Submission No 21

INQUIRY INTO 2018 REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: Workers Compensation Independent Review Office (WIRO)

Date Received: 9 July 2018

Workers Compensation Independent Review Office
Level 4, 1 Oxford Street, Darlinghurst NSW 2010
13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

2018 REVIEW OF THE WORKERS COMPENSATION SCHEME

BY THE

NSW LEGISLATIVE COUNCIL

STANDING COMMITTEE ON LAW AND JUSTICE

SUBMISSION BY THE WORKERS COMPENSATION INDEPENDENT REVIEW OFFICER

25 June 2018

EXECUTIVE SUMMARY OF SUBMISSION

WIRO accepts that the main focus of this Review is the establishment of a Personal Injury Tribunal (the Tribunal) to manage disputes concerning injured persons' rights, entitlements or obligations with respect to statutory compensation benefits under both the workers compensation (WC) and compulsory third party (CTP) schemes.

WIRO has set out its view about the feasibility of such a Tribunal and supports its establishment as this should provide better access to justice for all stakeholders and, if properly managed, will result in emotional and financial benefits for all stakeholders.

The Tribunal will need to be both independent and transparent in its operation and adopt a dispute resolution model that recognises different methods of resolving disputes between insurers and injured workers.

It is essential that independent legal advice and assistance is available to all injured workers and that where the provision of the legal services would constitute an unfair financial burden upon the injured worker, a fund is available to pay for those services.

That fund currently exists within the WC scheme and it should be extended to the CTP scheme by way of a levy on premiums.

There should also be available an effective appeal process and the Supreme Court of NSW should be fully vested with appellate jurisdiction.

However, as WIRO has often submitted, reforming the dispute resolution processes will be ineffective unless Parliament first attends to ambiguities that exist in the current legislation and regulations. It is these ambiguities and complexities that cause most of the disputes within the current adversarial system.

With the assistance of all stakeholders in the workers compensation scheme WIRO developed a statement of those aspects of the scheme that needed attention and obtained unanimous support from all involved. These aspects need to be addressed as a matter of urgency so that the new Tribunal will not be doomed to operate under the existing legislative complexities.

TERMS OF REFERENCE

The Terms of Reference issued by the Standing Committee on Law and Justice (SCLJ) were in the following terms:

2018 review of the workers compensation scheme

1. That, in accordance with section 27 of the State Insurance and Care Governance Act 2015, the Standing Committee on Law and Justice be designated as the Legislative Council committee to supervise the operation of the insurance and compensation schemes established under New South Wales workers' compensation and motor accidents legislation, which include the:
   (a) Workers' Compensation Scheme
   (b) Workers' Compensation (Dust Diseases) Scheme
   (c) Motor Accidents Scheme
   (d) Motor Accidents (Lifetime Care and Support) Scheme.
2. In exercising the supervisory function outlined in paragraph 1, the committee:
   (a) does not have the authority to investigate a particular compensation claim, and
   (b) must report to the House at least once every two years in relation to each scheme.

On 1 May 2018, the Committee resolved that the 2018 review of the workers compensation scheme should focus on:

- The feasibility of a consolidated personal injury tribunal for Compulsory Third Party and workers compensation dispute resolution, as per recommendation 16 of the Committee's first review of the workers compensation scheme, including where such a tribunal should be located and what legislative changes are required
- Recommending a preferred model to the NSW Government.

Recommendation 16 of the SCLJ following its first review of the Workers Compensation Scheme is as follows:

Recommendation 16

"That the NSW Government consider the benefits of developing a more comprehensive specialised personal injury jurisdiction in New South Wales."

Importantly, in the Committee's first review, it also made recommendations complementing recommendation 16:

Recommendation 13

"That the NSW Government investigate removing the distinction between work capacity decisions and liability decisions in the workers' compensation scheme.

Recommendation 14

"That the NSW Government establish a 'one stop shop' forum for resolution of all workers' compensation disputes, which:

(a) allows disputes to be triaged by appropriately trained personnel

(b) allows claimants to access legal advice as currently regulated

(c) encourages early conciliation or mediation

(d) uses properly qualified judicial officers where appropriate

(e) facilitates the prompt exchange of relevant information and documentation

(f) makes use of technology to support the settlement of small claims

(g) promotes procedural fairness."

Recommendation 15

"That the NSW Government introduce a single notice for both work capacity decisions and liability decisions made by insurers."

WHAT IS THE WORKERS COMPENSATION INDEPENDENT REVIEW OFFICE AND WHAT DOES IT DO?

The Workers Compensation Independent Review Officer (WIRO) was established as part of the June 2012 reforms. I was appointed by the Governor on 3 September 2012 and the Office commenced operations on 1 October 2012.

The Office undertakes the following functions:

[1] Receives and finds solutions to matter which concern injured workers and their helpers about the conduct of the Insurers (and employers) in dealing with the claims by injured workers for compensation because of a work injury.

[2] Funding the costs incurred by independent lawyers acting for injured workers in pursuing their claims for compensation whether through the Workers Compensation Commission or the Supreme Court.

[3] Providing education to all parties with an interest in the workers compensation system. This is managed by hosting face to face seminars; monthly Bulletins setting out recent Commission and Court decisions of relevance; regular updates by way of a WIRO WIRE and speaking at groups with an interest in the area.

[4] Conducting reviews of the workers compensation scheme and legislation and reporting to the Minister.

[5] Conducting procedural reviews of work capacity decisions by insurers and delivering decisions which are published online.

[6] Presenting the Minister with an Annual Report which is to be tabled in Parliament.

[7] Publishing data about the workers compensation system quarterly.

These functions when combined have enabled WIRO to collect and now accumulate very significant data about the operation of the workers compensation scheme across all insurers not just the Nominal Insurer which is managed by Insurance & Care NSW ("icare").

WIRO FUNCTIONS:

> COMPLAINTS BY INJURED WORKERS

Section 27(a) of the *Workplace Injury Management and Workers Compensation Act* 1998 (1998 Act) provides as follows:

> *"The Independent Review Officer has the following functions:*
> *(a) to deal with complaints made to the Independent Review Officer under this Division"*

Section 27A of the 1998 Act provides:

> **27A Complaints about insurers**
>
> *"(1) A worker may complain to the Independent Review Officer about any act or omission (including any decision or failure to decide) of an insurer that affects the entitlements, rights or obligations of the worker under the Workers Compensation Acts.*
>
> *(2) The Independent Review Officer deals with a complaint by investigating the complaint and reporting to the worker and the insurer on the findings of the investigation, including the reasons for those findings. The Independent Review Officer's findings can include non-binding recommendations for specified action to be taken by the insurer or the worker.*
>
> *(3) The Independent Review Officer is to deal with a complaint within a period of 30 days after the complaint is made unless the Independent Review Officer notifies the worker and the insurer within that period that a specified longer period will be required to deal with the complaint.*
>
> *(4) The Independent Review Officer may decline to deal with a complaint on the basis that it is frivolous or vexatious or should not be dealt with for such other reason as the Independent Review Officer considers relevant".*

While each of icare and its claims managers (Scheme Agents) as well as SIRA all have provision for "complaints" to be made about the conduct of claims, none of them have the statutory function that this office has. Each of these "complaints services" operate under different principles which does not allow for a transparent reporting of the reasons for the complaints and the systemic issues which may arise.

The effect of having multiple complaints agencies is that the data collected is not transparent and cannot be aggregated to obtain a clear picture of the performance by insurers.

Some of the documents issued by insurers inform the injured worker that she or he must first contact the insurer before contacting WIRO. These statements are not correct and very misleading. Every worker has the right and entitlement to contact WIRO at any time and raise concerns about the conduct of their claim.

In addition, s 27C of the 1998 Act provides:

> **"27C Annual report**
>
> *(1) As soon as practicable after 30 June (but before 31 December) in each year, the Independent Review Officer is to prepare and forward to the Minister a report on his or her activities for the 12 months ending on 30 June in that year…*

(4) The report is to include the following information:

(a) the number and type of complaints made and dealt with under this Division during the year,

(b) the sources of those complaints,

(c) the number and type of complaints that were made during the year but not dealt with."

It became apparent shortly after the office commenced operations on 1 October 2012 that the real demand was not for the Office to conduct investigations as an "ombudsman" might traditionally undertake with a report eventually as to each matter, but to achieve a fast and satisfactory outcome for the worker who was often in a vulnerable position.

I established a "Protocol" with Insurers in which they agreed to respond to a "Preliminary Enquiry" about a claim within 2 business days. The worker or her or his representative may telephone the WIRO Call Centre (13 94 76) or email a request.

The Call Centre deals with every call promptly and personally.

The experience of this group now known as the "Solutions Group" is that within the 2-day timeframe WIRO receives a response for the worker in almost all enquiries. This occurs because of the cooperation that WIRO receives from every insurer in endeavouring to find a solution rather than strenuously defending their decision.

WIRO publishes quarterly the data about the complaints received and the reasons for those complaints and the insurer involved. These are available on the WIRO website.

VG

> PROCEDURAL REVIEWS OF INSURER WORK CAPACITY DECISIONS

Section 27(b) of the 1998 Act provides:

> *"The Independent Review Officer has the following functions:*
> *(b) to review work capacity decisions of insurers under Division 2 (Weekly compensation by way of income support) of Part 3 of the 1987 Act"*

The 2012 Reforms created a method of dealing with the management of claims for compensation by way of weekly payments and in particular, claims involving a 'work capacity decision'.

The 1987 Act defines a work capacity decision by the Insurer as follows:

> *"(a) a decision about a worker's current work capacity,*
>
> *(b) a decision about what constitutes suitable employment for a worker,*
>
> *(c) a decision about the amount an injured worker is able to earn in suitable employment,*
>
> *(d) a decision about the amount of an injured worker's pre-injury average weekly earnings or current weekly earnings,*
>
> *(e) a decision about whether a worker is, as a result of injury, unable without substantial risk of further injury to engage in employment of a certain kind because of the nature of that employment."*

The 2012 reforms removed the jurisdiction of the WCC to deal with disputes arising from these decisions and it introduced an administrative review pathway.

The final Procedural Review of work capacity decisions (the fourth step) was managed by WIRO. Over 700 decisions were made and published on the WIRO website. Each decision was carefully considered by insurers and their practices and processes adjusted accordingly. This decision making had a significant effect, unlike the Merit Reviews which because they were secret were ineffective.

However, for numerous reasons the administrative review pathway has been unsuccessful. The Government has now recognised this and announced that further reforms to the legislation will abolish the administrative review pathway and return the jurisdiction to the WCC.

> REVIEW OF THE WORKERS COMPENSATION LEGISLATION: "PARKES" INQUIRY

When the Minister announced that there would be a review of the workers compensation legislation I instituted an Inquiry pursuant to section 27 of the 1998 Act into those parts of the legislation which could be improved in any amending legislation.

There were many provisions of the legislation that were internally contradictory and there were other sections which caused difficulties for those dealing with claims management.

I was assisted by having The Honourable Conrad Staff, recently retired as a Justice of the NSW Industrial Commission agree to Chair the Parkes Project.

I was able to gather 36 leaders of the workers compensation industry together as an Advisory Committee for regular meetings to consider a range of topics around the workers compensation scheme and the need for change.

Because of the meetings of this powerful Advisory Committee there were identified those issues which appeared to cause the greatest practical concerns. Discussion papers based on research were prepared and circulated. These were then the subject of frank discussion by the Group.

Over the course of the work of the Advisory Committee a schedule of principles was developed and had support from all parties. The twelve agreed matters are set out in **Appendix A.**

It remains a puzzle that, with agreement from all participants across the industry, those advising the Minister appeared to not take any of these recommendations into account when recommending some amendments in the 2015 changes which have caused further confusion.

The opportunity to ensure that there was a consistent interpretation of the legislation which reflected the Government policy was lost and the recommendations continue to be ignored.

KG

> REVIEW OF THE WORKERS COMPENSATION SCHEME: HEARING LOSS

I was fortunate to acquire the services of Mr David Effeney to assist me review the areas in which the workers compensation scheme interacted with the medical profession.

After some preliminary enquiry, I decided upon his recommendation to review the hearing loss legislation and practice.

Mr Effeney identified that there needed to be some changes to the rules which set out the calculation of the degree of hearing loss which the experts agreed.

The project then considered whether it would be possible to develop an innovative method of determining which workers met the threshold for the provision of hearing aids or the award of damages for permanent impairment.

At present the worker must undergo testing by an audiologist to determine the degree of hearing loss. The worker then instructs a lawyer to obtain a report from a qualified medical specialist as to the degree of hearing loss and whether it is consistent that the hearing loss resulted from noisy employment.

The lawyer obtains instructions about the employment history.

A software program was developed which would enable audiologists to measure the extent of hearing loss and therefore determine the worker's entitlement to hearing aids or to lump sum compensation for the permanent impairment.

This process would avoid the need for every injured worker suffering hearing loss to have to obtain a report from an ENT medical specialist.

This would have three significant improvements for the worker and his family.

Firstly, there would be no delay in being provided with hearing aids. A process that could take up to two years through the Insurer and then the Workers Compensation Commission.

Secondly, there would be a significant annual cost saving for all insurers in removing the need for the worker to see an ENT specialist to provide a report.

Thirdly, there would be a saving in legal costs for both the lawyer for the worker and the lawyer for the insurer.

It is estimated that the savings for the Scheme would be in excess of $15m per annum.

Unfortunately, DFSI declined to continue to fund the completion of the project and it has not been consummated. This innovation would have had benefit for the other schemes around the country.

Given the removal of funding that significant work has ceased and been archived. That is a tragedy with no reasons provided for the termination of funding.

12Co

> THE INDEPENDENT LEGAL ASSISTANCE AND REVIEW SERVICE ("ILARS")

The Government announced in September 2012 the establishment of this Service and The Minister directed that the management of the Scheme be undertaken this office.

Injured workers have a choice of their own lawyer providing that lawyer is experienced in workers compensation and familiar with the legislation and has sought approval from WIRO to provide legal services to injured workers.

There are presently over 1,200 lawyers who have requested to be approved by WIRO and whom currently provide legal services to injured workers.

When an injured worker seeks assistance with the conduct of her or his claim then the lawyer will take basic instructions and complete a grant application form which sets out essential facts and indicates what assistance is sought.

That application is then considered by WIRO Principal Lawyers (18 full time lawyers), who are experienced in workers compensation practice and procedure, as to whether on the information provided it appears to be reasonable to fund preliminary enquiries and evidence gathering to support the claim.

The grant of assistance will cover the costs of any medical reports and clinical notes as well as providing, in appropriate cases, for the lawyer to obtain further reports consistent with the proper conduct of the claim.

Given the extreme complexity of the legislation and associated regulation and rules the consideration of every application is carefully considered by the WIRO Principal Lawyers.

About 7% of applications are declined although they may subsequently be approved if further information is obtained and provided.

In the five years since it has been operating there have been over 65,000 applications for a grant of funding processed.

The information obtained during the funding of workers' claims has enabled WIRO to develop a program which utilises the data to assist lawyers with understanding their practice and their efficiency compared with other lawyers in their area or across the whole system.

This is very comprehensive and is not available elsewhere. Individual data is provided to lawyers and firms which informs them as to the processing and legal management of claims. The lawyer or firm is also able to be provided a ranking across the Scheme.

This will also allow WIRO to compare performance by individual insurers.

It also allows WIRO to compare the performance of medical specialists. It has been utilised in a pilot project covering one speciality in which it was apparent that the same individual medical specialist was biased in assessing the degree of whole person impairment depending upon whether a report was being prepared for an employer or a worker.

RG

Having drawn this alarming disparity to the group concerned there has been a significant improvement in their performance against the relevant criteria.

When there is a significant Commission or Court decision; a change in legislation or other significant event, WIRO issues an email communication - known as a WIRO WIRE - within a very short time (often within an hour) informing the subscribers of the news.

There are over 2,000 subscribers to this service which has a very successful open and read rating by industry standards.

The whole of ILARS is electronic so that communication is quick and the lawyers can make decisions with no delay. The delivery standard adopted is that every email is responded to within five business days. Every application is processed within 5 business days. Usually the response rate is much quicker. Payment of invoices is also electronic by way of EFT/direct deposit. 16

> EDUCATION

One of the very important roles of the WIRO office is to ensure that those who work within the industry from insurance staff through to lawyers and associated professionals are kept informed of current developments.

Each of the WIRO major Seminars have attracted over 500 attendees, with the most recent attracting over 900 registrants, and are acknowledged as being of significant value throughout the industry.

Seminars are also held every six months in regional areas with these being in constant demand.

A recent development was the introduction of a full day course for paralegals and secretaries in law firms as well as insurers.

These will be held regularly and, if required, will be conducted in regional areas.

WIRO also attends at a variety of other conferences where information is provided to attendees. This has recently included the Transport Workers Union Annual Delegates Conference attended by over 800 members.

A WIRO E Bulletin is also issued every month with case reports and other information.

KG.

THE SCLJ 2014 RECOMMENDATIONS

On 17 September 2014, The Upper House's Standing Committee on Law and Justice tabled its first review of the WorkCover Authority of NSW entitled Review of the exercise of the functions of the WorkCover Authority

There were many recommendations in that Review that involved this office:

Recommendation 1:

> "That the Minister for Finance and Services, in consultation with the WorkCover Independent Review Office and other stakeholders, consider establishing a separate agency or other administrative arrangements to clearly separate the roles of a regulator and nominal insurer in the workers compensation scheme, and implement that model as soon as practicable."

The new structure was implemented through legislation and took effect from 1 September 2015. There was no consultation with this Office.

Recommendation 2

> "That the WorkCover Authority of NSW consult with stakeholders, including worker and employer representatives, during its review of the segregation of functions and delegations around its role in work capacity decisions, and that it publish the review's findings."

The reasoning for this Recommendation appears in paragraphs 3.36 and 3.37 of the Report:

> Paragraph 3.36 stated:
>
> *"Mr Gary Jeffrey, Acting General Manager, Workers Compensation Insurance Division, WorkCover, acknowledged the concerns raised by review participants in this regard. With specific reference to the Transfield case, Mr Jefffrey advised that WorkCover was currently determining how to better structure internal operations to minimise potential conflicts, including examining models used in other jurisdictions such as Victoria, Western Australia and Queensland."*

There has been no consultation with this Office.

As far as I am aware no such review was ever undertaken. If it was the outcome was never published.

Recommendation 4

> "That the NSW Government amend Part 3 of Schedule 1 of the Government Sector Employment Act 2013 to designate the WorkCover Independent Review Office as a separate public-sector agency."

During November 2014, the provision of shared services previously undertaken by Safety Return to Work was transferred to then then Office of Finance and Services which was subsequently subsumed by DFSI. This was done without this office being notified.

There has been no discussion at all about the recommendation.

KL

Recommendation 5

> "That the NSW Government expand the operational parameters of the WorkCover Independent Review Office to include worker health and safety and review the resources of the office to ensure that it has the extra capacity to undertake this additional responsibility."

This has not been the subject of any consultation.

Recommendation 6

> "That the NSW government restore lifetime medical benefits for hearing aids prostheses home and vehicle modifications for all injured workers noting the actuarial evidence as to the relatively minimal cost of restoring such benefits to the workers compensation scheme in that it promptly reviews the viability of restoring all lost medical benefits for injured workers under the scheme"

The Government introduced the *"Workers Compensation Amendment (Existing Claims" Regulation 2014"*. This Regulation only applied to those injured workers who had first made a claim before 1 October 2012.

It exempted these workers from the compensation period restriction in section 59A of the 1987 Act in respect to compensation payable in respect of the provision of crutches, artificial members, eyes or teeth and other artificial aids or spectacles (including hearing aids and hearing aid batteries), as well as compensation payable in respect of the modification of a worker's home or vehicle.

Workers injured after 1 October 2012 can obtain similar benefits through the application of the savings and transitional provisions of the 1987 Act.

Recommendation 7

> "That the NSW government consider amendments to the WorkCover scheme to allow for payment of medical expenses where through no fault of the injured worker it was not reasonable or practical for the worker to obtain the preapproval of medical expenses before undertaking the treatment."

This recommendation has not been the subject of any discussion nor has it been implemented.

There have been further cases in which the Insurer has refused to meet medical expenses for this reason. In one alarming case, the worker had pre-approval from an Insurer and proceeded with the surgery only to discover later that it was the wrong insurer and the correct insurer refused to meet the cost of the surgery as it had not been the subject of a request for pre-approval.

There is an even more alarming case where an Insurer approved the surgery and later decided that the surgery did not arise from the work injury and cancelled the approval and sought to recover the expense.

Recommendation 8

> "That the WorkCover authority of NSW and WorkCover Independent Review Office collaborate to develop a process whereby disagreements over assessments of

KG

permanent impairment can be resolved through negotiation between an insurer and an injured worker."

Despite regular requests by this office for this to occur it has not been implemented much to the concern of injured workers affected who must undergo further medical examinations to determine the correct degree of impairment. That emotional distress is exacerbated by the delay involved.

Recommendation 9

"That the WorkCover authority of New South Wales develop through consultation with all stakeholders and their representatives finding operational directives the workers compensation nominal insurer's scheme agents or licensed insurers that ensure all parties are aware of their rights and responsibilities."

This recommendation has not been the subject of any discussion nor has it been implemented by SIRA.

Recommendation 10

"That the NSW government consider amending section 44 (6) of the *Workers Compensation Act* 1987 to allow legal practitioners acting for a worker to be paid or recover fair and reasonable fees for the work undertaken in connection with a review of a work capacity decision of an insurer, subject to analysis of its financial impact."

While SIRA Issued a discussion paper and sought comments from interested parties there has not been any final recommendation.

Recommendation 13

"That the WorkCover Authority of NSW develop an engagement plan in consultation with all stakeholders and their representatives and publish it as soon as practicable."

There was consultation with advisors some time ago. I am not aware of any outcome.

Recommendation 19

"That the WorkCover Authority of NSW immediately update its "Contact us" webpage as well as any automated phone messages used by the customer service centre, to include information about the WorkCover Independent Review Office."

This was implemented on the website of icare and SIRA. The Customer Service Centre makes no reference to this office.

Recommendation 20

"That the WorkCover Authority of NSW undertaken a review of all guidelines that apply to the workers compensation scheme, in consultation with stakeholders, to simplify and consolidate the guidelines."

The review of the Claiming Compensation Guidelines which had been under way for twelve months before the publication of the report was concluded recently.

KG.

SUMMARY

Of the 12 recommendations that had an impact on WIRO from this major review by the SCLJ, just one was implemented. Others were adopted but specifically excluding consultation with WIRO notwithstanding the recommendations of the Committee.

KG

THE 2016 SCLJ RECOMMENDATIONS

Recommendation 4

> "That the NSW Government consider the need for the Workers Compensation Independent Review Office to complete the Parkes Review."

***The Government's response*:**

> "Supported in principle- The Government supports this recommendation in principle and has given consideration to the need for the Workers Compensation Independent Review Office (WIRO) to undertake further work on the Parkes Project. The Government is broadly supportive of all efforts to improve the NSW Workers Compensation System, and respects the statutory independence of the WIRO to inquire into and report on matters that the Independent Review Officer considers appropriate. The Government has implemented several legislative, regulatory and administrative reforms to improve the NSW Workers Compensation System in the two years since WIRO published its last progress report on the Parkes Project. In light of this, the Government has considered the need to complete this review and has decided that subsequent reforms and current consultation and review projects mean the Parkes Project has been largely overtaken by later developments and further work is not necessary.

Clearly the information provided to the Minister to enable the quoted response to be given was incorrect and the suggestion that subsequent reforms have overtaken the recommendations was mischievous and designed to consign the recommendations of this whole of industry working group with unanimous recommendations to the archives without ever acknowledging the necessity of the urgency of those fundamental issues.

Set out in **Annexure "B"** are the recommendations and the changes already made which clearly disprove the statement above.

Recommendation 10

> "That SIRA expedite its stakeholder consultation process regarding the calculation of pre-injury average weekly earnings and develop a regulation on this issue as a matter of priority."

***The Government's response*:**

Supported in principle- The Government notes this is an important issue. There are a number of competing stakeholder perspectives that require further consideration. SIRA has undertaken extensive consultation regarding the calculation of pre-injury average weekly earnings (PIAWE) in the NSW Workers Compensation System. SIRA engaged an independent expert to lead further stakeholder consultation, which concluded with a PIAWE forum in December 2016. The Committee will be consulted on any future proposed changes.

KG.

Recommendation 11

"That SIRA issue a guidance note explaining the appropriate operation of s 44BC of the *Workers Compensation Act 1987*."

The Government's response:

"Supported in principle - The Government has commenced a review of workers compensation dispute resolution arrangements."

Recommendation 13

"That the NSW Government investigate removing the distinction between work capacity decisions and liability decisions in the workers compensation scheme"

The Government's response:

"Supported in principle -The Government has commenced a review of workers compensation dispute resolution arrangements."

I am delighted to confirm that the Government has announced that legislation will be introduced in the August sittings to implement this recommendation.

Recommendation 14

"That the NSW Government establish a 'one stop shop' forum for resolution of all workers compensation disputes, which:

- allows disputes to be triaged by appropriately trained personnel
- allows claimants to access legal advice as currently regulated
- encourages early conciliation or mediation
- uses properly qualified judicial officers where appropriate
- facilitates the prompt exchange of relevant information and documentation
- makes use of technology to support the settlement of small claims
- promotes procedural fairness."

The Government's response:

Supported in principle- The Government has commenced a review of workers compensation dispute resolution arrangements.

This is the subject of the consideration by this Committee in this review.

Recommendation 15

"That the NSW Government introduce a single notice for both work capacity decisions and liability decisions made by insurers.'

The Government's response:

"Supported in principle - The Government has commenced a review of workers compensation dispute resolution arrangements. In addition, SIRA will develop a *Claims Administration Manual* that will apply to all insurers in the NSW Workers Compensation System. The manual will establish clear and consistent expectations of

KG

all insurers in the management of their claims, disputes and litigation processes and their conduct in dealing with workers to foster a more supportive and transparent environment."

I am delighted to confirm that the Government has announced that legislation will be introduced in the August sittings to implement this recommendation.

Recommendation 16

"That the NSW Government consider the benefits of developing a more comprehensive specialised personal injury jurisdiction in New South Wales."

The Government's response:

"Supported in principle -The Government has commenced a review of workers compensation dispute resolution arrangements."

This is the subject of the consideration by this Committee in this review.

Recommendation 17

"That the NSW Government investigate the possibility of amending s 322A of the *Workplace Injury Management and Workers Compensation Act 1998* to allow up to two assessments of permanent impairment for certain clearly defined injuries that are prone to deteriorate over time, such as spinal injuries."

The Government's response:

"Supported in principle - The current legislative framework provides appropriate mechanisms for the assessment of permanent impairment for workers whose condition deteriorates over time. A worker is able to appeal against a Medical Assessment Certificate where there has been a deterioration of their condition that results in an increase in the degree of permanent impairment. Further, case law supports the approach that where parties agree and enter into a complying agreement, this does not prevent a worker from applying for and obtaining an assessment by an approved medical specialist where they are able to show there has been deterioration in their condition.

The Government's review of workers compensation dispute resolution arrangements will further investigate the recommendation to amend section 322A of the *Workplace Injury Management and Workers Compensation Act 1998* to allow up to two assessments of permanent impairment."

There has been no further consideration of this most important recommendation.

Recommendation 19

"That the NSW Government clarify the intended scope of s38A of the Workers Compensation Act 1987 and if necessary, extend the minimum weekly compensation payments for injured workers with highest needs to existing recipients of weekly payments, subject to an analysis of its financial impact." KG.

The Government's response:

> "Supported -The NSW Government acknowledges the need to clarify s 38A of the 1987 Act and its application. The Government commits to reviewing this section and its application."

Section 38A of the 1987 Act provides:

> "***38A Special provision for workers with highest needs***
>
> *(1) If the determination of the amount of weekly payments of compensation payable to a worker with highest needs in accordance with this Subdivision results in an amount that is less than $788.32, the amount is to be treated as $788.32.*
>
> *(2) If the amount specified in subsection (1) is varied by operation of Division 6A, a weekly payment of compensation payable to a worker with highest needs before the date on which the variation takes effect is, for any period of incapacity occurring on and after that date, to be determined by reference to that amount as so varied."*

I have highlighted the recommendations of the SCLJ to demonstrate the variable acceptance of them by Government and therefore the opportunities to simplify the system that have been lost.

KG

SINGLE PERSONAL INJURY TRIBUNAL

> PREFERRED MODEL

In my view, there is no reason that prevents the Government from introducing a single Tribunal that would manage the determination of disputes arising from the statutory benefits schemes that currently exist in both the workers compensation and CTP schemes as the types of disputes are similar in significant respects.

There is also a significant advantage in having a Tribunal whose members and decision makers are experienced in investigating, managing and determining these disputes.

Both the workers compensation scheme and CTP Scheme employ an adversarial dispute resolution model.

Transparency in decision making is essential to the community's acceptance of decisions made by Courts, Tribunals and Commissions.

It is instructive to consider the administrative law model that was introduced to the determination of work capacity disputes by the 2012 reforms. At the time of introduction, this model was hailed as being able to facilitate the resolution of disputes between injured workers and insurers without recourse to litigation. However, this model has now been recognised as failing to achieve those aims.

The Government has already announced reforms to the workers compensation legislation to remove the administrative law process and to commit to a transparent dispute resolution pathway for work capacity disputes within the Workers Compensation Commission.

As this significant policy decision has been made and published, this review should proceed as if it has already been implemented - particularly noting the proposed operational date of 1 December 2018.

> PRINCIPLES FOR A PERSONAL INJURY TRIBUNAL:

1. This Tribunal must be independent.
2. This Tribunal must operate without influence from the Government or the Regulator.
3. This Tribunal must be transparent in its decision-making process.
4. The parties involved in a dispute must be entitled to legal representation by experienced practitioners
5. Lawyers are entitled to be paid a reasonable fee for the work performed on behalf of their clients.
6. Funding for injured persons should be provided irrespective of the outcome of the claim for compensation. However, this may be subject to a means test.
7. Appeals from the Tribunal should be available subject to merit.
8. The Supreme Court of NSW should retain its judicial review jurisdiction.

Once the principles are adopted, the immediate issues become:

1. When is it possible to establish this Tribunal;
2. What model should be adopted; and
3. Where should it be located. KG.

> **SHORT TERM:**

When is it possible to establish this Tribunal?

If the SCLJ seeks to recommend to the Government that a single Tribunal be established within the next twelve months then, with respect, there is only one sensible and available model to adopt.

What model should be adopted?

This model is the WCC as it is already established, staffed, resourced and has dispute resolution processes in place that are capable of being adapted to also enable the resolution of all disputes arising from claims for injuries suffered by motorists and their passengers under the CTP scheme.

However, it would be necessary to extend the WCC's jurisdiction, as this is currently limited to that which is conferred or imposed upon it by or under the Workers Compensation Acts or any other Act (see s 366(2) of the 1998 Act).

As the WCC has no inherent jurisdiction, it will be necessary to vest it with specific powers to determine disputes regarding CTP claims, which will require amendments to the *Motor Accident Injuries Act* 2017 (the MAIA).

A relatively small number of legislative amendments, including the repeal of specific provisions from the 1987 and 1998 Acts, would empower the WCC to determine disputes arising from work capacity decisions by insurers.

Currently, the WCC has exclusive jurisdiction to examine hear and determine all matters arising under the 1987 and 1998 Acts, subject to other provisions (see s 105 of the 1998 Act). However, s 43 of the 1987 Act deprives it of jurisdiction to determine work capacity disputes and s 38 (3) (c) of the 1987 Act gives exclusive power to an insurer to determine whether a worker is working to their full capacity.

Therefore, the following provisions will require, repeal or amendment:

- S 38(3)(c) of the 1987 Act
- S 43 of the 1987 Act
- S 44BB of the 1987 Act
- S 44BC of the 1987 Act
- S 105(1) of the 1998 Act
- S 297(1A) of the 1998 Act

WIRO has not yet reviewed the entirety of the dispute resolution system introduced by the recent amendments to the CTP Scheme but it does resemble the discredited workers compensation administrative review scheme which is now about to be abandoned.

KG.

Where should it be located?

The Tribunal should be located in the CBD Sydney where the majority of the insurers and lawyers work.

However, the Tribunal must also have scope for determining disputes in regional locations (as does the WCC).

Working group to be established

WIRO recommends that a working group be formed with relevant expertise to consider and report back to the Committee within a short timeframe with recommendations regarding the legislative amendments required to establish the jurisdiction for the Tribunal. The working group should also review the existing WCC dispute resolution model and recommend any new processes that are considered optimal for dispute resolution by the Tribunal.

KG

> LONGER TERM

Careful consideration must be given to the timeframes required to establish a new Personal Injuries Tribunal. It is submitted that the likely period from establishment to efficient operation may be two to three years.

WIRO fully supports the establishment of a Tribunal that will operate independently of all stakeholders and the regulator and expects that the government's intention is that this will resolve disputes in a "fair, accessible and efficient manner within a reasonable timeframe" and that it will interpret the law "consistently, impartially and independently".

WIRO endorses the fundamental principles identified and examined in the *Tribunal Excellence Framework* of the Council of Australasian Tribunals ("COAT") published in June 2017.

There are abundant precedents for a multi-purpose Tribunal that determines disputes relating to discrete, but not dissimilar, areas of law.

Adopting an NCAT-type model, a Tribunal can be established to facilitate the resolution of disputes arising under the CTP Scheme and disputes arising under the WC scheme.

WIRO observes that currently, coal Miners and a cohort of other workers including Police Officers, Fire Fighters, Paramedics and some volunteers, are exempt from the 2012 amendments to the workers compensation legislation (exempt workers) and will not be affected by the proposals to introduce a new Tribunal.

The following matters also warrant consideration:

Incompatible Guides for determination of disputes

There are currently two incompatible sets of Guides for the Evaluation of Permanent Impairment that apply to the determination of CTP and workers compensation disputes. While the *AMA 4 Guides* apply to CTP claims, the *AMA 5 Guides* apply to workers compensation claims.

The *AMA 4 Guides* are widely perceived as being draconian in nature by numerous workers compensation stakeholders, including Unions NSW and it was this type of objection that resulted in the decision to apply the *AMA 5 Guides* to the determination of workers compensation disputes.

The conflict in the application of these *Guides* will require resolution and in view of the historical experience, it may be worth considering amendment to the CTP legislation to also apply the *AMA5 Guides* to the determination of those disputes.

KB.

EMERGING ISSUES THAT REQUIRE ATTENTION

The following scenarios have arisen under the existing legislation and the legislation requires amendments to resolve them.

Pre-existing psychological injury and s 39 of the 1987 Act

Section 39 (2) of the 1987 Act exempts workers with high needs (WPI greater than 20%) from the operation of s 39 (1) (the termination of weekly payments for more than 260 weeks).

However, there is an emerging class of workers who suffered a significant psychological injury before 1 January 2002.

Lump sum compensation for permanent psychological impairment was not available under s 16 of the Workers Compensation Act 1926 (for injuries suffered prior to 4pm on 30 June 1987) or under s 66 of the 1987 Act (for injuries suffered from 1 July 1987 until 31 December 2001)).

While cl 6 (2) of Pt 6 of Schedule 6 Savings, transitional and other provisions of the 1987 Act provides for the awarding of lump sum compensation under s 66 of the 1987 Act, it provides:

> *However, no compensation is payable in accordance with this Part and this Schedule for the part of the loss resulting from the injury received before that commencement whether or not compensation has been paid or is payable under section 16 of the former Act for that part of the loss.*

However, there is no provision for the assessment of the degree of WPI resulting from a psychological injury suffered during the period from 1 July 1987 to 31 December 2001 for the purposes of satisfying the s 39 (2) threshold. It follows that this class of workers will be unduly prejudiced if this impairment is excluded from an assessment for the purposes of satisfying the s 39 (2) threshold.

Back pay following resumption of weekly payments

There is also a significant issue about whether an injured worker is entitled to claim weekly payments for any period between the date of termination by an insurer and the date of any subsequent reinstatement of payments.

An example:

A worker's weekly payments are terminated by the insurer under s 54 (2) (a) of the 1987 Act. However, these are later resumed because:

a. The worker returns to work and complies with s 38 (3) (b) and (c) of the 1987 Act; or

b. The insurer accepts a Certificate of Capacity and makes payments from the date of acceptance under either s 36 or s 37 of the 1987 Act.

KG.

The 1987 Act requires amendment to empower the Tribunal to determine an injured worker's entitlement to weekly payments of compensation during this period.

There is also an issue as to whether the insurer can decide to retrospectively reinstate weekly payments of compensation (i.e. if it decides that a previous work capacity decision was incorrect).

Not MMI but weekly payments have been paid or payable for more than 260 weeks

Currently there is a significant number of injured workers who have undergone multiple medical and related procedures (including surgeries) to treat their injuries who have not reached maximum medical improvement when s 39 (1) of the 1987 Act applies. These workers are significantly prejudiced.

The Supreme Court of NSW has interpreted s 39 of the 1987 Act as meaning that the *injured worker* bears the onus of proving that they have suffered more than 20% WPI because of the injury (see *Hallman v The National Mutual Life Association of Australia Ltd* [2017] 151 (per Wilson, J at paragraphs 40-43).

WIRO recommends that s 39 (2) of the 1987 Act should be amended to provide that s 39 (1) ***does not apply*** to injured workers who have not reached maximum medical improvement as at the relevant date.

The definition of "suitable employment" in s 32A of the1987 Act

This currently includes *'any employment for which the worker is currently suited, regardless of whether such a job is available in the labour market and regardless of the worker's pre-injury employment and place of residence'*.

This definition has caused significant prejudice to injured workers who reside in remote and/or regional locations. WIRO recommends that it be reviewed and that the pre-2012 legislation be reinstated, as this considered the labour market that is accessible to the injured worker.

Section 322A of the 1998 Act

This provides that only one assessment may be made of the degree of permanent impairment of an injured worker. This restriction has caused considerable complexities for injured workers and their legal advisers and is unduly prejudicial in its operation. WIRO recommends review and amendment of this provision.

The meaning of "a week" in the context of determining a worker's entitlement to weekly payment.

WIRO submits that the pre-2012 definition should be reinstated.

KB.

Determination of disputes regarding the degree of whole person impairment

Section 65 (3) of the 1987 Act vests exclusive jurisdiction for the determination of the degree of Whole Person Impairment (WPI) in an Approved Medical Specialist (AMS). However, this has resulted in increased costs to the scheme and delays in the determination of disputes.

WIRO recommends that the legislation to should be amended to empower members of the Tribunal to make findings regarding the degree of WPI based upon the proper consideration of expert medical evidence.

This power was previously exercised by both judges and commissioners of the previous Workers Compensation Commission and Compensation Court of NSW.

Settlement on a compromise basis

WIRO recommends that the Regulator should revoke its operational instruction to the insurers that prevents the resolution of WPI disputes based upon a compromise between competing assessments.

This instruction appears to have been based upon the premise that the degree of WPI is capable of being consistently assessed in a purely objective manner. However, while *the Guidelines* set out certain objective criteria that must be applied by the AMS in assessing the degree of WPI, the AMS is required to apply these to their own findings upon a clinical examination of the claimant, which is necessarily subjective in nature.

The AMS is also required to consider and comment upon the available medical evidence, they are required to base their assessment of WPI primarily upon their clinical findings. As a result, the AMS' assessment is not objectively-based.

Final resolution of claims

WIRO recommends that the workers compensation legislation should be amended to facilitate the final resolution of claims. This is currently precluded, in effect, under the current scheme and it is difficult for an injured worker to exit from the scheme.

WIRO recommends that the restrictions imposed upon the parties' ability to negotiate a commutation of the insurer's liability for payment of statutory compensation benefits under s 87EA of the 1987 Act should be revoked. Instead, the legislation should require that the injured worker obtains independent legal advice regarding the proposed settlement and that a member of the Tribunal is satisfied, based upon the available evidence, that the settlement is in the best interests of the worker.

Conciliation and/or Arbitration

The WCC currently employs a hybrid model of dispute resolution in which the same Arbitrator oversees both conciliation and arbitration of disputes.

This model has given rise to concerns regarding the effect of the dual roles upon the integrity of the dispute resolution process and issues such as confidentiality, neutrality and perceived bias. It also precludes a robust conciliation process, in which the WCC Arbitrator (acting as

KG

conciliator) would be able to speak confidentially to each party separately and to effectively conduct a "reality test" of each party's position.

Ideally, where a dispute fails to resolve during conciliation, the dispute should be referred to another Arbitrator for formal arbitration – unless the parties consent to Arbitration by the initial Arbitrator.

Entitlement to Centrelink benefits post-section 39

WIRO has received multiple complaints from injured workers regarding their difficulties in transitioning onto Centrelink payments after the termination of weekly payments under s 39 (1) of the 1987 Act.

Many workers have complained that they are ineligible for Centrelink payments due to income earned by their spouse or because they fail to satisfy other criteria.

This demonstrates that the workers compensation and welfare schemes are not interchangeable and that great hardship can result from a failure to recognise this.

Non-compliance with fee orders by medical practitioners and allied health professionals

WIRO is increasingly aware that many medical practitioners and allied health professionals charge fees to injured workers that far exceed those set out in the regulator's Fees Orders.

WIRO recommends that the regulator should be encouraged to police compliance with its Fees Orders to achieve operational savings for the scheme.

Delays in medical assessments

WIRO continues to receive complaints from injured workers regarding significant delays in the availability of Independent Medical Examiners (IME's) to examine them and provide medico legal reports. We also note that insurers and worker's solicitors instruct a relatively small number of IME's to provide medico legal reports and this results in delays in making and determination of claims.

There are also significant discrepancies in assessments provided by SIRA-Trained Assessors of Permanent Impairment and this scenario may continue unless the regulation scrutinises their assessments with a view to ensuring compliance with the *AMA5 Guides* and the *Guidelines*.

Kim Garling
Independent Review Officer

25 June 2018

Annexure A

PARKES PROJECT ADVISORY COMMITTEE
STATEMENT OF PRINCIPLES

These principles have unanimous endorsement from the Parkes Project Advisory Committee.

They will form part of the Final Report to the Minister.

Where unanimous agreement is not reached a minority view has been included.

SETTLEMENT AND FINALISATION OF CLAIMS

Principles adopted

1. Workers should be entitled to exit the Scheme on a fair and reasonable basis with minimal constraints.

2. Negotiation between degrees of impairment should be permitted.

WEEKLY PAYMENTS

Principles adopted

1. The calculation of Pre Injury Average Weekly earnings should be a **simple and fair process**

2. The calculation method of PIAWE should provide a fair outcome regardless of the class of worker (for example, to ensure workers are not penalised for working more than one job, part time hours, or are aged)

3. 'PIAWE' should reflect the **current value** of 'pre-injury average weekly earnings' (Indexation) as should the Maximum cap on weekly payments.

4. Where there has been an inadequate payment of weekly payments, adjustments should be easily arrived at and paid from the date of the claim/notification

5. An injured worker should not be penalised because of their continued lack of any capacity (total incapacity) for work.

6. The suitable employment test has resulted in unfairness in the measure of benefits/earnings for certain categories of injured workers.

MEDICAL EXPENSES

Principles adopted

1. Prompt and early medical treatment underscores and supports early and successful return to health and work.

2. Access to medical treatment and services should not depend on impairment evaluation.

3. A medical expenses claims process including pre-approval processes must be prescribed and be simple.

4. Delays in treatment can lead to undesirable outcomes.

5. The 12 month cap on medical expenses should run from when weekly payments are last made and should capture all claims for medical treatment expenses **made** within that 12 months (currently, must have *received the treatment within the 12 months*).

6. For medical treatments or services, recognition should be given to the best practice scheduling of such treatments and standard treatment plans. (*Effect should be given to section 60(2C)(d) of the 1987 Act).*

7. There should be a general exception to the cap on duration of medical treatment to cover:
   a. Reasonably necessary surgery
   b. Treatment required to ensure the worker *remains at work* or is capable of returning to work
   c. Essential services to ensure that the worker's health or ability to undertake the necessary activities of daily living does not significantly deteriorate

- **Minority Position:** the 12 month cap should be removed for all injured workers.

PERMANENT IMPAIRMENT

Principles adopted

1. Workers should receive fair compensation for the permanent impairment which arises as a consequence of a work related injury.

2. Workers whose impairment significantly increases as an unintended consequence of reasonably necessary surgery or deterioration of the underlying injury/condition should be compensated for the consequent 'permanent impairment'.

3. There should be an exception to the one claim policy if it is established that an agreed degree of impairment is manifestly too low or there has been a significant increase in the degree of impairment.

4. The impairment assessment methodology and quantification of compensation should be the same regardless of when the injury occurred.

5. In a scheme where impairment thresholds determine access to various levels and types of benefit there must be exceptions to the 'one assessment' principle.

6. **Minority Position:**
   a. Workers should be able to access compensation for pain and suffering in addition to permanent impairment;
   b. There should be no threshold for permanent impairment compensation;
   c. there should be no restriction on claims for permanent impairment compensation (repeal section 66(1A) of the 1987 Act).

7. **Further Minority Position**:

   a. Reduce threshold in section 66(1) of the 1987 Act to 5%

   b. As an alternative to 6 a. above, incorporate the former pain and suffering compensation (section 67) into the compensation available for permanent impairment,

SERIOUSLY INJURED WORKERS

Principles adopted

1. There should be a separate assessment for determining whether a worker is seriously injured which is for the purpose of determining entitlement to weekly payments and medical treatment.

2. All of a worker's injuries and impairments should be considered for the purpose of satisfying a seriously injured worker threshold test, so long as there are compensable rights attached to each injury and impairment evaluation.

3. Determination of the apportionment of liability between insurers to the benefits payable to a seriously injured worker should be prescribed in the legislation.

4. A seriously injured worker who has no prospect of returning to work should be exempt from monthly medical assessments and regular certification of capacity where appropriate clinically.

DISPUTE RESOLUTION SYSTEMS

Principles Adopted

1. There should be one Dispute Resolution System which works within the legislation.

2. There should be one form of dispute notification.

3. Minor disputes or issues should be capable of resolution in a timely manner without the formality required for more complex issues.

COSTS AND LEGAL REPRESENTATION

Principles adopted

1. Workers and insurers should be able to obtain legal **advice** and representation with respect to all disputes (including WCDs)

2. Costs should reflect proper remuneration for all lawyers for both workers and insurers.

3. Part 16 "Marketing of Work Injury Legal Services and Agent Services" of the *Workers Compensation Regulation 2010* and Division 8 of Part 2 of Chapter 4 "Prohibited Conduct Related to Touting for Claims" of the *Workplace Injury Management and Workers Compensation Act 1998* should be deleted as this will be the subject of the *Legal Profession Uniform Law Application Legislation Amendment Bill 2015* introduced into NSW Parliament on 27 May 2015.

Annexure A

RETURN TO WORK OBLIGATIONS AND SUITABLE EMPLOYMENT

Principles adopted

1. Supported early return to work after injury is fundamental to the system and the scheme.

2. The test for suitable employment should be an actual test not a theoretical test

3. Disputes about provision of suitable employment or return to work should be simply and quickly managed.

4. Incentives should be provided to employers to provide suitable employment to injured workers and to workers to return to work after injury.

5. Rehabilitation following work injury should be meaningful and provided in a timely manner.

JOINT TORTFEASORS AND SECTION 151Z

Principles adopted

1. Workers should not be penalised in a joint third party tortfeasor action where they are unable to recover work injury damages from the employer

2. The insurer should be able to recover additional compensation paid to or on behalf of a worker as a consequence of a subsequent negligent act of a third party (not the employer)

3. Third Party tortfeasors should be able to be compelled to attend Mediation in Work Injury Damages claims.

ACCESS TO INFORMATION BY A WORKER

Principles adopted

1. There should be transparency about information collected by an employer or insurer about an individual injured worker.

2. A worker should be provided by the employer or insurer with information of the kind referred to in clause 46 of the WCR 2010 with the general exception that if the supply of that information would pose a serious threat to the life or health of the worker or any other person, the information, in the case of medical information, must be provided to a medical practitioner, or in other case, to a legal practitioner.

DEFINITIONS

Principles adopted

1. There should be consistency of language, terminology and drafting throughout the legislation.

2. The legislation should be clear on its face as to its meaning and intention.

3. The structure of the Act(s) should reflect the practical operation of the Scheme.

4. Where possible there should be national consistency or harmony of definitions used in workers compensation legislation.

Annexure A

INDEPENDENT MEDICAL EXAMINERS / EXAMINATIONS (IME'S)

Principles adopted

1. Where possible only one IME should be requested by a worker and an employer/insurer in relation to a medical issue with respect to a worker unless there are comorbid conditions.

2. Independent Medical Examiners (IMEs) should have qualifications, training and clinical experience commensurate with the body part/injury they are required to assess.

3. There should be better regulation of the use of IMEs in all circumstances (see section 119 WIM Act)

4. The Guideline on Independent Medical Examination requires updating through stakeholder consultation to achieve relevance in the current scheme design.

Annexure B

NOTES UPON IMPLEMENTATION OF ANY OF THE PRINCIPLES

PARKES PROJECT ADVISORY COMMITTEE

STATEMENT OF PRINCIPLES

It is proposed that the following, which are matters of general principle, be considered by the Advisory Committee and agreement reached where appropriate. These principles will then form part of the Second Interim Report to the Minister. Where unanimous agreement is not reached, where desired, a minority view will be included.

SETTLEMENT AND FINALISATION OF CLAIMS

1. Workers should be entitled to exit the Scheme on a fair and reasonable basis with minimal constraints.

2. Negotiation between degrees of impairment should be permitted.

Neither of these recommendations have been introduced.

WEEKLY PAYMENTS

1. The calculation of Pre Injury Average Weekly earnings should be a **simple process**

2. The calculation method of PIAWE should provide a fair outcome regardless of the class of worker (for example, to ensure workers are not penalised for working more than one job, part time hours, or are aged)

3. 'PIAWE' should reflect the **current value** of 'pre-injury average weekly earnings'. (indexation)

4. Where there has been an inadequate payment of weekly payments, adjustments should be easily arrived at and paid from the date of the claim/notification

5. An injured worker should not be penalised because of their continued lack of any capacity (total incapacity) for work.

6. The suitable employment test has resulted in unfairness in the quantum of weekly payments for certain categories of injured workers.

While a consultant produced a report for SIRA, there has been no further discussion with WIRO about this recommendation. WIRO has been informed Cabinet will be making a decision soon upon some recommendation by the Minister.

Annexure B

MEDICAL EXPENSES

1. Prompt and early medical treatment underscores and supports early and successful return to health and work.

2. A medical expenses claims process including pre-approval processes must be prescribed and be simple.

3. Delays in treatment can lead to undesirable outcomes.

4. The 12 month cap on medical expenses should run from when weekly payments are last made and should capture all claims for medical treatment expenses **made** within that 12 months (currently, must have *received the treatment within the 12 months*).

5. For certain medical treatments or services recognition should be given to the best practice scheduling of such treatments and standard treatment plans. (*Effect should be given to section 60(2C)(d) of the 1987 Act)*.

6. There should be a general exception to the cap on duration of medical treatment to cover:

    a. Reasonably necessary surgery

    b. Treatment required to ensure the worker *remains at work*

    c. Essential services to ensure that the worker's health or ability to undertake the necessary activities of daily living does not significantly deteriorate.

There has been no discussion with WIRO about these recommendations.

PERMANENT IMPAIRMENT

1. Workers should receive fair compensation for the permanent impairment which arises as a consequence of a work related injury.

2. Workers whose impairment significantly increases as a consequence of reasonably necessary surgery or significant deterioration of the underlying injury/condition should be compensated for the consequent 'permanent impairment'.

3. There should be an exception to the one claim policy if it is established that an agreed degree of impairment is manifestly too low or there has been a significant increase in the degree of impairment.

4. The impairment assessment methodology and quantification of compensation should be the same regardless of when the injury occurred.

5. In a scheme where impairment thresholds determine access to various levels and types of benefit there must be exceptions to the 'one assessment' principle.

There has been no discussion with WIRO about this recommendation.

Annexure B

SERIOUSLY INJURED WORKERS

1. There should be a separate assessment for determining whether a worker is seriously injured which is for the purpose of determining entitlement to weekly payments and medical treatment.

2. All of a worker's injuries and impairments should be considered for the purpose of satisfying a seriously injured worker threshold test.

3. Determination of the contribution to be made by insurers to the benefits payable to a seriously injured worker should be prescribed in the legislation.

4. A seriously injured worker who has no prospect of returning to work should be exempt from regular medical assessments and regular certification of capacity.

There has been no discussion with WIRO about these recommendations.

WCC JURISDICTION/DISPUTE RESOLUTION SYSTEMS

LIABILITY DECISIONS/WORK CAPACITY DECISIONS

1. There should be one Dispute Resolution System.

2. There should be one form of dispute notification.

3. Minor disputes or issues should be capable of resolution without the formality of more complex issues.

These recommendations have been accepted and will be included in the forthcoming legislation.

COSTS AND LEGAL REPRESENTATION

1. Workers and insurers should be able to obtain legal **advice** and representation with respect to all disputes (including WCDs)

2. Costs should reflect proper remuneration for all lawyers for both workers and insurers.

3. Part 16 "Marketing of Work Injury Legal Services and Agent Services" of the *Workers Compensation Regulation 2010* and Division 8 of Part 2 of Chapter 4 "Prohibited Conduct Related to Touting for Claims" of the *Workplace Injury Management and Workers Compensation Act 1998* should be deleted as this will be the subject of the *Legal Profession Uniform Law Application Legislation Amendment Bill 2015* introduced into NSW Parliament on 27 May 2015.

The proposed legislation will partially address these recommendations depending upon its final terms.

Annexure B

RETURN TO WORK OBLIGATIONS AND SUITABLE EMPLOYMENT

1. Supported early return to work after injury is fundamental to the system and the scheme.
2. The test for suitable employment should be an actual test not a theoretical test
3. Disputes about provision of suitable employment or return to work should be simply and quickly managed.
4. Incentives should be provided to employers to provide suitable employment to workers after injury and disincentives should be provided.

There has been no discussion with WIRO about these recommendations. There have been some new benefits introduced but these are relatively minor.

JOINT TORTFEASORS AND SECTION 151Z

1. Workers should not be penalised in a joint third party tortfeasor action where they are unable to recover work injury damages from the employer
2. The insurer should be able to recover additional compensation paid to or on behalf of a worker as a consequence of a subsequent negligent act of a third party (not the employer).

This has not been addressed.

ACCESS TO INFORMATION BY A WORKER

1. There should be transparency about information collected by an employer or insurer about an individual injured worker.
2. A worker should be provided by the employer or insurer with information of the kind referred to in clause 46 of the WCR 2010 with the general exception that if the supply of that information would pose a serious threat to the life or health of the worker or any other person, the information, in the case of medical information, must be provided to a medical practitioner, or in other case, to a legal practitioner.

This has not been addressed.

DEFINITIONS

1. There are too many instances of conflict around the use of the word "claim" in the legislation.
2. There should be one definition of a term within the legislation.
3. There should be one Act and Regulation to provide clarity and avoid the conflicts and ambiguities within the legislation.

A schedule of contradictory and ambiguous concepts will be provided.

This has not been addressed.

Annexure B

INDEPENDENT MEDICAL EXAMINERS (IMES)

1. The use of Independent Medical Examiners should be restricted to purpose (s 119 1998 Act and Part 9 of the Workers Compensation Regulation 2010)

This has not been addressed.

SUMMARY

Only one group of recommendations has been accepted with another two having minor changes.