LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND JUSTICE

FIRST REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE WORKCOVER AUTHORITY

QUESTIONS ON NOTICE ARISING FROM PUBLIC HEARING 21 MARCH 2014

QUESTION 1

CHAIR: Mr Watson, as of course you would be aware, New South Wales set up the WorkCover Independent Review Office [WIRO] to deal with individual complaints and provide strong accountability in respect to the use of the New South Wales workers compensation system, a very important body. Mr Garling from that office has prepared a report dated 7 February. Do you have a copy of that report?

Mr WATSON: We do have a copy amongst our papers, yes.

CHAIR: You have had it for some time, have you?

Mr WATSON: Yes, we have; WorkCover has, yes.

CHAIR: You would therefore be aware that he has raised a number of concerns in that report. Have all of those concerns been raised with you? Not with me directly but my colleague will take that question.

CHAIR: So they have been raised. For instance, he raises concerns that WorkCover has not complied with the legislation it is responsible for in setting policy directives for insurers in respect to the management of claims by injured workers. There are complaints about compliance by medical specialists. There is a complaint that there is a reluctance by WorkCover to engage with the participants in the workers compensation community. Without taking time today, because there are a whole series of complaints raised and clearly you have considered those, have you given a response to the WorkCover Independent Review Office [WIRO] in respect to the complaints he has raised?

Ms DONNELLY: Firstly, I confirm, that, yes, we are taking action on every single one of those issues. I have met personally with Mr Garling on those matters a couple of times and I have been meeting weekly with his office with other staff. We have put steps in place to improve the level of communication and coordination and prioritise. A number of those issues we have taken action and rectified; others we are giving top priority.

CHAIR: And you can confirm that you have responded in a timely manner when these complaints have been raised with you?

Ms DONNELLY: I believe we could improve and that is why we have put some additional steps in place so that going forward we are able to respond more quickly.

Mr DAVID SHOEBRIDGE: What are those steps?

CHAIR: To save time today could you provide to the Committee details of your response and how you have dealt with each of the complaints and concerns that he has raised?

Ms DONNELLY: I would be very happy to.

CHAIR: So that with more time available to us we can go through them, see what action has been taken and see how you evaluate those complaints. If you can take that on notice and get a response to us within 21 days that would be appreciated.

Ms DONNELLY: Yes, I would be very happy to.

RESPONSE:

Details of WorkCover's response to each of the matters raised in the WorkCover Independent Review Officer's submission dated 7 February 2014 is provided in Attachment A.

WorkCover and the WorkCover Independent Review Officer (WIRO) have each established key contact people who are meeting weekly and establishing and prioritising an agreed program of work to be undertaken to address workers compensation matters raised by the WIRO.

QUESTION 2

Ms DONNELLY: I am going to answer your question, Mr Shoebridge. From our point of view—and I note that both the committee and the WorkCover Independent Review Office have been set up to improve oversight of WorkCover—our job is to take those issues seriously and address them. On the zero weekly payments issue, we have looked at the issue. We agree with the WorkCover Independent Review Office. We have commenced advising insurers that we will be changing our approach. We are seeking from them information about what is needed practically to implement smoothly a change to that approach. We will then be identifying any injured workers that have been inadvertently disadvantaged and rectifying that disadvantage.

Mr DAVID SHOEBRIDGE: How many are we talking about? Do you have a handle on the number of workers who potentially have had their benefits terminated because of this wrong-headed approach by WorkCover?

Ms DONNELLY: We have begun assessing the numbers. We believe they are small numbers.

Mr DAVID SHOEBRIDGE: What is a small number?

Ms DONNELLY: Less than 1 per cent.

Mr DAVID SHOEBRIDGE: So how many?

Ms DONNELLY: I do not know the exact number precisely because we are still auditing that.

Mr DAVID SHOEBRIDGE: Six hundred, 700, 800?

Ms DONNELLY: I do not believe it is necessarily in that field, but I think it is more appropriate that we take that on notice and give you the figure as we complete our audit.

CHAIR: You will be giving detail, a time frame

Ms DONNELLY: Most happily we will.

CHAIR: When you received the complaint, when you responded and what action has been taken in specific terms.

Ms DONNELLY: I am happy to.

RESPONSE:

WorkCover continues to work with Scheme agents and insurers to finalise the assessment of how many injured workers have been impacted by the zero weekly payments matter.

The best data available to WorkCover at present is that a maximum of approximately 2 per cent of open claims could be potentially impacted. This is equivalent to about 1,500 open claims in the Workers Compensation Nominal Insurer Scheme, as a worst case scenario.

There are expected to be system related costs associated with the change of procedure. This is being assessed and an action plan developed for implementation of the change.

An implementation plan and draft instruction will be provided to the WIRO for comment as soon as possible.

QUESTION 3

Mr DAVID SHOEBRIDGE: And what does the law say in terms of time frames for merit reviews?

Mr JEFFREY: Thirty days.

Mr DAVID SHOEBRIDGE: And what are you doing? What is the time frame on average?

Mr JEFFREY: I will have to take that on notice.

RESPONSE:

Although the legislation does not specify a timeframe in which a Merit Review decision must be made, the current *Guidelines for Work Capacity Decision Internal Review by Insurers and Merit Reviewers* indicate that decisions will be made and issued as soon as practicable and, preferably, within 30 days.

The volume of applications received by the Merit Review Service remains at over 100 per month.

As at 10 April 2014, 683 merit review applications have been finalised in an average timeframe of 61.9 days.

Currently, merit reviews are being finalised, on average, 100-120 days after lodgement.

Timeliness is increasingly affected by the complexity of the disputes from later in the transition process, which are now being determined. Many of these disputes currently being considered relate to claims dating back as far as 1987.

WorkCover is implementing a range of strategies aiming to reduce the current workload backlog of applications for merit review as quickly as possible, including prioritising matters to ensure that those where workers are at greater risk of their weekly benefits being reduced imminently are dealt with as expeditiously as possible, and recruiting for additional staff.

WorkCover will undertake an operational review of the Merit Review Service and will introduce ongoing transparent reporting of Merit Review Service completion times.

QUESTION 4

CHAIR: You have seen the submission from Unions NSW? I think that was prepared at the end of January. They put a series of recommendations. Have you seen those recommendations?

Ms DONNELLY: I am aware. I have read through the submission and have seen that there are recommendations, yes.

CHAIR: Would you be able to take on notice and give us a response to those recommendations?

Ms DONNELLY: Happily.

CHAIR: I think there are nine or 10 recommendations. If you can take that on board and give us a written response?

Ms DONNELLY: I am very happy to.

The Hon. PETER PRIMROSE: That was one of my questions. There are actually 36 recommendations. I would also like to put them on notice.

Mr WATSON: We will deal with all of them.

RESPONSE:

Please see Attachment B.

QUESTION 5

Mr SCOT MacDONALD: A difficult question for you, but can you nominate a range of figures you think we might need to have—

Mr PLAYFORD: My understanding is the work of the board has a funding ratio policy, which is to target up to about 110 per cent funding ratio, and I think it is important to have a framework to try to manage solvency than make strategic decisions about what you do in terms of scheme design or pricing or other elements of the design of the scheme going forward. My understanding is that there is an aim of having the funding go up to no more than 110, but my understanding is that there is a range of perhaps 90 to 110. But I would have to take that on notice. It is the board's policy. That is a similar framework that many of the other schemes around Australia have.

Mr SCOT MacDONALD: All members of Parliament get representations. We get correspondence saying we need to turn the clock back, especially journey claims. Can you give me some response along the lines of if we did wind back in terms of particularly journey claims or other aspects of the scheme, what that might do in terms of that ratio you are talking about?

Mr PLAYFORD: Journey claims historically accounted for about 8 per cent of claims reported. I cannot do the maths in my head of what that number would be at the moment. On average, journey claims were slightly more severely injured in terms of overall profile than the remaining claims in the scheme, so they probably accounted roughly for about 9 per cent of costs. If I did the back-of-envelope calculations—and I can take it on notice to give you more accurate calculations—the annual cost of the scheme is circa $2 billion.
So you are talking roughly up to about $200 million, probably somewhere in the range of $150 million to $200 million in additional costs per annum.

RESPONSE:

To enable the long term sustainability of the New South Wales Workers Compensation Scheme, the value of the Scheme's assets should reasonably exceed the actuarially

calculated value of the Scheme's liabilities. This prudent approach is important to the overall management of Scheme risks.

The value of the Scheme's assets in relation to the actuarially calculated value of the scheme's liabilities is known as the funding ratio and is often stated in percentage terms. As such a funding ratio of 100 per cent indicates that the current market value of the assets equals the value of the actuarially calculated liabilities. The calculation of the funding ratio is impacted the changes in the value of the liability and the market value of the portfolio of investments that represent the assets of the Scheme.

As proven in the past, the investment returns can be volatile and are subject to market forces outside the control of WorkCover, though measures are put in place to attempt to manage this volatility. A documented funding ratio target reduces the risk of the decisions made regarding the management of the scheme and its investments easier.

As part of a review of the Scheme design, the Safety, Return to Work and Support Board discussed that a target funding ratio should be at a point above 100 per cent to ensure the sustainability of the Scheme and to maintain a solvency position. The Board's Investment Committee approved a funding ratio target of 110 per cent in early April 2014 and the Board will consider its adoption at its April meeting.

The proposed 110 per cent target funding ratio has been recommended after consideration of the following financial factors:

- The variability of the actuarially calculated value of the scheme's liability;
- The variability of the market value of the scheme's investments; and
- The correlation between these two variable factors.

The funding ratio as at June 2013 was 102 per cent.

QUESTION 6

Mr SCOT MacDONALD: How do we stand relative to other states in terms of our premium competitiveness? On seeing that trajectory prior to 2011-12 it was difficult. Are we getting back into a more competitive position?

Mr PLAYFORD: WorkCover will take it on notice to give you the exact figure. It is certainly more competitive. WorkCover certainly has been able to reduce premium rates since the June 2012 reforms. I think at June 2013 my recollection would be that some of the key comparable states such as Victoria, which has a relatively similar benefits structure, still had lower premiums than New South Wales. But there are very big differences in the benefit structure from scheme to scheme. It is not always a like comparison.

Mr DAVID SHOEBRIDGE: When you are taking that on notice, would you also include the impact of the premium cuts on the past and future surpluses as well? I note that the witness is nodding in terms of taking that on notice.

CHAIR: When you are doing your comparison will you compare apples with apples, if you understand what I mean?

Mr PLAYFORD: That is actually impossible to do. It is impossible to put a New South Wales benefit structure on a Queensland system and say what the cost is.

CHAIR: At least if you make a note of the variables we will have some understanding there.

Mr DAVID SHOEBRIDGE: Again, there was nodding, if not a verbal yes, in terms of taking that on notice.

CHAIR: You will take that on notice.

Mr PLAYFORD: Yes. I am sure they will summarise the question and give it to me.

CHAIR: Yes, they will.

RESPONSE:

Safe Work Australia produces a *Comparative Performance Monitoring Report* (CPM Report) that seeks to provide a comparative assessment of work health and safety, injury management and workers compensation performance across different jurisdictions in Australia and New Zealand. An outline of standardised average premium rates across jurisdictions as detailed on page 24 of the most recent Safe Work Australia *Comparative Performance Monitoring Report* is provided in the table and chart below.

It should be noted that the CPM Report does not use the same definitions as those used in jurisdictional statistical and annual reports, which may result in a variation of figures reported against those contained in the WorkCover NSW Annual Report. A direct comparison between jurisdictions is also difficult due to variations in each jurisdiction's operations, industry profiles and workers compensation schemes. While SafeWork Australia applies an adjustment factor to reported data to aid comparability, it also issues caveats throughout the report cautioning the reader against making jurisdictional comparisons.

Standardised average premium rates (including insured and self-insured sectors) by jurisdiction

	S'care	SA	ACT Private	NT	NSW	Tas	Qld	Vic	WA	Aus Gov	Aust	NZ
2007-08	5.00	2.85	2.90	1.83	1.91	1.50	1.10	1.46	1.41	1.19	1.63	0.91
2008-09	4.10	2.79	2.63	1.84	1.82	1.39	1.07	1.38	1.28	1.05	1.54	0.79
2009-10	3.27	2.73	2.25	1.75	1.81	1.40	1.12	1.39	1.28	0.91	1.53	0.79
2010-11	2.64	2.47	2.10	1.81	1.74	1.51	1.24	1.35	1.20	0.92	1.49	0.92
2011-12	3.12	2.51	1.99	1.81	1.70	1.51	1.42	1.34	1.21	0.99	1.51	0.84
2011-12 Aus av	1.51	1.51	1.51	1.51	1.51	1.51	1.51	1.51	1.51	1.51	1.51	

The Safe Work Australia *Comparative Performance Monitoring Report* 15th edition also provides analysis of the issues that need to be taken into account in drawing comparisons between jurisdictions.

"The principal regulatory differences that affect comparability and for which adjustments have been applied in this indicator are: the exclusion of provision for coverage of journey claims; the inclusion of self-insurers; the inclusion of superannuation as part of remuneration; and the standardisation of non-compensable excesses imposed by each scheme."

Pg24, Safe Work Australia *Comparative Performance Monitoring Report* 15th edition.

It should be noted that the information in the CPM Report pre-dates the New South Wales Workers Compensation Scheme reforms, which were progressively rolled out from June 2012.

Since the Safe Work Australia *Comparative Performance Monitoring Report* 15th edition, the New South Wales workers compensation nominal insurer scheme has reduced its target premium collection rate to 1.47 per cent, representing an average 12.5 per cent reduction in the 2013 premium cycle for employers in industries with good safety and return to work performance.

These premium reductions are not at the expense of the scheme aim to achieve 110 per cent solvency. The funding ratio as at June 2013 was 102 per cent.

QUESTION 7

The Hon. PETER PRIMROSE: Why are there no longer any references to scheme agent fees in your annual reports?

Ms DONNELLY: I am not aware why there are none. I am happy to take that on notice. I know that one of the things that we have agreed, in working to address the issues raised by the WorkCover Independent Review Office, is to provide more information, including scheme agent performance information. So I am sure we can look at it in that area of work.

The Hon. PETER PRIMROSE: Why were they taken out and will they go back in?

Ms DONNELLY: I am happy to take that on notice.

RESPONSE:

Prior to the 2012/13 year, the WorkCover Annual Report incorporated the Annual Report of the New South Wales WorkCover Scheme. However in the 2012/13 year, the Report was separated. The WorkCover Annual Report was released on the 30 September 2013 and the New South Wales WorkCover Scheme Annual Report was released on the 31 October 2013. Both reports were tabled in Parliament on 21 November 2013 as volumes 1 and 2.

The Scheme agent fees were included in the New South Wales WorkCover Scheme Annual Report rather than the WorkCover Annual Report, due to the NSW Treasury introducing an earlier timeframe for annual reporting. This impacted on availability of information and resulted in the production of the two reports. Any questions on Scheme agent fees should be referred to the New South Wales WorkCover Scheme Annual Report.

There is no specific requirement for the Scheme agent fees to be reported in the New South Wales WorkCover Scheme Annual Report. However, as it is a material item, it must be reported in the financial reports as required under the Australian Accounting Standards.

QUESTION 8

Mr DAVID SHOEBRIDGE: Injured workers do not have any legal representation when they are going through those workplace capacity assessments, do they?

Mr JEFFREY: That is correct.

Mr DAVID SHOEBRIDGE: So, for example, how would a Portuguese bricklayer who did not speak English properly navigate their way through a work capacity assessment under your scheme without legal representation?

Mr JEFFREY: I would like to take the question on notice so that I can put some detail and context around it.

RESPONSE:

Insurers have strategies in place to assist those workers who may experience difficulty in understanding the English language. These services are available to workers throughout the entire life of their claim.

Insurers utilise interpreter bookings through interpreting companies to assist injured workers. These interpreting services are then paid for as a cost on the worker's claim. These interpreters can assist in face to face meetings, phone conversations and written document translation. Some insurers also have staff that can speak other languages and can provide translating services to assist in the communication between workers and case managers. Case managers who can speak the same language as the worker may be assigned to manage the claim.

Insurers have used the following specific strategies to ensure those workers who experience difficulty understanding the English language understand the processes and content of work capacity assessments and decisions:

- When a work capacity decision has been made on a claim where the case manager has historically used an interpreter for conversations with injured workers, the work capacity decision is communicated via an interpreter service. This is at all decision points including work capacity decision, internal review decisions, and WorkCover's decisions made following merit review.
- Case managers have also had letters translated into the worker's first language. The availability of this service would usually be discussed with the injured worker at the time of initial communication regarding the work capacity decision.
- Letters/communication also mention that should the injured worker be from a non-English speaking background they can contact their case manager so that interpreting services can be arranged.
- Engagement of service providers who have a second language in order to improve communication with the injured workers, overcome cultural barriers and build a better rapport between the service provider and the injured worker.
- Utilisation of rehabilitation providers that specialise in providing job seeking assistance to non-English speaking workers.

WorkCover has a language icon on its website and offers translating services through its 13 10 50 customer contact number. For initial enquiries, WorkCover operates a community language scheme and has staff who are fluent in many community languages.

The Customer Service Centre also has an escalation service for work capacity concerns and a dedicated work capacity liaison officer to provide high quality customer focused service, advice and support in the work capacity process to injured workers. The role acts as a key escalation point for injured workers and contributes to the provision of feedback and communication between the WIRO, WorkCover Customer Service Centre, the Merit Review Service and Workers Compensation Insurance Division.

The work capacity liaison officer is responsible for:

- facilitating the provision of constructive feedback and effective complaint resolution for the work capacity decision process to injured workers;
- managing escalated work capacity related complaints and resolution in consultation with injured workers;
- providing feedback to the relevant workers compensation insurance teams on trends relating to work capacity; and
- providing advice and recommendations related to worker complaints concerning the work capacity processes of insurers, the Merit Review Service and the WIRO, to senior WorkCover staff and the NSW Ombudsman.

WorkCover continues to improve the information made available to injured workers including information on its website, fact sheets, information sent in correspondence by the Customer Service Centre and about the services provided by the WIRO.

QUESTION 9

Mr DAVID SHOEBRIDGE: Have the 10,000 workers who have had their benefits cut or failed to get benefits as a result of the reforms got back to work? Do you have evidence to prove that something like that proportion of workers is now back at work as a result of the changes?

Mr JEFFREY: We need to take that on notice to retrieve the data.

RESPONSE:

The Safe Work Australia National Return to Work Survey for 2012/13 showed that New South Wales had 88 per cent of workers having returned to work post their injury (ahead of the National average of 86 per cent and improving since the reforms were introduced).

Data retrieved across the Scheme where there has been an adverse work capacity decision for transitioned claims, shows that there were approximately 8,000 claims where benefits were reduced or ceased.

Of these claims, 83 per cent are still open or in the review process, 41 per cent have returned to work in some capacity, 56 per cent have not yet returned to work at the time of the work capacity decision and there are 3 per cent whose status is currently unknown.

QUESTION 10

Mr DAVID SHOEBRIDGE: What has happened to the 12,000 workers who have lost their medical benefits?

Mr WATSON: Many of them have returned to work.

Mr DAVID SHOEBRIDGE: How many?

Mr WATSON: I can get you that figure. Rather than waste the Committee's time while I wade through paper to find that, we will take it on notice.

Mr DAVID SHOEBRIDGE: In doing that, could you also provide the Committee with the number of older workers, those who are 66 years and older, who have lost their medical benefits?

Mr WATSON: We can put an age profile on that, yes.

RESPONSE:

Entitlement to weekly benefits for the majority of those workers would have ceased 12 months prior to the cessation of medical benefits. It is assumed that the reason for cessation of weekly benefits is that those workers had returned to work.

Data retrieved across the Scheme shows there were 7,707 claims not in receipt of weekly compensation prior to legislative reform that have subsequently closed and are no longer entitled to medical benefits. Of these, 58 per cent are confirmed as having returned to work, 28 per cent have not yet returned to work and there are a further 14 per cent of claims where the work status is unknown.

Approximately 20 per cent of these claims are for injured workers aged 66 years or older. Of these, 24 per cent have returned to work, 69 per cent have not returned to work and there are a further 7 per cent where the work status is unknown.

QUESTION 11

Mr SCOT MacDONALD: Why are there issues about the commitment of some labour hire companies to safety?

Mr SCOT MacDONALD: Please take on notice giving any recommendations for the Committee in that area.

Mr WATSON: Indeed, even in a workplace such as this you will have a number of persons conducting a business or undertaking forming a workplace and a great deal of cooperation is needed to make sure you have a safe outcome. I am happy to take this question on notice and provide more detail.

Mr SCOT MacDONALD: Are you concerned about any particular labour hire companies?

Mr WATSON: This is a public hearing and it is not appropriate for me to name particular firms.

Mr SCOT MacDONALD: You can provide us with a confidential reply.

Mr WATSON: I will take that on notice.

RESPONSE:

At present, the Work Health and Safety Division has no information to indicate that labour hire companies generally, are not committed to workplace safety. Should any parties be in possession of information that indicates a lack of commitment by any company, the Committee would be well placed to encourage them to report it to WorkCover.

As mentioned, WorkCover previously had a number of prosecutions against labour hire companies for instances where they had not provided a good workplace health and safety system for workers they sent to host employer sites. While all matters raised with WorkCover are investigated, current investigation activities do not indicate a general or systemic issue.

This was the case under occupational health and safety legislation, however with the change to work health and safety legislation, the scope of the primary duty of care now is now extended beyond the traditional employer and employee relationship. This means that under a labour hire arrangement, both the labour hire person conducting a business and undertaking (PCBU) and the host PCBU have duties to ensure the health and safety of labour hire workers

so far as is reasonably practicable. These duties must be fulfilled to the extent to which each PCBU has the capacity to influence and control the matter.

WorkCover does not have any specific concerns in relation to the effectiveness of these changes.