THE IMPACT ON INJURED WORKERS OF CHANGES TO NSW WORKERS' COMPENSATION: JULY 2012-NOVEMBER 2014 REPORT NO. 2 FOR UNIONS NSW

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EXECUTIVE SUMMARY

The legislative changes to workers' compensation introduced in June 2012 have significantly reduced entitlements for injured workers in NSW. Since the changes were made there has been a 24% reduction in active compensation claims. More than 5,000 workers have had their income entitlements terminated following the issuing of a work capacity decision notice. At least 20,000 long-term injured workers have lost their entitlement to medical benefits.

One extraordinary aspect of the 2012 legislative changes is that they apply retrospectively. Even legally binding decisions made prior to June 2012 in the Workers Compensation Commission have been rendered null and void by this legislation. This retrospectivity also extends to lump sum claims for injuries that preceded the legislative changes, unless the claim for permanent impairment compensation was lodged prior to 19 June 2012.

Between July 2012 and November 2014 four separate reviews of the NSW workers' compensation were completed by, or on behalf of parliament or the government:

First	WorkCover Independent Review Office (WIRO) – Annual Report (26 Nov 2013)
Second	General Purpose Standing Committee No. 1 of Legislative Council – Allegations of Bullying in WorkCover NSW (19 June 2014)
Third	The Centre for International Economics (CIE) – Statutory Review of the Workers Compensation Legislation Amendment Act 2012 (30 June 2014)
Fourth	Standing Committee on Law and Justice of Legislative Council – Review of the Exercise of the Functions of the WorkCover Authority (17 Sept 2014)

Each of these reviews highlight ways in which the scheme lacks fairness for injured workers and offers recommendations for improving the operation of the scheme and restoring fairness.

In June 2014 a set of discrete changes to the regulations were announced and the Workers Compensation Regulation was changed accordingly in September 2014 – restoring particular benefits to a small group of injured workers. However, these changes do not go far enough, many more changes are required to restore equity in the scheme.

This report draws on the parliamentary or government reviews listed above to compile a summary of recommendations urgently required to repair the imbalance in the NSW workers' compensation scheme.

TABLE 1. SUMMARY OF RECOMMENDATIONS FROM PARLIAMENTARY OR GOVERNMENT REVIEWS

Recommendation	Recommended by
1. Lower the threshold for seriously injured	CIE Statutory Review
2. Restore medical benefits for work-related injury and illness	CIE Statutory Review Standing Committee Review of WorkCover
3. Legal representation for WCD reviews and include location as a consideration in WCDs	CIE Statutory Review Standing Committee Review of WorkCover WIRO Reports
4. **Separate the functions of WorkCover to remove conflicts of interest**	Standing Committee Review of WorkCover Standing Committee on Bullying at WorkCover WIRO Reports
5. Improve data transparency in annual reports and statistical bulletins	Standing Committee Review of WorkCover WIRO Reports
6. **Ensure WorkCover Guidelines are clear, accurate, simplified and consolidated**	Standing Committee Review of WorkCover WIRO Reports
7. Ensure WorkCover meets legislative obligation to consult with stakeholders	Standing Committee Review of WorkCover WIRO Reports
8. Address bullying of injured workers by WorkCover and insurers	Standing Committee on Bullying at WorkCover
9. Enforce prevention and return to work legislation and regulations for employers	Standing Committee Review of WorkCover CIE Statutory Review
10. Extend the changes to Workers Compensation Regulations to all injured workers: **- Correct anomaly for 64 year old workers** **- Stay the decision of WCD until review complete**	CIE Statutory Review

GLOSSARY

ABS	Australian Bureau of Statistics
CIE	Centre for International Economics
DEEWR	Department of Education, Employment and Workplace Relations
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
GFC	Global Financial Crisis
ILARS	Independent Legal Assistance and Review Service
IWSN	Injured Workers' Support Network
MPHS	Multi-purpose household survey
NSW	New South Wales
PwC	Pricewaterhouse Coopers
ROI	Return on investments
TMF	Treasury Managed Fund
WCD	Work capacity decision
WIRO	WorkCover Independent Review Office
WorkCover	WorkCover Authority of NSW
WPI	Whole of person impairment

1. INTRODUCTION

In June 2012 the government introduced the Workers' Compensation Legislation Amendment Act 2012 (NSW). These legislative changes, and their potential adverse impacts on injured workers, were outlined in detail in Report no. 1 of this series produced by the Centre for Workforce Futures at Macquarie University.[1] The changes have been strongly criticised for the deleterious impact they have had on thousands of injured workers. Criticisms have come from media,[2] injured workers, trade unions, legal practitioners, and the WorkCover Independent Review Office.

The key rationale for introducing these changes was that the scheme had a 'crisis' level deficit of $4.1 billion, calculated in December 2011. An increase to employer premiums to resolve the rising actuarial deficit was considered untenable on the assumption that NSW employers would relocate their businesses to other states if premiums were not 'competitive'. These two lines of argument led the government to reduce substantially both entitlements for injured workers **and** employer premiums.

The result was a dramatic turnaround in a 'crisis' level deficit from $4.1 billion to a comfortable **surplus of $1.36 billion**, just two years later, in December 2013. Report no. 1 in this series made the observations about the 2012 legislative changes contained in Table 2.

TABLE 2. SUMMARY OF OBSERVATIONS FROM REPORT NO. 1

LEGISLATIVE CHANGE	IMPACT
Weekly benefits	
Increase in the statutory weekly payment rate.	Resulted in increased weekly entitlements for workers who were in receipt of entitlements.
Change the way earnings prior to injury are calculated to include overtime and shift work.	Benefitted those who work overtime and shifts. However the calculations can be convoluted, leaving scope for workers to be short-changed.
Increase in the percentage wage limits paid after 26 weeks.	Advantageous for workers who were eligible only if they met stringent work or incapacity for work requirements.

[1] Markey, Holley, O'Neill and Thornthwaite, 2013.

[2] See for instance: Anna Patty, 'New caps on benefits trigger cuts to workers' comp payment', *Sydney Morning Herald,* 31 December 2012; ABC 1 television programme '7.30', 7 Feb 2014: http://www.abc.net.au/news/2014-02-07/are-workers-compensation-laws-hurting-workers-or/5246942 ; The Conversation 24 March 2014: https://theconversation.com/workers-comp-needs-real-reform-not-red-tape-fiddling-24028 ; and 'Thousands of workers miss last-minute medical offer' Rachel Browne, Sydney Morning Herald, 31 December 2013

LEGISLATIVE CHANGE (cont.)	IMPACT (cont.)
Insufficient safeguards surrounding the procedures for work capacity decisions .	Provided opportunities for insurers to unilaterally and unfairly reduce weekly benefits. The result has been the potential to erode or eliminate the benefits of 1, 2 and 3 above.
Prohibition of payment for legal advice on work capacity decisions.	Effectively denies injured workers legal support regarding their capacity to work.
Termination of weekly payments when workers reach statutory retirement age (presently 65 years of age) regardless of when injury occurred.	Meant that 64 year old workers have been unjustifiably discriminated against.
Medical	
Entitlements to medical treatment cease 12 months after weekly entitlements are terminated.	Left workers bearing high costs of necessary, post-injury follow-up treatments, surgeries, prostheses, hearing aids and other items.
New pre-approval requirements.	Can delay necessary treatments, which can cause deterioration in injury and / or allow treatment to be withheld until the entitlement period ends.
Journey claims	
Compensation for personal injury received by a worker on any journey arising out of, or in the course of employment is no longer claimable unless there is a real and substantial connection between the employment and the accident or incident.	Workers disadvantaged if injured while journeying to or from work as benefits from the workers' compensation scheme surpass benefits available from other sources (e.g. Medicare, Centrelink and third party insurance schemes).
Other claims	
Claims for heart attacks and strokes, as well as nervous shock payments to seriously injured workers and their families, are now excluded.	Left workers unsupported if they suffer a work-related heart attack or stroke. This also leaves families unsupported if workers die from heart attack, stroke or traumatic injury at work.
Claims for lump sum payments have been restricted, including lump sum claims for injuries that preceded the legislative changes.	Disadvantageous for workers who have suffered a deterioration in their condition since suffering an injury at work.

LEGISLATIVE CHANGE (cont.)	IMPACT (cont.)
WorkCover Independent Review Officer (WIRO)	
Potentially provides workers an additional port of call for help with resolving problems with their workers' compensation claims.	However WorkCover and insurers have been reticent to inform injured workers about the WIRO service, leaving most workers oblivious to the assistance available.
WIRO has the potential to improve the quality and clarity of written communication from insurers to injured workers on the basis of WIRO judgments of work capacity decisions.	This is a gradual process of improvement and only enforceable through WIRO review decisions, so only impacts a fraction of communications with injured workers. Importantly this process does not have any potential to improve verbal communication – this is significant for workers with poor English written communication skills.
The WIRO now possesses unique powers to regulate, monitor and enforce standards of legal practitioners.	Although these powers have substantially improved accountability of legal practitioners, the benefits are tempered by the prohibition of payments to legal practitioners advising on work capacity decisions.
WIRO can conduct independent research and advise the Minister on findings arising from research or services provided to injured workers.	This has the potential to improve transparency and accountability.
Return to work	
Increased and expanded obligations on injured workers to return to work.	These obligations have made it easier for insurers to make decisions to cease workers' entitlements. The measures are only counteracted on the employer side by augmented powers for WorkCover inspectors to issue employer improvement notices to employers not complying with their workplace injury management (although fewer notices have been issued) and provision of suitable duties responsibilities (but there is an absence of evidence of increased inspections).

Perceived bullying
The changes enhanced the potential for insurers to bully and harass workers by delaying approval for medical treatments and/or pressuring workers to attend any number of medical assessments at short notice and at various locations. The changes did not address pre-existing problems with bullying and harassment, such as persistent verbal threats from insurers and non-responsiveness from WorkCover. The only positive change for workers is the strengthened obligations on insurers to provide written notice before changing entitlements.
Conflicts of interest
The WorkCover Authority of NSW is both the nominal insurer, with commercial incentives to minimise insurance claim payments, and a public institution, with a responsibility to regulate work health and safety through prevention, rehabilitation and workers' compensation, including monitoring and enforcement of the regulations binding both themselves and the contracted insurers.
Contracted insurers and licensed self-insurers have an inherent conflict of interest as their responsibilities to compensate injured workers and assist them to recover and return to work are overshadowed by their mandate to maximise profits. This conflict has come to the fore with the new system of work capacity decisions.
Independent medical examiners and rehabilitation providers have a direct relationship with the insurers that pay them. They have incentives to assist insurers to minimise expenditures for services and payments to injured workers. They do not, however, have incentives to minimise expenditures for their own services, nor to assist the worker to recover. The legislated changes have exacerbated these conflicts of interest.
Legal practitioners have had incentives to encourage multiple claims and to protract legal claims. These issues have been substantially minimised by the legislated changes.
Transparency and public accountability
The inability to review the specific key performance indicators built into Government contracts with Scheme Agents prevents examination of the performance management system and the potential incentives that exist. Furthermore, there has been a significant reduction in publicly available information from WorkCover NSW regarding compensated injury and illness. This has diminished opportunities for public discussion, independent assessment and accountability of operators of the scheme. Between 1998 and 2010, WorkCover NSW publicly released detailed information about compensated injury and illness claims via annual Statistical Bulletins. These bulletins were not published for 2009/10, 2010/11 and 2011/12.

Source: The Impact on Injured Workers of Changes to NSW Workers' Compensation: June 2012 Legislative Amendments. Report no. 1 for Unions NSW. (Markey, R., Holley. S., O'Neill, S., Thornthwaite, L. December 2013).

This report will:

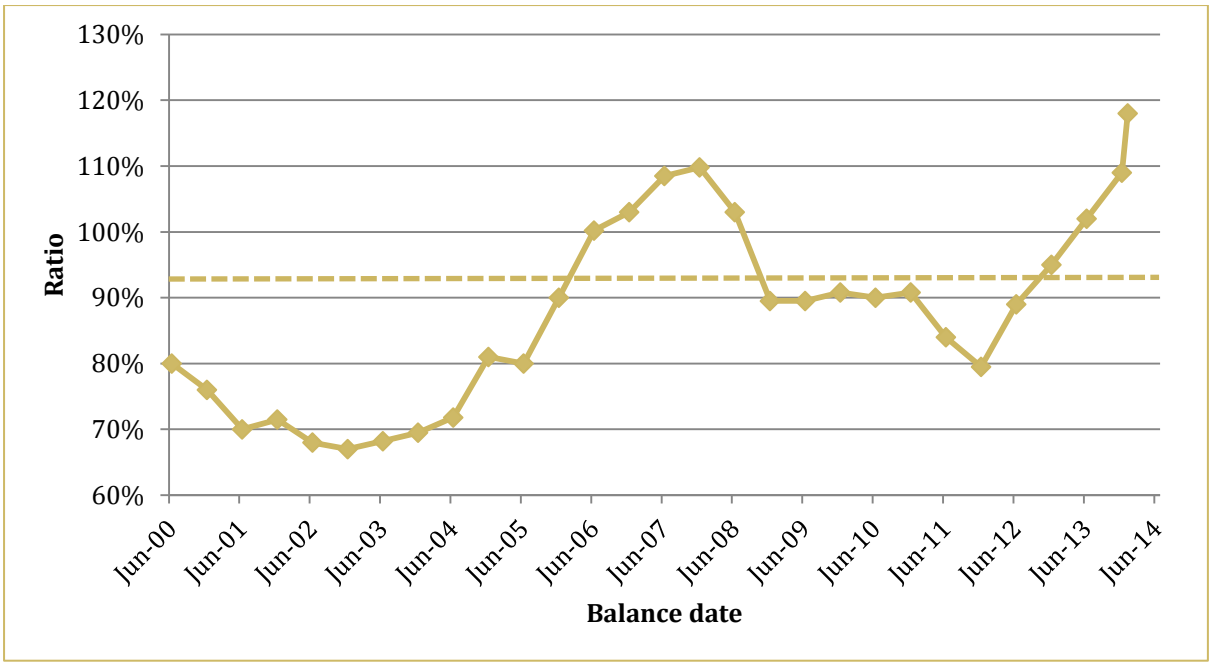
- Re-examine the feasibility of the two justifications provided for the 2012 changes to NSW workers' compensation legislation.
- Outline parliamentary and government reviews, inquiries and reports on the workers' compensation scheme since June 2012.
- Review changes made to the legislation since June 2012 and the implications of these changes.
- Explore recommendations for further change as outlined in parliamentary and government reviews and reports.
- Revisit benchmark quantitative measures for the impacts of the changes since Report no.1.

2. BACKGROUND

2.1 SCHEME SOLVENCY

The reported actuarial deficit in December 2011 was $4.1 billion. By June 2013, the scheme was reported to have a surplus of $308 million, which rose to $2.558 billion in June 2014 and is projected to be a $6 billion surplus by 2019.

FIGURE 1: SCHEME FUNDING RATIO



Source: Pricewaterhouse Coopers (PwC) Workers Compensation Nominal Insurer Scheme Valuation Results as at 31 December 2013 SRWS Board Briefing 15 April 2014 and WorkCover Annual Report 2013/14.

Figure 1 charts the scheme funding ratio and shows that the downturn to 'crisis' levels coincided with the Global Financial Crisis (GFC) of 2007/08. The upturn in the funding ratio then coincided with the recovery of investment markets after the GFC. Notably, the $1,053 million improvement between June and December 2013 was attributed primarily to gains in investment performance, with investments improving by $689 million over that period – a return on investment (ROI) of more than 10%.[3]

Furthermore, the original actuarial deficit that was used to justify the 2012 changes was based on an expected ROI of only 6.58% per annum (applied because of the GFC). The actual rate of ROI was far higher than this because the GFC had run its course by the end of 2011. For the 2012 calendar year, the ROI was already 10.0% and for 2013 the ROI was 11.2%.[4]

[3] PriceWaterhouse Coopers (PwC), 2014

[4] CIE Statutory Review, 2014. p.31

The premise on which the changes were made to workers' compensation – risk free discount rates derived from an expected ROI of 6.58% – was always questionable.

The substantial increase in estimates of outstanding claims liabilities between 30 June 2011 and 30 December 2011, which was used to justify significant reductions in workers' entitlements, was therefore attributable as follows:

- changes in assumptions around risk free discount rates, which proved to be inaccurate (approximately 60% of the increase);
- an accounting adjustment to alter the estimates of liabilities from previously held claims (more than 15%); and
- changes in the actuarial assumptions used to calculate expected claims expenses and actual changes in claims for workers' compensation (approximately 15%).[5]

Government reports cited a 'deterioration in claims management experience'[6] between June 2011 and December 2011 as necessitating the 2012 legislative changes to workers' compensation. It is now clear that the spike in claims was relatively minor and actually lower than 2008/9 and 2009/10. Table 3 illustrates the changes in expenditures for workers' compensation claimants before, during and after this period.

TABLE 3: NSW SCHEME EXPENDITURE CHANGES

	Claimant expenditures ($m)	% change	Total scheme expenditure ($m)	% change
2003/04	$1,843		$2,401	
2004/05	$1,471	-20.2%	$2,206	-8.1%
2005/06	$1,449	-1.4%	$2,044	-7.3%
2006/07	$1,452	0.2%	$2,043	0.0%
2007/08	$1,500	3.3%	$2,039	-0.2%
2008/09	$1,701	13.4%	$2,194	7.6%
2009/10	$1,831	7.7%	$2,333	6.3%
2010/11	$1,889	3.2%	$2,418	3.6%
2011/12	$2,000	5.9%	$2,629	8.7%
2012/13	$1,847	-7.6%	$2,522	-4.1%

Source: Safe Work Australia, 2009; Safe Work Australia, 2010; Safe Work Australia, 2011; Safe Work Australia, 2012; Safe Work Australia, 2013.

It is clear from Table 3, however, that costs of administering the scheme were increasing at a disproportionately higher rate.

[5] PwC, 2012, WorkCover NSW Actuarial valuation of outstanding claims liability for the NSW Workers' Compensation Nominal Insurer at 31 December 2011, 12 March 2012. In: CIE Statutory Review, 2014. p.31-32

[6] Roth and Blayden, 2012

Since the legislative changes were made there have been substantially reduced numbers of active claims in the scheme and the payments to injured workers. More than 5,000 workers have had their weekly entitlements terminated as a result of a work capacity decision.[7] Table 4 demonstrates how dramatic the reduction in claims and payments has been across the scheme between June 2012 and December 2013.

TABLE 4: CHANGES TO CLAIMS AND PAYMENTS BETWEEN JUNE 2012 AND DECEMBER 2013

	No. of active compensation claims	Level of payments
Nominal insurer scheme	23% ↓	14% ↓
Self and specialised insurance schemes	23% ↓	22% ↓
Treasury Managed Fund (TMF) schemes	24% ↓	33% ↓

Source: CIE Statutory Review, 2014. pp.3-4

The above table reveals extreme reductions in the number of active claims for injured workers. The Statutory Review conducted by the Centre for International Economics (CIE)[8] suggests that, 'perhaps workers have kept a wide berth from the system,'[9] suggesting that many workers in need of support to treat workplace injuries or illnesses have been deterred from claiming compensation by the changes to the scheme. However, this seems unlikely given a review of data from the Australian Bureau of Statistics (see Table 13) found that less workers are reporting to have experienced an injury or illness. This suggests that the significant reduction in new injury claims is a result of the substantial changes to Work Health and Safety legislation which was also introduced in 2012 and potentially confounds analysis of new injury claims data.

Actuarial predictions of the scheme surplus actually understate the financial impact of these changes because the risk margin used to calculate gross outstanding claims has now been increased from 12% in December 2011 to 16% in December 2013.[10]

This highlights problems with the lack of transparency and consultation on the actuarial assumptions employed. Ideally actuarial assumptions need to be published for public comment before they are applied. Then, actuarial results need to be published with responses to the public comments, including explanations on how assumptions were arrived at and how public comments have been addressed. At the very least, the provision of

[7] Office of Finance and Services, 2014. p.16

[8] The Statutory Review by the Centre for International Economics (CIE) is hereafter referred to as the CIE Statutory Review.

[9] CIE Statutory Review, 2014. p.6

[10] CIE Statutory Review, 2014. p.3

comparative data based on prior assumptions is needed to ensure meaningful comparison of expected results.

2.2 CHANGES TO EMPLOYER PREMIUMS

Less than 12 months after the changes came into effect, the NSW Government reduced scheme revenues by granting employers a 7.5% reduction in compensation premiums (effective 30 June 2013). Some four months later, on 30 October 2013, the Government officially declared that the workers' compensation scheme was no longer in deficit. Employers then received a further premium reduction of 5% from 1 January 2014 and another 5% from 30 June 2014. Some premium reductions are linked to claims performance, yet this has been marginal as WorkCover states that employer premium reductions have averaged 17%.[11]

WorkCover also states that the reductions in employer premiums demonstrate 'improved health, safety and return to work outcomes since the introduction of the 2012 reforms.'[12] This claim is difficult to substantiate given the significant reduction in scheme liabilities derived from reducing workers' entitlements.

The net result is that premiums have been substantially reduced from 1.7% of wages in 2011/12, to around 1.4% in late 2014. Premiums are now similar to the Queensland rate and remain higher than the Victorian premium rate of 1.298%.[13] However, Victorian premium rates are not comparable with other states because Victorian claims include an excess to be paid by the employer. These excess claims provisions typically require employers to pay the first 10 days of lost wages as well as the first $660 of medical expenses.[14]

Comparisons with other states' premium rates are typically made on the basis of a misconception that employers will relocate businesses to other states if premium rates are not 'competitive'. There is no evidence, in Australia or internationally, to support the assumption that businesses do relocate to the jurisdiction with the lowest premiums.[15] Instead the benefit of reducing premiums hangs on 'returning' money to employers.[16]

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[11] WorkCover NSW, 2014. p.9

[12] WorkCover NSW, 2014. p.9

[13] Standing Committee Review of WorkCover, 2014. p.41

[14] As at October 2014 and indexed annually – see http://www.vwa.vic.gov.au/laws-and-regulations/employer-rights-and-responsibilities. See Markey, Holley, O'Neill and Thornthwaite, 2013. p.15

[15] Purse, 2011. pp.37-38

[16] See Media Release Andrew Constance and Dominic Perrottet, 28 April 2014, Strong Investment Returns Deliver a Boost to Workers Comp Scheme

3. CHANGES TO WORKERS' COMPENSATION (JUNE 2012-NOVEMBER 2014)

3.1 WORKERS COMPENSATION AMENDMENT (EXISTING CLAIMS) REGULATION 2014

Minimal changes have been made thus far to rectify the inequities and anomalies of the 2012 workers' compensation legislation. In all, five changes to the Workers Compensation Regulation were gazetted on 3 September 2014.[17]

These changes only apply to a small group of workers with 'existing claims'. Notably, there appears to be some ambiguity in the legislation, such that the definition of 'existing claims' is open to different constructions. The Workers Compensation Amendment (Existing Claims) Regulation 2014 [NSW] s.25(1) defines an existing claim as 'a claim for compensation in respect of an injury made before 1 October 2012' – meaning that this amendment applies only to those who made a claim before 1 October 2012. However, other definitions or interpretations arise in Part 19H of Schedule 6 to the 1987 Act s.1; and Chapter 1, s.4, as well as Chapter 7, Part 1 s.250 of the Workplace Management and Workers Compensation Act 1998.

Nonetheless, the Workers Compensation Regulation 2014 includes amendments to provide the following entitlements for workers who have made a claim in respect of an injury before 1 October 2012:

1. Payment for crutches, artificial members, eyes or teeth, and other artificial aids (e.g. prosthetic limbs) and spectacles as well as hearing aids and batteries as well as home and vehicle modification until statutory retirement age.[18]
2. Medical benefits if 'whole person impairment' is assessed between 21% and 30%, until statutory retirement age.
3. Workers injured in the 12 months before retirement age will have the same entitlements as those who were injured at or after statutory retirement age.
4. Continued eligibility for weekly benefits until a disputed work capacity decision has been resolved providing that the original application for review of the insurer's decision is made within 30 days.
5. The 12 month time limit on medical entitlements imposed by the 2012 legislative changes will not apply to secondary surgery where it is consequential on earlier surgery and affects a part of the body affected by the earlier surgery **and** was pre-approved by the insurer within 2 years after the initial surgery.

These amendments have several significant limitations. Firstly, depending on WorkCover's and insurers' interpretations of these regulatory changes, workers may prove unable to

[17] Workers Compensation Amendment (Existing Claims) Regulation [NSW] Schedule 1 Amendment of Workers Compensation Regulation 2010.

[18] as defined in the Social Security Act (Cth): s51(2), currently this is 65 years of age.

receive reimbursement for out-of-pocket medical expenses. On one interpretation, workers may not be entitled to reimbursement where these expenses were not 'pre-approved' by the insurer, or have been 'completed', that is, paid for by the worker, Medicare or private insurer and therefore cannot be revisited. An alternative interpretation is that the insurer is liable, where workers are unable at the time to attain pre-approval or claim expenses because of a 'legal disability'.

Secondly, the fifth amendment, regarding secondary surgery, is limited by the technical wording, which appears to relate to payment only for the cost of surgery. There are two problems with this. The first problem is the ambiguity about liability for costs associated with a secondary surgery, which include but are not confined to rehabilitation, time off work and domestic assistance. The second problem is the wording of the amendment, which, on one interpretation, suggests that the surgeon probably needed to anticipate the requirement for secondary surgery at the time of the first surgery.[19] The result is that this amendment, which already covers a very discrete group of injured workers with 'existing claims', is likely to have little effect, as very few people will be eligible for very little.

Thirdly, it is noteworthy that the first two amendments in the list above closely intersect. This raises questions about the value of the first amendment – payment for medical aids.[20]

Given the ambiguities and the limited group to which the amendments apply, many workers may not know they are eligible and may fail to attain payments to which they are entitled. WorkCover has established a team to work back through claims to discover who is eligible for back-pay of weekly benefits. This includes, for example, those who reached statutory retirement age before they had received weekly payments for 12 months, and those who had their weekly payments reduced while a work capacity decision (WCD) was under review. It is yet to be seen how much responsibility will rest on individual workers to be aware of their entitlements and make specific requests to receive them.

The NSW government has estimated that these changes have incurred a total scheme liability of $280 million (outstanding liabilities and future annual costs).[21] This estimate can be compared to actuarial estimates of the cost of removing the medical cap at different levels for all workers, shown in Table 5. This makes it clear that to extend the changes to all injured workers past and present will not have a substantial impact on the overall scheme liabilities.

[19] Interview with WIRO Kim Garling 20/10/14

[20] Interview with WIRO Kim Garling 20/10/14

[21] Media Release, Minister for Finance and Services, 26 June 2014, 'Workers Benefit From NSW Government's Sound Financial Management

TABLE 5: ESTIMATE OF FINANCIAL IMPACT OF MODIFYING THE MEDICAL CAP

	Outstanding claims liability		Future annual cost	
Difference to the December 2012 valuation	Lower estimate ($m)	Upper estimate ($m)	Lower estimate ($m)	Upper estimate ($m)
No change to current benefit structure	0	0	0	0
Remove cap for hearing aids to retirement age22	75	100	14	16
Remove cap for all medical aids, home and vehicle modifications to retirement age23	100	140	not given	20
Remove cap for 21-30% whole person impairment	183	290	18	62
Remove cap for 11-30% whole person impairment	490	770	38	127
Remove cap for all claimants	1,085	1,700	84	282

Source: Standing Committee Review of WorkCover, 2014. s4.42 pp.46-47

While the amendments represent sensible changes and address some of the most blatant anomalies in the 2012 legislated amendments, they simply do not go far enough. Not only do the amendments capture only a small number of injured workers adversely impacted by the 2012 legislative changes, but there is no apparent justification for the arbitrary way they have been designed to improve equity and provide medical support for one small, group of injured workers, while excluding all others. There is also no apparent justification for making these changes by regulations, rather than legislation, especially since opposition parties have indicated they will consent to legislative changes to restore benefits to injured workers.[24]

[22] Standing Committee Review of WorkCover, 2014. p.50

[23] Standing Committee Review of WorkCover, 2014. p.50

[24] Interview with WIRO Kim Garling 20/10/14

3.2 IMPACT OF CASE LAW - GOUDAPPEL V ADCO CONSTRUCTIONS

One legal question which arose in relation to the 2012 amendments with potentially substantial implications for injured workers was whether the lump sum payment provisions were retrospective. In May 2014, the High Court settled this matter in the case of *Goudappel v ADCO Constructions.* This case involved a worker whose foot and ankle were crushed by steel falling from a forklift, resulting in an assessed 6% impairment, less than the current 11% required for lump sum compensation. The injuries were suffered in April 2010, yet the worker brought the claim for compensation for permanent impairment after 19 June 2012. This meant that provisions concerning lump sum claims had been altered by the Amendment Act. Before the June 2012 changes Mr Ronald Goudappel was eligible for a lump sum payment, but after that date he was no longer eligible.

The claim by Mr Goudappel for a lump sum payment to compensate the injury he sustained in 2010 therefore tested whether the 2012 changes to lump sum payments could be applied retrospectively, to injuries that occurred prior to the amendments being made (see Table 6).

TABLE 6: GOUDAPPEL V ADCO CONSTRUCTIONS TIMELINE

Lodged claim for lump sum compensation with insurer	20 June 2012	Insurer declined liability.
Workers Compensation Commission of NSW – Presidential[25]	22 Oct 2012	Finding in favour of ADCO Constructions – the legislation extinguishes Mr Goudappel's entitlement to lump sum compensation.
Court of Appeal of the Supreme Court of NSW[26]	29 April 2013	Finding in favour of Goudappel – the regulation does not retrospectively extinguish Mr Goudappel's entitlement to lump sum compensation.
High Court of Australia[27]	16 May 2014	Finding in favour of ADCO Constructions – the transitional regulation was valid and did extinguish Mr Goudappel's entitlement to lump sum compensation.

Ultimately the High Court held that the legislation applies retrospectively and Mr Goudappel was not eligible for a lump sum payment. The law therefore applies retrospectively to all other workers in a similar position to Mr Goudappel. Had the High Court overturned the employer's appeal, future liabilities for the scheme would increase by an estimated $346 million.[28] In the two years between enactment of the amendments and the High Court decision, there was considerable uncertainty concerning eligibility for lump sum payments.

[25] P. Keating in Goudappel v ADCO Constructions Pty Limited & anor [2012] NSWWCCPD 60 (22 October 2012)

[26] Goudappel v ADCO Constructions Pty Ltd [2013] NSWCA 94 (29 April 2013)

[27] ADCO Constructions Pty Ltd v Goudappel [2014] HCA 18 (16 May 2014)

[28] Standing Committee Review of WorkCover, 2014. p.78

4. GOVERNMENT REVIEWS (JUNE 2012-NOVEMBER 2014)

Since implementation of the June 2012 changes, three reviews or inquiries established by parliament have been conducted. Two reviews were required under the 2012 legislation, while the third inquiry was prompted by a particularly egregious case of bullying at WorkCover.[29] Reports released by the WorkCover Independent Review Office (WIRO) have also been influential, as its role is to provide an accountability mechanism for the scheme.

These various published reports are listed in Table 7.

TABLE 7: REPORTS ON THE OPERATION OF NSW WORKERS' COMPENSATION SCHEME

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

Each of these reports identifies ways in which the scheme lacks fairness for injured workers and makes recommendations for improving the operation of the scheme and restoring fairness for injured workers. This report examines the further changes that need enacting for the scheme to be equitable and effective in supporting injured workers to recover and

[29] The Parliamentary Inquiry into Allegations of Bullying at NSW WorkCover was recommended by an unfair dismissal case in the NSW Industrial Relations Commission – Wayne Butler vs Safety Return to Work Support Division [2013] NSWIRComm 45.

return to work. First we provide a summary of findings from the parliamentary and WIRO reports listed in Table 7.

4.1 WORKCOVER INDEPENDENT REVIEW OFFICE (WIRO) REPORTS

In their 2013 Annual Report and Submission to the Parliamentary Review on the Exercise of the Functions of WorkCover, the WIRO provides evidence of significant shortfalls in the work capacity assessment provisions, curtailed workers' rights to legal representation and behaviour of scheme agents. Specific issues addressed in these reports included:

Legislation being misapplied by WorkCover, e.g. advising insurers to conduct Work Capacity Assessments for workers in contradiction with the legislation.
Excluding workers from being able to seek legal assistance with work capacity decision reviews.
Missing Guidelines and inconsistencies between legislation and Guidelines.
Lack of enforcement of requirements for employers to assist workers to return to work (or insurers to pay their weekly benefits), yet fraudulent workers' claims continued to be rigorously prosecuted.
Significant delays in conducting Merit Reviews by WorkCover – even though most workers are left without weekly payments while WorkCover conducts the Review.
Conflicting roles of WorkCover as nominal insurer and regulator.

4.2 PARLIAMENTARY INQUIRY ON BULLYING AT WORKCOVER

The Legislative Council General Purpose Standing Committee inquiry into Allegations of Bullying in WorkCover NSW found that WorkCover NSW has a longstanding and significant organisational problem with bullying.[30] These problems are widespread, they impact WorkCover NSW employees and employees lodging complaints with the regulator (WorkCover) about bullying (i.e. questioning the organisation's credibility as regulator[31]). The problems also impact injured workers dealing with WorkCover and insurers acting on its behalf, who are treated with disrespect.[32]

This inquiry was conducted in late 2013. The Standing Committee on Bullying at WorkCover collected 98 submissions from the public between 10 July 2013 and 23 August 2013 and then held public hearings Standing Committee on Bullying at WorkCover on 6 and 11

[30] Standing Committee on Bullying at WorkCover, 2014. p.x.

[31] Standing Committee on Bullying at WorkCover, 2014. p.1.

[32] Standing Committee on Bullying at WorkCover, 2014. p.xiii.

November 2013. The Standing Committee on Bullying at WorkCover encountered significant procedural issues in attempting to extract information essential to meeting the terms of reference from WorkCover and the Public Service Commissioner.

The inquiry was preceded by an external review of bullying and harassment at WorkCover conducted by PwC in 2011. Questions were raised in the subsequent inquiry as to whether recommendations from the PwC review had been implemented adequately. Indeed, the inquiry was prompted by the findings of an unfair dismissal claim made against WorkCover NSW by Mr Wayne Butler. In 2013, two years after the PwC review, the Industrial Relations Commission found that the dismissal of Mr Butler by WorkCover had been 'harsh, unreasonable and unjust'[33] and had the 'characterisation of institutional bullying'.[34]

The inquiry into bullying also made important recommendations for improving fairness and respect for injured workers in the workers' compensation scheme. One such recommendation was for the urgent establishment of an independent workplace bullying steering panel to provide for the review of complaints by injured workers. The government's response to this inquiry was received on 16 October 2014 in the form of a letter from the minister to the Parliament. On the same day, WorkCover NSW took the significant step of issuing an unreserved apology to Wayne Butler, albeit as a result of continued parliamentary pressure.[35] Eight of the 13 recommendations from this report have been unconditionally accepted and implementation by WorkCover has commenced.

4.3 STATUTORY REVIEW OF 2012 LEGISLATION

The statutory terms of reference for this review were to determine whether the policy objectives of the amendments remain valid and whether the legislation remains appropriate for securing those objectives. The seven objectives of the scheme are to:[36]

- Enhance NSW workplace safety by preventing and reducing incidents and fatalities.
- Contribute to economic and jobs growth, including for small businesses, by ensuring that premiums are comparable with other states and there are optimal insurance arrangements.
- Promote recovery and the health benefits of returning to work.
- Guarantee quality long-term medical and financial support for seriously injured workers.
- Support less seriously injured workers to recover and regain their financial independence.

[33] Wayne Butler and Safety Return to Work Support Division [2013] NSW Industrial Relations Commission 45, 21 June 2013. [113]

[34] *Butler* (2013) NSWIRComm 45, [316].

[35] see Patty, 16 October 2014

[36] CIE Statutory Review, 2014. p.21

- Reduce high regulatory burden and make it simple for injured workers, employers and service providers to navigate the system.
- Strongly discourage payments, treatments and services that do not contribute to recovery and return to work.

To conduct the review, the NSW Government commissioned the Centre for International Economics (CIE), an organisation with no known prior experience in workers' compensation policy.

During the eight-week review, CIE Statutory Review contacted 150 stakeholders, and subsequent consultations included meetings with 36 groups, and six workshops. CIE Statutory Review obtained over 400 submissions. However, unlike most government-run inquiries, CIE Statutory Review report did not identify its stakeholder contacts or the organisations and individuals who made submissions.

The report findings essentially endorse the government's policy direction and fundamental priority of keeping the Scheme's financial liabilities and employer premiums low. Nonetheless, the CIE Statutory Review criticised many aspects of the 2012 legislation's operation:

> *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%) 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*.[37]

The report identifies several areas in which outcomes have been 'weaker' than the objectives defined for the legislative changes, creating barriers to enduring return to work:

- limited support for less seriously injured workers to recover and regain financial independence;
- increased power of insurers without commensurate checks and balances;
- retrospective nature of changes in benefits;
- difficulties for low income workers due to financial benefits reducing over time;
- lack of focus on rehabilitation and early intervention;

[37] CIE Statutory Review, 2014. p.50

- employers not supplying suitable alternative duties;
- time limits and lump sum rules not allowing for deteriorations and relapses in conditions.[38]

This report relies heavily on the assumption that it is financial incentives that are encouraging better return to work outcomes. In fact, the authors, in one part of the report, explicitly conflate 'return to work' with 'exiting the scheme'.[39]

Nonetheless, the report includes specific recommendations to improve fairness in the scheme by:

- Lowering the 'somewhat arbitrary' >30% WPI threshold for serious injuries;
- Restoring medical benefits to support return to work;
- Providing injured workers with equitable dispute resolution processes for work capacity decisions, including potential legal representation;
- Taking workers' place of residence, existing work experience and training into consideration when making work capacity decisions;
- Fixing the anomaly in the legislation that discriminates against 64 year old workers on the basis that their weekly payment entitlements will be terminated when they reach statutory retirement age (65 years old) regardless of their circumstances.

4.4 REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE WORKCOVER AUTHORITY

While the statutory review of the 2012 legislative changes to workers' compensation were underway, the Standing Committee Review of WorkCover conducted a concurrent inquiry into Workcover's functions. This was the first biennial governmental review, and must now be conducted at least once every two years under the Safety, Return to Work and Support Board Act 2012.

This review commenced on 22 October 2013, received 43 submissions, and held three public hearings in March and May 2014. The final report was unanimously accepted by committee members from the major political parties, and published on 17 September 2014. Committee members included:

The Hon David Clarke MLC	Liberal Party	*Chair*
The Hon Peter Primrose MLC	Australian Labor Party	*Deputy Chair*

[38] The states that its chart 3.6 – Rate of exit from scheme at different intervals – describes the 'return to work' rate. CIE Statutory Review, 2014. p.8-9

[39] CIE Statutory Review, 2014. p.46-47

Mr Scot MacDonald MLC	Liberal Party
The Hon Sarah Mitchell MLC	The Nationals
The Hon Shaoquett Moselmane MLC	Australian Labor Party
Mr David Shoebridge MLC	The Greens

Sweeping changes have been recommended in the Statutory Review report to improve equity for injured workers in the scheme. Recommendations addressing fairness include:

Recommendation 1 Recommendation 2 Recommendation 3	Separate the functions of WorkCover to improve the regulation of workers' health and safety and workers' compensation.
Recommendation 4 Recommendation 5	Expand the functions of WIRO – holding WorkCover accountable for regulating work health and safety as well as workers' compensation.
Recommendation 6 Recommendation 7	Restore full medical benefits.
Recommendation 10	Allow legal practitioners to be paid for assisting injured workers with WCD reviews.
Recommendation 11 Recommendation 12	Improve employer understanding of and compliance with return to work provisions. Also include workers' residence as a consideration in WCDs (specifically point 5.54).
Recommendation 16 Recommendation 17	Increase transparency of workers' compensation scheme (publish data including statistical bulletin) to improve accountability.
Recommendation 20	Review all guidelines to simplify and consolidate (thus improving regulation).
Recommendation 23 Recommendation 26	Improve consultation with all stakeholders (not just insurers).

5. CONSOLIDATED SUMMARY OF KEY RECOMMENDATIONS

5.1 LOWER THE THRESHOLD FOR SERIOUSLY INJURED

The threshold for seriously injured workers of >30% WPI has been established arbitrarily.[40] It is not based on evidence about what is needed to support injured workers to return to work. Only 1,031 of a total 57,966 workers in the scheme at 22 August 2014 have been assessed as having >30% WPI.[41] This equates to less than 1.8% of injured workers.

Anecdotal evidence suggests that workers in NSW who are assessed as having WPI below 31% are provided with inadequate support to recover and return to work.[42] Certainly, the assistance available for injured workers with WPI assessed as below 31% in NSW now falls below all other Australian jurisdictions.[43] The types of injuries that will be assessed as having less than 31% impairment are shown in Table 8.

TABLE 8: INJURIES THAT DO NOT QUALIFY AS 'SERIOUSLY INJURED'

Definitely below 31% WPI	Likely to be below 31% WPI
- Loss of sight in one eye - Substantial loss of use of leg, hand, or arm - Total loss of movement of wrist - <62% binaural hearing loss[44] - Loss of an eye or part of the nose resulting in functional loss[45] - Severe unilateral facial paralysis affecting most branches[46] - Significant scarring or skin damage that is visible and limits performance and exposure to heat or light[47]	- Spinal cord damage - Chronic pain

Source: CIE Statutory Review, 2014. p.57; WorkCover Guides for the Evaluation of Permanent Impairment 3rd Edition – 6 February 2009, WorkCover NSW.

[40] CIE Statutory Review, 2014. p.17 & 74

[41] Office of Finance and Services, 2014. p.17

[42] CIE Statutory Review, 2014. p.57

[43] CIE Statutory Review, 2014. p.17

[44] WorkCover Guides for the Evaluation of Permanent Impairment 3rd Edition – 6 February 2009, WorkCover NSW p.50

[45] WorkCover Guides for the Evaluation of Permanent Impairment 3rd Edition – 6 February 2009, WorkCover NSW p.38

[46] WorkCover Guides for the Evaluation of Permanent Impairment 3rd Edition – 6 February 2009, WorkCover NSW p.38

[47] WorkCover Guides for the Evaluation of Permanent Impairment 3rd Edition – 6 February 2009, WorkCover NSW p.84

In fact, the use of WPI percentages to determine workers' compensation entitlements is questionable. WPI percentages are derived from the Australian Medical Association Guides, which state that:

> *It must be emphasized and clearly understood that impairment percentages derived according to Guides criteria should not be used to make direct financial awards or direct estimates of disabilities.*[48]

Although the AMA Guides are designed to assist with determining WPI percentage for use in workers' compensation systems, it is expected that they should be only one factor incorporated into a well-rounded, holistic judgment about WPI percentages and corresponding compensation.

Furthermore, it is difficult to justify the failure to support the recovery and return to work for workers who have been injured through a failure of workplace safety. For instance, there is little real evidence justifying reductions in income support on the basis that such support will provide a disincentive to return to work. As the WIRO's Kim Garling has noted:

> *Because it was suggested that if someone continued to be in the same financial position there was no incentive for them to return to work, the government introduced a reduction in the weekly benefit according to the number of weeks that have passed and their capacity. I don't see why an injured worker who, through no fault of their own, is injured at work, should be in any way penalised. And if they're seriously injured then additional benefits must be made available to that group – again it's a small group – we're not talking about a widespread group.*[49]

A priority must be to compensate adequately the families of workers killed or permanently and totally disabled as a result of their work:

> *The level of compensation is pretty poor and that needs to be significantly changed. There aren't that many and the dollar figure is relatively minor. So I think that's priority number 1.*[50]

Another priority must be to support adequately families of victims of seriously injured workers. When a worker is seriously injured, not only will their income be reduced, but they will often be unable to fulfil regular household duties. In addition, they may need hospitalisation or regular transportation to a rehabilitation centre. This predicament was explained by the WIRO's Kim Garling:

> *You've now got a parent who's not available to do all the parenting tasks – that may involve getting assistance to collect children from school, take them to school, all of those additional tasks, as well as having to understand that the*

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[48] American Medical Association (AMA), 1995 (AMA Guides 4) p.1/5. Note that WorkCover NSW uses the AMA Guides 5 since 2008.

[49] Interview with WIRO Kim Garling 20/10/14

[50] Interview with WIRO Kim Garling 20/10/14

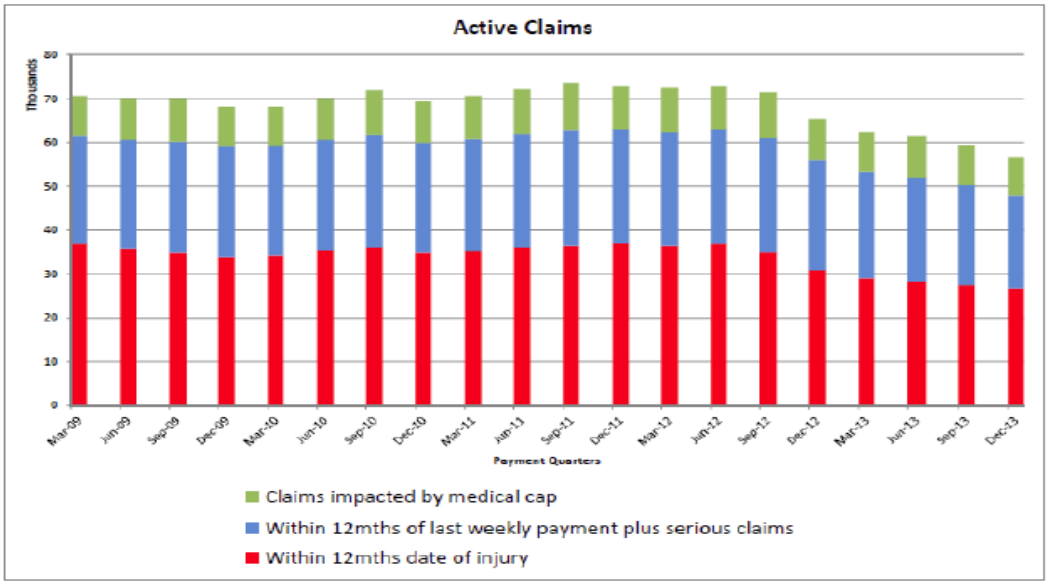
family is going to spend significant time going to and from hospital, to and from a rehab facility, with all of the emotional distress that follows the injury. That needs to be thought through much more carefully and recognise that it's a huge blow when someone is seriously injured. The government went a long way to addressing that, but they need to go a lot further in my humble opinion to ensuring that those families of those injured workers are properly looked after.[51]

5.2 RESTORE MEDICAL BENEFITS

The 2012 legislative changes drastically reduced the medical benefits available to support injured workers to recover and return to work. The legislation introduced two restrictions on medical benefits. Firstly, entitlement to medical treatments and aids are terminated 12 months after entitlement to weekly payments cease. This 12 month period for termination is an arbitrary timeframe introduced in the legislation, with no evidence as to how this will improve recovery and return to work outcomes.[52] Secondly, medical treatments must be pre-approved by the insurer.

As a result of these changes the number of recipients of medical benefits declined from 73,000 in June 2012 to approximately 56,500 claims at the December 2013 payment quarter. This reduction is illustrated in Figure 2. A further 10,000 active medical claims were expected to be terminated at 31 December 2013.[53]

FIGURE 2: MEDICAL ACTIVE CLAIMS BY PAYMENT QUARTER



Source: Standing Committee Review of WorkCover, 2014. p.48

[51] Interview with WIRO Kim Garling 20/10/14

[52] Standing Committee Review of WorkCover, 2014. p.48

[53] Standing Committee Review of WorkCover, 2014. p.47

Given that the scheme is now operating with a substantial surplus, which is expected to increase to $6 billion by 2019, the Standing Committee Review of WorkCover made two recommendations to restore medical entitlements:

Recommendation 6[54] That the NSW Government restore lifetime medical benefits for hearing aids, prostheses, home and vehicle modifications for all injured workers, noting the actuarial evidence as to the relatively minimal cost of restoring such benefits to the workers' compensation scheme, and that it promptly review the viability of restoring all lost medical benefits for injured workers under the scheme.
Recommendation 7[55] That the NSW Government consider amendments to the WorkCover scheme to allow for the payment of medical expenses where, through no fault of the injured worker, it was not reasonable or practical for the worker to obtain pre-approval of medical expenses before undertaking the treatment.

The costs of restoring medical benefits at different levels in the scheme were given earlier in Table 5. It showed that the costs of restoring medical benefits are insignificant in comparison to the operating surplus in the scheme. Table 9 below lists the numbers of people who will be impacted if their medical benefits are restored.

TABLE 9: NUMBERS OF WORKERS IN THE SCHEME AT 22 AUGUST, 2014

Assessed as having >30% WPI	1,031
Assessed as having between 21 and 30% WPI	1,326
Suffered hearing loss and require hearing aids	953
Suffered amputations	53
Total workers in scheme	57,966

Source: Answers to supplementary questions on notice, WorkCover Authority of NSW – Attachment B, p 2. in Standing Committee Review of WorkCover, 2014.

For a start, restoration of all hearing aids, prosthetics and home and vehicle modifications will only cost approximately 1% of current scheme expenditure.[56] Nonetheless, legislation to restore these benefits will have a substantial impact for thousands of workers who had their medical entitlements unjustly terminated.

[54] Standing Committee Review of WorkCover, 2014. p.xvi

[55] Standing Committee Review of WorkCover, 2014. p.xvi

[56] CIE Statutory Review, 2014. p.59

The three key problems with these restrictions on medical benefits include:

- Termination of payment for ongoing maintenance costs of returning to work, e.g. physiotherapy, hearing aids.
- Insurers delaying pre-approval of required treatments.
- Major surgeries encouraged to be conducted earlier than medical practitioners advise to fit into 12 month termination period.

Each of these problems are now examined in turn.

5.2.1 MAINTENANCE TREATMENTS

Workers requiring ongoing medical treatments or aids in order to continue working are no longer eligible to receive these entitlements. This can inhibit workers from returning to work and remaining employed.[57] The CIE Statutory Review noted that, 'It is not reasonable to end the entitlement to reasonably necessary medical benefits.[58]

This is particularly the case for the provision of hearing aids for workers who suffer from industrial deafness. The Standing Committee Review of WorkCover received 35 letters from individuals concerned about the cessation of compensation covering replacement hearing aids, batteries and repairs.[59]

> *Review participants argued that people suffering hearing loss were particularly disadvantaged by the limitations on access to medical treatment because of the ongoing and unavoidable costs associated with hearing related injuries.*[60]

The 2012 reforms terminated compensation for workers requiring hearing aids after an initial 12 month period, and restricted the entitlements during the initial 12 months, so that compensation for hearing aids, batteries and repairs are now inadequate. Workers are only permitted one pair of hearing aids for up to $5,000, batteries up to a cost of $110.60 per ear for the first 12 months and repairs up to $464.70 for the first 12 months only.[61] Hearing aids need to be replaced approximately every 4 years, depending on quality, usage required and wear and tear.

> *Without regular replacement and maintenance, a hearing device will likely become obsolete and restrict the ability of people with hearing impairment to fully participate in work, their family lives and the community.*[62]

[57] CIE Statutory Review, 2014. p.13 & 55

[58] CIE Statutory Review, 2014. p.13

[59] Standing Committee Review of WorkCover, 2014. p.50

[60] Standing Committee Review of WorkCover, 2014. p.48

[61] Standing Committee Review of WorkCover, 2014. p.49

[62] Standing Committee Review of WorkCover, 2014. p.49

People with hearing loss aged between 25 and 65 who are not eligible for the Australian Government Hearing Services Program and who do not have private health insurance have to pay for their hearing aids themselves and they can cost between $3,000 and $12,000 a pair. They have the option of taking out private health insurance to help meet the cost of purchasing and maintaining hearing devices, if they can afford it, but private health insurance only provides limited cover for hearing and the level of cover varies greatly between the insurers, and is frankly very low.[63]

Private health insurance policies will cover hearing aid expenses to the value of between $200 and $1,600 per annum, with an average coverage of approximately $700 per annum. A *Choice* survey found that people who had private health insurance with extras cover received less than 25% reimbursement of the costs of their hearing aids.[64]

5.2.2 PRE-APPROVAL

Access to timely and effective medical treatment at the earliest possible stage is a well-established cornerstone of good medical treatment.[65]

Insurers delaying pre-approval of required treatments are causing costly delays for injured workers. The legislation includes penalties for insurers not making decisions about pre-approval in a timely fashion. The Standing Committee Review of WorkCover has encouraged WorkCover to closely monitor the time insurers take to pre-approve medical treatments and provide statistical details in the annual reports.[66]

Allowance must also be made for instances where it is not reasonable or practicable for workers to obtain pre-approval.[67] In practice pre-approval is subject to review by the Workers' Compensation Commission, so where an insurer has not pre-approved a treatment, the Commission can do so.[68] However this requires workers being willing to pursue legal dispute procedures to assert their entitlements.

The futility and frustrations with the way the pre-approval process is being applied by insurers was expressed by the WIRO's Kim Garling:

Where an injured worker is in need of surgery or medical treatment for the injury, we currently have a system where the insurer, whether they be a scheme

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[63] Hearing Care Industry Association submission to the Review of the Exercise of the Functions of the WorkCover Authority 2014 p.4.

[64] Choice, 20 Feb 2013

[65] CIE Statutory Review, 2014. p.12

[66] Standing Committee Review of WorkCover, 2014. p.xiii & 54

[67] Standing Committee Review of WorkCover, 2014. p.xiii & 54

[68] Interview with WIRO, Kim Garling 20/10/14

agent or a self-insurer, intervenes in the medical process. So if a properly qualified medical practitioner determines that a particular course of medical treatment is required, in my view that is the end of the argument, unless there is a contrary view within the profession that is significant and needs to be taken into account. What is not appreciated, is that the medical practitioner can be sued for careless treatment, or for wrongful treatment, whereas the insurer can't. And the emotional stress we put people through over relatively straightforward surgical procedures by forcing them to go off and see yet another medical practitioner to get a view as to whether the recommended surgical procedure is appropriate or not, has got to stop.[69]

As this can also lead to extensive delays in determining claims, in the meantime, the injured worker's condition can be deteriorating and emotional stress exacerbated.

5.2.3 SURGERY WAITING PERIODS

Injured workers can be pressured to choose between having major surgery at a time when it will be compensated (within 12 month termination period) or when medical practitioners advise the surgery should take place.[70] This is critical for certain surgeries, such as knee and hip replacements, and back surgeries, where medical advice can be to delay surgery by a number of years, yet the surgery required remains attributable to the original injury. The legislation should make explicit allowance for postponed and secondary surgeries.[71] This has been addressed in part in the 2014 amendments to the Regulation for a small group of injured workers only. However, as highlighted earlier, the wording in this legislation is too limited to provide the assistance workers need to support a secondary surgery.

Somewhat confusing this picture, however, a recent case[72] in the Workers Compensation Commission, found that the 12 month termination period may not be what it seems. It may actually extend for a number of years. Workers' entitlements to compensation for medical treatments cease 12 months after their entitlement to weekly payments cease. But the legal interpretation of entitlement to weekly payments appears to be a great deal longer than the 26, 130 or 260 consecutive weeks, depending on capacity to work. The Commission determined that, in fact, if any weekly payments of compensation *have been paid or are payable*, then the worker has an entitlement of weekly payments for 130 weeks. Moreover, *this period of 130 weeks entitlement does not need to be paid in consecutive weeks* – it could be paid over a period of 10 years, for instance.[73] Workers are then entitled to medical

[69] Interview with WIRO Kim Garling 20/10/14; see also The Centre for International Economics (The CIE), 2014. p.62

[70] Standing Committee Review of WorkCover, 2014. p.45

[71] CIE Statutory Review, 2014. p.17-18, 75

[72] Vella v Penrith Council [2014] NSWWCC 363

[73] See, for instance, Workers Compensation Act s32A:

compensation as long as they are within 12 months of the last date they were *entitled* to weekly payments.[74] Thus, the *entitlement* period is longer than the period in which the worker is actually receiving weekly payments; it can extend for a number of years in which weekly payments could be payable to the worker.[75]

5.3 LEGAL REPRESENTATION FOR WCD REVIEWS AND INCLUDE LOCATION AS A CONSIDERATION IN WCDS

More than 5,000 injured workers have had their entitlements terminated following a work capacity decision, and at least 260 of these workers did not have suitable employment (per Workers Compensation Act 1987 s.32A) at the time of termination.[76] These workers have had no rights to legal representation to dispute the decision to terminate their entitlements.

A survey conducted by Unions NSW (refer to figure 7 in this report) has demonstrated that few workers are able to attain paid, or free, legal assistance with their WCD reviews (23%). Nearly half of the respondents (44%) navigated the complex procedures on their own; 35% consulted their doctor for assistance; 13% consulted their trade union; and only 16% sought assistance from WorkCover or the WIRO service.

Problems with restricting legal representation for injured workers have led the Standing Committee Review of WorkCover to conclude that legal practitioners must be enabled to act on behalf of injured workers when a WCD is being reviewed:

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first entitlement period, in relation to a claim for compensation in the form of weekly payments made by a worker, means an aggregate period not exceeding 13 weeks (whether or not consecutive) in respect of which a weekly payment has been paid or is payable to the worker.

[74] See Workers Compensation Act 1987 s59A(1) and s59A(2) (emphasis added):

59A Limit on payment of compensation

(1) Compensation is not payable to an injured worker under this Division in respect of any treatment, service or assistance given or provided more than 12 months after a claim for compensation in respect of the injury was first made, *unless weekly payments of compensation are or have been paid or payable to the worker*.

(2) If weekly payments of compensation are or have been paid or payable to the worker, compensation is not payable under this Division in respect of any treatment, service or assistance given or provided more than *12 months after the worker ceased to be entitled to weekly payments* of compensation.

[75] Vella v Penrith City Council [2014] s.72-77

[76] Office of Finance and Services, 2014. p.17

Recommendation 10

That the NSW Government consider amending section 44(6) of the Workers Compensation Act 1987 to allow legal practitioners acting for a worker to be paid or recover fair and reasonable fees for the work undertaken in connection with a review of a work capacity decision of an insurer, subject to an analysis of its financial impact.[77]

There is no justification for restricting legal representation for injured workers and this approach has not been replicated in any other jurisdictions.[78] This legislation has eroded the number of lawyers practicing in workers' compensation, which leaves workers increasingly unprotected.[79]

Three particular problem areas have emerged with the lack of legal representation for injured workers in work capacity decision (WCD) Reviews:[80]

- The role of insurers in the assessment process.
- The administrative burden for workers to complete the review process.
- Lack of fairness for injured workers.

5.3.1 ROLE OF INSURERS

There is evidence that case managers at insurance companies are inadequately trained to complete the review process, which can compound the problems with fairness for injured workers.[81] This problem is exacerbated by the lack of legal representation for the worker in this process.[82] This problem is further compounded by the fact that the legislation does not require a Work Capacity Assessment to be conducted for a WCD to be made – thus, an insurer can make a decision on the basis of outdated or irrelevant information. Nor is there any requirement for transparency on the part of the insurer, who should be required to keep workers up to date on the progress of their WCDs and reviews.

5.3.2 ADMINISTRATIVE BURDEN

The merit review process adds an additional administrative burden for injured workers, a burden which is challenging for a legal practitioner to navigate, let alone a non-legally

[77] Standing Committee Review of WorkCover, 2014. p.70

[78] Standing Committee Review of WorkCover, 2014. p.69; CIE Statutory Review, 2014. p.62; WorkCover Independent Review Office (WIRO), 2013. p.24-25 – Note that lawyers are excluded from the process in Victoria if all parties do not consent to their participation, however the Victorian WorkCover Authority does offer free advisory services to injured workers through the WorkSafe Advisory Service and WorkCover Assist.

[79] Standing Committee Review of WorkCover, 2014. p.xiv

[80] Standing Committee Review of WorkCover, 2014. p.62

[81] Standing Committee Review of WorkCover, 2014. p.66; CIE Statutory Review, 2014. p.16

[82] Standing Committee Review of WorkCover, 2014. p.67

trained injured worker.[83] This is a complex process and it is already difficult for injured workers to understand their rights and responsibilities.[84] It is not reasonable to expect them to also be able to complete the WCD review process.

5.3.3 LACK OF FAIRNESS

The 2012 legislation gives unprecedented powers to insurers to make decisions about a worker's capacity to work, without providing an adequate process for independent review of the merits of the insurer's decision.[85] This leaves workers at a double disadvantage.[86] The bias on the part of insurers can also extend to medical practitioners, because of the relationship between insurers and medical professionals:

> *insurers often form relationships with medico-legal houses to undertake medical assessments, which can, and apparently do, produce assessments that are at odds with the medical assessments pursued by the injured worker, yet insurers are empowered to use their own assessment.*[87]

The CIE Statutory Review identified the following five elements of lack of fairness in the WCD review processes:

- *injured workers are unlikely to be able to put together the documents and gather and present lay and expert evidence necessary to support their claims for a merit review*
- *the merit review process will therefore favour the insurers and WorkCover who are primarily concerned with reducing employer and fund liability,*
- *the merit review process cannot be considered a truly independent review pathway for workers or one that makes the system simpler for them to manage,*
- *the scope for arbitration has been restricted, despite the importance of arbitration in conciliation and perceptions of fairness, and*
- *the limiting of legal representation for injured workers to [the Independent Legal Assistance and Review Service] ILARS has reduced substantially the access of workers to justice.*

Most of these concerns have led some injured workers to feel that they are not fairly judged in terms of their work capacity decision, leading to perceptions that the work capacity decision process can be used to terminate a worker's benefits rather than to achieve a sustainable and realistic return to work objective.

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[83] Standing Committee Review of WorkCover, 2014. p.66-67; CIE Statutory Review, 2014. p.16; WIRO Annual Report 2013 p.24-25

[84] Standing Committee Review of WorkCover, 2014. p.70; WIRO Annual Report 2013 p.24-25

[85] CIE Statutory Review, 2014. p.56 & 62

[86] WIRO Annual Report 2013 p.24-25

[87] CIE Statutory Review, 2014. p.62

A potential power imbalance between insurers and injured workers may be particularly problematic in the context of any shortcomings in capacity and capabilities in compensation insurers, which some stakeholders have stated exist as a result of high turnover and inexperienced staff. The impact of capability issues will be greater where the insurer has greater power to make decisions.[88]

5.3.4 INCLUDE LOCATION AS A CONSIDERATION IN WORK CAPACITY DECISIONS

WCDs are used to determine if a worker has capacity to work and can be suitably employed. The intention of this legislation is to encourage injured workers to return to work in suitable employment. However, the legislative intent is undermined by lack of regard for whether the worker can relocate or the costs of relocation.[89] There is no justification for excluding an injured worker's geographic location from assessments of suitable employment or work capacity.

The CIE Statutory Review has recommended that the legislation should be amended to impose only 'reasonable' requirements on workers to retrain or relocate, and costs of relocation and retraining should also be reimbursed.[90]

5.4 SEPARATION OF FUNCTIONS OF WORKCOVER

As currently established WorkCover has three conflicting functions, which can be resolved by separating the Authority into distinct functions. The three conflicting functions are:

- The roles as nominal insurer and scheme regulator.
- Reviewer of the merits of work capacity decisions and financial responsibility for the scheme.
- Workplace health and safety advisor and regulator.

5.4.1 NOMINAL INSURER AND SCHEME REGULATOR

The WIRO's submission to the review of the exercise of the functions of WorkCover clearly sets out the causes and effects of WorkCover having a role as regulator and a commercial role as insurer in the workers' compensation scheme:

The legislative framework and organisational structure does not assist staff to separate their tasks and manage the potential conflicts as and when they may emerge. The legislation intertwines the responsibilities in such a way as to often confuse the two roles. Decisions on issues such as premium and benefit level,

[88] CIE Statutory Review, 2014. p.63

[89] CIE Statutory Review, 2014. p.51 – see s.32A of the Act for the requirements

[90] CIE Statutory Review, 2014. p.15

medical and legal costs are controlled by WorkCover in its capacity as regulator. The regulator also issues the claims technical manual which provides detailed instruction on the management of claims and their categorisation...[91]

The Workers Compensation Insurance Division's organisational structure provides no distinction or separation between its regulatory and insurance functions. Indeed the delegation manual for WorkCover outlines that senior staff who have delegations for the regulatory functions also have delegation for the functions of the Nominal Insurer. To an outsider, the only way at times to distinguish in which capacity the personnel within WorkCover are acting is the letterhead on which correspondence is written. So whose interests prevail when a conflict between objectives arises and what governance arrangements are in place to address this?[92]

The Standing Committee on Bullying at WorkCover has also recommended the establishment of procedures for conducting independent reviews of complaints of bullying by injured workers. This is important for ensuring they are treated fairly and with respect. The inquiry has recommended that there be an independent workplace bullying steering panel established to oversee all bullying related complaints WorkCover receives in its capacity as WHS and scheme regulator, and employer. This recommendation has been accepted in part by the government, as per the Minister's response to the parliament on the Inquiry into allegations of bullying at WorkCover NSW. The government has agreed to establish a panel to provide advice, rather than oversee bullying related complaints. Further, the panel will not 'be empowered to require action on its recommendations and sufficiently resourced to perform its role' – as per the committee's recommendation 12.[93]

5.4.2 REVIEWER OF WORK CAPACITY DECISIONS AND FINANCIAL RESPONSIBILITY FOR THE SCHEME

These dual roles pose a fundamental conflict of interest for WorkCover: the organization is required to act as both the merit review officer – assessing the fairness of insurer's decisions for all parties involved, and the commercial insurer – with financial responsibility for the scheme. This conflict was brought to light in the case of *Transfield Services (Aust) Pty Limited v WorkCover Authority of NSW and Mark Humphrey* (the Transfield case). In relation to this case, Roshana May, (Slater and Gordon Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales) commented that:

[91] WIRO submission to SCLJ Review p.4

[92] WIRO submission to SCLJ Review p.5

[93] Standing Committee on Bullying at WorkCover, 2014. p.118.

> *WorkCover was acting as the merit reviewer of the decision made by its agent but was also questioning the authority and the operation of its own function, the merit review officer.*[103]

The Standing Committee Review of WorkCover noted that as a result of Transfield, WorkCover is reviewing ways to segregate the functions of commercial insurer and merit review officer of the commercial decisions. The Standing Committee Review of WorkCover has recommended that WorkCover conduct this review in consultation with key stakeholders, including worker and employer representatives and publish the findings.[94]

5.4.3 WORKPLACE HEALTH AND SAFETY ADVISOR AND REGULATOR

While there can be synergies in keeping these two roles within one organisation, the Standing Committee Review of WorkCover has advised that there needs to be clear procedures in place to minimise possible conflicts of interest that can occur. These procedures should be implemented in consultation with key stakeholders.[95]

This separation of functions extends to the role of WorkCover as a regulator of workplace bullying. The inquiry into bullying at WorkCover recommended a review of the role and functions of WorkCover as a regulator of workplace bullying.[96] Currently, this review is being undertaken by NSW Treasury, albeit without the stakeholder consultation that the Standing Committee Review of WorkCover recommended.

WorkCover's performance of each of these separate functions simultaneously has led to suggestions that there is a high level of distrust in the Authority. Mr Anthony Scarcella, (NSW Director, National Council of the Australian Lawyers Alliance), for instance observed that:

> *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.*[97]

Therefore, the Standing Committee Review of WorkCover has made the following recommendations:

Recommendation 1

That the Minister for Finance and Services, in consultation with the WorkCover Independent Review Office and other stakeholders, consider establishing a separate agency or other administrative

[94] Standing Committee Review of WorkCover, 2014. p.29

[95] Standing Committee Review of WorkCover, 2014. p.31

[96] Standing Committee on Bullying at WorkCover, 2014. p.118.

[97] Standing Committee Review of WorkCover, 2014. p.27

arrangements to clearly separate the roles of regulator and nominal insurer in the workers compensation scheme, and implement that model as soon as practicable.[98]
Recommendation 2 That the WorkCover Authority of NSW consult with stakeholders, including worker and employer representatives, during its review of the segregation of functions and delegations around its role in work capacity decisions, and that it publish the review's findings.[99]
Recommendation 3 That the WorkCover Authority of NSW, in consultation with stakeholders, review the procedures currently utilised to distinguish between the work health and safety regulatory and advisory roles of WorkCover, and implement protocols to minimise potential conflicts of interest.[100]

The Standing Committee Review of WorkCover has also found that the WIRO provides a valuable independent service, giving free legal advice to injured workers as well as bringing greater accountability to the system. The Committee recommended that the WIRO should be made completely independent from WorkCover and the operational parameters should be broadened to include work health and safety.[101]

5.5 IMPROVE DATA TRANSPARENCY IN ANNUAL REPORTS AND STATISTICAL BULLETINS

The Standing Committee Review of WorkCover has found several ways in which injured workers, their representatives and other stakeholders are disadvantaged by the lack of transparency at WorkCover. Recommendations have been made not only that WorkCover publish relevant statistical data, but also that the organization abide by the Workers Compensation Act 1987 s23(m) to collect, analyse and publish statistical data.

Critically for injured workers, this lack of transparency extends to information about workers' entitlements and claims procedures. Information on the WorkCover website has been criticised for the lack of clarity, accuracy and for being out-of-date.[102] WorkCover had also not been informing workers about the WIRO, so many workers were unaware there was a free legal service available. The Standing Committee Review of WorkCover has, therefore, made a string of recommendations to rectify these problems:

[98] Standing Committee Review of WorkCover, 2014. p.26

[99] Standing Committee Review of WorkCover, 2014. p.27

[100] Standing Committee Review of WorkCover, 2014. p.32

[101] Standing Committee Review of WorkCover, 2014. pp.xii, xiii and see recommendations 4 & 5 p.38

[102] Standing Committee Review of WorkCover, 2014. p.98

Recommendation 16 That the WorkCover Authority of NSW include more detailed information in its annual reports, including information on claims processes, injury management, fraud, premium auditing and return to work rates.[103]
Recommendation 17 That the WorkCover Authority of NSW recommence publishing its statistical bulletins, and publish bulletins containing information from 2010 to September 2014, as a matter of urgency.[104]
Recommendation 18 That the WorkCover Authority of NSW update its website as soon as possible following the conclusion of its current review of publically available information.[105]
Recommendation 19 That the WorkCover Authority of NSW immediately update its 'Contact us' webpage, as well as any automated phone messages used by the customer service centre, to include information about the WorkCover Independent Review Office.[106]

It is noteworthy that since these recommendations were made WorkCover has commenced updating the website and publishing statistical bulletins. One statistical bulletin (2012/13) was published in October, but bulletins for 2009/10, 2010/11 and 2011/12 are yet to be published and WorkCover is yet to add WIRO contact information to all relevant correspondence with injured workers, as well as update the website so that workers' entitlements and procedures for claims are clearer, accurate and up-to-date.

5.6 WORKCOVER GUIDELINES MUST BE CLEAR, ACCURATE, SIMPLIFIED, CONSOLIDATED

There are presently a total of 105 WorkCover Guidelines[107]. This unwieldy number of Guidelines means that many lack cohesion, clarity, applicability and accuracy.[108] The guidelines have not been developed in consultation with stakeholders. This has resulted in several problems:[109]

- Guidelines may not accurately reflect legislative requirements.
- Guidelines have been poorly communicated to people they affect, who need to understand them.

[103] Standing Committee Review of WorkCover, 2014. p.95

[104] Standing Committee Review of WorkCover, 2014. p.95

[105] Standing Committee Review of WorkCover, 2014. p.98

[106] Standing Committee Review of WorkCover, 2014. p.98

[107] As at 11 September 2014

[108] Standing Committee Review of WorkCover, 2014. p.xv

[109] Standing Committee Review of WorkCover, 2014. p.108

- Some Guidelines are redundant but still in operation.
- Components of Guidelines that stakeholders are required to comply with were never produced, for example, the 'Best Practice Decision-making Guide' under the Work Capacity Decision Guidelines.[110]
- The status of each Guideline is unclear and inconsistent; they can either be delegated legislation or simply a guideline. This ambiguity means stakeholders can be uncertain whether compliance is legally required or just recommended.[111]

As a result the Standing Committee Review of WorkCover has recommended that all the Guidelines be reviewed and consolidated:

> Recommendation 20
>
> That the WorkCover Authority of NSW undertake a review of all guidelines that apply to the workers compensation scheme, in consultation with stakeholders, to simplify and consolidate the guidelines.[112]

Further, Guidelines, such as those concerning work capacity assessments, decisions and reviews remain unsettled, with several versions already released. As a result there is limited clarity about the correct procedures. This is exacerbating uncertainty for both injured workers and insurers. Indeed insurers have failed to follow the correct procedures in most WCDs. This has contributed to the fact that 240 of the 250 procedural reviews conducted by the WIRO service have found in favour of the worker.[113]

5.7 WORKCOVER MUST MEET LEGISLATIVE OBLIGATION TO CONSULT WITH STAKEHOLDERS

A pervasive criticism of the WorkCover scheme has been the inadequate consultation with key stakeholders. WorkCover has a legislative obligation to consult with stakeholders and has not been held to account on this.[114] In fact, WorkCover has been denying all stakeholders except scheme agents opportunities to contribute, receive feedback and keep informed of relevant activities.[115] The lack of consultation with stakeholders (other than scheme agents) was particularly pronounced during the process of the 2012 legislative reforms.[116] This had deleterious impacts for injured workers.

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[110] Standing Committee Review of WorkCover, 2014. p.103-104

[111] WIRO submission to Standing Committee Review of WorkCover, 2014. p.10

[112] Standing Committee Review of WorkCover, 2014. p.108

[113] Interview with WIRO, Kim Garling 20/10/14

[114] Standing Committee Review of WorkCover, 2014. p.91

[115] Standing Committee Review of WorkCover, 2014. p.82

[116] Standing Committee Review of WorkCover, 2014. p.90-91

To remedy these problems the Standing Committee Review of WorkCover has advised that WorkCover needs to take the following steps:

Recommendation 13
That the WorkCover Authority of NSW develop an engagement plan in consultation with all stakeholders and their representatives, and publish it as soon as practicable.[117]
Recommendation 14
That the Minister for Finance and Services establish a WorkCover Authority of NSW Advisory Committee under section 10 of the *Safety, Return to Work and Support Board Act 2012* and Schedule 2 of the *Work Health and Safety Act 2011*. The advisory committee should be comprised of representatives of workers and employers, together with other relevant stakeholders.[118]
Recommendation 15
That the WorkCover Authority of NSW establish a disability industry reference group as soon as practicable.[119]

5.8 ADDRESS BULLYING OF INJURED WORKERS BY WORKCOVER AND INSURERS

The pervasiveness of bullying of injured workers by WorkCover and insurers was brought to light with the Standing Committee on the Inquiry into Allegations of Bullying in WorkCover NSW. A survey conducted by Unions NSW (refer to Table 30 in this report) also demonstrates that bullying of injured workers is commonplace. More than 70% of injured workers in this survey reported being bullied as a result of making a claim for workers' compensation. 29% were bullied by their employer, 27% were bullied by the insurer, 5% were bullied by WorkCover and 21% noted that there had been inaction or a lack of appropriate action taken by WorkCover.

As the workers' compensation regulator, WorkCover NSW is responsible for producing and enforcing a code of practice for WorkCover employees and scheme agents. This code of conduct has the potential to improve treatment of injured workers by WorkCover staff and scheme agents. The code of practice has not yet been produced. This is despite the availability of exiting models such as the National Occupational Health and Safety Commission's Draft National Code of Practice.[120]

The Standing Committee on the Inquiry into Allegations of Bullying in WorkCover NSW made the following recommendations:

[117] Standing Committee Review of WorkCover, 2014. p.84

[118] Standing Committee Review of WorkCover, 2014. p.87

[119] Standing Committee Review of WorkCover, 2014. p.91

[120] Standing Committee on Bullying at WorkCover, 2014. p.116.

Recommendation 9 That WorkCover NSW ensure that the code of conduct for WorkCover and scheme agent staff is enforceable by individual workers and their representatives, and that financial penalties are included as one of the remedies where breaches of the code are established.[121]
Recommendation 10 That the Minister for Finance and Services take the necessary steps to ensure that complaints against WorkCover NSW staff by injured workers are investigated independently, and that investigations of complaints against scheme agent or WorkCover staff are reviewable by an independent body.[122]
Recommendation 11 That the Parliament of New South Wales enact laws which protect all workers in the state, including injured workers, from workplace bullying, and that such laws be based on the National Occupational Health and Safety Commission's Draft National Code of Practice.[123]

The government has responded to these recommendations in different ways. In response to Recommendation 9, the government maintained first, that WorkCover has an enforceable code of conduct and second, that scheme agents have one included in the 2015 scheme agent deeds, which could potentially impose financial penalties.

The government response to Recommendation 10 is that the status quo suffices: that is, complaints can be referred to WorkCover, the WIRO or the NSW Ombudsman.

The government response to Recommendation 11 reveals a gap between legal protections for those working under the NSW industrial relations legislation and those under the Fair Work Act and Work Health and Safety Act. Since 1 January 2014, under the Fair Work Act, workers in constitutionally covered businesses can apply to the Fair Work Commission for an order to stop workplace bullying, which they reasonably believe to be occurring. No such protections are available for NSW state government employees and others working in businesses not covered by the Fair Work Act. The NSW government is considering how to address this.

[121] Standing Committee on Bullying at WorkCover, 2014. p.116.

[122] Standing Committee on Bullying at WorkCover, 2014. p.116.

[123] Standing Committee on Bullying at WorkCover, 2014. p.117.

5.9 ENFORCE PREVENTION AND RETURN TO WORK LEGISLATION AND REGULATIONS FOR EMPLOYERS

The Standing Committee Review of WorkCover made the following recommendations:

Recommendation 11

That the WorkCover Authority of NSW review the mechanisms used to ensure compliance with the return to work provisions contained in the *Workplace Injury Management and Workers Compensation Act 1998*, and consider introducing incentives to encourage compliance and penalties for non-compliance.

Recommendation 12

That the WorkCover Authority of NSW undertake an education campaign to inform employees and employers of their rights and obligations in regard to returning to work following an injury.[124]

Recommendation 21

That the WorkCover Authority of NSW publish the external auditor's final report on the decision making process for prosecutions, and invite feedback on the report's recommendations from stakeholders.[125]

Recommendation 22

That the NSW Government require that insurers offering workers compensation cover have applicants declare whether any proprietor, director, senior executive or public officer associated with the applying entity has:

• any outstanding workers compensation premiums, and/or

• been associated with a registered corporation, sole trader or partnership that either has outstanding premiums as a going concern, or been placed in administration or receivership in the past five years.[126]

There are a number of issues in prevention and return to work. These include:

- Employer compliance with return to work provisions – this is poorly understood by employers and poorly enforced by the WorkCover authority.[127]
- Penalties for work health and safety noncompliance have dramatically reduced in recent years.
- Poor enforcement of employer premium evasion.
- Enforcement of insurer obligations.

[124] Standing Committee Review of WorkCover, 2014. p.76

[125] Standing Committee Review of WorkCover, 2014. p.113

[126] Standing Committee Review of WorkCover, 2014. p.120

[127] Standing Committee Review of WorkCover, 2014. pp.xiv & 70

5.9.1 EMPLOYER COMPLIANCE WITH RETURN TO WORK PROVISIONS

Employers are required to provide suitable work for an injured worker under the Workplace Injury Management and Workers Compensation Act 1998. Penalties are applicable if employers do not comply with these provisions – with a maximum civil penalty of 50 penalty units and inspectors can issue improvement notices. There is scope for WorkCover to improve compliance with these provisions. The Standing Committee Review of WorkCover has recommended that WorkCover conduct education programmes so employers understand their obligations, as well as issuing penalties to improve compliance.[128]

5.9.2 PENALTIES FOR WORK HEALTH AND SAFETY NONCOMPLIANCE

Diminishing enforcement of employers' obligations to comply with health and safety, and return to work regulations is problematic. Enforcement activities by WorkCover have significantly reduced over the last 7 years, as illustrated in the benchmark Table 25, later in this report. The table is reproduced here, as Table 10.

TABLE 10: ISSUING OF NOTICES AND PROSECUTIONS BY WORKCOVER

	Number of infringement notices issued	Number of improvement notices issued	Number of prohibition notices issued	Number of defendants in a successful WHS prosecution	Total amount of fines awarded by the courts ($'000)
2006/07	726	13,243	1,127	300	$11,086
2007/08	620	13,109	994	182	$8,600
2008/09	686	10,832	767	96	$4,602
2009/10	688	12,161	856	76	$5,614
2010/11	588	11,326	834	89	$6,039
2011/12	357	8,859	601	84	$7,922
2012/13	124	6,118	551	78	$5,057
2013/14	69	5,091	496	41	$2,480

Source: Safe Work Australia Comparative Performance Monitoring Reports 11-16, 2009-2014, WorkCover Annual Report 2013/14

A positive outcome is that worker fatalities in 2012/13 have decreased by 15% from the previous year. However, infringement notices in 2012/13 have decreased by 65% from the previous year, so there has been significantly less enforcement of health and safety

[128] Standing Committee Review of WorkCover, 2014. p.75

standards. There are also concerns from families of those killed at work that WorkCover has not communicated with them about whether they will prosecute for workplace fatalities.[129]

The review of the exercise of the functions of WorkCover also found that companies can and have avoided prosecution when they establish 'phoenix companies'. These are new companies established to avoid paying employee and tax entitlements and creditors by closing down an indebted company; the directors and business operations are retained but debts and obligations unloaded,. This makes it difficult for WorkCover to prosecute work health and safety breaches.[130]

5.9.3 POOR ENFORCEMENT OF EMPLOYER PREMIUM EVASION

The financial position and efficacy of the scheme are undermined by premium evasion. Phoenix companies pose a particular problem in this area as well because this company arrangement makes it difficult to recover outstanding premiums.[131]

5.9.4 ENFORCEMENT OF INSURER OBLIGATIONS

Insurers' failure to comply with their obligations can be penalised under the 1987 and 1998 Acts. For instance under Section 54(1) of the 1987 Act:

> *If a worker has received weekly payments of compensation for a continuous period of at least 12 weeks, the person paying the compensation must not discontinue payment, or reduce the amount, of the compensation without first giving the worker not less than the required period of notice of intention to discontinue payment of the compensation or to reduce the amount of the compensation. Maximum penalty: 50 penalty units.*

This provision is commonly breached, yet no insurers have ever been penalised for breaching this provision. Meanwhile, cases of fraudulent workers continue to be prosecuted.[132]

[129] Standing Committee Review of WorkCover, 2014. p.116-117

[130] Standing Committee Review of WorkCover, 2014. p.117

[131] Standing Committee Review of WorkCover, 2014. p.120

[132] WIRO submission to Standing Committee Review of WorkCover, 2014. p.8

5.10 EXTEND THE CHANGES TO WORKERS COMPENSATION REGULATIONS TO ALL INJURED WORKERS

5.10.1 CORRECT ANOMALY FOR 64 YEAR OLD WORKERS

The 2012 legislation introduced an anomaly, which presents a blatant inequity for 64 year old workers.[133] Entitlements to weekly payments cease when a worker reaches statutory retirement age, as defined in the Social Security Act (Cth): s51(2). The statutory retirement age is presently 65 years old, so if a worker is injured when 64 years old their weekly payments will cease when they turn 65 years old, regardless of how many days they have been receiving weekly payments – it could be 1 or 2 days. Then their medical benefits will cease 12 months later – when they turn 66 years old. However, when a worker has reached 65 years old, if they are then injured they are entitled to 12 months of weekly payments and an additional 12 months of medical benefits. It is indefensible to correct this part of the legislation for only a small group of 'existing claims' injured workers, while discrimination against other 64 year old workers continues.

5.10.2 STAY THE DECISION OF WCD UNTIL REVIEW COMPLETE

So that workers are not disadvantaged while a review is being conducted, the 2014 amendment made to the Regulations should be extended to include all injured workers, not just the small number who fit in the category of workers with an 'existing claim'.

When a WCD is made to reduce or end weekly payments for an injured worker, the decision can take effect from the specified date of commencement, even if a worker has commenced procedures for a review of the decision. As a review can take several months to be completed, workers can be left with minimal or substantially reduced weekly payments throughout the process.

The review of a WCD is a three stage process. First, an internal review is to be conducted by the insurer within 30 days. The average time insurers have been taking with internal reviews is 19 to 27 days.[134] Second, a merit review is to be conducted by WorkCover, also within 30 days. The average time WorkCover has been taking to complete these reviews is 61.9 days – with the longest so far taking 199 days.[135] The third stage is a procedural review conducted by the WIRO service, also to be completed within 30 days. The average time taken by the WIRO service has been 14 days.[136]

The substantial delays in the length of time taken for WorkCover to conduct merit reviews has disadvantaged injured workers, for whom the decision to reduce or terminate their

[133] CIE Statutory Review, 2014. p.13

[134] Standing Committee Review of WorkCover, 2014. p.62-63

[135] Standing Committee Review of WorkCover, 2014. p.63

[136] Standing Committee Review of WorkCover, 2014.. p.65

payments had already been implemented. This problem for injured workers was described by Roshana May, (Slater and Gordon Lawyers and Member, Injury Compensation Committee, Law Society of New South Wales):

> *For most people who have received work-capacity decisions and seek reviews, benefits have been reduced to nil, so they receive nothing from three months after the work-capacity decision is issued until such time as an alternative decision is substituted or reviewed and changed … Ostensibly it is six months that the worker has no benefits and is forced on to Centrelink. It is a cost-shifting exercise.*[137]

[137] Standing Committee Review of WorkCover, 2014. p.64

6. JOURNEY CLAIMS

Since the 2012 legislative changes, workers injured while journeying to or from work are no longer eligible to receive workers' compensation. This change in legislation has shifted the costs of journey claims from the workers' compensation scheme to other sources of funding, including Medicare, Centrelink benefits and compulsory third party motor vehicle insurance, overseen by the Motor Accidents Authority (MAA).

It is known that there is a cost transfer from employers paying workers' compensation premiums to support workers injured journeying to or from work, to individuals paying for compulsory third party motor vehicle insurance.[138] The MAA is not able to publish the estimated or actual quantity of this transfer since data on the purpose of the journey is not collected when individuals make a third party insurance claim.[139] Furthermore, the impact on third party insurance premiums will not be made explicit because the MAA has prohibited insurers from including 'a specific increase in prices to reflect possible future journey claims in premium filings'.[140] However actuarial estimations by Ernst and Young have estimated that 'insurers will recognise approximately 50% of the cost' from the long-term impact on third party motor vehicle insurance, when costs are transferred from workers' compensation to the motor vehicle insurance scheme.[141]

On the other hand, the cost of journey claims in the NSW workers' compensation scheme, prior to the legislative changes, was negligible (2.6% of claims within the scheme) and journey claims did not impact directly on employer premiums. Therefore the withdrawal of compensating journey claims unless there is a real and substantial connection between the journey and the work has had a minimal impact on the scheme or employers. By contrast, workers who have been injured while journeying to or from work have suffered a significant impact as the benefits from the workers' compensation scheme surpass benefits available from other sources. Given the substantial, and increasing scheme surplus, the withdrawal of journey claims for injured workers is a particular, and unreasonable impost on workers who must travel long distances for work, or who walk, jog, or ride a bicycle to work.

[138] Standing Committee Review of Motor Accidents Authority, 2014. p.35

[139] Office of Finance and Services, 2014. p.2

[140] Office of Finance and Services, 2014. p.2

[141] Office of Finance and Services, 2014. p.2

7. BENCHMARKS

Report no. 1 in this series[142] established a series of benchmarks for data to continue to monitor the impact of the legislative changes on injured workers.

Level One Broad quantitative data – benchmarks the distribution of expenditures in the scheme, numbers of injured workers and longevity of claims, return to work, enquiries to the Injured Workers' Support Network, enforcement measures by WorkCover and cost-shifting to Medicare and Centrelink benefits.

Level Two Survey – The first annual survey was conducted in May 2014. Results of this survey are analysed in this report.

7.1 BROAD QUANTITATIVE DATA

This section includes the following eight benchmarks:

Scheme expenditure
Numbers of injured workers, claims and accepted claims
Longevity of claims
Serious incidence rates and long-term injury claims
Return to work
Enquiries to Injured Workers' Support Network
Enforcement by WorkCover
Uptake of Centrelink payment
Medicare services

[142] Markey, Holley, O'Neill and Thornthwaite, 2013

BENCHMARK 1: SCHEME EXPENDITURE

TABLE 11: NSW SCHEME EXPENDITURE: PERCENTAGE CHANGES – SAFE WORK AUSTRALIA

	Direct to claimant, NSW ($m)	% change from previous year	Services to claimant, NSW ($m)	% change from previous year	Total scheme expenditure NSW ($m)	% change from previous year
2003/04	$1,194.5	-	$648.8	-	$2,400.9	-
2004/05	$948.0	-21%	$522.7	-19%	$2,205.6	-8%
2005/06	$944.4	0%	$505.0	-3%	$2,043.5	-7%
2006/07	$944.2	0%	$508.1	1%	$2,042.5	0%
2007/08	$964.7	2%	$535.6	5%	$2,039.3	0%
2008/09	$1,094.3	13%	$606.3	13%	$2,193.9	8%
2009/10	$1,194.7	9%	$636.6	5%	$2,333.0	6%
2010/11	$1,257.3	5%	$632.0	-1%	$2,417.6	4%
2011/12	$1,310.9	4%	$689.1	9%	$2,629.0	9%
2012/13	$1,187.4	-9%	$659.7	-4%	$2,521.6	-4%
Source: Safe Work Australia *Comparative Performance Monitoring Reports* 11-16, 2009-2014						

This benchmark provides an elaborated picture of the data provided in Table 3, earlier in this report. Its shows that there was no sharp increase in direct payments to claimants in the period preceding the 2012 legislative changes; increases were lower than the recent upwards trend. However, the changes had an immediate impact on direct payments to injured workers for 2012/13, with a 9% reduction from the previous year. The cost of services to claimants had increased relatively more substantially in 2011/2, but was also immediately impacted by the changes, even if the reduction was relatively less.

TABLE 12: AUSTRALIA SCHEME EXPENDITURE – SAFE WORK AUSTRALIA

	Direct to claimant, Australia ($m)	% change from previous year	Services to claimant, Australia ($m)	% change from previous year	Total scheme expenditure Australia ($m)	% change from previous year
2003/04	$2,892.4	-	$1,312.4	-	$5,611.1	-
2004/05	$2,810.3	-3%	$1,218.6	-7%	$5,653.1	1%
2005/06	$3,002.6	7%	$1,274.4	5%	$5,808.7	3%
2006/07	$3,198.0	7%	$1,325.3	4%	$6,030.4	4%
2007/08	$3,381.7	6%	$1,418.8	7%	$6,300.5	4%
2008/09	$3,786.2	12%	$1,581.4	11%	$6,936.1	10%
2009/10	$4,063.8	7%	$1,633.4	3%	$7,302.0	5%
2010/11	$4,089.2	1%	$1,706.6	4%	$7,448.2	2%
2011/12	$4,191.3	2%	$1,822.7	7%	$7,838.3	5%
2012/13	$4,214.4	1%	$1,848.6	1%	$7,979.0	2%
Source: Safe Work Australia *Comparative Performance Monitoring Reports* 11-16, 2009-2014						

Data availability: The Safe Work Australian Comparative Monitoring Reports are released each year in October or November. The reports are available on the Safe Work Australia website. Care needs to be taken to revise data for earlier years, as well as updating the latest year, because there can be a lag effect with data.

A comparison of the changes in NSW scheme expenditures with Australia-wide scheme expenditures contrasts the reduction in benefits for NSW injured workers in 2012/2013 with the trend of continued annual increases for all other injured workers in Australia.

BENCHMARK 2: NUMBERS OF INJURED WORKERS, CLAIMS AND ACCEPTED CLAIMS

The following section reports on changes in the incidence of injured workers, compensation claims and accepted claims. Importantly, Tables 13-19 show a substantial decline in the number of reported injuries over the period. It should be noted that while it is possible that the workers compensation changes may have some influence on claims numbers, major changes to work health and safety legislation were also introduced in 2012. These are likely to have resulted in amplified focus on workplace health and safety and injury prevention, driving a substantial reduction in injury and illness outcomes – and is most likely observed in low consequence, high frequency injury and illness occurrences.

TABLE 13: NUMBERS OF INJURED WORKERS, CLAIMS AND ACCEPTED CLAIMS

Injured workers in NSW	2009/10		2012-13	
	Number of workers	%	Number of workers	%
Persons who worked at some time in the last 12 months[(1)]	3,834,300		3,863,700	
Persons who worked at some time in the last 12 months and experienced a work-related injury or illness in that period[(1)]	213,200	5.5% of all persons who worked	143,600	3.7% of all persons who worked
Number of claimants for workers' compensation who received some form of compensation[(2)]	129,482	60.7% of all persons who were injured*	104,137	72.5% of all persons who were injured*
Number of non-contested claims[(2)]	112,211	86.6% of all persons who made a claim*	96,404	92.5% of all persons who made a claim*
Source: (1) ABS 6324.0 Work-Related Injuries from *Multi-Purpose Household Survey* (MPHS) and (2)Combined sources from Safe Work Australia, various reports, 2008-2013 *Note that this percentage is derived from two sources. The NSW data for work-related injuries comes from the Multi-Purpose Household Survey, so total numbers are extrapolations from surveys of a sample of the population. The numbers of claimants comes from Safe Work Australia reports. Therefore percentages can only give an indication, but cannot be assumed to be accurate proportions as they come from two different data sources.				

Data availability: This data is only available for 2009-10 and 2012-13 from the ABS website. Surveys are conducted every 4 years, the next survey will be available 2016-17.

Table 13 indicates there has been a substantial drop in workers who participated in the multi-purpose household survey reporting that they had experienced a work related injury or illness within the last 12 months. While it is not possible to assign causation for the drop

in injuries from this data, the reduction is more likely attributable to the changes in work health and safety legislation than the workers' compensation amendments.

Those who did report that they experienced a work-related injury or illness, were, however, more likely to successfully claim workers' compensation.

Table 14 highlights the substantial drop in the number of workers in the scheme since September 2012.

TABLE 14: TOTAL CLAIMS OPEN - HANSARD

30 Sept 2012	71,589
31 March 2013	68,043
22 August 2014	57,966
Source: Hansard, Peter Primrose MLC questions to parliament June 2013, August 2014	

Data availability: Peter Primrose MLC has committed to ask these same questions in parliament twice per year.

There has been a steady decrease in the number of workers in the scheme, with a reduction close to 20% since September 2012, as shown in Table 15.

TABLE 15: ALL INJURY AND ILLNESS CLAIMS ACCEPTED OR DELAYED

	Total number of claims	Total number of claims accepted initially	Percentage of contested claims
2007/08	136,908	122,162	11%
2008/09	131,933	120,400	9%
2009/10	129,426	123,252	5%
2010/11	131,760	125,472	5%
2011/12	130,861	123,327	6%
2012/13	104,137	96,404	7%
Source: Combined sources from Safe Work Australia, various reports, 2008-2013			

Data availability: The Safe Work Australian Comparative Monitoring Reports are released each year in October or November. The reports are available on the Safe Work Australia website. Care needs to be taken to revise data for earlier years, as well as updating the latest year because there can be a lag effect with some of the data.

Table 15 indicates that between 5 and 11% of claims have initially been declined, but ultimately the injured worker has received compensation. Note however that these figures

do not account for injured workers who attempted to claim workers' compensation but were unsuccessful.

TABLE 16: ALL CLAIMS EXCLUDING JOURNEY CLAIMS – ACCEPTED OR DELAYED

	Total number of claims	Total number of claims accepted initially	Percentage of contested claims
2007/08	126,886	113,031	11%
2008/09	121,782	111,052	9%
2009/10	119,632	113,791	5%
2010/11	121,421	115,490	5%
2011/12	120,490	113,380	6%
2012/13	103,386	95,911	7%
Source: Combined sources from Safe Work Australia, various reports, 2008-2013			

Data availability: As for previous table.

The figures in Table 15 are similar for all claims excluding journey claims, shown in Table 16. This table shows that claims for non-journey claims have significantly reduced – with a reduction in excess of 25% of claims accepted in 2012/13 compared to 2011/12.

Table 17 demonstrates that journey claims, which have ultimately been accepted and paid, have been substantially less likely to be initially accepted by insurers since the 2012 legislative amendments. Journey claims have also significantly diminished in total. The only journey claims that remain are those that have a real and substantial connection between the journey and the work, and claims from professions excluded from the 2012 legislative changes – including fire fighters, paramedics, coal miners and police officers.

TABLE 17: JOURNEY CLAIMS ACCEPTED OR DELAYED

	Total number of claims	Total number of claims accepted initially	Percentage of contested claims
2007/08	10,022	9,131	9%
2008/09	10,151	9,348	8%
2009/10	9,794	9,461	3%
2010/11	10,339	9,982	3%
2011/12	10,371	9,947	4%
2012/13	751	493	33%
Source: Safe Work Australia, various reports, 2008-2013			

Data availability: As for previous table.

Table 18 shows that insurers have also been far less likely initially to accept a claim for heart disease, with only 16% of claims that were paid initially accepted by insurers.

TABLE 18: CLAIMS FOR HEART DISEASE ACCEPTED OR DELAYED (HEART ATTACK, ANGINA, MYOCARDIAL INFARCTION OR CORONARY EXCLUSION)

	Total number of claims	Total number of claims accepted initially	Percentage of contested claims
2007/08	43	15	65%
2008/09	44	17	61%
2009/10	33	15	55%
2010/11	30	12	60%
2011/12	41	12	71%
2012/13	44	7	84%
Source: Safe Work Australia, various reports, 2008-2013			

Data availability: As for previous table.

Table 19 reveals a spike in claims for exposure to trauma in the year preceding the June 2012 legislative changes. Further trends may be revealed in future years.

TABLE 19: CLAIMS FOR EXPOSURE TO TRAUMA ACCEPTED OR DELAYED (WITNESS TO ACCIDENT FATAL OR OTHER)

	Total number of claims	Total number of claims accepted initially	Percentage of contested claims
2007/08	120	97	19%
2008/09	142	117	18%
2009/10	273	226	17%
2010/11	233	213	9%
2011/12	594	517	13%
2012/13	249	232	7%
Source: Safe Work Australia, various reports, 2008-2013			

Data availability: As for previous table.

BENCHMARK 3: LONGEVITY OF CLAIMS

Table 20 indicates the longevity of all workers' compensation claims since 2007/08.

TABLE 20: LONGEVITY OF CLAIMS FOR ALL INJURIES AND ILLNESSES EXCLUDING JOURNEY CLAIMS

	Less than 12 weeks	12 weeks or more	Percentage of claims ≥12 weeks
2007/08	114,858	12,028	9%
2008/09	109,806	11,976	10%
2009/10	107,798	11,834	10%
2010/11	108,826	12,595	10%
2011/12	108,631	11,859	10%
2012/13	92,138	11,248	11%
Source: Safe Work Australia *Comparative Performance Monitoring Reports* 10-15, 2008-2013			

Data availability: The Safe Work Australian Comparative Monitoring Reports are released each year in October or November. The reports are available on the Safe Work Australia website.

Table 20 shows a trend downward in claims overall. However, the decline in number of claims is particularly marked for 2012/13 (as noted in Benchmark 2). There has been a slight increase in the proportion of injured workers with claims that carry on beyond 12 weeks. This suggests the reported number of less serious injuries has reduced. On the other hand, there has been a slight increase in the proportion of injured workers with claims that carry on beyond 12 weeks. This indicates that the deterrence effect of the 2012 changes related far more to less serious injuries.

BENCHMARK 4: SERIOUS INCIDENCE RATES AND LONG-TERM INJURY CLAIMS

Table 21 reveals a downward trend in claims per total numbers of employees over the last 5 years. This downward trend has been accentuated since the June 2012 legislative changes occurred.

TABLE 21: SERIOUS INCIDENCE RATES AND LONG-TERM CLAIMS FOR NSW

	Incidence rate of serious[1] compensated injury and musculoskeletal claims	Incidence rates of serious[1] injury and disease claims	Frequency rates of serious[1] injury and disease claims	Incidence rates of long term (12 weeks or more compensation) injury and disease claims	Frequency rates of long term (12 weeks or more compensation) injury and disease claims
	Claims per 1,000 employees	Claims per 1,000 employees	Claims per million hours worked	Claims per 1,000 employees	Claims per million hours worked
2008/09	12.4	13.3	7.9	3.7	2.2
2009/10	12.2	13.2	7.8	3.7	2.2
2010/11	12.1	13.3	7.9	3.8	2.2
2011/12	11.5[2]	12.7[3]	7.5[4]	3.4	2.0
2012/13	-	11.7	6.9	3.3[5]	1.9[5]

[1] Includes accepted workers' compensation claims for temporary incapacity involving one or more weeks compensation plus all claims for fatality and permanent incapacity.

[2] Each year this is worse than the national average e.g. the national average in 2011/12 is 10.9.

[3] Each year this is worse than the national average e.g. the national average in 2011/12 is 12.0.

[4] Each year this is worse than the national average e.g. the national average in 2011/12 is 7.2.

[5] These are similar to the national averages for each year.

Source: Safe Work Australia Comparative Performance Monitoring Reports 11-16, 2009-2014

Data availability: Same as for previous table.

BENCHMARK 5: RETURN TO WORK

Despite the stated legislative intention that the 2012 changes to workers' compensation would give workers incentives to return to work, Table 22 provides no evidence of improvements in return to work rates for injured workers in NSW. There may be some delay in the impact of the policies, so this will be a measure to monitor further.

TABLE 22: RETURN TO WORK - SURVEY DATA

	Returned to work at any time since workplace injury or illness	Currently working in paid job	3 Month stable return to work rate*	If still at work: Days back at work since returning from injury	If not at work: Days back at work before stopping work again
	% of NSW injured worker respondents	% of NSW injured worker respondents	% of NSW injured worker respondents	Average number of days	Average number of days
2006/07	86%	78%	-	155	63
2007/08	86%	76%	-	149	86
2008/09	83%	72%	-	144	87
2009/10	85%	74%	-	134	71
2010/11	86%	78%	-	144	65
2011/12	85%	76%	-	158	86
2012/13	88%	80%	64%*	-	-
2013/14	87%	78%	65%*		

* Given that the average no of days back at work before needing to stop work again is 86 days, a 3 month 'stable return to work' is not going to capture a large portion of workers who are unable to work after trying to return to work for 3 months.

NB: 600 respondents in each year except 2012/13 with 826 and 2013/14 with 824 respondents.

Sources: *Return to Work Monitor* 2006/07 to 2011/12, Campbell Research prepared for Heads of Workers Compensation Authorities and *Return to Work Survey* August 2013 & July 2014, The Social Research Centre prepared for SafeWork Australia.

Data availability: The Return to Work Survey and 2006/07 to 2011/12 Return to Work Monitor reports are available on the Safe Work Australia website.

BENCHMARK 6: ENQUIRIES TO WIRO

Table 23 indicating types of enquiries to the WIRO service shows increasing concern with the work capacity assessments and decisions, with the proportion of inquiries regarding work capacity doubling in the last three months, compared to the previous twelve months. Calls about delays or whole of person impairment have also increased. On the other hand, enquiries regarding medical treatment or procedural reviews have reduced.

TABLE 23: INQUIRIES TO WIRO

	Communication	Delay	Denial of liability	Fraud/ misrepresentation	IME	Incorrect calculations	Medical costs	Medical treatment	Procedural review	Rehabilitation	Weekly benefits	Work capacity (general)	WPI	Not recorded
1 July 2013 to 30 June 2014	10%	7%	13%	0%	1%	1%	8%	17%	9%	2%	22%	7%	2%	2%
1 July 2014 to 30 Sept 2014	11%	10%	14%	0%	2%	0%	6%	13%	0%	3%	22%	13%	5%	0%
Source: WorkCover Independent Review Office Performance Report July 2013 to June 2014 and Performance Report July 2014 to September 2014														

Data availability: Data available on the WIRO website.

BENCHMARK 7: ENFORCEMENT BY WORKCOVER

Although there has not been a reduction in WorkCover inspectors interacting with people in workplaces, there has been a reduction in notices issued and prosecutions of employers, as illustrated in Table 24.

TABLE 24: ENFORCEMENT ACTIVITY BY WORKCOVER

	Number of workplace proactive visits	Number of workshops, presentations, seminars or forums	Number of reactive workplace visits	Other reactive interventions	Number of field active inspectors per 10 000 employees
2006/07	na	na	na	na	1.1
2007/08	na	na	na	na	1
2008/09	na	na	na	na	1.1
2009/10	8,915	631	15,661	19,138	1
2010/11	9,735	3,015	16,370	23,263	1
2011/12	6,577	1,065	13,652	26,244	1
2012/13	10,162	223	12,782	28,777	1*
* National average is 1.1 for each of these years na – data not available					
Source: Safe Work Australia Comparative Performance Monitoring Reports 11-16, 2009-2014					

Data availability: The Safe Work Australian Comparative Monitoring Reports are released each year in October or November. The reports are available on the Safe Work Australia website. Care needs to be taken to revise data for earlier years, as well as updating the latest year because there can be a lag effect with some of the data.

Table 25 shows a continuing downward trend in enforcement activities not justified by a smaller reduction in fatalities. The reductions in the issuing of infringement notices for 2012/13 and 2013/14 are particularly significant.

TABLE 25: ISSUING OF NOTICES AND PROSECUTIONS BY WORKCOVER

	Number of infringement notices issued	Number of improvement notices issued	Number of prohibition notices issued	Number of legal proceedings resulting in a conviction, order or agreement (number of defendants in a successful WHS prosecution)	Total amount of fines awarded by the courts ($'000)	Worker fatalities
2006/07	726	13,243	1,127	300	$11,086	137
2007/08	620	13,109	994	182	$8,600	124
2008/09	686	10,832	767	96	$4,602	139
2009/10	688	12,161	856	76	$5,614	113
2010/11	588	11,326	834	89	$6,039	117
2011/12	357	8,859	601	84	$7,922	122
2012/13	124	6,118	551	78	$5,057	103
2013/14	69	5,091	496	41	$2,480	NA

Source: Safe Work Australia Comparative Performance Monitoring Reports 11-16, 2009-2014

Data availability: The Safe Work Australian Comparative Monitoring Reports are released each year in October or November. The reports are available on the Safe Work Australia website. Care needs to be taken to revise data for earlier years, as well as updating the latest year, because there can be a lag effect with some data.

BENCHMARK 8: UPTAKE OF CENTRELINK BENEFITS

Injured workers who are still employed and unable to work, but forced to transfer from workers' compensation to Centrelink benefits, are most likely to receive Sickness Allowance. Sickness Allowance is paid to workers with a current employment contract, or who are self-employed, suffering a temporary injury and expecting to return to work. If the recipient's injury or illness deteriorates such that they are permanently incapacitated, or they no longer have a job to return to, they will be transferred to Disability Support Pension or Newstart Allowance depending on assessed capacity for work.

The data in Table 26 does not indicate how many workers have transferred from workers' compensation to Centrelink benefits. Data that demonstrates the cost-shifting from workers' compensation to welfare is not available. This data does, however, demonstrate that beneficiaries of the three relevant benefits did increase a little after the June 2012 changes to NSW workers' compensation legislation.

TABLE 26: CENTRELINK BENEFITS – NUMBER OF RECIPIENTS

	Sickness Allowance	Newstart	Disability Support Pension
Sep-11	1,826	163,805	267,798
Mar-12	1,917	173,395	268,709
Sep-12	1,965	172,949	267,828
Mar-13	2,218	203,633	267,611
Dec-13	2,126	213,445	270,415
Mar-14	2,069	216,546	270,680
Source: Department of Education, Employment and Workplace Relations (DEEWR) electorate data and Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) electorate data, Department of Human Services 2011-2013			

Data availability: Available every quarter (from December 2013) from the Commonwealth Department of Human Resources website.

BENCHMARK 9: MEDICARE SERVICES

The available data presented in Table 27 does not indicate how many injured workers have been forced onto Medicare services even though they are receiving treatment for a workplace injury. Nonetheless, this benchmark data gives a broad indication of the scale of Medicare services used in NSW and the upward trend for the state and all-Australia that has been occurring for some years.

Injured workers only started to have their medical entitlements terminated from 31 December 2013 (unless they were terminated earlier because they had reached statutory retirement age 12 months prior). Therefore, monitoring the use of Medicare services in NSW and comparing the rate of increase against Australia-wide uses of Medicare may give some indication of the extent to which workers' compensation medical expenses are being cost-shifted to tax-payers via Medicare.

TABLE 27: MEDICARE SERVICES NSW COMPARED WITH WHOLE OF AUSTRALIA

People of working age (20-64 years old)	Number of services NSW	Number of services Aust	Services per capita* NSW	Services per capita* Aust
2005-06	50,795,584	144,208,337	12.51	11.64
2006-07	53,244,848	150,327,922	12.94	11.91
2007-08	57,034,771	161,566,292	13.63	12.53
2008-09	59,751,454	169,095,770	14.05	12.83
2009-10	61,740,300	176,047,412	14.35	13.15
2010-11	63,315,696	181,117,327	14.58	13.35
2011-12	64,864,419	185,707,125	14.83	13.51
2012-13	66,463,464	192,836,323	15.03	13.82
2013-14	67,813,885	198,856,910	n/a	n/a

Sources: Department of Health and Ageing (DOHA), *Medicare Statistics*, June Quarter 2012 and Australian Bureau of Statistics 3101.0 *Australian Demographic Statistics*

n/a – not available

Data availability: This data is released annually on the ABS website. Medicare data is available in ABS 4125.0 and population data is available in ABS 3101.0.

7.2 SURVEY

A survey of injured workers, as initiated in Report no. 1 in this series, was conducted by Unions NSW in April-May 2014. This survey asked workers about their experiences with workplace injuries, workers compensation and return to work. Survey questions were developed by Unions NSW staff in consultation with the authors of this report. The survey was hosted on Survey Monkey and emailed to union members throughout NSW during April and May 2014. A total of 2,200 responses were received, including responses from workers who had experienced workplace injury and illness, as well as workers who had not.

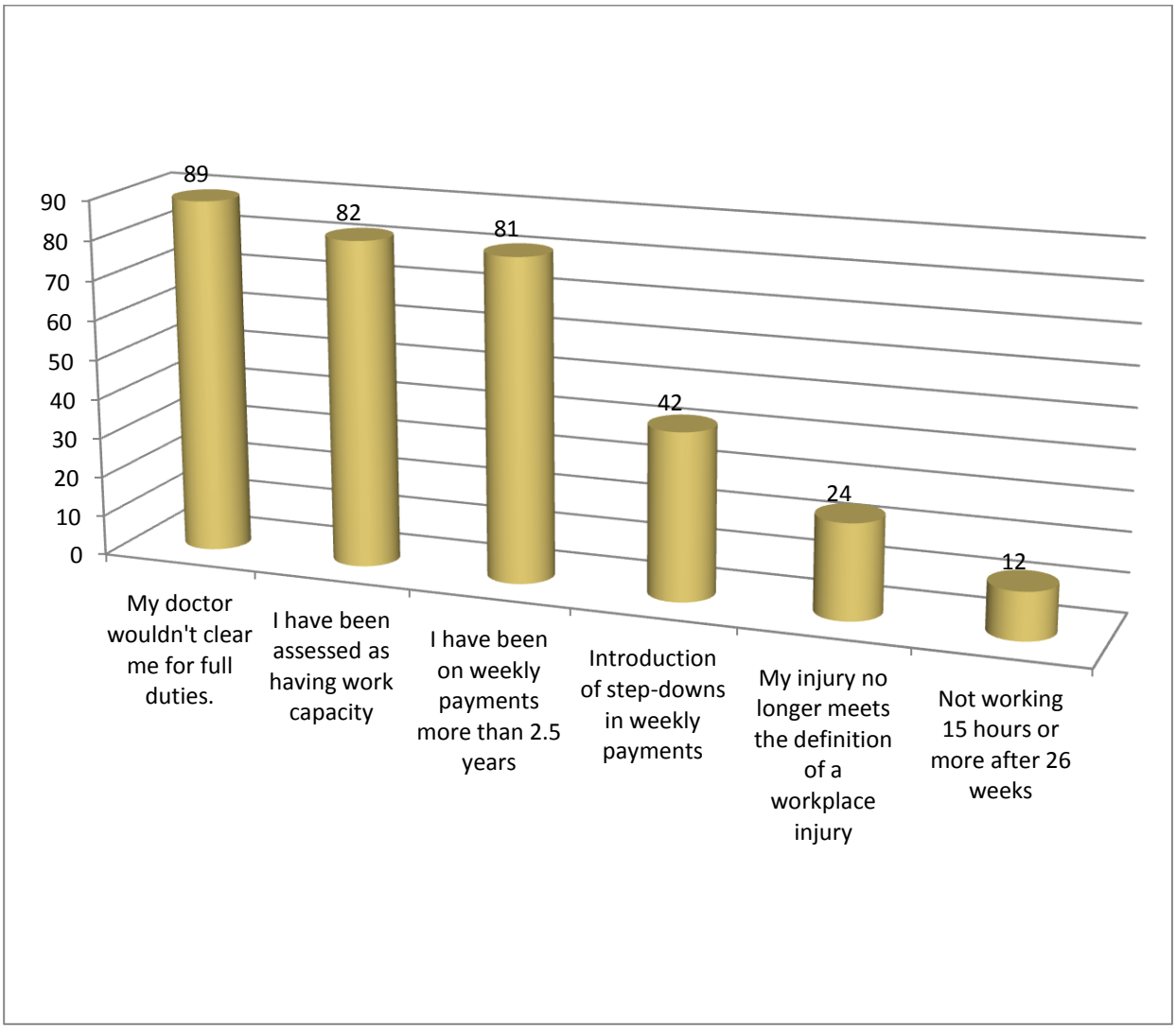
Responses were received from a total of 1,665 workers who had suffered an injury or illness from their work, or suffered trauma as a result of the injury of a close colleague or family member. Of these respondents, 1,431 had received workers' compensation and 592 were receiving weekly payments on 1 October 2012, thus they were impacted in some way by the legislative changes to workers' compensation. The profile of the survey respondents is summarised in Table 28.

TABLE 28: PROFILE OF SURVEY RESPONDENTS

	Number of respondents
Suffered an injury or illness from their work, or suffered trauma as a result of the injury of a close colleague or family member	1,665
Received workers' compensation	1,431
Did not receive workers' compensation	235
Suffered injury or illness on or after 19 June 2012	323
Suffered injury or illness prior to 19 June 2012	1,107
Receiving weekly payments on or since 1 October 2012	592

Of the 592 workers who were receiving weekly payments on 1 October 2012, 237 workers (40%) have had their payments reduced or cut off as a result of the 2012 legislative changes. The reasons for payments being reduced or terminated are summarised in Figure 3.

FIGURE 3: REASON(S) GIVEN FOR YOUR WEEKLY PAYMENTS BEING REDUCED OR CUT OFF?



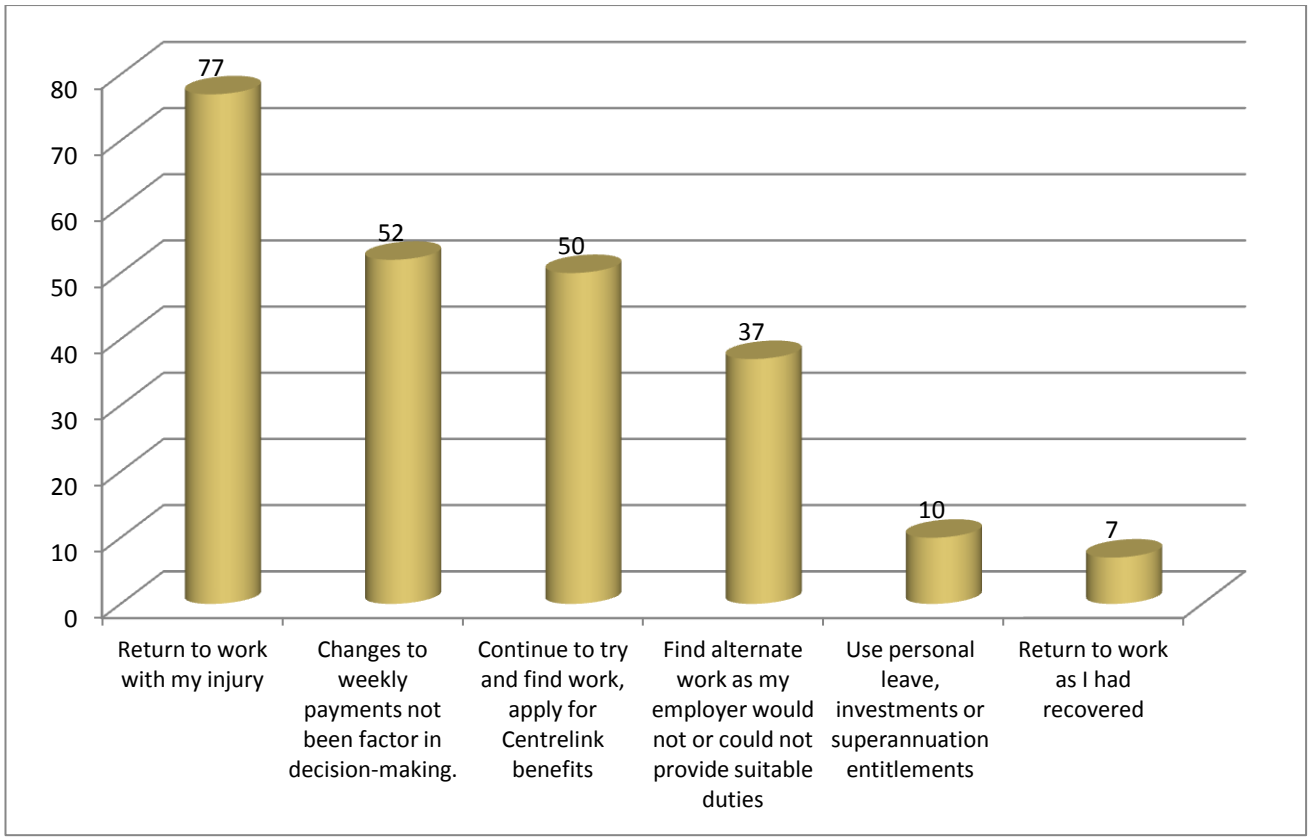
Survey question: What was the reason given for your weekly payments being reduced or cut off? (answer as many as apply)

Survey respondents noted that reducing or terminating weekly payments compounded their stress and did not necessarily assist them to recover from their workplace injury. One survey respondent whose payments had been terminated noted:

> *What it's done is put pressure & stress on an already stressful situation. Injuries don't just miraculously get better because weekly payments have been terminated.*

These survey respondents who had had their weekly payments reduced or terminated reported being motivated to take a variety of actions, as summarised in Figure 4

FIGURE 4: ACTIONS MOTIVATED BY REDUCTION OR TERMINATION OF WEEKLY PAYMENTS



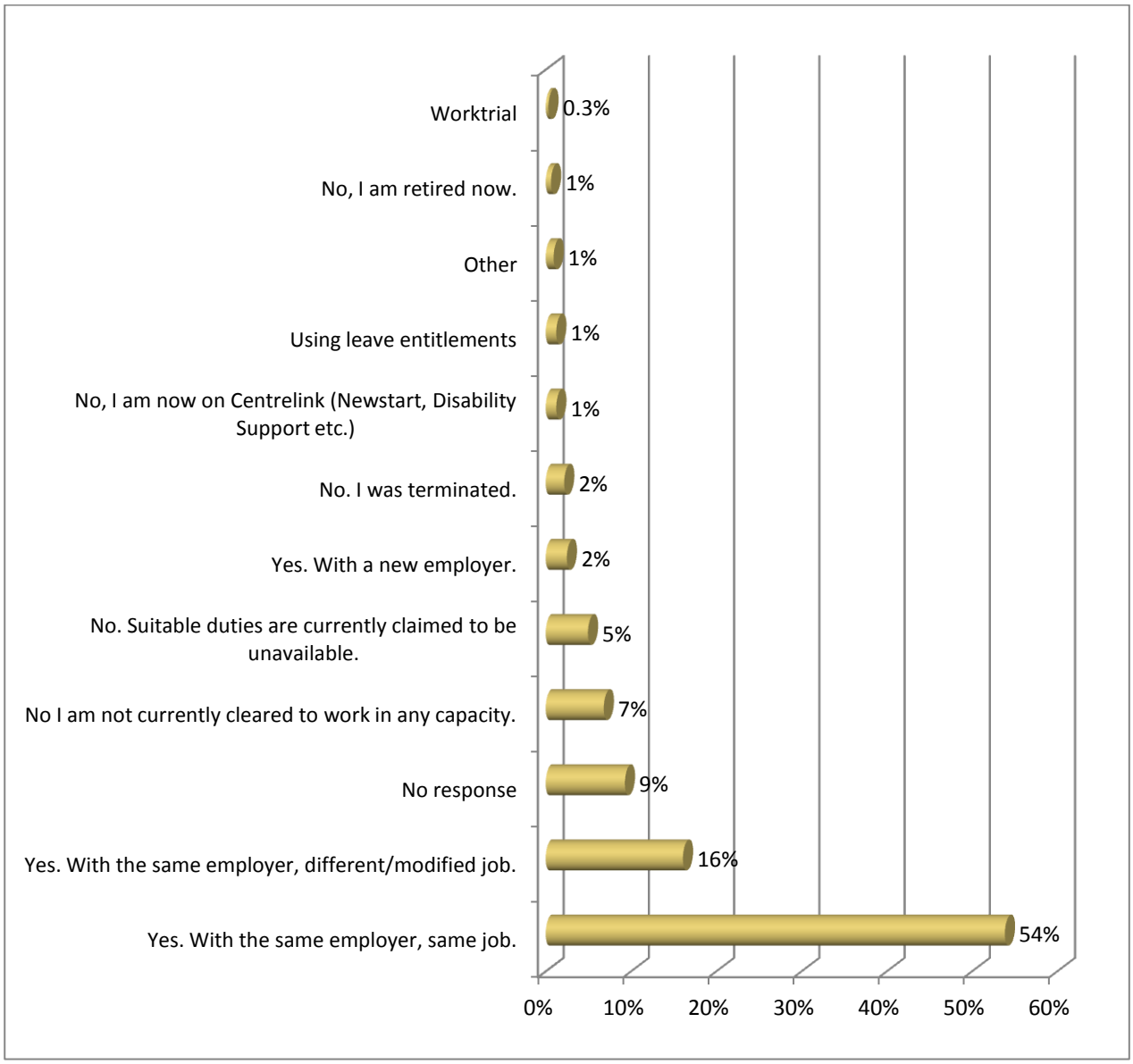
Survey question: Did a reduction or termination of weekly payments motivate you to do any of the following? (answer as many as apply)

The 2012 legislative changes were based on the premise that workers will have an incentive to return to work if their weekly payments are reduced or terminated. These results reveal that 77 of 252 workers (30%) who had their payments reduced or terminated returned to work with their injury. The results are unable to tell us, however, whether these workers were able to return to work safely and if there is a risk of injuries being exacerbated or prolonged by the work, which may result in future periods of incapacity for work.

More than a third of workers reported being unable to find work, or their employer being unable or unwilling to find suitable duties for them. This is a significant concern, as there was evidence in the case studies in Report no. 1 of injured workers being stigmatised by their injuries and workers' compensation claim history.

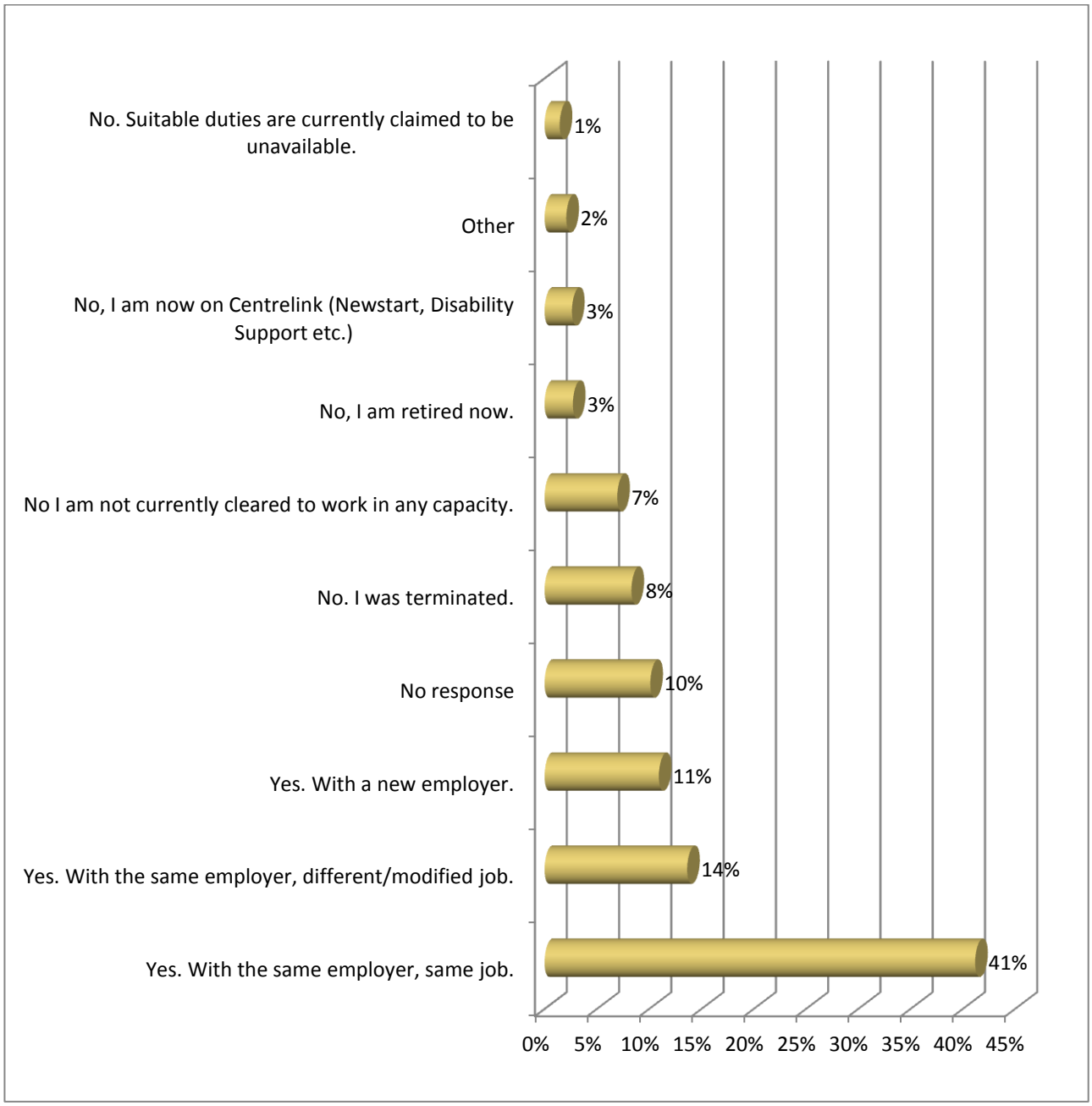
Only 7 of the 252 workers (equivalent to 3%) reported returning to work because they had recovered from their injury or illness.

FIGURE 5: RETURN TO WORK – INJURED ON OR AFTER 19 JUNE 2012



Survey question: Have you returned to work? (Total 323 workers)

FIGURE 6: RETURN TO WORK – INJURED BEFORE 19 JUNE 2012



Survey question: Have you returned to work? (Total 1107 workers)

Figures 5 and 6 demonstrate that workers are most likely to return to work with the same employer, in the same job. Fifty-four per cent of workers who were injured on or after 19 June 2012 are continuing to work with the same employer in the same job. For workers who were injured before 19 June 2012, 41% were working in the same job with the same employer after their injury.

Next, workers are most likely to have returned to the same employer, but be working with modified or different duties. Some workers in this situation noted, however, that different or modified duties consisted of reduced working hours or in a lower grade position, and thus receiving reduced pay.

Survey respondents indicated that more than 20% of workers who had successfully returned to work encountered difficulties in relation to the provision of suitable duties (for workers who were injured since the legislative changes). Similarly, close to 20% of workers injured prior to the legislative changes, who had successfully returned to work, also encountered difficulties in relation to the provision of suitable duties.

The greatest concern is the workers who have been terminated as a result of their injuries. For workers injured on or after 19 June 2012, 2% have been terminated, however the proportion is much higher for workers who were injured prior to 19 June 2012, at 8%. This potentially shows that workers are less likely to be terminated from their employment now than they were prior to the 2012 legislative changes, however it is too early to draw these conclusions as termination processes can take a long period of time.

Stigma against workers who have made a workers' compensation claim is also a concern. Of the 337 workers in total who stated that they had applied for other jobs, 188 workers (56%) said they had been asked by prospective employers if they had ever made a workers' compensation claim.

Table 29 highlights the difficulties that workers experience after suffering a workplace injury or illness and making a workers' compensation claim. For those who are unable to return to work their financial circumstances are highly likely (79-80%) to deteriorate. It is concerning that the financial circumstances of more than 30% of injured workers who have successfully returned to work, have also deteriorated.

The high rates of injured workers who have suffered secondary or additional injuries are also concerning. These rates are lowest for workers who were injured since the legislative changes, who have successfully returned to work (35%), but are close to 50% for those who have been unable to return to work after suffering an injury since the legislative changes in 2012. For workers who were injured prior to the legislative changes, the majority have suffered additional or secondary injuries. It would be premature to conclude that rehabilitation and return to work processes have improved since the 2012 legislative changes because additional and secondary injuries develop over a long period of time. Overall, these results raise serious questions about the quality of rehabilitation and return to work programmes and more research is recommended to better understand how these results have come about.

TABLE 29: DIFFICULTIES ENCOUNTERED AFTER INJURY OR ILLNESS

	Unable to return to work	Successfully returned to work
Injured on or after 19 June 2012		
Suffered additional (or secondary) injuries after the first injury	48%	35%
Since injury/illness/claim financial circumstances have worsened	79%	32%
Since injury/illness/claim financial circumstances have improved	3%	3%
Injured prior to 19 June 2012		
Suffered additional (or secondary) injuries after the first injury	72%	54%
Since injury/illness/claim financial circumstances have worsened	80%	39%
Since injury/illness/claim financial circumstances have improved	3%	10%

Survey questions: Have you suffered additional (or secondary) injuries after the first injury? Since you were injured/suffered illness/made a claim have your financial circumstances: worsened/stayed the same/improved.

This report has also outlined problems injured workers experience with bullying. This problem was highlighted by the Standing Committee Inquiry on Bullying at WorkCover in 2014. The Unions NSW survey highlights how widespread and pervasive this problem of bullying is for workers who have claimed compensation. The results are shown in Table 30.

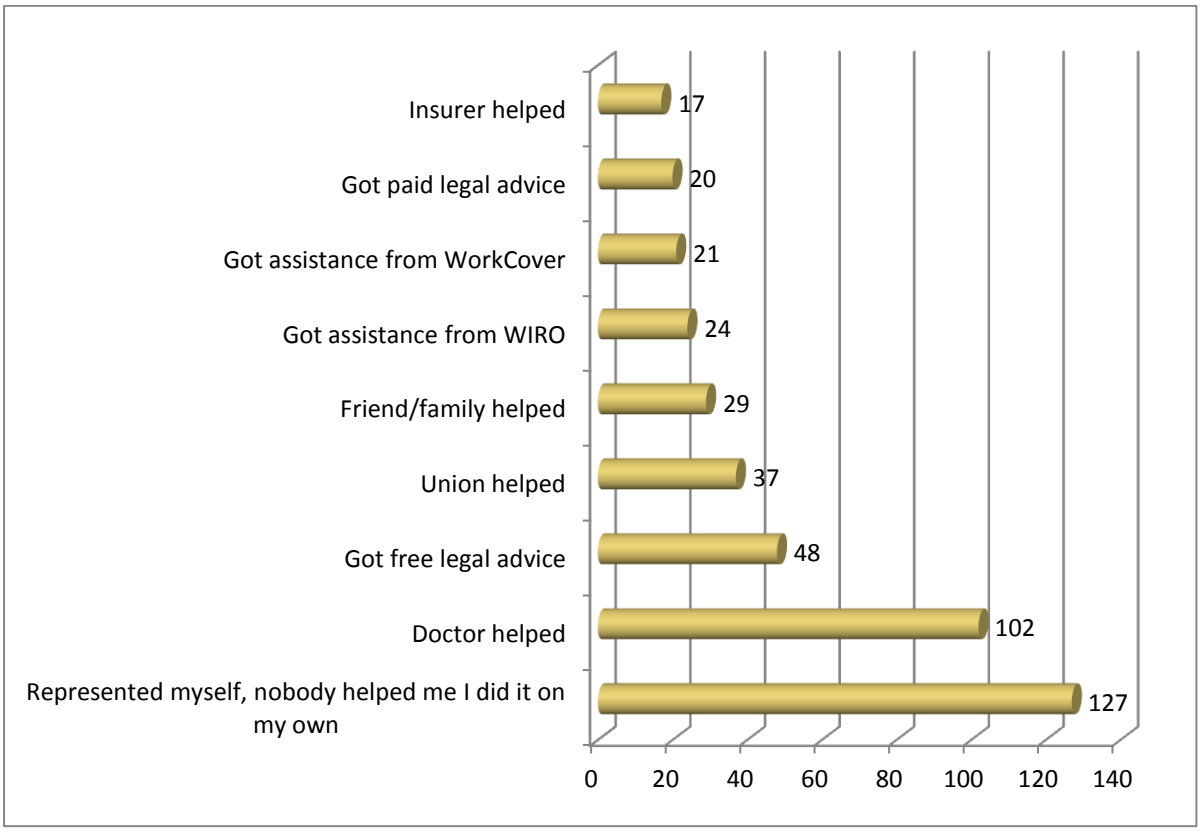
TABLE 30: BULLYING OF INJURED WORKERS

	Suffered an injury or illness and made a claim for workers' compensation	Suffered an injury or illness but did not make a claim for workers' compensation
Been bullied, threatened or intimidated by your employer	29%	18%
Been bullied, threatened or intimidated by the insurer	27%	2%
Been bullied, threatened or intimidated by your rehabilitation provider	13%	1%
Been bullied, threatened or intimidated by a doctor	13%	1%
Been bullied, threatened or intimidated by WorkCover	5%	2%
Inaction or lack of appropriate information from WorkCover	21%	4%
Had communication difficulties with the insurer	37%	5%
None of the above	28%	56%

Survey question: Since you made your injury/claim, have you: (answer as many as apply)

A total of 289 of the 592 respondents who have received weekly payments since 1 October 2012 have had a work capacity assessment or decision completed by their insurer. The assessment, decision and review processes are highly complex and legalistic, making them inaccessible to most injured workers. Section 5.3 in this report has highlighted the difficulties and unfairness workers experience when they are unable to seek assistance from a legal practitioner with their work capacity decisions.

FIGURE 7: ASSISTANCE WITH WORK CAPACITY ASSESSMENTS AND DECISIONS



Survey question: Did you get any of the following help you with your work capacity assessment/decision? (answer as many as apply)

Thus, 127 of the 289 workers (44%) who went through a work capacity assessment or decision navigated the complex procedures on their own. Others sought assistance from a range of sources, predominantly their doctor, as well as legal advisors, their trade union, WorkCover, WIRO and family or friends.

To put these findings into perspective, a look across the entire scheme shows that only 250 workers out of all the workers in the NSW compensation system had successfully navigated their way through the three part WCD processes to complete an internal review with the insurer, merit review with WorkCover or a procedural review with the WIRO service by the middle of October 2014. This means that only a small fraction of the workers are successfully making their way through the WCD review process to completion.

It would be reasonable to expect WorkCover and the WIRO service to be providing workers with more assistance in these procedures. In Victoria lawyers are also excluded from work capacity reviews processes, but the Victorian WorkCover Authority offers free advisory services to injured workers through the WorkSafe Advisory Service and WorkCover Assist.

A likely explanation for limited engagement with WIRO is that WorkCover had not been informing workers of the WIRO service. Recommendation 19 of the Standing Committee Review of WorkCover proposes that contact information about the WIRO service should be provided by WorkCover, and this has been gradually implemented.[143]

[143] Interview with WIRO, Kim Garling, 20/10/14

8. CONCLUSIONS

In 2013, in the first of three planned Reports for Unions NSW on the NSW Workers' Compensation System, Markey, Holley, O'Neill and Thornthwaite (2013) outlined how legislative amendments in 2012 had made the system inefficient, dysfunctional and morally impoverished. Markey et al (2013) also established benchmarks and an ongoing methodology for collecting evidence of how workers have been impacted by the 2012 changes to the workers' compensation legislation. This second Report examines the implications of the legislative changes one year later. The changes themselves are outlined in Section 3 of the Report. The research has drawn on four parliamentary and government reviews of the 2012 legislative changes to the NSW Workers Compensation system as well as empirical data based on the benchmarks established in 2013.

Since the 2012 legislative changes, more than 5,000 injured workers have had their entitlements terminated following the work capacity decision, and at least 260 of these workers did not have suitable employment (per the Workers Compensation Act 1987 s.32A) at the time of termination. At least 20,000 long-term injured workers have lost their entitlements to medical benefits. As Section 2 of this Report observes, the government argued the necessity for these changes on the basis of a reported actuarial deficit in December 2011 of $4.1 billion. As a result of the 2012 legislative changes, the scheme was reported to have a surplus of $308 million by June 2013, which rose to $2.558 billion in June 2014 and is projected to be a $6 billion surplus by 2019.the upturn in the funding ratio coincided with the recovery of investment markets after the GFC of 2007/08. In fact, the $1,053 million improvement between June and December 2013 was attributed primarily to gains in investment performance, with investments improving by $689 million over that period.[144]

Less than 12 months after the changes came into effect, the NSW Government reduced scheme revenues by granting employers a 7.5% reduction in compensation premiums (effective 30th June 2013). Some four months later, on 30 October 2013, the Government officially declared that the workers' compensation scheme was no longer in deficit. Employers then received a further premium reduction of 5% from 1 January 2014 and another 5% from 30 June 2014. Some premium reductions are linked to claims performance, yet this has been marginal as WorkCover states that employer premium reductions have averaged 17%.[145]

WorkCover also states that the reductions in employer premiums demonstrate 'improved health, safety and return to work outcomes since the introduction of the 2012 reforms.'[146] This claim is difficult to substantiate given the significant reduction in scheme liabilities

[144] PriceWaterhouse Coopers (PwC), 2014

[145] WorkCover NSW, 2014. p.9

[146] WorkCover NSW, 2014. p.9

derived from reducing workers' entitlements. The substantial reduction in work health and safety incidences during this period is more likely to be attributable to major changes to work health and safety legislation, introduced in 2012.

Sections 4 to 7 of this Report examined evidence concerning the implications of the legislative changes to the NSW Workers' Compensation system. Section 4 discussed the findings of the four Government reviews on the scheme since June 2012 and Section 5, the evidence concerning key recommendations made in these reviews. Section 6 considered the particular case of journey to work claims largely prohibited under the amended legislation. Section 7 reported first, the data on key benchmarks used to monitor the impact of the legislative changes on injured workers, and second, the findings of the first annual Unions NSW survey.

The evidence presented in this Report raises serious concerns about the NSW Workers' Compensation scheme including: access to workers' compensation, both income benefits and lump sum payments; fairness and due process within the system; the treatment of injured workers by some stakeholders; inadequate enforcement of compliance; and inadequate outcomes in terms of the incidence and sustainability of returns to work. Withdrawing support for injured workers does not necessarily provide an 'incentive' for them to return to work. The most effective motivators for returning to work are being treated respectfully and fairly in the workplace. Bullying, harassing and treating injured workers unfairly only heighten the risk of individual workers developing a secondary psychological injury, prolonging their return to work.

The evidence demonstrates that regulatory changes introduced to the system in September 2014 have not gone far enough to restore fairness and equity in the NSW workers' compensation scheme. A thorough rethinking of government policy in this area is required in order to achieve the fundamental objectives of guaranteeing support for injured workers and promoting their recovery and continued return to work.

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