Master Builders Association
New South Wales

5 June 2012

Ms Vanessa Viaggio
Principal Council Officer
Joint Select Committee
On the Workers Compensation Scheme
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms Viaggio

We write to acknowledge receipt of your letter and copy of transcript received by our Office on 28 May 2012.

First, we advise that we have read the transcript of our evidence to the Committee and we have no corrections to submit.

Second, Master Builders Association of New South Wales (MBA), agreed to take a question on notice from the Hon Paul Green in respect of commutations. At page 24 of the transcript on 28 May 2012 vis:

> *"Are you for them in all circumstances?"*

In responding to the above question, MBA notes from page 9 of its Submission that the Scheme Actuary and industry experts have advised against broadening access to commutations and such a measure would need to be limited to very specific classes of injury / claim.

MBA understands that a commutation is an agreement between the injured worker, employer and Scheme Agent or insurer, to pay all of the injured worker's entitlements to weekly benefits, medical, hospital and rehabilitation expenses as a lump sum.

By agreeing to a commutation, the injured worker's entitlements to weekly payments and all other expenses will no longer be paid and the Scheme Agent or insurer will not be liable for further claims with regards to the injury.

WorkCover must also certify the commutation meets all the criteria as provided for in Section 87EA of the Workers' Compensation Act 1987.

MBA also understands that currently a commutation is only available when the following pre-conditions have been met:

- The injured worker must have a permanent impairment that is at least a 15 per cent whole person impairment.

- Compensation for permanent impairment and pain and suffering has been paid.
- It is two or more years since the worker first received weekly payments for the injury.
- All opportunities for injury management and return-to-work have been fully exhausted.
- The worker has received weekly benefits regularly and periodically throughout the previous six months.
- The worker must be entitled to ongoing weekly benefits.
- Weekly benefits have not been stopped or reduced as a result of the worker not seeking suitable employment.

Prior to receiving a commutation:

- The worker must receive independent legal and financial advice.
- The Scheme Agent or insurer, employer and worker must agree with the commutation.
- WorkCover must approve the commutation.
- All agreements must be registered with the Workers Compensation Commission.

MBA submits that commutations should be limited to injured workers assessed by a level of whole person impairment of at least 20%. All other existing conditions should be satisfied.

In respect of the NSW Nurses' Association "seven point plan", MBA submits the following:

1. MBA supports the investigation of a proposal that there be a financial incentive for employers to provide suitable work to injured workers by way of a reduced premium.

2. MBA members already take seriously their obligations to provide work to injured workers where such work is available. Increasing penalties on employers by way of an increased premium would not be of assistance.

3. MBA supports the contention that insurers be required to examine whether clients are able to provide suitable work to an injured worker prior to termination, on or suitable work being withdrawn and prior to requiring that worker to seek work elsewhere. However, such contention should not override or interfere with an employer's right to legitimately terminate an employee for reasons not associated with their workers' compensation claim, or an employee's right to resign their employment and seek work elsewhere.

4. MBA does not support a recommendation that in any legal proceedings dealing with the question of whether suitable work is available, the onus be on the employer to establish that no suitable work exists. Such an approach would constitute an unwarranted reversal of the legal onus of proof.

5. MBA does not support the need for the introduction of a formal review process needing to be undertaken prior to an employer being able to withdraw suitable work or terminating injured workers. The notion of work capacity testing employers seeks to place more onerous obligations on employers already struggling with the requirements and costs associated with the current scheme.

6. MBA does not support any restriction on an employer's right to require a prospective employee to declare whether they had previously suffered a workers' compensation injury.

7. MBA does not support making it an offence for an employer to inform another prospective employer that a former employee has suffered a workers' compensation injury. MBA submits that such a contention could prevent an employer from placing a new employee in a work environment which could put such employee at risk to their health and safety.

MBA also notes that it has been requested to provide any further written material regarding a proposed Building and Construction Industry specific workers' compensation scheme. MBA advises that a "Confidential Draft" was prepared for the NSW Branch of the CFMEU by Tillinghast-Towers Perrum dated 18 September 1997.

MBA also advises that Tillinghast, in conjunction with Aurora Managers and Consultants, were asked by the CFMEU to investigate the financial and actuarial aspects of a workers' compensation scheme specific to the construction industry in New South Wales. As a consequence, MBA recommends that the Committee requests the CFMEU to supply a copy of this documentation.

Finally, MBA has been requested to provide a response to Sections 8 – 11 (pages 20 – 23) of the submission by the Civil Contractors Federation as it relates to work capacity testing.

MBA agrees with the recommendation that treatment of an injured worker be separated from Work Capacity Assessment. Whilst early intervention is supported, the suggestion that this be commenced after only three days could prove problematic in all cases.

We also note the proposal that an injured worker notifies their employer **or** (our emphasis) Agent of an injury ASAP. MBA prefers the current obligation be kept that in all cases the employer is the party to be notified.

MBA agrees that depending on the nature of the injury, a Work Capacity Assessor (WCA) should not be the employee's Nominated Treating Doctor (NTD). Instead, the WCA should be appointed by the claim Agent and be accredited and audited by WorkCover. MBA also agrees that WCA's might be a Medical Doctor, Occupational Therapist, Psychologist, Dermatologist, Optometrist and we would also add – Workplace Rehabilitation Provider to this list. In addition, the NTD is often not familiar with the injured employee's workplace and is therefore often not in the best position to make decisions regarding rehabilitation and return to work options and programs.

MBA agrees that the WCA should be able to call in an Independent Medical Expert (IME) to assess either treatment or assessing. MBA also agrees that the injured worker or the employer have the right to seek an IME from the Agent and the IME ruling would be binding.

MBA agrees that Work Capacity Assessments would continue through the entire period of the Claim with maximum periods set and assessments undertaken at specific periods in the claim, such as benefits step downs and claims estimates.

Conclusion

MBA trusts that it has adequately answered all questions on notice posed by the Committee.

Should you have any further enquiries, please do not hesitate to contact the undersigned.

Yours sincerely

Peter Glover
DIRECTOR CONSTRUCTION