

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 12 MAY 2014

QUESTION 1

CHAIR: As you would be aware, in the case of Transfield Services (Australia) Pty Limited v WorkCover Authority of New South Wales and Mark Humphrey, it has been identified that conflicts of interest can arise with WorkCover undertaking multiple roles in the workers compensation scheme. Would you like to outline the details of that case and its implications for the operation of the workers compensation scheme?

Mr JEFFREY: Can I clarify? Around the Transfield case?

CHAIR: The details of that case and its implications generally for the scheme?

Mr JEFFREY: I would like to take the details of the Transfield case on notice.

RESPONSE

In July 2013, self-insured employer, Transfield, received an application from a worker for an internal review of its work capacity decision under the workers compensation legislation. After Transfield issued the internal review decision, the worker applied to WorkCover for a merit review, which was completed and issued on 27 August 2013.

WorkCover's merit review decision recommended Transfield should not have made a work capacity decision about the worker's weekly payments until after the Workers Compensation Commission determined a current dispute about liability. The effect of the WorkCover merit review decision would have been to continue the worker's weekly payments until after the dispute regarding liability was determined by the Workers Compensation Commission.

In October 2013, Transfield filed a Supreme Court challenge seeking to set aside the merit review decision asserting the decision fell into jurisdictional error. Both WorkCover and the worker were joined as defendants. Transfield joined WorkCover as the party responsible for issuing a decision that was not in accordance with the law. Transfield also sought an injunction to prevent the worker claiming further weekly payments.

It was agreed that WorkCover's merit review decision contained an error at law. Both WorkCover and the worker filed submissions that an error of law was made.

On 31 January 2014, a consent judgment was made by the Supreme Court quashing WorkCover's decision of 27 August 2013, and remitting the matter back to WorkCover to be determined according to law. WorkCover completed the merit review in accordance with the Supreme Court's orders after the parties had supplied additional information.

On 1 April 2014, WorkCover's merit review found the worker is not entitled to ongoing weekly payments of compensation. The findings and recommendations have been issued to both parties.

This matter was resolved by consent. WorkCover uses its best endeavours to ensure its merit review decisions comply with the law.

QUESTION 2

Mr DAVID SHOEBRIDGE: Were you troubled by what you read in that transcript—the authority seeking costs from the worker when it was the authority's own stuff-up in the first place? Were you not troubled by it? Did you not go back and look at it?

.....

Mr JEFFREY: I was not aware we sought costs from the worker.

Mr DAVID SHOEBRIDGE: That was what was said in evidence?

Mr JEFFREY: I would have to go away and look at it, Mr Shoebridge.

CHAIR: Does anyone else want to comment on that aspect?

Mr WATSON: No, I think we will take the matter in respect of Transfield on notice. We are happy to provide a full and detailed response to your question, Chair, and to the interjections by Mr Shoebridge.

RESPONSE

WorkCover did not seek costs from the worker. WorkCover's formal participation in the matter was to file submissions in response to the statement of claim served on it by Transfield. WorkCover is not aware of the basis of the comments made about costs being sought from the worker. WorkCover's records show that the costs of all parties were paid for by WorkCover, save for the injunction, in accordance with the consent judgment made by the Supreme Court.

The worker's costs of the injunction were met by a grant from the Independent Legal Assistance and Review Service (ILARS).

WorkCover as the regulator of the New South Wales Workers Compensation Scheme does not generally recover costs from a worker unless there are exceptional circumstances for example, where a worker is of means and vexatiously commences litigation. This was not the case in Transfield.

QUESTION 3

The Hon. PETER PRIMROSE: Can you tell me how many injured workers were receiving support under the workers comp scheme as a consequence of hearing loss prior to the 2012 amendments to the scheme?

Mr PLAYFORD: I would have to take that on notice to get the actual numbers and I can respond to that.

RESPONSE

See Attachment A.

QUESTION 4

The Hon. PETER PRIMROSE: While you are doing that, can you also let me know how many of those workers have had their support terminated under the provisions of the new legislation?

Mr WATSON: Yes, we can take that on notice.

RESPONSE

See Attachment A.

QUESTION 5

The Hon. PETER PRIMROSE: How many injured workers met the scheme's definition of being seriously injured in 2013?

Mr JEFFREY: Approximately—we would have to give you the exact number on notice—but approximately 900.

RESPONSE

At the commencement of the seriously injured worker provisions on 1 October 2012, 817 workers under the Workers Compensation Nominal Insurer Scheme met the seriously injured worker threshold.

As at the end of December 2013, 1,008 workers under the Nominal Insurer Scheme met the seriously injured worker threshold.

QUESTION 6

Mr DAVID SHOEBRIDGE: On notice you were asked this question: How many workers have lost their entitlements to medical expenses as a result of work capacity assessments for the periods 1 July 2012 to 30 June 2013 and 1 July 2013 to date. Your answer was:

A work capacity decision does not examine an injured worker's entitlement to medical expenses. Workers whose weekly payments of compensation have ceased will retain their entitlement to reasonably necessary medical and related expenses for 12 months from the date those weekly payments ceased.

I do not know if that was you Mr Playford or Mr Jeffrey or someone else in WorkCover that gave that answer, but the answer clearly recognised the fact that when a work capacity decision gives a worker a zero entitlement to weekly benefits and they lose their weekly benefits for 12 months that they then cease to get their medical expenses. You recognised that was what the question was getting at. How many workers have lost their medical expenses because that has played out and I ask you now to answer it?

Mr JEFFREY: I think we would have to—I am trying to think about how—

Mr DAVID SHOEBRIDGE: The number would have been helpful.

Mr JEFFREY: Because of the complexity around work capacity assessments we would have to go back and look at who has been reinstated into benefits as well. It could fluctuate. I am trying to think—

The Hon. PETER PRIMROSE: How many people have had their benefits reinstated?

Mr DAVID SHOEBRIDGE: You have given the Committee those partial answers in other parts of your answers. We are asking you to put the two pieces of information together and tell us how many people have had their medical expenses cut because of an adverse work capacity decision? They have had 12 months with no weekly payments and then had their medical expenses cut—it is not brain surgery.

Mr JEFFREY: No, but it depends. The number of work capacity assessments and numbers we gave you were over a period and then they get 12 months post that. We need to go back 12 months from today and look at the number to there to give you that figure.

CHAIR: You will be able to do that?

Mr JEFFREY: Yes.

RESPONSE

While WorkCover collects data regarding the number of adverse work capacity decisions made across the system, it does not collect specific data on the number of workers who have stopped receiving medical benefits as a result. Advice from Independent Scheme actuary, Mr Michael Playford, provides an estimate as to the extent of the reduction of medical benefits in relation to the Nominal Insurer Scheme:

“... approximately 10,000 active claims ... per quarter historically received medical benefits which would now be expected to be initially eliminated by the operation of the medical cap at 31 December 2013”.

Further comment around the complexities of collating this data is outlined in Mr Playford's letter at Attachment B.

QUESTION 7

Mr DAVID SHOEBRIDGE: When you saw there had been a case for 199 days this director who you work closely with, what did you ask him?

Mr JEFFREY: I have asked him. We have an action plan to implement, we have appointed resources and—

Mr DAVID SHOEBRIDGE: What did he say about the 199 day case?

Mr JEFFREY: I would need to take that on notice.

RESPONSE

The oldest merit review application that was on hand at 10 April 2014 was 199 days after lodgement. This matter has since been finalised and issued.

The timeliness of the decision in this matter was affected by the age of the claim, the volume of documentation to be considered during the review and the backlog caused by the high volume of matters lodged at the Merit Review Service.

WorkCover is implementing a range of strategies aiming to reduce the backlog of applications for merit review as quickly as possible, including prioritising matters to ensure 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. It is anticipated the current backlog will be removed by the end of the transition period at 30 June 2014.

QUESTION 8

Mr DAVID SHOEBRIDGE: How many workers have had an absolute loss of their benefits because of a bureaucratic failure by WorkCover?

Mr JEFFREY: I would need to take that on notice.

RESPONSE

There are approximately 69 workers who have had their payments ceased while their matter remains at merit review for reasons such as:

- The worker obtained alternate financial assistance.

- The worker returned to employment.
- Work Injury Damages claims settled and the worker was no longer entitled to weekly payments.
- The insurer is waiting for information, such as payslips, from the worker.

WorkCover is unable to give a breakdown of what specific category the 69 workers fall into. WorkCover is aware there are approximately another 145 workers who have had their weekly payments ceased while their matter is still at merit review. WorkCover has been liaising with insurers and workers to ensure that any complaints regarding these matters are addressed as a priority, and, where appropriate, weekly payments are reinstated.

WorkCover will continue to work with Nominal Insurer Scheme agents as the remaining merit review applications are completed.

QUESTION 9

Mr DAVID SHOEBRIDGE: Could you please provide us the exact numbers of workers who have lost their benefits because of these failures in WorkCover and perhaps some detail about what WorkCover is doing to address it. For myself, I find that failure of WorkCover one of the grossest failures of a statutory authority: To see people struggling on workers comp, then lose their benefits absolutely because of the bureaucratic failings in WorkCover. It beggars me that it has got to that point. Could I ask you about the Goudappel case? I do not know who has their head around the finances best for the Goudappel case. What has been the financial impact of the Goudappel case?

Mr PLAYFORD: The Goudappel matter?

Mr DAVID SHOEBRIDGE: You can call it Goudappel, you may know better than me.

Mr PLAYFORD: I have recently completed my evaluation as at 31 December 2013. The outstanding liability that I estimated in respect of future payments that could be paid to Goudappel matters, including associated legal costs, is of the order of \$355 million. I have provided a letter to WorkCover in which I included an estimate of the number of claims.

Mr DAVID SHOEBRIDGE: Did you say \$355 million?

Mr PLAYFORD: Yes. There has also been a quantum that has been paid over the last 12 months or so in respect of Goudappel matters.

Mr DAVID SHOEBRIDGE: How much is that? You are looking, sorry.

Mr PLAYFORD: If you would like me to dig through—if I am taking too long I am happy to take it on notice. It is of the order of about 17,000—

Mr DAVID SHOEBRIDGE: Claims.

Mr PLAYFORD: —claims for section 67 and of the order of about 13,000 to 15,000 matters for section 66 benefits. I have a letter somewhere where I can provide some exact numbers.

Mr DAVID SHOEBRIDGE: You can give us the exact numbers on notice.

RESPONSE

In relation to the numbers of workers who have had their payments ceased while their matter is at merit review, please see response to question 8.

In relation to the financial impact of the Goudappel case, please see Attachment C.

QUESTION 10

Mr DAVID SHOEBRIDGE: If you have a detailed working from PricewaterhouseCoopers, could you provide that to the Committee?

Mr PLAYFORD: Absolutely.

RESPONSE

See Attachment C.

QUESTION 11

Mr SCOT MacDONALD: My question relates to an earlier issue raised with the Committee—namely, Atilio Villegas, your file No: 2012005855. Indeed, my question relates to the separation of decision making and whether you decide to prosecute or not. This report outlines 17 failures, some of which are substantial and others possibly not so substantial, but in the view of investigator Pryor they probably contributed to the death of this man. I would like to understand how the decision was made not to prosecute Leighton, Waco or Proforma, or all of them, and the reason behind that. We all stood for the death of workers. I am not signed-up to the idea that the number of prosecutions is what really matters; to me it is the quality of prosecutions. When I read this report, even though procedures were put in place by Leighton and Proforma, and possibly even Waco, the design of those procedures and the monitoring of them had failures. In the design there were not, as they call them, hop-ups, mid-rails and things like that.

So even though there were some good processes, you can have the best processes in the world but if those processes are not followed through, particularly in performing dangerous roles such as this man was carrying out—by all accounts the lack of hop-ups appears to have contributed to his death—I am not a lawyer but from my reading it appears there were some fairly substantial failures.

I am happy for this question to be taken on notice: Why has there not been a prosecution of one or all of those companies, in spite of their written processes and all those sorts of things? Do you want to respond to that now or leave it for later?

Mr WATSON: I will take the substantive part of the question on notice.

RESPONSE

Based on its *Compliance Policy and Prosecution Guidelines 2012*, WorkCover made the decision not to take prosecution action in this instance on public interest grounds.

The company which employed Mr Villegas, along with three related entities, were placed into external administration in July 2013.

Two of these entities, were recently de-registered and have ceased trading. The other entity remains in administration and is currently being wound up.

A decision was also made not to prosecute the principal contractor of the site on the basis it had implemented advanced safety and monitoring of work systems on site. The design intent was for 'hop ups' to be used and monitoring by the principal contractor was adequate.

QUESTION 12

Mr SCOT MacDONALD: Is there some rationale or thinking behind why Leighton would not be brought to account over this?

Mr WATSON: I am happy to take that question on notice. I do say that it has been the application of the publically available document that we have used. We will look at that and give you a full explanation of that on notice.

Mr SCOT MacDONALD: I cannot see a date on this WorkCover report by Mr Pryor. It is a comprehensive report, and there is a police report behind it, but it does not have a date. One of the issues is, unless I have got the date wrong, there seems to have been a long time between the death in March 2012 and the report about 18 months or close to two years later. Unless I have missed something, it was a long period of time before that report came through. Could give us some clarification around that?

Mr WATSON: I will certainly do that. We often have interactions with the Coroner that also delay matters. We will look at the time frame, the content and the decision-making.

Mr DAVID SHOEBRIDGE: I think the Coroner has refused.

Mr SCOT MacDONALD: I am confused about the Coroner. I went to the Coroner and I even paid for a coroner's report, but there is no report that I can find.

Mr WATSON: They made a decision not to hold an inquest.

Mr SCOT MacDONALD: That could well be. My office was not told precisely that. That is a grey area.

Mr WATSON: I think that is the case. I will check it and provide the information to the Committee.

Mr SCOT MacDONALD: Without specifically talking about this report, I think I or other members might have put some questions to you about the phoenix problem. In this instance we are dealing with some phoenix problems. I do not want to verbal you, but I think you responded that it is not your role; it is an Australian Prudential Regulation Authority/Australian Securities and Investments Commission role. I understand the reasoning behind that response; you do not have the powers to go behind it. This Committee could put up some ideas or make some recommendations around phoenixing and probing at the point of a company applying to get a policy. You might put questions to them much like those asked when people apply for comprehensive insurance. They are asked whether they have a no-claim bonus, whether they have other policies and so on.

If the authority were given the power—if that is the appropriate thing to do—would it not be feasible or reasonable to do a bit of probing when the policy is applied for? The public officer, director or related party might be asked whether they have any outstanding premiums or other policies and whether in the past six months or year they have had a policy relating to an entity that has gone into receivership or administration, has been suspended, or a policy has been suspended. Would they be unreasonable things to consider that might go some way to overcoming the pro forma, Waco or phoenix issues?

Mr WATSON: Getting as much information as we can when a policy is issued by an agent will obviously assist that. Clearly, there needs to be legislative power for us to make those probes.

Mr SCOT MacDONALD: You do not have that power now?

Mr WATSON: I am not sure; I will need to take advice.

RESPONSE

As detailed in the response to Question 11, based on its *Compliance Policy and Prosecution Guidelines 2012*, WorkCover made the decision not to take prosecution action in this instance

on public interest grounds. The decision was made on the basis the principal contractor had implemented advanced safety and monitoring of work systems on site.

The report to the Coroner was sent in January 2013, just under a year after the incident, along with the WorkCover Inspector's report.

A 15-volume WorkCover report to the Coroner was provided to the Court in January 2013. The Coroner is yet to advise WorkCover whether an inquest will be held.

As previously advised to the Committee, WorkCover does not have power to prevent a company from incorporating and employing workers. The *Workers Compensation Act 1987* requires employers to hold a workers compensation insurance policy. WorkCover's obligation as a regulator is to ensure employers hold a workers compensation insurance policy. Any change in legislation is a matter for Government.

QUESTION 13

The Hon. SARAH MITCHELL: I refer to the inspections undertaken by and the reports from workplace inspectors. Some witnesses have been critical of the variability in the reports. What action does WorkCover take to ensure that the quality and accuracy of not only the inspections but also the reports?

Mr WATSON: I am not sure to which reports the member is referring. I will talk about the governance arrangements we have in place to ensure that inspectors comply with our internal standards and against which they are required to deliver. We have a specific governance unit that conducts internal audits of operations of inspectors when they serve a notice, write a report, provide an exit report when they leave a workplace and so on. Those sorts of things are all subject to audit and a report is prepared for our senior management team, which discusses them at meetings to ensure that we get consistency. When it comes to the individual performance of an inspector in the field, as I have said the previous times I have appeared before Parliamentary inquiries such as estimates and so on, we are very happy to hear from members of the public if they believe that an inspector is not fulfilling their duties appropriately; and we will deal with that. My inspectors know that that is something I am committed to doing.

It is important we do that because it is important that the New South Wales community has an inspectorate which is robust and inspectors who understand how to conduct themselves, with the authority that they have, in an appropriate manner. So we are very happy to receive that information. I can provide you on notice with the detail of our structure around the management of the governance of that. Recently I have asked for our internal auditor, who is separate from the people who work in our division, to seek out a review of the decision-making processes—the very issues that Mr MacDonald has been exploring with me here this morning—we have for prosecutions to ensure that it is robust, that best practice is going on around the country, and that it delivers what we need to deliver in respect of transparency and accountability. So that process is getting underway. An external person will come in and do that for us. They will provide us with an overview and, I would expect, with some recommendations for improvements or areas we can adjust. If members are interested and if it would be helpful for the Committee then we can detail that as well.

The Hon. SARAH MITCHELL: Thank you, that would be helpful.

RESPONSE

WorkCover ensures the accuracy and consistency of its inspections and related reports through a number of mechanisms.

Training - The New Inspector Training Program is a comprehensive 12-month training program, which provides new inspectors with the knowledge and skills required to carry out the role of an inspector, as well as meeting the training and assessment requirements for the *Diploma of Government (Workplace Inspection)*. The training program includes specific training on conducting workplace inspections, WorkCover's policies and procedures and the reporting requirements that arise from workplace visits

New inspectors put their classroom training into practice throughout the training program. Supervision and guidance is provided by allocating new inspectors to experienced inspectors, which allows new inspectors to observe workplace inspections, be mentored and supported until they progressively start conducting workplace inspections.

Policies, Procedures and Guidelines - Inspector practice is expected to comply with WorkCover's detailed policies, procedures and guidelines. A single authoritative source of direction for inspectors is contained within the Work Health and Safety Division's Single Operational Manual, launched on 25 February 2014. All current WorkCover inspectors have received training on the Manual, which is available on the Agency's intranet site, and staff are dedicated to maintaining the currency and accuracy of it.

The Manual covers all aspects of inspector work and addresses things such as inspector behaviour, practices, record keeping, report issuing and exercising compliance powers. The Manual sets out the policies and procedures that apply in every circumstance that an inspector encounters, including the requirement for inspectors to advise businesses of their statutory and non-statutory rights to appeal an inspector decision.

Additionally, managers who supervise inspectors routinely review records of inspector actions. Policies and procedures for supervisors are also contained in the Single Operational Manual.

Internal Governance – The Governance and Appeals Unit supports WorkCover's Work Health and Safety Division by monitoring and reviewing business processes and reporting on identified issues and deficiencies in relation to organisational, government and legislative requirements. For example, the Unit conducts independent internal reviews of regulatory activities undertaken by the Inspectorate. The areas of activity assessed as being higher risk in regards to consistency and conformance are reviewed as per an Executive-approved schedule that identifies and nominates review types and timeframes over a 12-month period. The outcomes and recommended actions of these reviews are used as a learning tool to progress continuous improvement and are monitored by independent units to ensure completion.

The Unit also conducts internal reviews of reviewable decisions made by the Regulator and the Inspectorate (as provided by law) as requested by eligible persons, including appeals against notices and licence decisions. Regular reports and recommendations are provided by the Unit to promote conformance and continuous performance improvement across the Work Health and Safety Division.

External Review - SRWS has commissioned Fellows Medlock & Associates Pty Ltd to undertake an external review of work health and safety investigation decision. Within SRWS, the Investigations Decision Making Panel determines whether to commission a full investigation following a report on workplace health and safety incidents from WorkCover inspectors. The Panel is guided by criteria in the Investigations Decision Making Policy and National Compliance and Enforcement Policy.

This review will consider matters both referred and not referred to the Panel between June 2013 and March 2014, to measure inspector decisions against these policies. The review is now underway and it is anticipated that a final report will be received in July 2014.

QUESTION 14

The Hon. PETER PRIMROSE: Has that person been communicating with other agencies such as the WorkCover Independent Review Office?

Ms DONNELLY: We have not been publicising it. I believe at the moment they have got something like about seven matters that they are working on for which they will have perhaps made phone calls on behalf of that person. But at this point there has not been a lot of publicity. They will be just ringing and saying, "I'm from the customer service centre." But the idea is to build a resource within the first level of the front-line team of a person who has deeper expertise and networks.

The Hon. PETER PRIMROSE: Mr Garling from WIRO has advised the Committee that he has never heard of the officer.

Ms DONNELLY: I had a conversation with Mr Garling about that last week. He was kind enough to advise me of that as well. I do not believe we have taken particular steps to publicise the role. My team have advised that they have mentioned that we intended to do it sometime ago, so he may not have been advised that it has now started up. I can take on notice, if you like, whether or not the person has actually had conversations with the WIRO. They just may not have introduced themselves in terms of their particular position title at this point because it is just starting up.

RESPONSE

The Work Capacity Liaison Officer role provides specialist support to other WorkCover Customer Service Centre staff. In instances where staff refer an injured worker or other customer to the Work Capacity Liaison Officer, the Officer will communicate directly with the injured worker or other customer.

WorkCover and the WorkCover Independent Review Office have both established a single liaison and contact person to communicate on matters related to injured workers. The WorkCover single liaison and contact person is the Senior Manager of Customer Experience. The Work Capacity Liaison Officer reports to the Senior Manager Customer Experience in the organisational structure.

In line with this arrangement, the Work Capacity Liaison Officer raises matters that need to be discussed with the WorkCover Independent Review Office, to the Senior Manager of Customer Experience who communicates with the single liaison and contact person at the WorkCover Independent Review Office. For this reason, the Work Capacity Liaison Officer has not had direct conversations with the WorkCover Independent Review Office.

QUESTION 15

The Hon. PETER PRIMROSE: Returning to the review of the guidelines for claiming benefits, what significant changes are you looking at?

Mr JEFFREY: Can I take that on notice, because, as I said, they were quite complicated and convoluted. I would rather put some structure around a response.

The Hon. PETER PRIMROSE: That is fine. Thank you.

RESPONSE

The purpose of the review of the *Guidelines for Claiming Compensation Benefits* is to outline the actions to be taken when making or determining a claim for compensation under New South Wales workers compensation legislation.

The objectives of reviewing the Guidelines are to:

- make them simpler;
- ensure that the guidelines are accessible and easily understood by all stakeholders in the claims process;
- review current content to remove duplication;
- determine content where allowed by specific legislative provision; and
- identify inconsistencies and provide clarification of claims processes.

The Guidelines have undergone a comprehensive review by working groups consisting of WorkCover Scheme agent and self and specialised insurer representatives.

This working group was formed to prepare technically correct content for a draft Guideline in line with the objectives stated.

WorkCover is proposing that the reviewed guidelines should include:

- Reasonable excuse - The new Guidelines will reflect legislation on this point.
- Provisional liability – There is a new emphasis on the term ‘provisional payments’ rather than the term ‘Provisional Liability’ in order to clarify the intent of legislation and remove confusion over the concept of provisional liability .
- Legislative powers - WorkCover is currently undergoing a review process of the Guidelines with stakeholders to ensure appropriate material is contained in the statutorily binding WorkCover Guidelines.

WorkCover has developed a consultation strategy to ensure the draft guidelines are appropriately released for consultation prior to gazettal. This strategy involves initial consultation with the WorkCover Independent Review Office (WIRO), followed by the opportunity for further feedback via the ‘Have your Say’ website. Key stakeholders will be notified of this mechanism and the 21-day consultation period once the site is live.

WorkCover notes that a concern expressed within the Law and Justice Review was that the review of the *Guidelines for Claiming Compensation Benefits* would result in a significantly longer document than currently exists. By adopting the above objectives and proposed changes, the draft Guidelines have become more concise, accurate and accessible to stakeholders. Despite the inclusion of benefits not covered in the existing Guidelines, the draft Guideline length has been significantly reduced.

QUESTION 16

Mr DAVID SHOEBRIDGE: What is your best estimate, sitting here now or as recently as you have done it, of the scheme's current deficit?

Mr PLAYFORD: The scheme is currently in a surplus position of a bit over \$1.3 billion, and that is about a \$1 billion improvement over the last six months. If you would like me to dig into the drivers of that improvement, obviously I am happy to.

Mr DAVID SHOEBRIDGE: I would.

RESPONSE

See Attachment D.

QUESTION 17

Mr DAVID SHOEBRIDGE: Who authorises payment for the wages of the WorkCover Independent Review Office's staff? If the WorkCover Independent Review Office wants some money to employ some additional staff, who do they come to?

Mr WATSON: I will have to take that on notice. I would have to take that on notice. I am not aware of that complexity, but we can take that on notice.

RESPONSE

Non-Executive staff within the WorkCover Independent Review Office (WIRO) are employed by the Office of Finance and Services. Senior Executive Staff within the WIRO are employed by the Department of Treasury and Finance. Wages for all staff are paid by Safety, Return to Work and Support.

Section 35 of the *Workplace Injury Management and Workers Compensation Act 1998* provides that the remuneration of the WorkCover Independent Review Officer and staff of the WorkCover Independent Review Office, as well as costs incurred in connection with the exercise of the functions of the WorkCover Independent Review Office may be paid from the WorkCover Authority Fund.

Any planned increases in resourcing form part of the annual Treasury budget and forecasting process and may require an Expenditure Review Committee Minute. Any in-year over budget expenditure would be a matter for Treasury.

QUESTION 18

Mr DAVID SHOEBRIDGE: Would WorkCover have any objection to there being an independent funding arrangement for the WorkCover Independent Review Office; in other words, you getting out of the business of funding the WorkCover Independent Review Office and there being a statutorily independent funding process for the WorkCover Independent Review Office?

Ms DONNELLY: I think we will take that on notice because partly it may be a matter of government policy about how they have set up the arrangements.

.....

Mr DAVID SHOEBRIDGE: Well, it is called the independent review office.

Ms DONNELLY: I certainly understand and accept that.

Mr DAVID SHOEBRIDGE: If you want to put truth to that statement, independence in funding would be a key part of it, would it not?

Ms DONNELLY: I guess I am just alerting the Committee to the fact that a position on that would not be made by the witnesses that you have here today, so we will take that on notice.

RESPONSE

The funding arrangements for the WorkCover Independent Review Office to be funded from the WorkCover Authority Fund are set out in the *Workplace Injury Management and Workers Compensation Act 1998*.

Changing the legislation would be a matter for Government and ultimately the Parliament.

QUESTION 19

Mr SCOT MacDONALD: This is not so much question but a clarification getting back to Mr Villegas. One of the things I am looking for in your response is the feature of subcontractors and contractors going into administration not being a barrier to prosecution. The Waco pro forma, in that decision to prosecute or not prosecute, the fact that those subcontractors had gone into administration was a barrier to not prosecute.

Mr WATSON: In this particular case.

Mr SCOT MacDONALD: In this particular case, but in your thinking.

Mr WATSON: In general terms, one has to have a defendant to prosecute or a legal identity to prosecute. When that legal identity has been wound up, you do not have that.

Mr SCOT MacDONALD: I understand the pro forma and Waco, but we have a principal contractor in this situation. We have Leighton's—

Mr WATSON: Yes.

Mr SCOT MacDONALD: —which is responsible for a safe working environment.

Mr WATSON: As I say, we will take all that on notice, but every case rises and falls on the facts of the matter and the details. We will bring all that together for you.

Mr DAVID SHOEBRIDGE: But when a company becomes deregistered, you have also got the people who are involved in the management of it.

Mr WATSON: That is right. By practice we look at running prosecutions against the individual directors of companies as well as the legal identity of the company. That is quite a common practice for WorkCover.

Mr DAVID SHOEBRIDGE: Will it be part of your answer to Mr MacDonald in the Villegas matter?

Mr WATSON: If you have a question that you want us to answer.

Mr DAVID SHOEBRIDGE: Did you look at that?

Mr WATSON: Did we have a look at that? Yes, we can have a look at that, sure.

RESPONSE

As detailed in responses to Questions 11 and 12, based on its *Compliance Policy and Prosecution Guidelines 2012*, WorkCover made the decision not to take prosecution action in this instance on public interest grounds. The decision was made on the basis the principal contractor had implemented advanced safety and monitoring of work systems on site.

WorkCover determined not to prosecute either Director of the related entities involved in employing Mr Villegas on the basis they exercised due diligence as required by the legislation. That is, they were involved in monitoring the safety systems in place at the incident site, ensuring that safety breaches were followed up and workers were provided with supervision and training.

QUESTION 20

The Hon. SARAH MITCHELL: I have just a quick question in relation to the Self Insurer's Association. I am not sure if you have seen a transcript of the evidence that they gave to us when they appeared, but they had some concerns about the audits that they have to go through in relation to workplace health and safety. The cost, complexity and regularity were three of the terms that were used. Are you able to provide some information, either now or on notice, to the Committee about what the audit requirements are for self and specialised insurers?

Mr WATSON: We can provide you on notice with the detail of the audit, but by way of background and for context to the answer we will give: We use the national audit tool for work health and safety, which is agreed to by all the workers compensation insurers across Australia. It is that audit tool that we administer in New South Wales. We use a sampling practice rather than a 100 per cent practice so out of the five elements in the audit tool we sample two of those and self-insurers need to pass to a 75 per cent standard rather than a 100 per cent standard. Other self-insurer arrangements around the country in at least one jurisdiction may use 100 per cent over the five standards or the five elements. That is the approach we take. That audit tool currently is being reviewed—I am aware of that—and we have people working on that committee to review that audit tool. But we will give you a full answer to that question on notice, if you like.

RESPONSE

New South Wales workers compensation self-insurer licence conditions state insurers must perform their obligations and functions as a licensee in accordance with commercially acceptable and professional standards, and demonstrate performance in injury and claims management of a standard acceptable to WorkCover. Self-insurer licensing conditions relate to the type, term and continuity of a licence, minimum employee number, financial viability and strength, provision of security, injury and claims management, compliance with legislative requirements, and occupational health and safety management system (OHSMS) performance.

OHSMS audits are conducted using the National Self-insurer OHS Audit Tool (NAT). The NAT also helps assess an organisation's compliance to the relevant legislation that applies within its jurisdiction.

The NAT is based on Australian Standard 4801: 2001 Occupational health and safety management system specification, with guidance for use. It defines 108 criteria (previously 114) and is grouped into five categories:

- health and safety policy;
- planning;
- implementation;
- measurement and evaluation; and
- management review.

Due to varying methodology in each jurisdiction, audit duration can vary from four days to a few months. WorkCover NSW uses a risk-based approach and requires new applicants to achieve 75 per cent conformance for three categories audited, with the same percentage required for two categories at licence renewal. WorkCover NSW chooses one of the categories. This results in an audit duration of four days for an individual licence, and five to eight days on group licences (excluding pre-reading and preparation).

The New South Wales sampling methodology was developed in consultation with the NSW Self-Insurer's Association.

WorkCover NSW issued a discussion paper in September 2013 to measure the satisfaction of this approach. The majority of feedback was positive and supported that WorkCover process and sampling methodology is fair, to the extent that a similar approach would be preferred in other states. It was also agreed that the current three-year audit frequency for those self-insurers that meet the benchmark is adequate and that extending this period to more than three years would be detrimental to safety standards within the self-insurers' workplaces.

QUESTION 21

The Hon. PETER PRIMROSE: I note that WorkCover has convened an allied health provider framework working party. The review will identify and develop opportunities to harmonise approaches across WorkCover and the Motor Accidents Authority. Would someone talk to that?

Mr JEFFREY: It would probably be better for us to take it on notice.

RESPONSE

WorkCover convened the Allied Health Provider Framework Review Working Party in January 2014. The group meets once a month and the outcomes are communicated back to the relevant stakeholder via the representative. The objectives of the Allied Health Provider Framework Review are to:

- align with the increased focus on recovery at work and system objectives resulting from the 2012 workers compensation legislative reforms
- embed the principles of the provision of health services to injured people as outlined in the Clinical Framework For the Delivery of Health Services
- reduce red tape and improve consistency across the various allied health provider groups involved with the authorities of Safety, Return to Work and Support (SRWS).

The Allied Health Provider Framework Review Working Party comprises representatives from key allied health provider peak associations, insurers, WorkCover's independent consultant network and each of the SRWS agencies.

QUESTION 22

The Hon. PETER PRIMROSE: Yes, please. Are you aware of any impact in relation to the Motor Accidents Authority of costs transferred to it as a consequence of the abolition of journey claims?

Ms DONNELLY: I am certainly happy to take that on notice. But if I recall correctly when Mr Nicholls and other witnesses appeared before the Committee's review of the Motor Accidents Authority he indicated that there were not any impacts evident yet.

The Hon. PETER PRIMROSE: "Yet"?

Ms DONNELLY: There have not been any impacts detected to date.

The Hon. PETER PRIMROSE: Will you take that question on notice?

Ms DONNELLY: I am happy to.

RESPONSE

While it is possible that some workers compensation recovery claims are being made in the Compulsory Third Party (CTP) Scheme, it is not possible to identify them from the available data.

However, the claims experience in the 18 months ending December 2013 shows that workers compensation recovery claims reduced by about 70 per cent, while claims in the CTP Scheme have not yet shown a corresponding increase. It is anticipated that some of the workers compensation recovery claims will emerge as CTP claims, however it is not clear how quickly they will enter the CTP Scheme or to what extent.

QUESTION 23

The Hon. PETER PRIMROSE: I note that WorkCover Tasmania is developing a workplace bullying strategy. Will you talk about what WorkCover NSW has done?

Mr DAVID SHOEBRIDGE: It sounds like the subject of a whole new inquiry.

The Hon. PETER PRIMROSE: It does.

Mr WATSON: The bullying strategy is being developed. Tasmania are informing us of that across the Heads of Workplace Safety table so I will be able to inform the Committee more about that towards the end of next week after we have had another Heads of Workplace Safety meeting. The approach we have taken is we have had—I think I have spoken of this in another place—

The Hon. PETER PRIMROSE: I am not in that other place.

Mr WATSON: I understand that term, Mr Primrose. We have a service whereby people can ring the WorkCover Authority. We send out a pack of information to them which allows them to make a formal complaint to us. There is a bit of complexity here now with the Fair Work Commission as well working in this space at the Federal level so we have got the two jurisdictions operating, a bit like our discussion to do with Comcare. We then triage that against the national agreed triaging arrangements for inspectorates and we conduct an investigation into what the concern is and interact with the complainant and with the business.

The Hon. PETER PRIMROSE: You said that you expect to have some additional information in the next two weeks.

Mr WATSON: There is a Heads of Workplace Safety Authority meeting next week. I am the chair of that group and I will get some information from Tasmania and I am happy to provide it. Out of session I can seek the information from the Tasmanian jurisdiction, if you like, to inform the Committee of what it is doing.

RESPONSE

WorkCover is able to provide guidance and advice to help prevent workplace bullying, investigate whether a risk to health and safety is, or may be, posed by workplace bullying and undertake prevention and enforcement activity where appropriate. WorkCover NSW is committed to national efforts in relation to work health and safety including workplace bullying and is involved in developing and implementing the following strategies:

A common approach to work health and safety regulator event triaging

WorkCover NSW has embedded the national framework for a common approach to work health and safety regulator event triaging, into its request for service receipt and triage processes, including requests for service about workplace bullying. This allows WorkCover to triage each request for service, proportionate to the level of risk and consistent with the National Compliance and Enforcement Policy. WorkCover NSW will review these processes when the Heads of Workplace Authorities Workplace Bullying Working Group material is provided and finalised.

A uniform national approach to compliance and enforcement for preventing and responding to workplace bullying

WorkCover is a member of the co-regulator Workplace Bullying Working Group, authorised by the Heads of Workplace Safety Authorities, to develop responses to recommendation 21 of the House of Representatives Standing Committee on Education and Employment Report *'Workplace Bullying: We just want it to stop'*. The role of the Working Group is to develop a suite of operational guidance documents to support the implementation of a uniform national approach to compliance and enforcement for preventing and responding to workplace bullying. The draft documents are under review and are expected to be made available for consideration by the members in mid-2014.

A national accredited training program that equips work health and safety regulator inspectors to identify and address instances of workplace bullying

Comcare was asked by the Heads of Workplace Safety Authorities to develop a training framework for work health and safety regulator inspectors in response to recommendation 20 of the House of Representatives Standing Committee on Education and Employment Report *'Workplace Bullying: We just want it to stop'*. A draft model, titled *Workplace Inspectorate Training Framework – Preventing and Responding to Workplace Conduct Hazards and Risks*, is under review and is expected to be made available for consideration by WorkCover NSW in mid-2014.

Uniform national guidance on preventing and responding to workplace bullying

Safe Work Australia released the *Guide for Preventing and responding to workplace bullying* and the *Workplace bullying – a worker's guide* on 27 November 2013. These guides were previously released for public comment by Safe Work Australia. WorkCover NSW is in the process of replacing its current publications with these guides. These guides will be available via a link on the WorkCover NSW website.

The Fair Work Commission anti-bullying jurisdiction

On 1 January 2014, the Fair Work Commission commenced dealing with applications for an order to stop bullying if a worker is bullied while they are at work in a constitutionally covered business. There is nothing in the amended Fair Work legislation to suggest that a person conducting a business or undertaking does not need to comply with their obligations with respect to work health and safety, including in relation to the primary duty of care under section 19 of the *Work Health and Safety Act 2011*. A particular case of bullying may be under investigation by WorkCover and also subject to application with the Fair Work Commission. The Fair Work Commission and WorkCover have a cooperative working relationship, which includes development of a Memorandum of Understanding. The WorkCover website provides a link to the Fair Work Commission website bullying page.

Mental disorders - a national priority work-related disorder

WorkCover NSW endorses the priority *Australian Work Health and Safety Strategy 2012-2022* which lists mental disorders as a national priority work-related disorder and Research and Evaluation as an action area.

In support of the Strategy and the WHSD Occupational Disease and Wellbeing Strategic Plan 2011-2015, WorkCover NSW is a partner organisation of the People at Work Project, a collaborative research project between the Queensland University of Technology, the Australian National University and Work Health & Safety Queensland. It is funded by the Australian Research Council and partner organisations, including WorkCover NSW, WorkSafe Victoria, Comcare and beyondblue.

The Project provides organisations that participate with a risk assessment process to identify and manage workplace risks to the psychological health of all the people that work in the organisation, including workplace bullying. WorkCover NSW has promoted the project through WorkCover e-news, workshops, a webinar and a WorkCover website news-rotator. WorkCover continues to provide information on the Project to industry.

WorkCover Tasmania update

WorkCover Tasmania conducted a State-wide telephone survey of the community, in-depth interviews with respondents who experienced or witnessed bullying in the past six months and a survey of Tasmanian organisations to better understand how they dealt with instances of bullying, relevant policies and procedures, and the impact of bullying on their workplace.

The findings of this research will provide the basis for the Tasmanian Workplace Bullying Strategy to:

- define exactly what workplace bullying is;
- identify initiatives to raise awareness that inappropriate behaviour will not be tolerated;
- develop management systems and build organisational capacity to manage bullying; and
- look at early intervention methods, support mechanisms and quality information for individuals, as well as ensuring external intervention is readily available to resolve issues of bullying.

The Workplace Bullying Project Team consists of representatives from the WorkCover Tasmania Board, Workplace Standards and the Office of the Anti-Discrimination Commissioner. A draft strategy is expected to be released in July 2014 for public comment.

QUESTION 24

Mr SCOT MacDONALD: I am interested about the close-the-loop program. If I am right, Leightons is one of the principal contractors at Barangaroo. Will you provide me an assurance that the faults that were identified by Mr Prior in his investigation into the death of Atilla are covered off in your close-the-loop program and we will not have that risk at Barangaroo?

Mr WATSON: I am happy to take that on notice.

RESPONSE

WorkCover's 'Close-the-Loop' Program is conducted once a prosecution undertaken by WorkCover has been finalised. The Program is designed to re-engage with those persons conducting a business or undertaking (PCBUs) that have been part of the prosecution process, to ensure the risks that gave rise to the incident have been eliminated or controlled by the duty holder on a long term basis.

The Program also aims to establish positive working relationships with WorkCover, promote improvements in safety culture, open communication lines about safety issues and encourage scrutiny of existing systems.

As the case involving Leightons was not brought to prosecution, it was not part of the 'Close-the-Loop' Program.

Barangaroo is a Lend Lease project and Leightons has no role on site. However, WorkCover continues to engage with the construction industry, including companies such as Leightons and Lend Lease (at Barangaroo and at other sites), via a range of mechanisms. An example of this is the High-Risk Commercial Construction Audit 'blitz' program that commenced on 24 March 2014.

The blitz had a focus on significant construction projects of four stories or more in height, or of an equivalent size in warehousing or industrial facilities. The WorkCover inspectors undertaking the compliance program were tasked with paying particular attention to Site Safety Management Systems, the effectiveness of procedures for emergency evacuation and identification of on-site personnel. High-risk items of plant such as cranes, hoists and scaffolds were also audited by inspectors.

As part of the program, inspectors conducted over 300 site visits State-wide, where they had interaction with approximately 850 PCBUs and issued 91 Notices. The majority of Notices issued were for falls from height and electrical safety issues. Findings from this program will now be collated and possible follow up actions will be considered.

QUESTION 25

Mr DAVID SHOEBRIDGE: The Hearing Care Industry Association presented to this Committee with a gentleman who had the benefit of hearing aids under the scheme. He said how life-changing they were for him but he was not entitled to replacements or batteries and the like. What has been the reduction in the liability to the scheme for that kind of medical provision of hearing aids?

Mr PLAYFORD: I will take that question on notice to provide the Committee with the exact numbers.

RESPONSE

See Attachment B.

QUESTION 26

Mr DAVID SHOEBRIDGE: A number of inquiry submissions have urged us to reinstate those medical benefits. Would you be able to provide some figures for perhaps reinstating them to anyone, from 10 per cent, a bit below and above, and also a complete reinstatement. Would that be possible?

Mr PLAYFORD: I can do something, yes.

Mr DAVID SHOEBRIDGE: I would appreciate that, thank you Mr Playford.

RESPONSE

See Attachment B.