

**REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE
WORKCOVER AUTHORITY**

Organisation: The Law Society of New South Wales

Date received: 30/01/2014



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: Injury:RElw817654

28 January 2014

The Hon. David Clarke MLC
Committee Chair
Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: lawandjustice@parliament.nsw.gov.au

Dear Mr Clarke,

Review of the exercise of the functions of the WorkCover Authority of NSW

The Law Society welcomes the opportunity to provide a submission to the Standing Committee on Law and Justice ("Standing Committee") in relation to its review of the exercise of the functions of the WorkCover Authority ("WorkCover"). Members of the Injury Compensation Committee ("the Committee") represent workers, scheme agents and self insurers that are key stakeholders in the workers compensation scheme. The Committee would be pleased to assist the Standing Committee by providing oral testimony to supplement this submission.

The Committee has reviewed the general, specific and Nominal Insurer functions of WorkCover as set out in sections 22, 23 and 23A of the *Workplace Injury Management and Workers Compensation Act 1998* ("the 1998 Act"). Feedback is provided on the effectiveness of WorkCover's performance and issues have been identified for further examination by the Standing Committee as requested.

It should be noted that the Committee has restricted the submission to a review of the functioning of WorkCover rather than a general review of the operation of the workers compensation scheme since the legislative changes introduced in 2012. The Committee is aware that clause 27 of Part 19H of Schedule 6 of the *Workers Compensation Act 1987* ("the 1987 Act") provides for the latter review to be undertaken this year and the Committee will be pleased to contribute a submission at that time.

WorkCover's general functions

The general functions of WorkCover are set out in section 22 of the 1998 Act and may be summarised as follows:

- (a) to be responsible for ensuring compliance with the workers compensation legislation and the work health and safety legislation;

- (b) to be responsible for the day to day operational matters relating to the schemes to which any such legislation relates;
- (c) to monitor and report to the Minister on the operation and effectiveness of the workers compensation legislation and the work health and safety legislation and on the performance of the schemes to which that legislation relates;
- (d) to undertake such consultation as it thinks fit in connection with current or proposed legislation relating to any scheme as it thinks fit;
- (e) to monitor and review key indicators of financial viability and other aspects of any such schemes;
- (f) to report and make recommendations to the Minister on such matters as the Minister requests or WorkCover considers appropriate.

WorkCover's specific functions

The specific functions of WorkCover are set out in section 23 of the 1998 Act and may be summarised as follows:

- (a) to initiate and encourage research to identify efficient and effective strategies for the prevention and management of work injury and for the rehabilitation of injured workers;
- (b) to ensure the availability of high quality education and training in such prevention, management and rehabilitation;
- (c) to develop equitable and effective programs to identify areas of unnecessarily high costs in or for schemes to which the workers compensation legislation or the work health and safety legislation relates;
- (d) to foster a co-operative relationship between management and labour in relation to the health, safety and welfare of persons at work;
- (e) to identify (and facilitate or promote the development of programs that minimise or remove) disincentives for injured workers to return to work or for employers to employ injured workers, or both;
- (f) to assist in the provision of measures to deter and detect fraudulent workers compensation claims;
- (g) to develop programs to meet the special needs of target groups including workers who suffer severe injury, injured workers who are unable to return to their pre-injury occupation, injured workers who are unemployed, persons who live in remote areas, women, persons of non-English speaking background and persons who have a disability;
- (h) to facilitate and promote the establishment and operation of work health and safety committees at places of work and return to work programs;
- (i) to investigate workplace accidents;
- (j) to develop policies for injury management, worker rehabilitation and assistance to injured workers;

- (k) to monitor the operation of requirements and arrangements imposed or made under the workers compensation legislation or the work health and safety legislation, including requirements and arrangements for all or any of the following: injury management; worker rehabilitation; workers compensation insurance; workers compensation insurer licensing; and to commence and conduct prosecutions for offences in connection with any such requirements and arrangements;
- (l) to collect, analyse and publish data and statistics as WorkCover considers appropriate;
- (m) to provide advisory services to workers, employers, insurers and the general community (including information in languages other than English);
- (n) to provide funds for or in relation to measures for the prevention or minimisation of work injuries or diseases and work health and safety education;
- (o) to arrange or facilitate the provision of interpreter services to assist injured workers;
- (p) to provide and administer (subject to the regulations) a legal aid service to persons who are parties to proceedings relating to workers compensation.

WorkCover's Nominal Insurer functions

The Nominal Insurer functions of WorkCover are set out in section 23A of the 1998 Act. WorkCover has such additional functions as may be necessary or convenient for enabling it to act for the Nominal Insurer and to ensure that the Nominal Insurer's functions are able to be exercised by any of WorkCover's other functions. When acting for the Nominal Insurer, WorkCover has and may exercise all the functions of the Nominal Insurer and is not limited by any of WorkCover's other functions. Further, when acting for the Nominal Insurer, WorkCover must exercise its functions so as to ensure the efficient exercise of the functions of the Nominal Insurer and the proper collection of premiums for policies of insurance and the payment of claims in accordance with both the 1998 Act and the 1987 Act.

WorkCover function overload and performance

The Committee submits that WorkCover has too many functions to operate effectively, efficiently and without being conflicted. In many cases decisions or changes adopted in one area of operation seem to have been made without due consideration of the ramifications in another area under its control. The Committee contends that WorkCover is constantly operating under conflicted conditions due to the multiplicity of its roles and functions. In the Committee's experience the end result is that employers, insurers and workers are all dissatisfied with the operation of the workers compensation scheme. It would be beneficial to refer to other stakeholders such as medical providers, rehabilitation providers, allied health providers and hospitals to obtain their views on whether deficiencies in WorkCover's operations filter right through the workers compensation system.

Contrary to its experience with the Motor Accident Authority ("MAA") and the Lifetime Care and Support Authority, the Committee is of the view that WorkCover's level of communication with stakeholders has been inadequate. While a WorkCover Legal

Stakeholder Reference Group exists it has met infrequently and issues raised by stakeholders have often not been addressed.

An important example of the lack of communication is WorkCover's failure to consult with this Group with respect to the issuing of guidelines introduced following commencement of the *Workers Compensation Legislation Amendment Act 2012*. Thorough and timely stakeholder consultations would have avoided the additional time and cost involved in production of the numerous amended versions of these guidelines. The Committee cannot envisage either the MAA or the Lifetime Care and Support Authority issuing or amending guidelines without engaging in a legitimate stakeholder consultation process.

The Committee submits more generally that the role of WorkCover in the development of subordinate legislation in the form of guidelines needs to be carefully reviewed. There have been several instances where guidelines prepared by WorkCover for the purpose of facilitating the legislation have been inconsistent with the legislation, rendering those guidelines unworkable and potentially invalid. In the Committee's view it is also arguable that some of the guidelines go beyond WorkCover's mandate as provided in the 1987 Act and 1998 Act. WorkCover has arguably been operating even further beyond the scope of its already broad functions.

It is the view of the Committee that the current legislative framework is itself sufficiently complex and difficult to understand without rendering it more so by the repeated development and redevelopment of guidelines by WorkCover.

Conflict of interest

The Committee submits that WorkCover as Nominal Insurer is conflicted in the following ways:

(a) *As Nominal Insurer and its function as the safety regulator*

The Committee is of the view that there is an inherent conflict in WorkCover operating as the Nominal Insurer while, at the same time being responsible for the regulation of work, health and safety and the investigation and prosecution of breaches of work, health and safety legislation.

One of the important obligations imposed by the legislation is the requirement that an employer notify its insurer when it receives a claim or any documentation in respect of a claim. Reference is made to section 264 of the 1998 Act. In circumstances where WorkCover is the Nominal Insurer for all employers (other than self insurers or those covered by a specialised insurers licence) there is a specific disincentive for employers to notify WorkCover regarding claims arising from an injury because of the concurrent role that WorkCover has in respect of potential prosecutions for breaches of work, health and safety legislation.

Further, the availability of an injured worker's entitlement to the recovery of work injury damages from an employer is contingent on proving (among other things) negligence on the part of the employer giving rise to the injury. The extent to which workplace injury is investigated and/or prosecuted by WorkCover has the potential to have a significant impact on whether any injured worker is able to prosecute a successful claim for work injury damages. This gives rise to the possibility of a lack of objectivity affecting decisions made by the Nominal Insurer concerning whether workplace incidents are investigated or prosecuted.

There is an even more fundamental conflict of interest here. On the one hand WorkCover manages the fund from which all work injury damages are paid and regularly intervenes in the defences of these claims. On the other hand WorkCover is responsible for investigating and/or prosecuting the same alleged breaches of work, health and safety legislation which give rise to the damages claims.

(b) *As Nominal Insurer and its function as decision maker on review in work capacity decisions*

Pursuant to section 44 of the 1987 Act, WorkCover has the function of reviewing an insurer's decision as to an injured worker's work capacity on the merits after the insurer has reviewed its own decision. WorkCover's function as Nominal Insurer creates a situation of unequivocal conflict when WorkCover acts in its role as a merit reviewer. The authority that runs the scheme and is also the Nominal Insurer is also the merit reviewer. One can understand an injured worker feeling uncomfortable about this process and questioning the independence and impartiality of the merit reviewer.

This conflict was demonstrated in the recent Supreme Court case of *Transfield Services (Aust) Pty Limited v WorkCover Authority of NSW and Mark Humphrey* (case number 2013/314766) where WorkCover's Merit Review Service directed an insurer to rescind a work capacity decision and, further, not to make a work capacity decision until the insurer had determined the disputed issue of liability. The insurer commenced proceedings in the Supreme Court of NSW seeking to quash this merit review decision. The Court directed that there be a stay and that the worker continue to receive his weekly payment. The respondents to the proceedings were WorkCover and the injured worker and it is understood that on the first return date, the WorkCover representative appeared (not by way of a submitting appearance) with counsel and took an active role. The injured worker appeared himself. WorkCover filed a response in which it apparently had no trouble conceding that its Merit Review Service decision was outside its jurisdiction.

(c) *As Nominal Insurer and its function to oversee the Workers Compensation Commission*

The Committee is of the view that there is a further inherent conflict which arises by reason of WorkCover operating as the Nominal Insurer while having a role in the administration and other functions of the Workers Compensation Commission. Decisions made by the Workers Compensation Commission have a direct and significant influence on the nature and extent of the liabilities of the Nominal Insurer for the payment of workers compensation benefits to injured workers. The Committee believes that the Standing Committee would accept that justice not only needs to be done but needs to be seen to be done. In this respect the oversight of the Workers Compensation Commission by WorkCover which acts as Nominal Insurer is inherently inconsistent and gives rise to the possibility of the Nominal Insurer exercising its function of oversight of the Commission in a manner which advances its interest as the Nominal Insurer to the detriment of injured workers.

- (d) *As Nominal Insurer and its function to oversee the WorkCover Independent Review Office*

Similar concern arises to that described under (c) above in relation to WorkCover's role in the oversight of the WorkCover Independent Review Office ("WIRO"). Decisions made by WIRO again have the potential to impact substantially on the nature and extent of the liabilities of the Nominal Insurer. The most explicit example of this conflict arises where WIRO is required to review decisions made by WorkCover's Merit Review Service and is responsible for the final review of work capacity decisions. In these circumstances it is, in the view of the Committee, inappropriate for WorkCover to have any role in the administration or oversight of the operations of WIRO which should be a legitimately independent organisation.

- (e) *As Nominal Insurer and its functions in regard to the licensing of self and specialised insurers*

There is, in the view of the Committee, an inherent conflict in the role of WorkCover as the Nominal Insurer and its role in the licensing of self and specialised insurers. The obligations imposed by WorkCover in the form of licensing conditions, on self insurers and specialised insurers extend well beyond simple prudential regulation to areas involving compliance with work, health and safety, case management and injury management audits. WorkCover is able by use of this audit process to specifically direct self and specialised insurers in the manner in which they manage claims arising from injuries to injured workers. In many circumstances the interests of self and specialised insurers are in direct conflict with the interests of the Nominal Insurer particularly in circumstances where a worker has sustained multiple injuries over a period of time. WorkCover is able to use its role in the licensing of self and specialised insurers to advance its own interests as the Nominal Insurer to the detriment of the interests of the self and specialised insurers and this is clearly a conflict of interest and one which is, in the view of the Committee, unacceptable.

WorkCover's multifunctional status is neither efficient nor effective and has resulted in issues of conflict arising in numerous situations.

Matters for consideration

The Committee submits the following matters for the Standing Committee's consideration:

1. WorkCover should not continue as the Nominal Insurer, having regard to the conflicts identified. Consideration should be given to reintroducing private underwriting or alternatively separating the role of Nominal Insurer from WorkCover altogether.
2. WorkCover should be divested of many of its functions in addition to that of Nominal Insurer. It is the Committee's view that WorkCover's core responsibility should be as the licensing and prudential regulator with control of the functions associated with premium collection and enforcement. In this scenario WorkCover should have no role whatsoever in the dispute resolution process due to conflict issues.
3. If WorkCover is to continue as the Nominal Insurer, it should be divested of many or all of its other functions to avoid issues of conflict of interest.

4. In any event, the investigation and enforcement of work, health and safety obligations should be removed from WorkCover and vested in a separate independent body.

The Committee thanks you for the opportunity to provide a submission and looks forward to providing further assistance by way of oral evidence in due course.

Should you have any queries with regard to this submission, please contact the Committee's Policy Lawyer, Leonora Wilson at or on

Yours sincerely,

Ros Everett
President