NSW SELF INSURERS ASSOCIATION INC

DATE: 5th June, 2012

Inquiry into the NSW Workers Compensation Scheme

Response to further Supplementary Question from Evidence provided on 21st May, 2012

Thank you for the further opportunity of responding to your additional supplementary question regarding the basis for the Association's view that Section 52A of the Workers Compensation Act 1987 has failed and also concerning what could be done to correct the failure.

The section was first inserted into the Act in 1998 and it was intended that the section would enable weekly payments of compensation to a partially incapacitated worker to be discontinued after 104 weeks of partial incapacity in circumstances where the worker was not seeking suitable employment, had unreasonably rejected suitable employment or had only failed to obtain suitable employment because of the state of the labour market.

It is the view of the Association that the section has not achieved its intended purpose and this is evident from the extremely limited number of cases in which the discontinuance of weekly compensation by reliance upon the section has been upheld when disputes come before the Workers' Compensation Commission.

The first and most difficult problem that arises for employers in relying on the section, is that the employer is considered to bear the onus of proving that the grounds for discontinuance apply to the worker at the relevant time within the meaning of the section. So much was determined by His Honour Judge Burke (as he then was) in the case of *Camilleri v Western Sydney Area Health Service* (2000) 20NSWCCR499. It would be self evident that there are inherent difficulties in requiring an employer to prove a negative, particularly when the best evidence concerning the matters which need to be proved is that of the worker. Unless an employer is able to obtain a specific and unequivocal admission by a worker that they are not seeking suitable employment or that they specifically reject suitable employment, discharging the onus of proof is essentially impossible.

The onus of proof in this regard extends to requiring that an employer prove what is the "state of the labour market" for the purpose of Section 52A(c) (see the decision of Judge Curtis, as he then was, in *Hughston v Hughston & Sons Pty Ltd* (1999) 18NSWCCR312).

There is an additional problem in reliance on Section 52A(c) because it requires that the failure by a worker who is seeking suitable employment is "primarily because of the state of the labour market". It is inevitably quite simple for a worker to assert that any failure to obtain suitable employment when it is being sought is primarily because of the worker's injury rather than because of the state of the labour market.

The failure of the section to achieve its intended purpose could at least be partly overcome by firstly expressly indicating that where an employer discontinues payments in reliance on Section 52A the onus of proving that the section did not have relevant application to the worker continues to rest with the worker.

Further the Association is of the view that the operation of the section could be improved if Section 52A(c) was amended so that it had application to a worker who has sought suitable employment but failed to obtain suitable employment, either partly or wholly because of the state of the labour market and whether or not this failure was partly because of the effect of the worker's injury or any other cause.

Finally, this section could also be improved if Section 52A(2) was amended to read to the following effect:-

> "The relevant time for the purpose of this section is the time at which the notice under Section 54 of the intention to discontinue payments of compensation pursuant to this section is given and includes any time between the expiration of the first 104 weeks of partial incapacity for work and the giving of that notice. The discontinuation of payments under this section has effect even if, after the relevant time, none of the grounds of discontinuation applies to the worker".

Once again we thank you for the opportunity of providing a response to the supplementary question. If further information or assistance is required, please do not hesitate to contact us.