THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Inj.CompREIb847747

2 May 2014

Ms Teresa McMichael
Director Committees
Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms McMichael,

Inquiry into Review of the exercise of the functions of the WorkCover Authority
Post-hearing responses

I refer to your letters to Ms May and Mr Concannon who represented the Law Society at the recent hearing conducted by this Inquiry on 28 March 2014. The Law Society is pleased to return a marked copy of the corrected transcript (Annexure A) together with answers to questions taken on notice and an answer to a supplementary question (Annexure B). The additional Annexures are referred to in Annexure B.

Should there be any queries arising from this letter, please contact ,

Yours sincerely,

Ros Everett
President

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0333 F +61 2 9231 5809
ACN 000 000 699 ABN 98 696 304 966 www.lawsociety.com.au

Certified System Quality ISO 9001
Law Council OF AUSTRALIA CONSTITUENT BODY

Answers to Questions on Notice and supplementary question.

Question 1 (on page 31)

CHAIR: *What is their basic response when you do raise this issue of conflict?*

Ms MAY: *Their basic response has been, since the reforms, that they will take it on notice and get back to us.*

CHAIR: *When did they tell you that they would take it on notice and get back to you? You can take that on notice, if you wish.*

Answer 1

The issue of conflict was raised in a meeting of the Legal Reference Group on 15 November 2012 .

Question 2 (on page 31)

Ms MAY: *I can take that on notice, but let me briefly answer.*

CHAIR: *Yes.*

Ms MAY: *I was a nominated representative of the WorkCover legal reference group task force, which was convened first on 21 June 2012. Prior to that for seven years I had been part of a small WorkCover Law Society regulatory and process working group. From 2005 to 2011 I was one of four lawyers nominated by the Law Society to regularly meet with WorkCover and consult over various issues of the scheme. That body was disbanded in 2011 and the task force was started up in 2012 after the reform legislation was passed. We met on about 20 occasions. At those meetings we were charged by our members and our committee to raise issues that affected all sides. We raised these issues then and they were taken on notice. I do not think we ever got resolution of one of them. The last meeting of that committee was on 12 December 2003. It was only convened because pressure was put on WorkCover to convene it.*

Mr CONCANNON: *I think you mean 2013.*

Ms MAY: *I am sorry, 2012—no, 2013.*

CHAIR: *You can take this on notice, but would you like to give us an outline of the occasions that you have raised this issue and what responses, if any, you have received?*

Ms MAY: *Certainly. I can provide you with minutes of that legal reference group where they are available. When not, I can provide you with reports provided.*

Answer 2

Please find **enclosed** (Annexure C) a Summary of the Legal Reference Group Meetings which commenced on 21 June 2012 as a 'Regulatory Review Task Force' to which the Law Society was invited to send two representatives.

Also, **enclosed** (Annexure D), is a copy of all salient communications including Meeting requests, Meeting Agendas, WorkCover Minutes and meeting reports prepared by Roshana May or Anthony Scarcella. Mr Scarcella was both a representative at the meetings for the Australian Lawyers Alliance and a member of the Law Society's Injury Compensation Committee.

Question 3 (on page 33)

Mr DAVID SHOEBRIDGE: *I do not know if you saw the evidence of WorkCover but it was that there was an average delay of four months before determining the merit review process. What impact does that delay have on your clients, in terms of their benefits and general wellbeing?*

Mr CONCANNON: *The benefits are effectively stayed whilst the review process is underway, so the claimant is effectively out of pocket for the period of the delayed decision.*

Mr DAVID SHOEBRIDGE: *In the WorkCover Independent Review Office evidence it was said that benefits were irredeemably lost because of the delay. Please explain that.*

Ms MAY: *Absolutely, because there is no stay on a decision once it is made. If you seek a review, the decision stands. 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. The delay is on average four-and-a half months and not four months—we have learned from the Merit Review Service it is 140 days, and that is what people are being told over the telephone. After three months a person has 30 days to seek an internal review from the insurer and within 30 days they give their review. Then the person has 30 days to seek a review from the Merit Review Service and it has 3½ months. Ostensibly it is six months that the worker has no benefits and is forced on to Centrelink. It is a cost-shifting exercise.*

Mr DAVID SHOEBRIDGE: *Even if they succeed at the merit review, there is a limited amount that can be back-paid, so there is a potential area of a permanent loss of benefits. Is that right?*

Ms MAY: *Unless they get a decision backdating it and restoring benefits—which I do not think is possible and there is no limited back pay.*

Mr DAVID SHOEBRIDGE: *Could you take that on notice?*

Ms MAY: *Certainly.*

Answer 3

The Law Society has canvassed the IRO, Mr Garling who has advised that where a worker is in receipt of weekly benefits but by virtue of a Work Capacity Decision ("WCD") has that payment reduced to $zero, the reduction (effective termination of payment) takes effect 3 months (plus one week) after the date of the WCD.

If on review by the Merit Review Service ("MRS") (assuming internal review fails to restore payments), the MRS finds that the worker is entitled to $x, the MRS is of the opinion that this can only take effect from the date of the new WCD made by the insurer.

Where the time that has elapsed from the date of the original WCD to the date of the new WCD (following the MRS recommendation) exceeds the three months then there is a gap when the worker receives nothing. That 'gap' can never be recovered. There is no action in the Commission for that recovery because it is a WCD and outside the jurisdiction of the Commission.

We are aware that currently the MRS is taking over 160 days to conduct a review.

A further example of gap in recovery is where the worker continues to receive weekly payments but at a reduced rate because of the WCD, and the worker seeks a Merit Review and the MRS increases or reinstates the weekly payment. This only applies to existing recipients (as at 1/10/12) but the requirement of Clause 21 of the Regulation applies to delay the increase by three months.

We understand that the MRS takes the view that their recommendation can only apply from the date of the new WCD made by the insurer after receipt of the MRS recommendation. The IRO does not accept that proposition because Section 44 (3) does not limit the recommendation that can be made and indicates in sub-section (h) that the recommendations made by the IRO are "*binding on the insurer and the Authority*". Hence the IRO's recommendations affect the original WCD and apply from the date of that decision.

Question 4 (on page 34)

The Hon. SARAH MITCHELL: *On the final two pages of your submission you raise four matters for consideration by this Committee and I take you to the fourth one:*

> *In any event the investigation and enforcement of work health and safety obligations should be removed from WorkCover and invested in a separate independent body.*

Please give the Committee some guidance on how the body should be established to take over that function.

Ms MAY: *We say WorkCover can only manage one function not many. We believe the investigation and enforcement of work health and safety obligations should be removed to an independent body, probably under the board, that is specifically charged with the investigation and enforcement of the work health and safety legislation. We will take on notice how we see that operating as we will discuss it with our committee.*

Answer 4

The Law Society is of the view that the investigation of work health and safety obligations should be invested in an independent body, independent of the Minister for Finance who is responsible for WorkCover. This is to reduce the risk of budgetary constraints being the primary driver of such decisions as well as to avoid inevitable conflicts which arise when WorkCover is the body charged with this responsibility. For an effective and comparative arrangement it is suggested that Workplace Health And Safety Queensland be examined. However the Society maintains that this function, unlike the position in Queensland, should remain independent of the Regulator.

In relation to enforcement of work, health and safety obligations it is suggested that the DPP is the appropriate body to assume responsibility. It would be hoped that such a change might go some way to arresting the steep decline which has been experienced in prosecution rates for work injuries over recent years.

Question 5 (on page 36)

The Hon. SARAH MITCHELL: *I have a question that follows on from what the Hon. Shaoquett Moselmane was saying and some of the responses you have both just given. You say the stakeholder reference group exists in your submission but it sounds like it exists in name only. You say you have met frequently. Can you provide us with a time line since 2012 of when you have met so we can raise those issues and consider them? You can give us that information on notice.*

Ms MAY: *Certainly. I think that is consistent with the question from the Chair initially.*

Answer 5

The Committee is referred to the answer provided to Question 1.

Question 6 (on page 36)

The Hon. PETER PRIMROSE: *I think you have already addressed a lot of this, but I want to put it to you in case there is something else. On page 4 of your submission you say, "... the role of WorkCover in the development of subordinate legislation in the form of guidelines needs to be carefully reviewed". I know we have been talking about this. Is there anything else that you wish to say in relation to that?*

Ms MAY: *I would like to reflect on Mr Macken's points from last Friday. I agree with Mr Macken where he said every time the word "guidelines" appears in the Act it should be highlighted and only a guideline that is in compliance with the responsibility that is given in that part of the Act should be responded to by WorkCover. Secondly, there has to be consultation because we know from history that WorkCover do not get it right. They do not get it right for all sorts of reasons. They do not get the interpretation of the legislation and this piece of legislation in itself is the most complex piece of legislation we have ever had in New South Wales in workers compensation. I have worked and I think Mr Concannon has worked since the 1926 Act. That is not to say that we are nearly 100 years old, but we have had experience across all Acts that have been relevant amongst this Committee's lifetime.*

Mr CONCANNON: *I think a good start would be to go back to stage 1 and get rid of all the guidelines that people do not know are not current and start afresh. If you have to issue any guidelines, only do so if they are absolutely necessary. As Ms May said, under the 1926 Act, which has been in place since 1987, there were no guidelines. We were dealing with a simple piece of legislation. Now we have got two pieces of very complex legislation plus any number of guidelines. I think there were at least 70 at last count. Not only that, we have also got these documents called Operational Instructions sent by WorkCover to the insurers that we do not know anything about. We only hear about it inferentially.*

The Hon. PETER PRIMROSE: *I have implemented sunrise clauses in organisations so that as of a particular date anything that has not already been approved or reapproved ceases to be operative. Is that something that could happen?*

Ms MAY: *That is something that could probably be considered but we have guidelines that were issued in 2006 and there is no way of finding out from the WorkCover website, we believe, whether they are still relevant but we do not know because WorkCover has not, despite our requests, provided us with a list of current operating guidelines and they are changed so often.*

The Hon. PETER PRIMROSE: *This is a critical area and I know others have questions, so could I get you to take on notice any specific recommendations that you would be looking for us to take on in relation to precisely this matter and, in your view, what should we be recommending?*

Ms MAY: *Certainly.*

Answer 6

The Law Society is of the opinion that in a functional scheme Guidelines are only required where mandated by the legislation and should not take the form of 'subordinate' legislation. Furthermore, they should be devised through consultation with all stakeholders and participants in the scheme.

The Guidelines should have a limited life, not unlike the Registrar's Guidelines and Practice Directions written under the Workers Compensation Commission Rules which are expressed to have a limited life and are subject to regular review, revision and release. A sunset clause may be the appropriate mechanism to signal the life cycle of a Guideline made under the Act.

However, given that legislative change is not commonplace, the Society is of the view that any Guidelines (which have been amended at least five times to date since September 2012), should be the subject of a regulated, transparent and rigorous review process which occurs at defined times in the calendar or fiscal year and is responsive to the demands of all scheme participants including the Commission, the IRO, Scheme agents or insurers, the regulator, the inspectorate and the stakeholder and user representative groups.

Supplementary question on notice

On page 6 of your submission you suggest that the WorkCover Independent Review Office has a conflict of interest in its role as the reviewer of decisions made by WorkCover's Merit Review Service and in its responsibility to conduct final decisions concerning work capacity decisions.[2] *Can you please elaborate on your concerns in this regard?*

[2] *Submission*

Answer to Supplementary Question on Notice

With respect to the Committee, the Law Society believes that the Committee may have misinterpreted what has been said in our submission. The conflict of interest is not with WIRO but with WorkCover having oversight of the WIRO as the body charged with reviewing WorkCover's own Merit Review Service. We say this because the source of funding for WIRO is the Fund (WorkCover) which potentially is also the object of adverse recommendation in WIRO's review decisions.

The Law Society believes in order to avoid further conflict and deliver to the IRO the independence his office requires, that funding for WIRO should be sourced from premium collection and administered solely by WIRO.

Additional matters

The Committee is referred to the Transcript at page 30 and the discussion of the matter of *Transfield Services v Humphrey.* For the convenience of the Committee, please find enclosed (Annexure E) a copy of the Summons filed in the matter of *Transfield Services (Australia) Pty Ltd v WorkCover Authority of NSW and Mark Humphrey, Supreme Court matter no. 2013/314766.*

The Committee is also referred to the Transcript at page 37, commencing with Mr Shoebridge *"Then the Government, no doubt in close consultation with WorkCover..."* . The gazettal of the relevant regulation has been examined and it is noted that the Government gazetted the Transitional Regulation (no 480 of 2012), which amended clause 11 of the Workers Compensation Regulation 2010 on *28 September 2012*, **prior** to the Court of Appeal's Decision in *Goudappel.*

The record therefore requires correction as to the answer from Ms May and Mr Concannon recorded as "*That is right*" and *"Correct"* respectively.