WiRO
WorkCover independent review office

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Ms Teresa McMichael,
Director Committees,
Standing Committee on Law & Justice,
Legislative Council,
NSW Parliament,
By email: lawandjustice@parliament.nsw.gov.au

Dear Ms McMichael,

Inquiry into Review of the exercise of the functions of the WorkCover Authority

Thank you for your letter of 27 March 2014.

I do not seek any changes to the transcript of the hearing on 21 March 2014.

I reply to the questions on notice taken during that hearing as follows:

Question:

[1] What matters has WIRO raised with WorkCover ?
What were the responses and the responses to the responses ?
What were those issues and whether you have obtained a satisfactory response ?

Answer:

Please see the attached Schedule which is current as at 4pm on 17 April 2014. It sets out the issues I have raised with the WorkCover Authority and whether I consider that I received a satisfactory response. If you wish me to produce copies of the actual correspondence please let me know.

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Question:

[2] In what way does WIRO believe that the Regulator and Insurer functions should be separated ?

Answer:

The WorkCover Authority acting as the Nominal Insurer has as its principal function, the conduct of the management of the claims for compensation undertaken on its behalf by the Scheme Agents while on the other hand WorkCover acting as the Regulator oversees the conduct of claims by the self insurers and the specialised insurers. The two roles are currently occupied by the same personnel.

The structural separation of Nominal Insurer from Regulator would ensure a transparently regulated Nominal Insurer and a more independent, responsive Regulator.

A sensible first step would be to establish two separate offices with different personnel undertaking the required functions.

That would enable a review of decisions made by the Nominal Insurer and of the claims management process and also enable oversight of the Scheme valuation process.

There are a variety of models for a separate regulator for an industry which would be suitable for the WorkCover Scheme however it would ultimately be a policy matter for Government.

I have identified a number of anomalies within the present legislation which relate to the functions of each of the WorkCover Authority and the Nominal Insurer.

I would be prepared to assist with the consideration of which model would be the most appropriate for the Government to consider.

In my view the Regulator should not be as intrusive as the WorkCover Authority in its role as Nominal Insurer presently in making decisions for Scheme Agents on individual matters. Similarly the over regulation of Self & Specialised insurers is an unnecessary burden for them.

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Question:

[3] Lack of stakeholder consultation by WorkCover

Answer:

There are a number of instances where WorkCover has determined not to undertake consultation with various stakeholders who have an important role within the Scheme.

As a general principle, WorkCover has issued regulations and Guidelines with no consultation at all with any stakeholder.

In particular since the creation of WIRO, WorkCover have avoided any consultation at all on important issues relating to the Scheme.

The most troubling of the lack of consultation was reflected by the issue of the Regulations on 28 September and 21 December 2012 respectively.

The *Workers Compensation Amendment (Transitional) Regulation 2012* was published on Friday 28 September 2012 and took effect from Monday 1 October 2012 (even though this was a public holiday).

Among a variety of amendments to the existing *Workers Compensation Regulation 2010* was Clause 8 which provided that the new costs amendments[1] did not apply to claims made before 1 October 2012 in respect of which proceedings were lodged with the Workers Compensation Commission before Tuesday 1 January 2013.

This Regulation was published without notification to the Law Society of NSW or the NSW Bar Association whose members were the persons who would have the carriage of notifying the injured workers and for whom the urgency of preparing claims for lodgement was paramount.

This involved the need to arrange appointments for independent medical examinations for injured workers so that the resulting reports would be available to support the claim of the injured worker and provide for that information to be notified to the insurer.

There was no information as to how the costs were to be dealt with where a lawyer had received instructions to commence preliminary

[1] Section 341 of the 1998 Act provided for injured workers to meet their own legal costs.

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investigations on behalf of an injured worker to determine whether there were reasonable grounds to substantiate a claim for lump sum damages for permanent impairment or to the denial of liability generally at a time when the lawyer was prohibited from charging the injured worker and where the claim was not lodged before 1 January 2013.

This Regulation was issued without any consultation at all with those interested parties.

What then occurred could only be described as chaotic as those lawyers representing injured workers worked to meet the deadline imposed – a period of 13 weeks.

At the eleventh hour, WorkCover issued a further amending Regulation being the *Workers Compensation Amendment (Further Transitional) Regulation 2012* which was published on Friday 21 December 2012 without any notification to any stakeholder. This extended the deadline for lodging claims in the Workers Compensation Commission to Sunday 31 March 2013[2].

Again the impact on the lawyers was significant given that there were only four working days across the Christmas period remaining before the original deadline passed.

I learnt of this Regulation from an external lawyer and I immediately issued an email notification to those lawyers and insurers who were on my database.

Of far more concern was the amendment to the Regulation on 20 December 2013 which allowed injured workers who had obtained approval for medical treatment prior to 31 December 2013 to receive that treatment after that date.

Again there was no consultation and the amendment was published on Friday 20 December which allowed only five working days over the traditional holiday close down period for approval to be sought from insurers.

These are just two examples of the reluctance of WorkCover to consult.

[2] This caused further confusion because the time expired on a Sunday.

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Question:

[4] What should be included on the WorkCover website or in the Annual Report ?

Answer:

The WorkCover website is complex and difficult to navigate. It probably tries to do too much. The information for injured workers is often out of date and therefore no longer correct or is couched in terms and language which the injured worker could find difficult to understand.

There are fact sheets which purport to be of assistance to the injured worker but are written for the benefit of insurers rather than injured workers particularly those who struggle with the complex terms used in these publications.

It would be important, in my view, to have in a clear and obvious position information about what an injured worker should do following an injury at work. This should tell then who to notify and what treatment they are entitled to immediately.

Given the access of the majority of the population to mobile telephone devices with photography capability and voice recording capability, I would suggest that the injured worker should be encouraged to capture the result of the workplace incident immediately and to take a comment from any witness.

There was until after my evidence to the Committee (21 March) no mention of the existence of WIRO as the statutory office with the responsibility to deal with complaints by injured workers about how their claim is dealt with by insurers.

Since my evidence there is reference to the existence of WIRO and its complaints handling function in a number of fact sheets.

The Annual Report for 2012/13 contained on page 14 a reference to the 2012 reforms (which introduced very significant reforms) but the information contained on that page commented on only parts of the reforms and was incorrect in some of the information provided.

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There is a lack of information about the claims process and how injured workers are managed. I would suggest that the community would benefit from being informed as to how the process had changed with the 2012 reforms.

The publication annually of the information previously contained in the Statistical Bulletins would be of considerable assistance to stakeholders.

I have been working with WorkCover recently and I am prepared to continue to work with WorkCover in improving their dissemination of information to injured workers and other stakeholders either through the website or through the Annual Reports.

Question:

[5] What assistance does WIRO require to operate more effectively ?

Answer:

The WIRO budget for the period from 1 September 2012 to 30 June 2013 was not considered a formal budget but was an estimate of operating expense. It was prepared by WorkCover on the basis of the best guess as to what could be the requirements of the office. It should be noted that I had been entrusted with the management of the legal aid scheme (Independent Legal Assistance and Review Service) after my appointment and shortly before 1 October 2012.

The staffing numbers and accommodation requirements for the various functions including the ILARS Scheme could only be the subject of a guess.

In order to better understand the resources required by my office I should set out the actual history. WorkCover produced an Organisational Chart which established various positions for the WIRO office and contained provision for 45 fte staff. In order to obtain staff to actually undertake the necessary functions I was provided on a temporary basis with two staff from WorkCover.

I then had to find the necessary personnel to commence operation within a two week period. The actual organisation chart was in draft form only and WorkCover was to seek approval from Treasury and the Public Service Commissioner. I was excluded from that process.

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I was informed that as a statutory officer I am unable to have any financial or recruitment authority at all.

I was instructed by WorkCover that all proposed personnel would require prior approval by the Chief Executive Officer of WorkCover and that these persons should be employed through a particular employment agency on a temporary basis.

Accordingly while in theory I was being provided with adequate funding and resources from a practical position there was little assistance as to the process.

It takes about six months from obtaining approval of a particular position from the Public Service Commissioner to then have a permanent staff member. That applicant has to be also approved by WorkCover.

All procurement requests have to be approved by WorkCover. I have one permanent Executive Officer who has delegated financial authority (to $5,000) but only after WorkCover approval has been obtained.

If I consider that I should undertake an enquiry pursuant to my authority[3] and functions I have to obtain the prior approval of WorkCover to the acquisition and allocation of resources and the funding for the project – even if it happens to be an investigation of aspects of WorkCover itself.

There is no review if the decision is to refuse a request by my office.

This control of the operations, staffing and general expenditure by WorkCover is not consistent with the independence of the WIRO.

Within the new structure of the Public Service as a result of the introduction of the *Government Sector Employment Act* 2013 it would seem that WIRO should be a separate agency along with those agencies set out in part 3 of Schedule 1 to that Act.

[3] Section 27(c) of the 1998 Act.

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Question:

[6] Recommendations of Unions NSW that are relevant to WIRO.

Answer:

I have carefully considered the 35 recommendations of Unions NSW contained from page 16 of their submission. Not all of these are relevant to my functions however I provide the following comment:

1. Recommendation 4:

The Committee should be aware that with the introduction of the work capacity assessment and decision process, combined with the definition of suitable employment being a theoretical one, the previous practice of encouraging employers to provide return to work duties for injured employees is no longer as significant from a practical viewpoint.

The real issue, with respect, is the need for a change in the attitude of a number of employers (particularly large employers) toward the cost of employment and the need for prevention of workplace injuries consistent with a recognition that the cost of retention of employees is far less than the cost of recruiting replacement workers.

As an example, one of the major employers has a policy whereby the Chief Executive contacts an injured worker as soon as possible after the incident to enquire as to their well-being and continues to follow the progress of the return to work of that employee.

That employer indicated that they took the issue of safety return to work seriously and had representation as a board level which reported on the success or otherwise of the safety of the workplace.

There is a significant gap between employers who have a responsible attitude and take their obligations to provide a safe and healthy workplace seriously and those who regarded as merely the safety issue as being of less importance.

2. Recommendation 6

This recommendation relates to the previous situation where the responsibilities for worker health and safety and the responsibilities for insurance or undertaken by different agencies. I do not see any conflict of interest arising from the authority having both functions, however there is

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the potential for funding issues to arise which would impact on the proper performance of the different functions.

3. Recommendation 7

It is important that WorkCover publish a variety of statistical information which enables different stakeholders to understand how the scheme is operating and which provides significant data for that purpose. I agree with the submission.

4. Recommendation 10

I agree that the actuarial reports obtained by WorkCover should be published and the information available for consideration by stakeholders.

5. Recommendation 11

I do not see the need for the committee to instruct its own actuary as the detailed report from the current Actuary is detailed and sufficient for consideration by interested parties.

6. Recommendation 12

In my view this is an erroneous view of the requirement contained in Clause 27 of Schedule 6 of part 19H of the 1987 Act. That provision required the Minister to conduct a review of the amendments made by the 2012 amending Act as soon as possible after the return to surplus of the Scheme. That is a matter for the Minister not this Committee.

It is apparent that the return to surplus envisaged by this clause occurred in October 2013 and the only issue that arises is when there will be a review and whether that is considered to be "as soon as possible".

7. Recommendation 14

I agree that the decision of the insurer should not be implemented until the review process is completed. This has arisen because of the extreme delays in the Merit Review process by WorkCover.

8. Recommendation 15

The 12 month limit on medical expenses is a policy question for Government. The dispute about prior medical treatment approval is presently a matter for the Workers Compensation Commission.

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9. Recommendation 16

This raises a philosophical question. There seems to me to be no point in legislating for a penalty for non-compliance when there is no intention to actually enforce the penalty. In my view penalties that are legislated should be enforced.

Delays often create disenchantment with the Scheme and better enforcement of the time to process claims will improve the process.

10. Recommendation 17

I do not accept that there is a need for an additional office given the existing powers of WIRO.

11. Recommendation 28

I am not sure what the reasoning is for this recommendation. I am certainly independent. I assume the reference is to the Merit Review. Having now had the benefit of the experience of the system I would suggest that the Merit Review should be abolished and that there be one review of the Insurer's decision and that should be both a merit and procedure review by WIRO.