

NEW SOUTH WALES BAR ASSOCIATION

ANSWERS TO QUESTIONS ON NOTICE FOLLOWING EVIDENCE AT THE HEARING ON FRIDAY 28 MARCH 2014 OF THE INQUIRY INTO THE REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE WORKCOVER AUTHORITY AND THE WORKERS COMPENSATION (DUST DISEASES BOARD)

Question 1

How has the Bar Association found the consultation process with WorkCover?

The NSW Bar was represented on the WorkCover Legal Reference Group Task Force by a member of the Association's Common Law Committee, Luke Morgan.

The Group was initially convened 21 June 2012 and met on regular occasions initially but ultimately the meetings of the Group petered out through 2013 with the last meeting being held in December 2013.

The Group originated as a result of agitation from the legal profession, which was concerned with the implementation of the 2012 changes to the Scheme. The changes were recognised to be far reaching and it was felt important that those at 'the coal face' should be in a position to relay to the regulator practical difficulties that might arise and perhaps help address any unintended or unforeseen consequences of the legislative change that might be ameliorated or avoided.

The outcomes of the Group's meetings were minimal at best.

This poor outcome was perhaps partly a reflection of a lack of acknowledgment from WorkCover of issues which were emerging in the implementation of the reforms, but also a reflection of the fact that the 'bedding down' of the legislation and a series of decisions in the Workers Compensation Commission and the Court of Appeal meant that many practical consequences of change only really began to emerge later in 2013, by which time WorkCover had wound back the meetings of the group.

This was disappointing as increasingly, practical problems such as issues with respect to the payment of medical expenses beyond 31 December 2013, payment of future treatment expenses and the transitioning arrangements for the assessment of weekly compensation entitlements did not have a forum where the reality of the sometimes drastic consequences for workers of implementation of the new scheme could be addressed.

Question 2

If there is a dispute about whether it is a work capacity assessment or jurisdictional dispute and that finds its way to the Supreme Court and then the Supreme Court finds it is a work capacity assessment, what is the situation with rights to legal representation and remuneration in those Supreme Court proceedings?

The ordinary rule that "costs follow the event" would apply. That is the unsuccessful party, in the present example, the worker, would be ordered to pay the employer's costs of the Supreme Court proceedings. Administrative law review which involves Supreme Court proceedings takes a worker out of the workers compensation scheme as such and thereby removes a worker from any protection provided under that scheme from adverse costs orders. The cost consequences of any Supreme Court proceedings are a significant disincentive to workers to pursue such an avenue because of the consequences of an adverse costs order which could amount to tens of thousands of dollars.

The potential for overlap between jurisdictional issues and a work capacity decision arises under Section 43A of the *Workers Compensation Act 1987*. Judicial review would be available in either instance. The consequence in terms of the potential for an adverse costs order is the same in either event.

In the case of a work capacity decision it is obviously intended that WIRO will provide an avenue for review which will in many cases avoid the need for Supreme Court proceedings but of course a worker is not entitled to paid legal representation in relation to such a review. There would appear to be the possibility of recovering legal costs in Supreme Court proceedings.

Question 3

The Law Society made a submission that the investigation and enforcement of work, health and safety obligations should be removed from WorkCover and invested in a separate independent body. What is the view of the Bar Association on that?

The New South Wales Bar Association has stated on a number of occasions that WorkCover in its many roles has a number of apparent potential conflicts of interest. Its role as an investigator and prosecutor is at odds with its role as a nominal insurer and regulator of the workers compensation system. The Association agrees with the Law Society on the issue. Those functions of WorkCover must be seen to be performed at arms length from its other functions.

It is however the other functions of WorkCover which are of greatest concern to the Association. It is the involvement of the WorkCover Authority in the provision of legal advice to injured workers at the same time that the Authority administers the compensation scheme with a view to reducing premiums that the most apparent and unacceptable conflict exists.