Submission No 84

FIRST REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: NSW Self Insurers Association

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N.S.W. Workers' Compensation
Self Insurers Association Inc.

Employers Managing Their Own Risk
ABN 69 780 464 009

Standing Committee on Law and Justice – Review into NSW workers compensation scheme
Submission by NSW Self Insurers Association Inc

The NSW Self Insurers Association Inc (SIA) welcomes the opportunity to make this written submission and thanks the Standing Committee on Law and Justice for permitting this late submission following evidence given on behalf of the SIA on 4 November 2016 by Mick Franco (honorary solicitor) and Stephen Keyte (then chairperson).

The SIA wishes to address several concerns about the operation of the NSW workers compensation system from the perspective of self insured organisations. Approximately 60 organisations are self insured for workers compensation in NSW.

Additionally, there are a number of specialised insurers for industry groups such as racing, local government, the Catholic Church, pharmacies, clubs and hotels, and coal mining. Self and specialised insurers represent a significant proportion of the workforce in New South Wales and play a vital role in the successful and efficient operation of the NSW workers compensation system.

The SIA, as a general observation, believes the legislation (together with regulations and guidelines), claims management and disputation requirements, and multiple dispute resolution forums are confusing and unnecessarily complex. The SIA believes the level of complexity within the system is increasing at an exponential rate, making it very difficult to properly administer claims and entitlements, and manage employer liabilities.

The SIA calls for the simplification of the claims determination and dispute resolution process, the simplification of section 59A relating to medical expense entitlement, the simplification of work capacity assessment and decision process, and the reintroduction of unfettered commutations without the requirement of regulator approval. Further, the SIA encourages the regulator to take a more active role in providing instruction and guidance to the whole industry.

This submission deals with each of these items separately below.

1. **Simplification of claims determination and dispute resolution process:**

    a. The technical and content requirements of section 74 liability dispute notices and work capacity decision notices are too complex, onerous and difficult to administer. The construction of these notices consumes inordinate resources and is costly to implement. Injured workers have great difficulty in understanding the notices and their rights, particularly without legal representation in the area of work capacity.

    b. The legislation fails to clearly delineate between liability disputes which fall within the jurisdiction of the Workers Compensation Commission and work capacity as evidenced by the recent Sabanayagam decision. This is an ongoing issue where injured workers and self – insurers face the real prospect of different components of what is essentially a dispute about a single injury ending up in different forums simultaneously. For example, there may be a dispute about liability for the injury which is dealt with by the Workers Compensation Commission. However, if there is a work capacity decision in respect of the claim for weekly payments, the Commission may not be able to deal with the determination of the weekly payments entitlement.

    c. There are multiple processes and forums for the determination or resolution of different claim types:

        i. Liability disputes as to injury, causation and weekly payments if there is no work capacity decision are dealt with by the Commission, but only if the weekly compensation claim falls within the first 130 weeks.

        ii. Medical cost disputes are dealt with by the Commission.

        iii. Permanent impairment liability disputes are dealt with by the Commission.

        iv. Permanent impairment assessment is dealt with by the Commission's AMS and Medical Appeal Panel processes, with potential for judicial review proceedings in the Supreme Court of NSW, if a party is aggrieved by the final outcome.

        v. Work capacity disagreements are dealt with firstly by internal review of the insurer and then by further review by the Merit Review Agency (MRA) and procedural review by WIRO; and these agencies adopt different approaches on certain issues; with potential for judicial review proceedings following the three-step review process.

        vi. Work injury damages claims are dealt with by the mediation process in the Commission and substantive proceedings in the District Court, if claims do not resolve at mediation.

vii. Interim payment, expedited assessment and injury management disputes are dealt with by dispute resolution officers of the Commission in a truncated non-arbitral process where conferences and hearings are conducted entirely by telephone, with no opportunity to ask questions of or cross-examine witnesses.

d. The SIA considers there are too many pathways for resolution or determination of different types of claims or claim components. The pathways are too complex and confusing to negotiate by both injured workers and self – insurers. The SIA recognises the further difficulty injured workers face in understanding their rights in the area of work capacity, where they are not afforded access to paid legal representation.

e. The SIA considers the disparate systems and methodologies applicable to claim determination or resolution and the multiple dispute determination forums result in a disjointed system, which at times is quite dysfunctional.

f. The SIA considers the time has arrived for the introduction of a single and simple form of notification to the injured worker of the entitlement to statutory compensation benefits and the extent of those benefits, dealing with all of the issues. The notice should be simple, concise and understandable. It should be able to be constructed by a case manager; rather than read like a judgment of a court or tribunal. The notice should not be rendered invalid simply by technical deficiency or deficiency in form and content.

g. Further, all workers compensation disputes should fall for determination in one single forum and not in the multiple forums, which currently exist.

h. The SIA recommends the establishment of a specialist and independent court or tribunal; a 'one stop shop', with appointed judicial officers dealing with resolution and determination of all issues, disagreements and disputes arising under the workers compensation legislation.

i. The SIA believes its members should be able to access properly remunerated legal representation at all times. It therefore follows injured workers should also be able to do so.

2. Entitlement to medical expenses and section 59A:

a. Section 59A is poorly designed, contains a number of anomalies and the SIA believes it is unworkable.

b. There is potential for the old version of section 59A to continue to apply to old or existing claims made prior to 1 October 2012. That is, if the first payment of weekly compensation for an injury was not made between 1 October 2012 and 4 December 2015 and if the injured worker was not in receipt of weekly payments for the injury

immediately before 17 September 2012, the old version of section 59A applies subject to Schedule 8 Part 2 of the Workers Compensation Regulation 2016: Reference Schedule 6 Part 19I Clause 11 of the 1987 Act.

c. If the old version of section 59A applies, the injured worker is only entitled to medical costs for the injury for 12 months after the claim is made or, alternatively, 12 months after weekly payments have ceased. If, however, the injured worker can establish a permanent impairment of more than 20% resulting from the subject injury, then he or she qualifies for reasonable medical costs in respect of the injury, but only until "retiring age": Schedule 8 Part 2 Clause 27 of the Workers Compensation Regulation 2016.

d. Because the old version of section 59A continues to apply in certain circumstances to old or existing claims, there are some injured workers in the system who cannot recover the cost of medical treatment for the subject injury beyond 31 December 2013.

e. Sorting out whether the old or current version of section 59A applies is a complex exercise with the high risk of error. Providing a simple, accurate and easy to understand explanation to the injured worker, who is sometimes an ongoing employee of the self-insurer, is virtually impossible.

f. Alternatively, if the new version of section 59A introduced from 4 December 2015 applies, injured workers and self-insurers are required to turn their mind to permanent impairment resulting from the subject injury and the quantification of that impairment to determine whether medical costs relating to the injury are payable for 2 years or 5 years from the date of claim or cessation of weekly payments or whether medical costs are for life.

g. A permanent impairment of 10% or less triggers an entitlement for up to 2 years. A permanent impairment of more than 10% and less than 20% triggers an entitlement for up to 5 years. A permanent impairment of more than 20% triggers an entitlement, potentially for life.

h. For the 2 and 5 year scenarios, the legislation requires the permanent impairment assessment to be made "as provided by section 65". Section 65 is linked to chapter 7 part 7 of the 1998 Act. This is the AMS process in the Commission. Therefore, in order for the legislation to be satisfied, there must be an AMS process in the Commission and a Medical Assessment Certificate issued by the Commission, following an AMS assessment: section 59A(2).

i. To apply the new version of section 59A, it is not sufficient to merely obtain permanent impairment assessments from medico – legal experts commissioned by one or both of the parties.

j. By contrast, if an injured worker is potentially "high needs", that is: permanently impaired to the tune of more than 20% as a result of the

subject injury, the self-insurer can agree to that based on the medical evidence which may have been assembled.

k. The Association believes linking the medical expenses entitlement to permanent impairment in this fashion is unworkable. There are too many anomalies. It is a recipe for disagreement and disputation, which will potentially delay the delivery of medical services to injured workers and return to work pending determination of eligibility.

l. The Association also believes section 59A will fuel undesirable claim making conduct. Self-insurers have started to see inflated permanent impairment assessments comprised of impairments resulting from separate injuries where it is not permissible to aggregate the separate permanent impairments to achieve the required threshold. This will give rise to unnecessary and costly disputes where the self-insurer will be obliged to dismantle the globalised impermissible permanent impairment assessment.

m. The Association also believes this will drive a higher level of work injury damages/common-law claims, which would not otherwise be the case.

3. Work capacity assessments and decisions

a. Work capacity continues to be a problem for self-insurers with the lack of clarity and guidance on technical issues such as:

i. Calculation of pre-injury average weekly earnings (PIAWE);

ii. Calculation or reckoning of a 'week' for the purpose of the weekly compensation entitlement period continuum;

iii. The absence of a template suite of correspondence, particularly the work capacity decision letter.

b. Although the recent SIRA guidelines for claiming workers compensation have simplified the process for making work capacity assessments and decisions, and review of those decisions, our members still struggle to explain the process and rights to injured workers because of the complexity of the legislation and review systems in circumstances where the injured worker has no access to paid legal advice.

c. The SIA believes its members should also be freely able to access paid legal advice in relation to work capacity reviews.

d. Finally, the Association is concerned about differences in approach between the MRA and WIRO on the review of work capacity decisions, which creates further uncertainty in the system.

4. Commutations:

a. The SIA has been a long-term proponent of the introduction of a simple and speedy commutation mechanism to enable injured workers (who are advised and legally represented) and self-insurers to resolve their workers compensation disagreements and entitlements by payment of a lump sum which finalises all claims and entitlements in relation to the subject work injury.

b. The current commutation mechanism prescribed by section 87EA, in the opinion of the SIA, is too complex and onerous to satisfy. It requires a permanent impairment threshold of 15% to be met. It also requires the approval of the regulator. Arguably, the pre-condition "all opportunities for injury management and return to work for the injured worker have been fully exhausted" can never be met because further rehabilitation initiatives can always be considered, no matter how poor the previous rehabilitation outcomes have been.

c. In the current environment, the reality with the existing commutation mechanism is that, once an injured worker attains a permanent impairment of 15% resulting from the injury, the focus shifts to other potential claims such as work injury damages.

d. The current commutation mechanism also contains an anomaly. For injuries prior to 4 PM 30 June 1987, the preconditions for commutation do not apply. In other words, for these injuries, all that is required is for the parties to agree on a commutation figure and then have the commutation agreement registered in the Commission. It is an administrative process. The SIA appreciates claims for injuries prior to 4 PM 30 June 1987 may not be many, but they still exist with some of our members.

e. Ultimately, the SIA believes injured workers and self-insurers are able to identify where rehabilitation and return to work initiatives, following injury, have been exhausted and nothing further can be done to realistically support the worker to return to work with the self-insurer. In these circumstances, the SIA believes the parties should be able to reach agreement to finalise the worker's entitlements by a simple commutation, with no red tape. The SIA believes this will better enable the worker to gain control of his or her life and the parties can move on, rather than remain stuck in a fragmented, disjointed, confusing and often distressing workers compensation system, which currently exists. The SIA believes finalisation of the claim in this fashion will also enhance the prospects of the injured worker securing employment elsewhere.

5. SIRA's role as workers compensation system regulator:

a. The SIA understands and accepts SIRA is a relatively new regulator building its infrastructure, presence and engagement within the system.

b. However, the SIA is concerned clear, accurate and consistent policy positions on legislative interpretation affecting the whole system are not being formulated and communicated quickly enough.

c. In this regard, the SIA notes icare has developed and publicised to its scheme agents and injured workers a number of policy positions including recently information on the application of section 39 which relates to cessation of weekly payments after 5 years. The application of section 39 is a significant milestone in the implementation of the 2012 weekly compensation legislative reforms which arises in December 2017. While SIRA has commenced consultation with self – insurers on this issue, it would seem icare has reached a more advanced position; with information disseminated to injured workers.

d. The Association also notes that, following the Presidential appeal in the Sabanayagam case, both icare and SIRA published information concerning what constitutes a liability decision versus a work capacity decision and the publications by the two organisations contained significant differences. SIRA left open the prospect of disputation of weekly payments by reference to section 33 of the 1987 Act constituting a liability decision. Conversely, the SIA understands icare instructed scheme agents refusal of weekly payments by reference to section 33 amounted to a work capacity decision. The differing communications by SIRA and icare are reproduced in the appendix to this submission.

e. More recently in August 2016, the SIA believes icare published guidance material for scheme agents on different scenarios applicable to section 74 dispute notices and work capacity decisions.

f. Self insurers have no interaction with icare.

g. The SIA acknowledges SIRA representatives attend meetings of its executive and members to provide information and updates, mainly on licensing issues. The SIA appreciates SIRA's input in this regard.

h. The SIA would like to see SIRA provide more guidance material on interpretation of the increasingly complex legislation.

i. Without wishing to criticise SIRA, the SIA would encourage the regulator to assume the lead role in developing and articulating policy positions on interpretation of the legislation for the benefit of the whole system to ensure clarity and consistency for all New South Wales injured workers and employers. Material disseminated by icare is not applicable to self-insurers.

The SIA believes it has answered the questions on notice arising from the evidence given on 4 November 2016 in this submission. The SIA is nevertheless prepared to amplify this submission and answer any further questions the Committee may have.

Stephen Keyte
NSW Self Insurers Association

Appendix

Examples of different communications by SIRA and icare following decision of Deputy President O'Grady in Sabanayagam v St George Bank Ltd [2016] NSWWCCPD 3 was issued on 21 January 2016

Icare direction to scheme agents 12 February 2016.

The decision of Deputy President O'Grady in Sabanayagam v St George Bank Ltd [2016] NSWWCCPD 3 was issued on 21 January 2016. This decision concerned the jurisdiction of the Workers Compensation Commission to determine an injured Worker's entitlement to weekly payments of compensation in circumstances where a section 74 notice had been issued disputing liability.

As a result of this decision you are advised that, effective immediately, any decision made to cease a Worker's weekly payments of compensation should be communicated by way of a Work Capacity Decision.

A Work Capacity Decision should be made even if the Scheme Agent determines the effects of a workplace Injury have resolved and the Worker is no longer incapacitated for work as a result of the Injury.

Section 74 notices resulting in the cessation of weekly payments of compensation are not to be issued where the Scheme Agent has accepted liability for the Injury.

Section 54 notices resulting in the reduction of weekly payments of compensation are not to be issued where the Scheme Agent has accepted liability for the Injury.

Section 74 notices may be issued where Injury is in dispute (e.g. pursuant to section 4 and/or 9A of the 1987 Act) and/or in relation to any dispute that is not concerning ongoing weekly payments of compensation (e.g. treatment related expenses, permanent impairment compensation).

The above instructions only apply where the Worker is not an exempt Worker (i.e. is not a police officer, paramedic, fire-fighter, coal miner or other worker specifically exempted from the effects of the Workers Compensation Legislation Amendment Act 2012).

SIRA letter to self- insurers dated 11 February 2016

Dear XXXXXX

Re: Decision – Sabanayagam v St.George Bank Ltd [2016] NSWWCCPD 3 ("Sabanayagam")

The State Insurance Regulatory Authority (SIRA) is currently reviewing the abovementioned decision of Deputy President O'Grady dated 21 January 2016 and

its potential impact on the scheme. The decision may be subject to further litigation or appeal, and if so SIRA will monitor those proceedings accordingly.

In light of the decision, it is useful to note that section 43 of the *Workers Compensation Act 1987* (1987 Act) sets out the type of decisions that are considered to be work capacity decisions under the legislation. These include decisions regarding an injured workers capacity, suitable employment, earning capacity, and PIAWE. Where a work capacity decision is made, insurers must follow the notice requirements set out in the Work Capacity Guidelines and section 54 of the 1987 Act. Further, the appropriate procedure for review of a work capacity decision is that set out in section 44BB of the 1987 Act i.e. internal review by the insurer, followed by SIRA merit review and review by the Workers Compensation Independent Review Officer.

However, where a decision is made to dispute liability, an insurer is required to issue an appropriate notice under section 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act). Section 74 notices should not be used to notify a worker of a work capacity decision. Disputes as to liability can be reviewed by the Workers Compensation Commission.

SIRA requires that insurers review their claim portfolio to identify those claims which may be
impacted by Sabanayagam. I would appreciate your advice by Friday 19 February 2016 on the number of potentially impacted claimants and confirmation that processes are in place to directly communicate with claimants if required. SIRA will advise insurers of any further action required.

Kind regards
Carmel Donnelly
Executive Director, Workers & Home Building Compensation Regulation
State Insurance Regulatory Authority

Stephen Keyte
Chairperson NSW Self Insurers Association