Australian Lawyers Alliance

GPO Box 7052

Sydney NSW 2001

The Hon David Clarke MLC
Committee Chair
Standing Committee on Law & Justice
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: lawandjustice@parliament.nsw.gov.au

2 May 2014

Dear Mr Clarke,

Inquiry into the Review of the Exercise of the Functions of WorkCover
Responses to Questions taken on Notice on 28 March 2014

The Australian Lawyers Alliance ("ALA") welcomes the opportunity to provide the Standing Committee on Law & Justice ("the Committee") with responses to the questions taken on notice during the evidence given by Mr Bruce McManamey and Mr Anthony Scarcella on 28 March 2014.

The questions on notice have been paraphrased in bold by reference to the numbered points below, noted with a transcript reference and answered there under:

1. **Specific examples of injustice that otherwise would not have arisen had there been the separation of different functions of WorkCover** (transcript at page 50):

   (a) A clear example of perceived injustice is demonstrated by the conflict created between WorkCover's function as Nominal Insurer and its function as decision maker on review in work capacity decisions. Pursuant to section 44 of the 1987 Act, WorkCover, wearing its Merit Review Service hat, has the function of reviewing an insurer's decision as to an injured worker's work capacity on the merits after the insurer has reviewed its own decision. WorkCover's

function as Nominal Insurer is in an inherent conflict with its function as a merit reviewer. The authority that runs the scheme and is also the Nominal Insurer, is also the merit reviewer. The experience of ALA members is that injured workers perceive this an injustice, in that, they fear that they will not receive a fair hearing. Add to this the complexity of the work capacity review process for an injured worker who must self represent himself/herself because legislation prohibits paid legal assistance, many workers simply "walk away" and do not pursue their rights to review a work capacity decision. This is an example of actual injustice.

(b) Another example of actual injustice in the work capacity decision process arose in the case of *Transfield Services (Aust) Pty Limited v WorkCover Authority of NSW & Mark Humphrey (Supreme Court case number 2013/314766)*. In summary, WorkCover wearing its Merit Review Service hat decided that it would direct an insurer to rescind a work capacity decision and directed it not to make a work capacity decision until the insurer had determined the disputed issue of liability. The insurer commenced proceedings in the Supreme Court of NSW seeking, amongst other things, to quash the merit review decision of WorkCover's Merit Review Service. The Court directed that there be a stay and that the worker continue to receive his weekly payment. The respondents to the proceedings were WorkCover and the injured worker. ALA understands that on the first return date, the WorkCover appeared with counsel and took an active role in the proceedings. The injured worker appeared for himself. Apparently, WorkCover filed a response in which it conceded that its Merit Service Review decision was outside its jurisdiction. An order for costs against the injured worker was sought. It is understood that the matter was eventually resolved without the worker having to pay costs.

2. **WorkCover Legal Stakeholders Reference Group reduction in the number of meetings** (transcript at page 52):

The WorkCover Legal Stakeholders Reference Group ("the Reference Group") was formed following a meeting called by the WorkCover Regulatory Review Taskforce and chaired by Mr Tim Castle on 21 June 2012. Attendees included representatives from WorkCover, the Workers Compensation Commission, the Law Society of NSW, the NSW Bar Association, the ALA, self and specialised insurers, scheme agents and a scheme agent legal representatives. At this inaugural meeting it was announced by Mr Castle that the intention was to create a legal reference group. It was also stated that the purpose of the Taskforce was to strip away the red tape and to

implement a system that would make the Scheme more efficient for workers, insurers and employers to navigate.

Initially, meetings were regular and involved the creation of sub groups to deal with specific issues, including the role of lawyers in the Scheme. However, over a period of time these meetings diminished in frequency. There have been no meetings of the Reference Group in 2014. Mr Anthony Scarcella has recorded the meeting dates as follows:

- 21 June 2012
- 5 July 2012
- 11 July 2012 (subgroup meeting)
- 19 July 2012
- 2 August 2012
- 6 August 2012 (subgroup meeting)
- 10 August 2012
- 23 August 2012
- 10 September 2012
- 21 September 2012
- 18 October 2012
- 15 November 2012
- 13 December 2012
- 18 December 2012 (joint seminar to workers' compensation practitioners)
- 21 February 2013
- 18 April 2013
- 27 June 2013
- 12 December 2013

By the 21 February 2013 meeting, agenda items were consistently stood over to the next meeting and meetings became a reporting exercise only. As the ALA understands that the Law Society of NSW will attach to its responses to questions on notice the Reference Group agenda and notes, we refer the Committee to those documents rather than reproducing them again.

3. **WorkCover guideline inconsistencies and examples of matters that should be covered in the guidelines but are not and create lack of understanding and confusion** (transcript at page 53):

The inconsistencies in the WorkCover guidelines and confusion created by them are many and varied. The ALA respectfully submits that rather than providing an

exhaustive list of guideline inconsistencies and/or omissions, it would be preferable for the Committee to recommend that WorkCover liaise and work with the Reference Group to review, cull, simplify and correct the guidelines which are currently in existence. Reference Group members have expert practical experience to assist WorkCover with such a task. The purpose of guidelines are to guide the users of the system through the system.

4. **Whether section 59A of the *Workers Compensation Act 1987* and the *Workers Compensation Amendment (Medical Expenses) Regulation* gazetted on 20 December 2013 were raised at the WorkCover Legal Stakeholders Reference Group meeting on 13 December 2013** (transcript at page 56):

Section 59A of the *Workers Compensation Act 1987* and the *Workers Compensation Amendment (Medical Expenses) Regulation* gazetted on 20 December 2013 were not discussed at the WorkCover Legal Stakeholders Reference Group meeting on 13 December 2013. However, the ALA understands that Section 59A of the *Workers Compensation Act 1987* was discussed in prior meetings and its difficulties were certainly raised with WIRO from about mid 2013.

Supplementary Comment

It is with some considerable concern that the ALA notes the joint media release issued by NSW Treasurer, Andrew Constance and Minister for Finance and Services, Dominic Perrottet on 28 April 2014 wherein a *"$1 billion improvement to the bottom line of the NSW Workers Compensation Scheme*" was announced. This significant turn around in the financial status of the Scheme in such a short period of time following the 2012 amendments comes as no surprise. The NSW government relied upon unduly pessimistic actuarial information. Now that investment returns have picked up (as they were always going to from historic lows) we are left with projected surpluses which the government intends to redistribute to employers instead of injured workers. The reality is that the 2012 amendments slashed injured workers' entitlements and their ability to make an early, safe and durable return to work. The amendments effectively transitioned many injured workers from Scheme benefits to Centrelink and Medicare benefits. The Scheme's overriding objectives should be to have employers, scheme agents, specialised insurers and self insurers support injured workers so that they are able to make an early, safe and durable return to work. The Scheme should not be profit driven. The ALA submits that the policy objectives of the 2012 amendments no longer remain valid or appropriate for securing those objectives. Accordingly, the ALA calls for an immediate review of the Scheme in accordance with Schedule 6, Part 19H, Division 3, Clause 27 of the *Workers Compensation Act 1987*.

Should you have any queries in relation to the responses provided above, please do not hesitate to contact me.

Yours faithfully,

Jnana Gumbert
NSW State President
Australian Lawyers Alliance