dropping out of the system.
- Lawyers also moving out of workers' compensation.
- This is vastly inequitable and morally hazardous:
 - Injured workers unlikely to be able to follow complex legal processes.
 - WorkCover Merit Reviews lack full independence.
 - Insurers poorly trained to do WCDs and WCD internal reviews
 - No other jurisdiction has these kinds of restrictions on legal assistance.
- Power imbalance leaves injured workers at a double disadvantage.
- Perceptions of systemic bias negatively impacts return to work outcomes.

Legal practitioners should be paid through ILARS (Independent Legal Assistance & Review Service) to assist workers with WCD reviews.

2. Restore medical benefits

1. Urgently restore payment for hearing aids, prostheses, home and vehicle modifications – cost about 1% of current scheme expenditure.
2. Restore medical payments for all other medical expenses for all workers, in particular ‘maintenance expenses’ so workers can keep working and allow secondary surgeries to occur at an appropriate time.
3. No requirement for pre-approval when it is not reasonable or practical.

3. Separation of functions of WorkCover

‘Without being overly simplistic, if you look at it this way: WorkCover is the regulator, the investigator, the police officer, the prosecutor, the judge and the jury when you look at work capacity ... And the owner, and that distrust comes from there.’ (Mr Anthony Scarcella, NSW Director, National Council of the Australian Lawyers Alliance)

Recommendations:

- WorkCover conduct an internal review to separate the roles of nominal insurer and decision maker in merit reviews.
- Establish a separate agency or administrative arrangement to clearly separate the roles of regulator and nominal insurer.
- Establish independent Workplace Bullying Steering Panel.

Concluding remarks

There is mounting pressure for the government to amend the 2012 legislation to make it more 'efficient, fair and equitable'.

In particular the government needs to start with:

1. Paying legal practitioners to assist with WCD reviews to remove the power imbalance.
2. Restore medical benefits for all workers.
3. Separation of the functions of WorkCover.



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