Submission
No 14

INQUIRY INTO 2018 REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: Australian Lawyers Alliance

Date Received: 20 June 2018

Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

2018 review of the workers compensation scheme

Submission to Standing Committee on Law and Justice

June 2018

CONTENTS

Who we are 3

Introduction 4

The ALA favours independence in decision making........ 4

Internal review of substantive decisions is a waste of time – The MAI Act – Internal review 6

Case study: Mr DC 6

Case study: Mr NY 8

Specialisation is an advantage 9

Retain some court access........ 9

Preserve WIRO 10

Not NCAT........ 10

Preserving benefits 10

Conclusion 11

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

[1] www.lawyersalliance.com.au.

Introduction

1. The Standing Committee on Law and Justice is considering the issue of creating a consolidated Personal Injuries Tribunal to operate across both the NSW workers compensation and Compulsory Third Party (CTP) schemes.

2. It is noted that in December 2017 a discussion paper ('Improving workers compensation dispute resolution in NSW') from the Department of Finance, Services and Innovation, canvassing four (4) options for reforming the dispute resolution system, included as an option a consolidated personal injury model delivered by the State Insurance Regulatory Authority (SIRA)/Dispute Resolution Service (DRS) in charge of 'claimant support', legal support, dispute management and resolution, and system oversight with the elimination of the Workers Compensation Commission (WCC) and the Workers compensation Independent Review Office (WIRO).

3. Following that review the Government announced that the WCC will undertake all dispute resolution (removing the merit review function from SIRA and procedural review function from WIRO). The changes appear to be in line with recommendations that the ALA has been advocating for some time. The ALA welcomes the announcement and looks forward to being able to review the details and provide feedback where necessary to the Government.

4. In relation to the consideration of creating a consolidated Personal Injury Tribunal the ALA commences its consideration of these issues by identifying the critical principles or issues in relation to dispute resolution design.

The ALA favours independence in decision making

5. At a minimum, the ALA strongly prefers an independent Commission with a distinct separation from the SIRA bureaucracy. The scheme regulator should have no access to, and no influence over, the decision makers.

6. To achieve this independence, it is necessary that the decision makers maintain a judicial, rather than an administrative focus. The Workers Compensation Commission model is a better model than the 'new CTP' DRS. The reality is that CTP DRS and its predecessors, Medical Assessment Service (MAS) and Claims Assessment Resolution Service (CARS), are too close to the regulator. DRS remains part of the SIRA structure and still reports through the SIRA structure. It has no judicial head. It has no judicial culture. It has no objective independence.

7. It is unthinkable to anybody properly educated in the separation of powers within the Westminster system to suggest that the Attorney General would be able to summon the judges of the Supreme Court, District Court or Local Court and give them a lecture about sentencing and the way in which those judges should approach their sentencing task. The separation of powers within the Westminster system ensures that such a meeting never occurs.

8. The same degree of independence should exist in relation to civil determinations of significant and potentially life altering determinations of statutory benefits and awards of damages. The head of the regulator (SIRA) should not be exercising administrative control over the dispute resolution system. It should be wholly and entirely at arms' length. The 'new CTP' DRS as created under the *Motor Accident Injuries Act* 2017 (MAI Act) is not.

9. A further bulwark of independence is the use of sessional decision makers. The fact that the decision makers are not all permanent employees of SIRA helps maintain their independence within the current CARS, MAS and workers compensation systems. The use of such sessional experts as decision makers should be a retained feature of any changed scheme design.

Internal review of substantive decisions is a waste of time – The MAI Act – Internal review

10. Unfortunately, a feature of the new MAI Act is that many statutory benefits disputes can only be progressed beyond an insurer rejection or denial after the claimant pursues (within a short timeframe) an internal review.

11. The ALA strongly opposed introducing internal insurer review into the MAI Act. The experience of ALA members within the workers compensation scheme has been that internal review can be successful in addressing minor mathematical issues (miscalculation of wage rates), but is a complete waste of time and has been a failure when it comes to more substantive issues.

12. That experience is already starting to repeat itself in the CTP scheme. It is anticipated that internal review will be a pointless waste of time, with little role other than to deter the vast majority of claimants from pursuing any review at all.

Case study: Mr DC

13. **Attached** to this submission is an internal review conducted by an Internal Review Officer at GIO dated 10 May 2018 in a claim brought by Mr DC. Also **attached** is the letter of complaint from the ALA of 6 June 2018 regarding systemic issues raised by the internal review decision.

14. The issues raised by the ALA included:

    a. The internal review decision contained a clear legal error, fundamentally misinterpreting the Act. The internal review officer decided that a claimant with a non-minor physical injury and minor psychiatric injury could only claim damages for the physical injury. This is not what the Act provides.

b. The internal review raised procedural concerns with regards the internal review officer telephoning the claimant and questioning the claimant to adduce evidence. It is unclear whether this is to be a feature of the internal review system — the insurer questioning the claimant to adduce evidence to support a denial of benefits.

c. The internal review officer conducting his own analysis of psychiatric diagnostic criteria (DSM 5), reaching interpretations of those medical diagnostic criteria contrary to that of the treating psychologist.

d. The internal review officer not seeking yet further information from the treating specialist, but taking the opportunity to impose his own psychiatric diagnosis in preference to obtaining more information from the treating specialist.

e. The internal review officer preferring his own medical diagnosis to that of the treating specialist.

15. Within three days of the ALA complaint, GIO acknowledged that the internal review decision was legally incorrect, reversed it and apologised.

16. However, but for the willingness of members of the legal profession to advocate for Mr DC (without charge) a patently incorrect decision may have gone unchallenged and uncorrected.

17. This case study clearly illustrates just some of the problems that can attend on an internal review where there are no rules as to how the insurer concerned is to conduct a fair and reasonable review of the initial denial of benefits (and in circumstances where the internal review was entirely unnecessary to begin with and where a significant legal error was made in trying to divide up physical and psychiatric injury for the purposes of an ongoing entitlement to benefits).

18. The ALA has asked SIRA for reassurance that GIO has not communicated or imposed this incorrect legal analysis on any other claimants.

Case study: Mr NY

19. Mr NY was injured on 4 February 2018 (a Sunday). His claim form was submitted on Monday 5 March, 29 days later.

20. NRMA (for the Nominal Defendant) denied the first 28 days of benefits on the basis the claim was submitted 29 days post-accident. An internal review confirmed this decision.

21. Apparently, neither the original decision maker nor the review officer was familiar with s.36 of the *Interpretation Act* that provides that when a time limit expires on a weekend, time is extended to the next weekday. It took the involvement of a lawyer to assist the claimant and get the law right. Internal review was a waste of time.

22. On a separate note, SIRA has been notified and asked how many other claimants NRMA has underpaid as a consequence of legal ignorance.

23. SIRA has also been asked as to whether Claims Assist staff had been trained as to how the law measures time.

24. The government has made the very sensible decision to cut out or cut back on internal reviews and merit reviews in work capacity decisions within the workers compensation scheme. The same dose of common sense should now be applied to the MAI Act, by removing internal review and merit review from that Act.

Specialisation is an advantage

25. The determination of issues of causation, medical questions, liability and contributory negligence (in motor accident claims) are complex questions where decision making is improved by having experienced experts in the field making decisions. The ALA favours the retention of specialist workers compensation and CTP decision making tribunals (even if they are merged within the one organisation). There has been a flirtation within the workers compensation system in employing experts in dispute resolution with no specific experience in workers compensation. That was not a happy experiment. It makes much more sense to retain experts in the complexities of workers compensation law and CTP law and have them determining workers compensation and CTP disputes.

26. There is a difference between CTP and workers compensation. It is important to note there are differences between the two schemes. The Workers Compensation Commission deals with disputes with different complexities than those that arise in CTP claims. Further, there have been multi-million dollar awards of damages from the CARS system under the current *Motor Accidents Compensation Act* 1999 (MAC Act) — figures rarely seen in the workers compensation system. Whilst many experienced legal practitioners understand both systems, not all do. Not all current CARS assessors could do justice to a workers compensation dispute and not all Commission arbitrators could apply principles of contributory negligence in a motor vehicle accident (MVA) claim.

Retain some court access

27. Currently CARS/MAS under the MAC Act and DRS under the MAI Act do not have exclusive jurisdiction. There are some cases that get exempted and go to court. That should continue to be the case. Whatever new dispute resolution design is pursued, work injury damages claims (with the significant sums involved) should continue to be

determined by the District Court. So too, complex issues surrounding liability in CTP cases should be determined by the District Court. Finally, CTP cases (unlike workers compensation (WC) claims) much more frequently involve children and persons without legal capacity. It is appropriate that the court continue to exercise supervisory jurisdiction in relation to those claims. Thus it is necessary that any scheme design continue to allow some degree of court access in appropriate cases.

Preserve WIRO

28. Restructuring of dispute resolution should not be the excuse for SIRA/the Department of Finance, Services and Innovation to axe WIRO. To the contrary, the ALA supports an expanded role for WIRO, with a WIRO style organisation needed to ensure accountability within the CTP scheme.

Not NCAT

29. In NSW, the NSW Civil and Administrative Tribunal (NCAT) has enough challenges meeting its current array of dispute types. There are unique and distinct aspects to workers compensation and CTP disputes. They warrant a separate and independent tribunal, rather than folding these important functions into NCAT.

Preserving benefits

30. It is always tempting when putting two schemes together for administrative purposes to then try to merge the benefits. NSW has a bare bones WC scheme. Benefits have been slashed because of a past supposed crisis in premiums. The CTP scheme has been dragged down (although not to WC levels), again, because of perceptions about premiums.

31. Work accidents and motor vehicle accidents can have life altering consequences for those injured. Catastrophic injury can have catastrophic consequences. The ALA supports maintaining proper compensation for both workers compensation and CTP accident victims. A 'lowest common denominator' approach to benefits is not supported.

Conclusion

32. Taking all of the foregoing into account the ALA is not opposed to seeing motor vehicle disputes handled by an independent, judicial-led body, similar in style to the Workers Compensation Commission. The ALA is cautiously supportive of the move to such a tribunal, provided that independent body:

    a. Has a judicial rather than bureaucratic head;

    b. Reports direct to the Minister and not through SIRA;

    c. Abandons merit review;

    d. Maintains the specialist workers compensation and CTP jurisdictions;

    e. Does not move to using exclusively fulltime employed staff as non-judicial decision makers;

    f. Does not drag down damages to a lowest common denominator; and

    g. Retains the use of experts in the field of CTP and workers compensation.

33. As always, the devil is in the detail and in this environment, it is particularly important to be aware of competing bureaucratic demands for power and control. The bureaucracy is not necessarily a great fan of judicial independence and of independent decision making. Any parliamentarian with a keen appreciation for the Westminster system and an appreciation for the integrity that comes with judicial

oversight should be supporting as independent a dispute resolution process as possible.

Yours Sincerely,

Andrew Stone SC

NSW President
Australian Lawyers Alliance