

JOINT SELECT COMMITTEE ON THE NSW WORKERS COMPENSATION SCHEME

Insurance Council of Australia Supplementary Submission Questions asked by Committee

1. What is the percentage of employers which actually provide suitable duties. (p4)

The Hon. ADAM SEARLE: What percentage of employers—in terms of the claims managed by your members—actually provide suitable duties under the legislation?

Mr KRAWITZ: I do not have any statistics like that at hand.

The Hon. ADAM SEARLE: Will you take that question on notice?

Mr KRAWITZ: Yes. I am not sure if we would be able to pull that together on a scheme-wide basis but we will take it on notice and see what we are able to do.

The WorkCover Authority requires a significant amount of data from our member licensed insurer scheme agents concerning policies and claims generally. The percentage of employers who provide suitable duties is not required by WorkCover and therefore is not captured by our members.

2. What reports to WorkCover do scheme agents make if employers are not meeting their RTW obligations (p4)

The Hon. ADAM SEARLE: For example, where an employer, in the view of your members, was not upholding their obligations surely you would report that to WorkCover with all the details?

Mr KRAWITZ: We would tell the employer what those obligations are. As far as reporting to WorkCover in each and every instance I would have to take that on notice to see what the policies dictate.

The Hon. ADAM SEARLE: What reporting do your members do to WorkCover where they uncover instances of non-cooperative employers not adhering to their legal obligations?

Mr KRAWITZ: As far as specific reporting I do not have that information on hand.

The Hon. ADAM SEARLE: Will you take that question on notice?

Mr KRAWITZ: Yes.

The role of our members, as licensed insurer scheme agents in the rehabilitation process generally, is in educating employers on the importance of maintaining suitable duties by working collaboratively with employers to return injured workers to work. There is however no requirement for scheme agents to report on the performance of employers who do not meet their obligations under the legislation.

3. What proportion of workers in the tail have had their employment terminated and at what stage has their employment been terminated (p5)

The Hon. ADAM SEARLE: Will you ask your members for that information and provide it to the committee?

The Hon. TREVOR KHAN: I do not think that is appropriate. WorkCover attended the committee on Monday. The Hon. A. Searle had ample opportunity to investigate those matters here. He is now seeking this witness to undertake an investigation of potentially other witnesses or other bodies. I believe what he is asking the witness to agree to is inappropriate.

The Hon. ADAM SEARLE: First of all, I can ask Alliance about its experience but leaving that aside, this body represents a number of the scheme agents. I am not asking the witness to do something he cannot do, I have just asked whether he could ask his members for such information as they have got.

[Interruption]

Mr Chair, I am discussing this matter, not debating it with the Hon. Trevor Khan. Surely the scheme agents are closer to the action than WorkCover and they would have the primary data or information.

CHAIR: I allow the question. It is up to Mr Krawitz whether he can, or is prepared to, get the information.

Mr KRAWITZ: We can certainly make the request of our member agents.

CHAIR: Will you take that question on notice?

Mr KRAWITZ: Yes.

As noted above, WorkCover Authority requires our member licensed insurer scheme agents to report data on a range of issues. The proportion of workers who have had their employment terminated is not required by WorkCover and therefore is not captured by our members.

4. What is the comparative data for the level of tail claims in different jurisdictions. (p7)

Mr MARK SPEAKMAN: At page 8 of your submission you talk about New South Wales having the largest tail liability. Is that just in dollar terms or is it also in some sort of percentage terms?

Mr KRAWITZ: I think we would have to take that on notice. I certainly would not want to share any statistics that we have not checked and proven.

Mr MARK SPEAKMAN: Could you take on notice generally what the comparative data are for tail liability of different schemes?

Mr KRAWITZ: Yes.

The ICA's statement in our submission that NSW has the largest "tail" is based purely on the current outstanding claims liability figure as represented in the most recent annual report of WorkCover. The 2010-2011 outstanding claims liability for NSW is larger, for example, than that of Victoria and Queensland as follows:

- NSW - 14,268 million¹
- Victoria - 8,991 million²
- Queensland - 2,763 million³

To the knowledge of the ICA, a comparative analysis of the "tail" liabilities of various workers compensation schemes across Australia is not available.

¹WorkCover NSW Annual Report 2010 – 2011, p152

²WorkSafe Victoria Annual Report 2011 P56

³ Workcover Queensland Annual Report 2010 – 2011, p44

5. What is the ICA's view about the Bar Association's submission that section 151Z(2) should be abolished so that injured workers can make common law claims against third party tortfeasors (p8)

Mr MARK SPEAKMAN: The Bar Association made a submission to us and they gave us a seven point plan they would like to see, and one of them was revocation of section 151Z (2) of the Workers Compensation Act to allow injured workers to take action against third party tortfeasors under the Civil Liability Act. They say that that would enable recovery of payments made at no cost to the scheme and that it is wholly consistent with insurance principles that it spreads the risks and protects the interests of WorkCover. Would you like to comment on that?

Mr KRAWITZ: The Insurance Council of Australia does not have a view in that regard from its members, so there really would not be any comment I would be able to make today.

Mr MARK SPEAKMAN: Are you able to comment on whether that would affect premiums for other insurers?

Mr KRAWITZ: I would not be in a position to comment on that today, no.

Mr MARK SPEAKMAN: Is that something you could take on notice?

Ms MULLEN: We could take that on notice but I think the general answer to that is it would obviously depend on who the third party was in any recovery that has been made outside the scheme framework, and that would typically depend on, presumably, the kind of public liability cover that a particular third party may have. So I guess the generic answer would be it is possible that that would create costs elsewhere. That is probably the best we could say.

The ICA believes that, as an issue of scheme design, this is a matter for the consideration of the government. However, in line with our general comments at the hearing of the inquiry on 21 May 2012, we suggest that a thorough actuarial analysis would be needed to consider the implications of this suggestion, both on the workers compensation scheme in NSW but also on the wider insurance industry more generally.

6. Describe the MAS system of medical assessment under the NSW CTP scheme.(p9)

Mr MARK SPEAKMAN: At the bottom of page 6 of your submission you talk about the medical assessment service currently in operation in the CTP scheme. Could you describe that for us please?

Ms MULLEN: I am no expert on that but what I can say is that, as members may be aware, in the CTP scheme in New South Wales there is a specific system for the assessment of medical injuries. So I guess what we are saying there is really support for an independent and binding medical assessment scheme. We can take that on notice and provide you with more details of that scheme if that helps the committee members.

The Medical Assessment Service (MAS) assesses medical disputes as they arise between a person injured in a motor vehicle accident and an insurer throughout the course of a claim. MAS can assess medical disputes about the injured person's treatment and permanent impairment. Further detail concerning the MAS process is provided in our response to question 13 below.

The Insurance Council submits that the main benefits of MAS are that the medical assessments are independent and objective. In relation to issues such as determining whole person impairment, MAS assessments are definitive and binding in most circumstances.

7. What is the composition of medical panels in Victoria and what range of disputes do they determine (p10)

Mr MARK SPEAKMAN: I refer to the second last paragraph on page 8, commencing with the word "Further". What is the composition of the medical panels in Victoria that you are referring to and what is the range of disputes they determine?

Mr KRAWITZ: I would have to take that on notice for further details regarding the composition.

Medical Panels in the Victorian Workers compensation scheme are constituted pursuant to the *Accident Compensation Act 1985* and the *Wrongs Act 1958*.

A Medical Panel may be asked to provide an opinion where there is disagreement or uncertainty about any medical issues which arises as part of a WorkCover related injury or medical condition. The panels are also used to determine if the threshold of whole body impairment is satisfied in order to pursue a claim for non economic loss in respect of common law matters.

The Convenor will appoint an appropriate number of members to sit on the Panel. Section 63A(2)) The panel may consist of one or more relevantly qualified medical specialists. The panel must not include a treating doctor.

The Medical Panel has the status of a Tribunal. Decisions are final and conclusive unless by order of the Supreme Court. (section 68(4)) The decision must be made with 60 days.

8. Please provide further detail of the decision concerning the payment for the spa. Is it a reported decision of the WCC (p11)

The Hon. TREVOR KHAN: You used the example earlier of the purchase of the spa. I am not being critical of the anecdote, but is there a reported decision that you relied upon or is it simply an internal note from one of your members?

Mr KRAWITZ: I do not understand.

The Hon. TREVOR KHAN: If it went to the commission is there a case citation of some form that relates to that?

Mr KRAWITZ: We have guidelines around what is considered reasonable and necessary. I am not sure whether a case study has been put forward.

The Hon. TREVOR KHAN: We are at cross purposes. You have indicated a decision was made by the insurer and it went to the commission and the commission said it was reasonable to spend whatever the amount was on the spa bath. Normally when a decision such as that is made it will be an unreported or a reported decision.

Mr KRAWITZ: I will take that question on notice and provide further details about that particular claim.

The Hon. TREVOR KHAN: Thank you. If there are any other such similar decisions that you are aware of, can you provide the Committee with details?

Mr KRAWITZ: Yes.

The Hon. TREVOR KHAN: Preferably in the form of a reported or unreported decision.

Mr KRAWITZ: Yes.

Please find attached a copy of the published decision in relation to the claim for the cost of a spa discussed at the hearing on 21 May 2012. This decision is available on the Workers Compensation Commission Website.⁴

Insurers are obliged to comply with the gazetted WorkCover Guidelines on Independent Medical Examinations and Reports when arranging a medical opinion for a particular claim. However, there is no particular legislative relevance or precedence given to those opinions in the workers compensation legislation.

As a result the independent medical examination obtained by the scheme agent is dealt with as only one medical opinion available in the matter for the Arbitrator to

⁴ http://decisions.wcc.nsw.gov.au/NR/rdonlyres/41FBC155-5373-4789-941F-928EA448F19F/0/54910_Ivanisevic_COD_SOR.pdf

consider. As can be seen in this instance, the Arbitrator preferred the evidence of the applicant's medical reports.

The ICA submits that use of a binding independent medical assessment would substantially reduce friction costs in the scheme.

9. Please provide the basis of the findings in the Rutherford Report (p11)

Mr MARK SPEAKMAN: On page 5 of your submission you refer to the Rutherford review report. Can you give details of what evidence there was in that inquiry that you say supports the proposed option for change?

Mr KRAWITZ: At this stage we would have to take that question on notice to provide further details.

The Rutherford Review examined—amongst other matters—the impact of a higher step-down provision at 13 weeks as part of reforms to the Tasmanian Workers Compensation scheme in 2001.

While no hard data or analysis is provided in this report, Rutherford stated the following with respect to the rationale for step-downs:

It is important to understand the rationale behind step-downs in workers' compensation income support, as they are a fundamental feature of all modern statutory schemes and certainly of those in Australian jurisdictions.

There are two key arguments for having a step-down structure. The first is based on equity between employer and employee. Given that the system is no-fault, the existence of step-downs provides, as a quid pro quo, an element of sharing of the cost burden between the parties. The second, and to my mind more important line of reasoning, is one based on the efficiency argument for having an incentive to return to work. The Interim Report of the Productivity Commission alludes specifically to empirical evidence that suggests step-downs provide incentives for return to work (p195–6).

He further states the following regarding their effectiveness:

My own view, pending further evidence, is that the step-downs are an important incentive. I note, for example, that South Australia has no step-downs in the first 12 months and, relative to other States, has below average performance on a number of return to work measures⁴. Most of the anecdotal evidence I heard supported the value of step-downs as an incentive and they had broad policy support in the other jurisdictions visited.⁵

⁵ The Report on the review of Workers' compensation in Tasmania (Rutherford Report) is available on the WorkCover Tasmania website at http://www.workcover.tas.gov.au/workcover_tasmania/scheme_performance_and_reporting/other_research_and_reviews/rutherford_report

10. In relation to work capacity testing what is the Victorian methodology which is more effective than the current scheme available in NSW (p12)

The Hon. ADAM SEARLE: Is there any particular model of this working in any other jurisdiction that you would look to as a guide?

Mr KRAWITZ: Victoria has a model around work capacity assessment that is more binding and the view from our members who also play a role in the Victorian scheme is that we believe it is a positive and a strong tool to assist partially incapacitated workers back into the workforce.

The Hon. ADAM SEARLE: I was really more looking at the methodology of how the assessment was being done. Are you saying the Victorian methodology is the one you would be looking to?

Mr KRAWITZ: I cannot say if the methodology in Victoria is substantially different to the methodology in New South Wales. I would have to take that on notice.

The ICA submits that there is a more robust and effective framework in Victoria in relation to work capacity testing than currently exists within the NSW scheme.

In Victoria all injured workers are required to undergo work capacity testing before the 130 week mark for weekly payments. This involves the use of strict assessment criteria by independent medical examiners and vocational assessment providers who examine information from the worker's treating doctors to determine what, if any, employment the worker is capable of doing, either currently or in the foreseeable future.

If it is established that they have no capacity for work they remain on weekly payments.

If however it is established that they have a level of work capacity at that stage then in most circumstances, payments of weekly compensation end at that time subject to the usual review processes.⁶

The process is undertaken by appropriately qualified and independent medical personnel and is clearly explained to the worker at each step in the process. The ICA submits that this regime is effective as the work capacity testing, the benefit structure under the legislative requirements all work together to encourage sustained return work outcomes for injured workers.

⁶ Section 114 Accident Compensation Act 1985 (Vic)

11. Who pays for the first and subsequent assessments for WPI in the workers compensation scheme (p14)

The Hon. TREVOR KHAN: I take you to the third paragraph on page 6. In a situation where a lump sum benefit is paid, there has been some form of assessment undertaken to determine the whole person impairment. Is that correct?

Mr KRAWITZ: That is correct.

The Hon. TREVOR KHAN: Who pays for that assessment?

Mr KRAWITZ: I believe the scheme ultimately pays for that assessment, but we should take that on notice to be 100 per cent certain.

...

The Hon. TREVOR KHAN: Let us go to a situation of an assessment having been made, one assumes the worker has been appropriately represented and a year or two later seeks a further assessment. Who pays for the second assessment undertaken at that stage?

Mr KRAWITZ: Again my belief would be that that would be paid for by the scheme and the scheme agent.

The Hon. TREVOR KHAN: Would that be the case irrespective of whether, on that further claim, the level of impairment was increased?

Mr KRAWITZ: I believe that is the case, but we will take it on notice to confirm it.

The Hon. TREVOR KHAN: If they came back for a third assessment a year or so later, is that again a situation where the insurer pays for the third assessment, irrespective of the size of the further impairment?

Mr KRAWITZ: Again, I believe that to be the case and we will confirm it.

The Hon. TREVOR KHAN: If the second or third assessment came back—perish the thought—with a lesser level of impairment, would you check whether the insurer would end up paying for that assessment as well?

Mr KRAWITZ: I believe that would be the case, but we will confirm it.

Under section 73 of the Workers Compensation Act 1987 the cost of obtaining of a permanent impairment medical certificate and any examination required for the certificate are recoverable from the scheme agent and form part of the worker's reasonable and necessary medical expenses under Division 3 of that Act. This section would apply equally to any subsequent examination. The scheme agents pay these costs in accordance with the Gazetted Fee Schedules issued by WorkCover.

12. What is the process of assessment for WPI in the MAS process for the CTP scheme (pp 14 - 15)

The Hon. TREVOR KHAN: Prior to the motor accidents legislation going through its most recent iteration, you essentially only got one hit in terms of the level of impairment that somebody had suffered in a motor injury. Would that be correct?

Ms MULLEN: Could you ask that question again?

The Hon. TREVOR KHAN: In terms of a motor accident, where an assessment of impairment was done, irrespective of the precise mechanism, the injured passenger or driver only got one shot in terms of impairment, did they not? They were not able to come back over and over again.

Ms MULLEN: That is my understanding. In the New South Wales compulsory third party scheme there was a medical assessment service and my understanding is that those injuries would be assessed by that service, and my understanding is that that is their single shot, but I can confirm that and get back to you.

The Hon. TREVOR KHAN: That has historically been under motor accidents legislation.

Ms MULLEN: Yes.

The Hon. TREVOR KHAN: You made your claim and you got an assessment, and whether that was done you only had one shot at it, you could not come back a year or so later and say, "Wait a minute"—

Ms MULLEN: I think that is correct. My understanding is that you cannot come back for a second time, but I will confirm that.

Mr KRAWITZ: I think we should take that on notice. I do not have intimate knowledge of the workings of the Motor Accidents Scheme, so I think we should take that on notice to confirm.

The ICA refers to the material provided above under question 7 concerning the independent assessment of medical issues by MAS in the NSW CTP scheme. Under that process, if the matter is ready for assessment the dispute is allocated to a MAS Assessor or more than one Assessor if required, to assess the dispute. MAS Assessors are medical and allied health professionals who have been appointed under Section 59 of the *Motor Accidents Compensation Act 1999* on the basis of their acknowledged expertise, independence and credibility within their area of specialty. There are currently 176 MAS Assessors from over 25 different medical specialties and allied health groups.

MAS Assessor decisions are final and binding on the injured person, the insurer, any claims Assessor and the Court. However there are particular circumstances when a party may lodge an application for further assessment or review of a medical assessment.

A further MAS assessment can only be lodged when there is deterioration in the injured person's condition or additional information has come to hand which will have a material effect on the outcome of the previous assessment. As there is threshold of 10% WPI in the CTP scheme to access non economic loss, any new information would not be material if it was not likely to take the assessment over that threshold.

A review of the MAS assessment can only be lodged if the party can show that the assessment is incorrect and if corrected could have a material effect on the outcome. This preliminary assessment is undertaken by the MAS Proper Officer. If the Proper Officer accepts the review application the dispute is then referred to a Review Panel. The Panel is usually made up of 3 or more MAS Assessors and often re-examines the injured person. The Panel will review all aspects of the previous assessment and may confirm the previous decision or issue a new one.⁷

The only avenue for judicial review of decisions of the Proper Officer or MAS Assessors is in the Supreme Court for breach of administrative law principles.

⁷ More information is available on the MAA website: www.maa.nsw.gov.au