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INJURY MANAGEMENT

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The Chair
NSW State Parliament Legislative Council
Standing Committee on Law and Justice
NSW Parliament House
6 Macquarie Street
SYDNEY NSW 2000

Re: 2022 Review of the NSW Workers Compensation Scheme – Supplementary Submission

I refer to the 2022 Review of the NSW Workers Compensation Scheme and to my attendance before the Standing Committee on Law and Justice on 8 September 2022.

I acknowledge receipt of supplementary questions on 16 September 2022 addressed to me.

I now provide these supplementary submissions in answer to the questions posed.

Question 1: More psychological claims are contested through litigation than physical injury claims. Why do you think that is the case?

Briefly, I consider that is the position because:

1. There is a different approach to liability for psychological injury claims (as opposed to physical injury claims) embedded in the legislation, due to the operation of section 11A of the Workers Compensation Act 1987 ('WCA'). Section 11A provides for a complete defence to a claim if an employer and insurer (Scheme agent) can establish the necessary grounds for the defence.

2. There is much greater scope for acceptance of the existence and severity of physical injury claims by employers and insurers (Scheme agents) simply as a consequence of the lack of independently verifiable, objective evidence available to the employer and insurer (Scheme agent) as to the existence and severity of a psychological injury. This is one of the reasons why I have called for greater resources to be directed towards establishing injury, diagnosis and causation at an early stage in claims, so that stakeholders can be satisfied that a claim is both genuine and compensable.

Question 2: What is preventing more psychological claims being settled in NSW?

As outlined in my evidence to the Committee, I believe the problems are both structural and practical.

In short, there is a lack of flexibility to allow early resolution of claims. One of the measures I addressed in my evidence was the wider availability of commutation settlements.

I also suggested that employers should be allowed to resolve industrial disputes (which, although arising in a different jurisdiction, often relate to similar alleged events in the workplace) in a manner which had the effect of concluding a worker's entitlement to workers compensation benefits by way of a 'damages' settlement (consistent with section 151A of the WCA).

This may also require reconsideration of the provisions of the standard workers compensation policy as set out in Schedule 3 to the Workers Compensation Regulation 2016 as they relate to an employer's inability to *"make any payment, settlement or admission of liability in respect of any injury to or claim made by any worker"*.

On a separate but related issue, some formal guidance from icare and / or SIRA to employers would be useful to ensure that employers are authorised and empowered to resolve hybrid (industrial / compensation) disputes by including a formal resignation of the worker from their employment as part of any settlement of such disputes.

A further measure which would reduce the duration of claims and the incidence of work injury damages claims for psychological injury would be the removal of the current 15% WPI (whole person impairment) threshold required for a successful lump sum compensation claim for psychological injury.

Instead, the lump sum compensation threshold for psychological injuries should be consistent with the threshold for physical injuries i.e. 11% WPI. This would involve a relatively simple change to the WCA by deleting section 65A(3) of the WCA.

Question 3: Should there be any changes to the legislation? If so, what should they be?

Yes.

1. As noted above, I recommend deleting section 65A(3) of the WCA.

2. There is a case to consider simplification of the terms of section 11A of the WCA in my opinion. Requiring an employer's reasonable action to relate to one or more of the identified section 11A(1) criteria (*"transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers"*) is unnecessarily restrictive and adds to the complexity of decision-making in relation to liability disputes. Further, in the case of *"discipline"*, a line of authority in the case law[1] has developed around the notion of 'discipline' meaning 'training or instruction', which in my opinion does not reflect the ordinary English meaning of the word 'discipline' as understood by most members of society. Should a change be considered to section 11A of the WCA, I recommend the section be amended to refer to *"reasonable management action taken or proposed to be taken by or on behalf of the employer"* (end of section) rather than *"reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers"*. I would be pleased to expand on my thoughts regarding the above if asked to do so. Briefly, I note my recommended change would be relatively simple, while also being consistent with the broader structure of similar provisions in other Australian jurisdictions[2].

3. Depending on whether it is considered appropriate to allow 'damages' settlements in any industrial proceedings to resolve workers compensation claims, consideration should be given to prescribing any appropriate sums paid to a worker as part of any industrial settlement as being 'compensation' for the purpose of section 87A(2) of the WCA. This should clarify the ability to pay a settlement in any industrial proceedings to resolve concurrent workers compensation claims.

[1] See *Kushwaha v Queanbeyan City Council* [2002] NSWCC 25; 23 NSWCCR 329 and its discussion in *Webb v State of New South Wales* [2019] NSWWCCPD 50, for example.

[2] See, for instance: section 40(7) of the Victorian *Workplace Injury Rehabilitation and Compensation Act* 2013, section 32(5) of the Queensland *Workers' Compensation and Rehabilitation Act* 2003, and the proposed section 7 of the draft Western Australian *Workers Compensation and Injury Management Bill* 2021.

4. Substantial amendments to Division 9 of the WCA (sections 87D through 87K) would be required if commutations were to be made more accessible and utilised to resolve psychological injury claims at a much earlier stage.

5. Consideration should also be given to the re-enactment of the deleted section 57 of the *Workplace Injury Management and Workers Compensation Act* 1998 (WIM Act). As Chapter 3 of the WIM Act notes, the Chapter applies even if liability is disputed (see section 41A). At present, there are formal obligations with respect to compliance with the Chapter upon insurers (section 55), scheme agents (section 55A) and employers (section 56) but not on workers, as the former section 57 has been repealed. The lack of an effective tool to address non-compliance by injured workers with respect to injury management issues is another unsatisfactory aspect of current claims management which is dictated by the ill-advised deletion of the former section 57 in the October 2012 legislative amendments.

6. Equal treatment of both parties under the applicable costs provisions should also be considered, in order to allow for the proper preparation of section 11A defences and for the presentation of such defences in the Personal Injury Commission by qualified barristers. At present, solicitors and barristers acting for employers and insurers (Scheme agents) are forced to split the scheduled fees for such work between them, whereas solicitors and barristers acting for workers are funded from separate pools of funds (administered via the ILARS scheme), with the effect being that, for a worker, the barrister is paid for by the Scheme, whereas for an employer / insurer / scheme agent, the barrister is paid for by a reduction in the solicitor's fees. This provides an obvious structural disadvantage in the litigation process and may be a contributing factor to the poor success rates of section 11A defences in litigation in the Personal Injury Commission.

Question 4: Does icare or SIRA report on the timing of the appointment of workplace rehabilitation providers?

Not to my knowledge.

Question 5: How should the current workers compensation system change so that workers receive proper treatment as soon as possible?

Nominated treating doctors (NTDs) should be encouraged to refer workers for independent psychological and / or psychiatric assessment at the earliest opportunity if they consider there is a condition present which renders the injured worker unfit for their pre-injury work.

The standard SIRA certificate of capacity should oblige a NTD to provide an explanation as to:

1. Why a worker is not fit for their pre-injury work? There is presently no formal requirement for a NTD to do so in the current version of the SIRA certificate of capacity.

2. Whether a worker is fit for some form of alternative work and, if not, why not?

3. What steps or actions the NTD considers necessary to promote a return to work?

Very often certificates of capacity are issued by NTDs and accepted by insurers (Scheme agents) without proper scrutiny as to whether a recognised psychological condition has been diagnosed and on what basis such a diagnosis has been reached. It is only after a diagnosis

has been made that consideration can be given to the questions of whether the treatment being provided is appropriate and whether the injury is compensable.

In appropriate cases, consideration should be given to formal psychological testing for diagnostic purposes, especially if there is treating medical evidence available to suggest the existence of a pre-existing psychological condition prior to any work injury.

Question 5a: How should provisional liability provisions operate in these circumstances?

No changes are required in my opinion.

The only proviso I would add is that the provisional liability period must be better utilised by insurers (Scheme agents) in order to obtain proper evidence as to diagnosis, in order to inform better decision-making regarding liability issues. If that means earlier referral to independent psychological or psychiatric assessment is required, then I would support such action.

Question 5b: How should this operate in an ideal workers compensation system and what changes to the legislation would be required?

Faster and cheaper access to treatment would be ideal but would presumably depend upon a range of factors well beyond my expertise (including adequate numbers of qualified medical and psychological professionals prepared to deal with workers compensation matters).

I don't know whether a solution can simply be found in amending the legislation. Regrettably, I believe the scope of the task is much broader.

Question 6: What is your main reason for opposing the part of the Business NSW submission regarding why provisional liability should not apply where there is a section 11A defence?

Briefly, I consider:

1. Removing financial support from injured workers (regardless of whether the claim is compensable or not) is highly undesirable and may have significant adverse outcomes; and

2. The demonstrated lack of success of litigated section 11A defences under the current arrangements in the NSW Workers Compensation Scheme shows that adopting a default provisional liability position that a section 11A defence should be preferred over a worker's position or version of events is not appropriate.

Question 7: Do you agree with the argument that access to commutations will create a lump sum culture in the workers compensation system?

No. This is for two reasons:

1. A lump sum culture already exists by virtue of the 15% WPI threshold being required to claim both section 66 lump sum compensation and work injury damages for an employer's alleged negligence. Please also see my comments in the previous submissions to the Committee dated 6 September 2022.

2. Earlier access to commutations will promote resolution of claims and normalise the concept of early settlement and swift return to alternative work.

Question 8: Who do you believe should be able to access commutations?

All injured workers.

I trust the above views are of assistance to the Committee. Please contact me should there be any queries.

Kind regards

Bill Pardy
Risk & Strategy Consultant
Rehab Options Injury Management

30 September 2022