THE LAW SOCIETY
OF NEW SOUTH WALES

5 June 2012

The Hon. Robert Borsak MLC
Chair
Joint Select Committee on the NSW Workers Compensation Scheme
Parliament House
Macquarie St
Sydney NSW 2000

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

Re: Inquiry into the NSW Workers Compensation Scheme

Dear Mr Borsak,

The Law Society's Injury Compensation Committee refers to the additional supplementary request for information made on your behalf by Ms R Callinan, Committee Director, on 31 May 2012.

The question posed by the Joint Select Committee is as follows:

> *"1. Looking at Mr Concasson's (sic) oral evidence on 21 May 2012 (transcript page 48), how and why does section 52A of the Workers Compensation Act 1987 'just does not work as a mechanism purely because of the wording of the legislation'?"*

The provisions of section 52A enable an insurer to terminate weekly payments of compensation beyond the first 104 weeks of partial incapacity for work in limited circumstances. In particular, the insurer is required to establish that one or more of the following paragraphs applied to the worker "at the relevant time":

> *"(a) the worker is not suitably employed (within the meaning of section 43A) and is not seeking suitable employment (as determined in accordance with section 38A),*
> *(b) the worker is not suitably employed (within the meaning of section 43A) and has previously unreasonably rejected suitable employment (within the meaning of section 40(2B)),*
> *(c) the worker has sought suitable employment but has failed to obtain suitable employment primarily because of the state of the labour market (rather than because of the effects of the worker's injury)."*

The first difficulty with establishing one or more of these requirements is that the onus of proof is on the insurer to establish that "at the relevant time" one or more of these requirements is fulfilled. It is by no means a straightforward task for the insurer to satisfy this onus in the absence of some form of admission by the worker.

Furthermore, the relevant case law (for example, *Camilleri v Western Sydney Area Health Service* (2000) 20 NSWCCR 499) has defined the term "relevant time" in relatively elastic terms. For instance, it would ordinarily be insufficient for the insurer simply to establish at the precise time the worker received the section 54 Notice to terminate payments under section 52A that the worker was, for example, not seeking suitable employment. Provided the worker can establish that reasonable efforts were made to obtain suitable employment in the period leading up to the relevant time coupled with a persisting intent, then this is sufficient to discharge any obligation imposed on the worker to be seeking suitable employment "at the relevant time".

Regarding section 52A(1)(c), the difficulty is firstly that the onus is again on the employer to establish that it was primarily because of the state of the labour market that the worker failed to obtain suitable employment. Secondly, the employer is likely to be faced with an argument that the primary reason why the claimant has not been able to obtain suitable employment is because of his or her injury and incapacity rather than due to the state of the labour market.

Should you wish to contact the Law Society regarding this submission, the policy lawyer with responsibility for this matter is Patrick McCarthy who may be contacted on [redacted].

Yours sincerely,

Justin Dowd
President