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INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

Organisation: NSW Bar Association

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NEW SOUTH WALES BAR ASSOCIATION

SUBMISSION TO JOINT SELECT COMMITTEE ON THE NSW WORKERS COMPENSATION SCHEME

Introduction

The New South Wales Bar Association welcomes the opportunity to make submissions to the Joint Committee in response to the Issues Paper entitled "NSW Workers Compensation Scheme" released by the Minister for Finance and Services on 23 April 2012.

The future shape of the workers compensation scheme is a matter of critical importance to current and future injured workers and their families. Although the Issues Paper sets out a number of options for change to the scheme, there are a number of other reforms which could help to achieve the Government's aims which are not raised in the paper. These submissions advocate alternate structural and legislative changes to ensure the long term viability of the scheme without adversely affecting injured workers. They address specific proposals for reform included in the Issues Paper.

The Association is concerned that the Committee in its deliberations should not be solely reliant on actuarial advice provided by the WorkCover Authority or on its behalf. The current state of the scheme has been brought about at least in part by Government acting on the basis of WorkCover actuarial material, and WorkCover's position has been compromised as a result. It is crucial for the future successful operation of the scheme that the Committee obtain independent actuarial advice on the proposals contained in the Issues Paper.

Any change to the NSW workers compensation system must:

1. Be financially supportable and avoid the risk of the present threatening tail;
2. Properly support those injured in the workplace; and
3. Produce incentives to exit the workers compensation scheme and return to work.

The Bar Association considers that the present scheme is unwieldy and over-administered, and fails to meet any of the three criteria above. Our suggestions for reform embody the following broad propositions:

- The current regime should be adjusted to apply benefits for those where they are most needed and terminate benefits insufficiently related to the purposes of the scheme;
- Reduce the costly over-management and bureaucratic nature of the scheme; and
- Allow claims (including death claims) to be apportioned, or converted to lump sums by commutation so as to terminate long term tail liabilities and give workers the incentive to leave the workers compensation system and return to work.

Action on these three general areas would end the tail and improve benefits where needed. The Association's proposals, if implemented, would not result in any additional legal costs and would bring about a reduction in other scheme costs.

The Association has identified seven areas for reform of the scheme which would address cost pressures while maintaining the principal goal of the system to ensure that injured workers are adequately compensated for their injuries.

A 7 Point Reform Plan

1. Allow commutations. The Ernst & Young External Peer Review of outstanding claims liabilities of the Nominal Insurer annexed to the Government's Issues Paper recommends consideration of a wider use of commutations. It is the most effective way of managing "tail claims". There has been a systematic and prolonged objection to commutation by Workcover which has been a principal cause of the present tail. The Association believes this reform is critical and further detail is provided later in this paper.

2. Work injury damages actions should be permitted not discouraged as presently occurs. Where injury has occurred by breach of duty the result terminates the liability of the scheme and allow injured workers to avoid dependency on the scheme.

3. The claims handling guidelines for Scheme Agents should be revised to ensure that evidence presented by a worker is effectively challenged. The procedural requirements for work injury damages claims should be reviewed to ensure that both parties have a fair trial. For example, at present an employer has only 42 days to respond to a pre-filing statement which means that a plaintiff's expert evidence is almost never challenged as employers representatives do not have time to obtain proper experts reports.

4. Revocation of Section 151Z(2) of the *Workers Compensation Act 1987* to allow injured workers to take action against third party tortfeasors under the *Civil Liability Act 2002*. That would enable recovery of payments made, at no cost to the scheme. Such a legislative amendment is wholly consistent with insurance principles as it spreads the risk and protects the interest of the Workcover Authority.

5. Death benefits should not be payable unless they go to dependants of the worker that died. At present they are paid even if there are no dependants.

6. Allowing more than one whole person impairment assessment or claim only in circumstances where the injured worker's condition has deteriorated materially.

7. Reintroducing the concept of fault as a mitigating factor in journey claims.

As a general proposition, the actuarial reports available point to problems with the management of claims by Scheme Agents and the WorkCover Authority which have hindered the defence of claims for lump sum compensation and work injury damages. More effective administration of the Scheme would necessarily mean a reduction in claims liabilities. The *Workers Compensation Act* and the *Workplace Injury Management and Workers Compensation Act 1998* comprehensively provide for the termination of weekly payments in appropriate cases and for the rehabilitation and retraining of workers. These are areas which will always function according to the standard of claims management.

The Issues Paper: Options for Change

The Issues Paper sets out some comparisons with other jurisdictions at clause 1.7.2 and sets out 16 potential Options for Change. This submission deals with the suggested options for change and provides alternative proposals where necessary.

1. Severely injured workers

The Issues Paper suggests that workers who are assessed at more than 30% whole person impairment (WPI) should receive improved income support, return to work assistance where feasible, and more generous lump sum compensation. The suggested reform in this area appears to draw on the Victorian system which requires the existence of either a "serious injury" or a total and permanent incapacity for a continuation of weekly benefits for total incapacity which are then paid at 80% of pre-injury earnings. That would be an improvement for those seriously injured workers on current benefits under the New South Wales Scheme where weekly benefits revert to the statutory rate after 26 weeks.

However, the use of the AMA Guides in assessing WPI produces results which are often extremely unfair. The Guides do not provide for any assessment in cases involving neuropathic pain which can be a totally disabling condition. Indeed pain is not used as a criterion for assessment at all. There are many injured workers who by community standards would be regarded as severely injured who fall well below a 30% whole person impairment threshold. There are many examples of people who would not qualify under such a high test. Without listing all of them they include:

1. Failed spinal surgery – 20% – 28% including sexual dysfunction
2. Pain disorders or neuropathic pain syndrome usually assessed at 0%
3. Moderate brain damage – 15% - 29%
4. Severe injuries to the foot and ankle – rarely over 15%
5. Severe shoulder injuries – rarely over 15%
6. Psychological injury – an assessment of 15% whole person impairment is often made by an Approved Medical Specialist on the basis of total incapacity for work.

Further, in order for the Committee to appreciate the possible cost to injured workers of the imposition of such a threshold, the WorkCover Authority should be in a position to make available the figures for the proportion of injured workers who have to date been assessed as having a whole person impairment in excess of 30%. Indeed it would be instructive to have before the Committee similar figures for 5%, 10%, 15%, 20% and 25% arrived at for whole person impairments for all claims assessed under the Scheme from 2001 to date.

The Association supports law reform which results in greater compensation for the seriously injured but not at the expense of the right to statutory benefits for those with genuine claims who fall below any artificial definition of serious injury. The imposition of a 30% threshold for "serious injury" is unrealistic, arbitrary and unjust. Many workers who are in fact very seriously injured would fail to meet this standard.

2. Removal of cover for journey claims

Workers should be covered for an injury suffered in the course of their journey to or from their place of employment. The majority of these claims relate to motor accidents. Where a worker can claim damages under that system the WorkCover Authority obtains a full recovery of compensation paid by a CTP motor vehicle Insurer. The saving to the system made by removing journey claims would not justify the removal of the protection of weekly payments during incapacity.

However, the Association proposes an alternative approach to journey claims which would address costs to the scheme.

The Act previously provided that compensation would not be payable with respect to an injury on a journey where the fault of the worker contributed to the occurrence of the incident causing injury.

The reintroduction of a fault provision along these lines would substantially lower costs to the workers compensation system resulting from journey claims.

3. Prevention of nervous shock claims from relatives or dependents of deceased or injured workers

No figures are provided in the Issues Paper to support the suggestion that these rights should be abolished. In the Association's experience, such claims are few and far between, and their cost implications for the scheme would be minimal.

What is more deserving of scrutiny is the current form of Section 25 of the *Workers Compensation Act* which provides for the payment of a death benefit of $425,000 whether there are dependents or not.

The previous version of the section provided for payment of that benefit if a worker died leaving a dependent totally dependent for support. In the event of partial dependency the amount of a death benefit paid was determined according to the extent of dependency. If there were no dependents no death benefit was paid. The section operated fairly in that total dependents received a full entitlement and partial dependents in appropriate cases also received that full entitlement. Since December 2008 death benefits have been payable regardless of whether the deceased worker had any dependents.

In December 2008 the benefit was increased from $331,250 to $425,000 and the maximum amount was payable regardless of whether there were any dependents and without any regard to the level of financial dependence. The amount is indexed and is presently $481,950.00.

The Act should be returned to the pre-2008 position to avoid payment of the death benefit in cases where it is not warranted. Such an amendment would result in substantial savings without compromising the rights of those dependent on the deceased worker.

4. Simplification of the Definition of Pre-injury Earnings and Adjustment of Pre-Injury Earnings

The current method of calculation of weekly benefits is settled and well understood by participants in the system. In the Association's view the simplification of this approach would not have any cost implications for the scheme and is not necessary.

5. Incapacity Payments – Total Incapacity

6. Incapacity Payments – Partial Incapacity AND

8. Cap weekly payment duration

Taken together, the proposals in the Issues Paper seek to increase the amount payable in cases of total incapacity, while reducing benefits for the partially incapacitated through the introduction of a shorter "step down" period of 13 weeks. The Association considers that the financial benefit of this change would not justify its harsh effects. Ultimately, weekly benefits are meant to be compensatory and should for some period of time reflect a significant measure of the worker's pre-injury wage.

Further, the comparison with shorter "step down" periods in other States fails to take account of the far more generous common law rights to damages that exist in those other jurisdictions.

There are good reasons why a higher rate of compensation ought be maintained for an initial 26 week period. These are:

a. This is the period during which an injured worker is most significantly incapacitated;

b. It is the period in which most rehabilitation takes place;

c. It allows workers to make appropriate financial arrangements within a reasonable time to overcome difficulties which may arise by reason of their injuries and/or their particular circumstances before the statutory rate is imposed;

d. It gives employers an incentive to be actively involved in the rehabilitation of the worker and his or her return to work.

The suggestion that a lesser period would align itself more with clinical recovery patterns has no evidentiary basis.

The Association refers to a recent examination prepared by an Approved Medical Specialist on a 48 year old male, with a lifelong history of employment as a labourer.

That worker injured his ankle at a worksite in September 2006:

- In August 2007 he underwent surgery being a release of ligaments in his right ankle.
- In June 2010 he had a fusion procedure performed at the sub-talar joint, in his right foot.
- In March 2011 he underwent a third procedure: the original fusion was revised, the surgical hardware removed and a bone graft and further surgical hardware applied.

Although back at work, and performing much the same work tasks, this labourer still needed to wear heavy duty "walkers" with custom orthotics and is left with pain and stiffness in his injured right foot and ankle. He described, on a bad day, as feeling as though his foot had been run over.

Perhaps understandably, he has been certified unfit for work requiring him to stand for long periods of time, perform repetitive crouching or other awkward positions. He needs to exercise caution on stairs, inclines, rough and uneven surfaces, along with avoiding all impact activity.

Remarkably, he was assessed as being only 5% WPI as a result of the injury to his right lower leg. The Association notes that WPI assessments for physical injury do not involve any consideration of a person's capacity to work. A medical assessor undertaking a WPI Assessment is not concerned with work capacity.

The Association is concerned that workers will be restricted in their ability to receive proper compensation for time and income lost as a result of serious injuries with serious consequences sustained in the course of his employment. These reductions in family income have a serious effect and can add greatly to the stress already affecting both worker and family.

The Issues Paper refers to the capping of weekly benefits duration for workers of "a lower level of permanent impairment", although the level is not defined. Earlier in the paper, an assumption is made that severely injured workers must have whole person impairment (WPI) of more than 30%.

As mentioned earlier in this submission, a 30% WPI threshold excludes many injured workers who by community standards would be regarded as severely injured. Any attempt to reduce the 26 week step down period for those who do not meet a 30% WPI test would have a draconian effect on the support available to many seriously injured workers.

7. Work Capacity Testing

The Association supports the need to rehabilitate and return injured workers to the workplace.

However, the Association is concerned that work capacity testing is largely used as a tool for getting injured people off payments. There is no requirement on employers to rehabilitate and return injured workers to suitable employment.

In the absence of a requirement for employers to employers to provide suitable employment for a worker returning from injury, work capacity testing does not achieve its stated goals. Forcing workers to return to unsuitable positions negatively affects the productivity of businesses and has clear adverse consequences for the worker. The process in reality increases red tape and therefore costs to the scheme without any viable result for the worker or employer.

9. Remove "Pain and Suffering" as a Separate Category of Compensation

The Association is not opposed to the incorporation of compensation for pain and suffering into lump sum payments for injuries with more than 10% WPI. We acknowledge that the removal of this separate head of claim could result in administrative savings to the scheme.

The Association notes that $50,000 is the maximum allowed for pain and suffering. That figure has not changed since 1996; and it was in fact reduced to the current level at that time. As a result, the Association considers that $75,000 would be a more appropriate sum for the pain and suffering component in a lump sum damages award.

The Association opposes any increase in the 15% WPI threshold for work injury damages. That threshold is quite unreasonable. It is known that under the motor accidents system, over 90% of injured claimants undergoing WPI assessment do not qualify for any lump sum compensation for pain and suffering.

10. Only One Claim can be made for Whole Person Impairment AND

11. One Assessment of Impairment for Statutory Lump Sum, Commutations and Work Injury Damages

Both of the above proposals in the Issues Paper fail to recognise that medical conditions change, often for the worse, over time. The proposals would exclude claims being made in cases where there is substantial deterioration – this is a dangerous idea and would result in arbitrary and patently unfair outcomes.

The implementation of the proposals would encourage many injured workers to wait for an extended period of time until all conservative and surgical measures have been exhausted, to ensure that when the WPI assessment is made it is made having regard to the totality of the condition. Such a result would be clearly unsatisfactory for all scheme participants, as the longer workers wait for their injuries to stabilise, the longer an insurer would be unable to pay out a claim, with the resultant uncertainty creating adverse implications for the scheme tail.

The Association considers that this circumstance can be far better addressed by adopting

exactly the same approach as is adopted in s 62 *Motor Accidents Compensation Act 1999* . This provision successfully allows an additional assessment or claim in circumstances where the injured worker's condition has deteriorated in a material way. Some sensible threshold is required and s 62 *Motor Accidents Compensation Act* is an existing example. An alignment between the two systems would help in the streamlining of the various personal injury systems. An approach of that kind would provide both a fair response to a worsening condition and protection of the scheme from claims for minimal deterioration.

This approach would substantially contain medical, legal, red tape and administrative costs in the scheme, while recognising the genuine need for further support brought about where a worker's medical condition worsens.

12. Strengthen work injury damages

A strong work injury damages system has the effect of removing injured workers from the workers compensation scheme, thus reducing long term liabilities. These claims have been retained in other states.

The Association has long advocated a single uniform system of personal injury laws based on the general principles contained in the *Civil Liability Act*. However it is not correct to say, as the Issues Paper does, that the principles used to determine negligence in workers compensation common law matters diverge from the general law. There are some parts of the *Civil Liability Act* which are presently incompatible with workplace negligence but that can be easily accommodated by some additional sections in the *Civil Liability Act* that deal with the workplace. For example there are provisions in the *Civil Liability Act* which prevent damages claims for inherently dangerous activities or where a risk is obvious. Many occupations are inherently dangerous and involve risks which may be obvious. Implementation of the proposal in the Issues Paper without this adjustment would gravely undermine an employer's duty to take reasonable care for its employees and would be inconsistent with community expectations of industrial work safety. Those provisions would simply be excluded for workplace claims. To do so would not interfere with the law on contributory negligence by a worker.

A strong and effective system for work injury damages also requires claims to be properly contested by defendant insurers. One of the principal barriers to the effective defence of claims is the current requirement that allows an employer only 42 days to respond to a pre-filing statement. This means that a plaintiff's expert evidence is almost never challenged as employer's representatives do not have time to obtain proper experts' reports. The procedural requirements in relation to the claims for work injury damages should be reviewed to ensure that both parties have a fair trial.

The removal of fetters on employer representatives which reduce their ability to defend actions would not only enhance the operation of the adversarial system, but would have clear positive effects on the successful defence of claims, and thus the long term viability of the scheme.

13. Medical coverage duration

This proposal to limit the term of payment of medical treatment caused by a work injury would be less necessary if the Government adopts the Association's proposals concerning commutations, set out at 15 below.

14. Strengthen Regulatory Framework for Health Providers

The Association broadly accepts a strengthening of the regulatory framework for health providers, to ensure that the scheme's resources are directed to evidence-based treatment with proven health and return to work outcomes, rather than on treatment that maintains dependency.

Attention is particularly drawn to the remarkable growth of the rehabilitation "industry" that has surrounded the new scheme. Its cost seems to be far higher than its effectiveness in getting workers back to work. This development is part of a bureaucratic structure that weighs heavily on the Workers Compensation system. Rehabilitation can have important work to do but the industry requires both trimming and re-direction.

Employers do not currently have the incentive to accept back into the workplace workers not yet fully fit. They need the incentive to do so. That could come through premium benefits. It is a development would be good for almost everyone. It is a development that should be accepted by the rehabilitation industry.

15. Targeted Commutation

The Ernst & Young report recommends consideration of a wider use of commutations. It is the most effective way of managing "tail claims". Part 3 Division 9 of the *Workers Compensation Act* already specifically provides for the commutation of suitable claims. Yet there has been a systematic and prolonged objection to commutation by Workcover which has been a principal cause of the present tail. The Association believes this change to be critical to the long term future of the scheme.

Workers should not be encouraged to remain in receipt of benefits without ultimately becoming the target of commutation. The Association accepts that that commutation of liabilities should be limited to those cases where the objects of the Act can no longer be achieved.

However there is considerable scope for commutation of liabilities. In the case of workers that have returned to work, for example, but are no longer able to work their former hours and are in receipt of weekly 'top up' payments. Commutation of these claims would remove these cases from the system.

Other workers may not be receiving top up payments but may be availing themselves of physiotherapy and/or massage therapies funded by the scheme to keep themselves in the workforce.

Commutation of such liabilities would target a long term liability but would also provide the worker and the scheme with the incentive to bring the claim to a satisfactory conclusion.

16. Exclusion of Strokes/Heart Attack, Unless Work a Significant Contributor

The Issues Paper proposes that strokes and heart attacks be excluded from the workers compensation system unless work is a significant contributing factor.

The Association does not oppose this proposal, which reflects the current law. Injuries, to be compensable, need to arise out of employment but an added requirement is contained in Section 9A of the *Workers Compensation Act* that no compensation is payable unless employment is a substantial contributing factor to the injury. Three recent decisions in the Court of Appeal, have clarified how the section operates.

Conclusion

A fair and effective workers compensation system is an imperative in a stable society. Currently, the costs of the system are disproportionate to the benefits provided to injured workers.

The Association considers that there must be greater scope to allow injured workers to exit the system with lump sum payments.

The current practices and policies of the WorkCover Authority, such as its refusal to allow commutations in suitable cases, have had and continue to have an adverse effect on the long term viability of the New South Wales workers compensation scheme. The lifting of such restrictions would reduce the costs of the scheme and increase the benefits to the injured.

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