Our ref: ICC:GUlw:1219345

25 November 2016

CTP Review
State Insurance Regulatory Authority
Level 25, 580 George Street
Sydney NSW 2000

By email: ctp_review@sira.nsw.gov.au

Dear Sir/Madam,

CTP Review – claims handling and dispute resolution

We write on behalf of the Law Society of NSW, the NSW Bar Association and the NSW Branch of the Australian Lawyers Alliance ("ALA") in response to the Government's discussion paper on insurer claims handling and dispute resolution in the CTP insurance scheme dated November 2016 ("discussion paper").

General comments

The discussion paper requests feedback with respect to various options relating to a proposed dispute resolution system and presupposes that there will be a reformed defined benefit scheme. We note that the terms of reference for this consultation specifically exclude reviewing or advising on the scheme design details of the defined benefits scheme or eligibility for common law.

The Government's CTP reform position paper of June 2016 "outlined a starting proposition for consultation on the benefit structure in the scheme". Subsequently, a confidential "straw man" outline of benefit design, which was said not to be government policy, was provided in July for the purpose of consultation. So far as we are aware there has been no further refinement of the "proposal" or final statement of the benefits design.

The legal profession has provided lengthy and detailed submissions addressing our opposition to the straw man outline proposal and a proposed dispute resolution model put forward by the Insurance Council of Australia ("ICA") during consultation with the Reference Panel. We have also provided recommendations for the reform of the scheme. We have now furnished all the legal profession's previous submissions to SIRA Board members, Dr Abby Bloom and Mr Graeme Innes.

While we have demonstrated our willingness and ability to engage in constructive consultation, we are unable to assist in the drafting of a dispute resolution system which we believe is fundamentally unsound and unfair and which removes from innocent accident victims their right to independent professional advice and support in pursuit of their legal

rights and entitlements. The discussion paper is focused on setting up a system of "claim advocates" to assist the injured in pursuing claims. There are already claimants' advocates available to innocent motor accident victims in NSW – the solicitors and barristers of this state who provide a high quality service at a relatively reasonable cost given the complexity of the system, and who are insured against the risks that such a service entails.

The submissions of the Law Society and the Bar Association dated 6 May 2016 made various recommendations to address emerging problems and, importantly, to improve claim processes. The suggestions were designed to reduce friction points in the scheme and provide for speedier resolution of claims. The discussion paper describes the current scheme as "adversarial", but to the contrary we submit that many CARS processes designed to be "inquisitorial" are made unnecessarily adversarial as a result of various process blockages, particularly the Medical Assessment Service ("MAS") and the pre-filing requirements imposed at CARS by sections 89A – 89E and section 91 of the *Motor Accidents Compensation Act 1999*. The Standing Committee on Law and Justice recently made recommendations with respect to some of these friction points in its report on the first review of the CTP scheme, dated August 2016.

A workers compensation model

We note that elements of the proposed model in the discussion paper draw heavily on the ICA's proposal for a dispute resolution model provided to the Reference Panel in July. It also bears features of Finity Consulting's paper "A Best Practice Workers Compensation Scheme" dated May 2015 which was commissioned by the ICA. The legal profession provided detailed reasons for our rejection of this model in our joint submission of 23 August 2016 (section 2.1). The legal profession has provided models for a dispute resolution system to encompass a reformed scheme with extended no fault benefits and more efficient resolution of common law disputes.

The models proposed in the discussion paper make various connections to the current NSW workers compensation scheme. We draw your attention to the fact that this scheme's dispute resolution system is regarded by many, if not all, stakeholders to be in crisis and in need of a complete overhaul.

The problems with the workers compensation scheme dispute resolution processes were a major focus of the current review of this scheme by the Standing Committee on Law and Justice. We refer to the many submissions made on this issue and the evidence given at the hearings before the Standing Committee on 4 and 7 November 2016. We have provided the SIRA Board representatives with our submissions to the review.

We note that the workers compensation scheme has three possible stages for reviews of work capacity decisions, which include an internal review by insurers and a merit review by SIRA. The legal profession considers that such reviews do not satisfy the necessary requirements of a fair and transparent dispute resolution model, namely, impartiality, independence and integrity. We refer to the publication by the Council of Australasian Tribunals ("COAT") – "International Framework for Tribunal Excellence" dated April 2014, which we have provided to the SIRA Board.

The enormous problems faced by workers in navigating these internal and merit reviews without legal assistance is also very well documented. Stakeholders are currently awaiting the finalisation of a regulation which will allow for legal practitioners to be paid for assisting a worker with the review of a work capacity decision.

This review system has also resulted in lengthy delays in decisions regarding benefits for workers.

We also note that the workers compensation scheme clearly demonstrates the fiction that a defined benefits scheme results in fewer disputes. To the contrary, the workers compensation benefits regime, which it appears the Government will replicate in some parts, particularly economic loss payments, and the bifurcated dispute resolution process demonstrate that there will be an increase in disputes, but that claimants will find it increasingly difficult to manage these disputes on their own.

The legal profession strongly warns against importing the known problematic aspects of the dysfunctional workers compensation dispute resolution system into a reformed CTP scheme.

Dispute resolution and the "*Kirk*" difficulty

In considering any re-design of dispute resolution systems, SIRA and the government need to pay due consideration to the High Court decision in *Kirk v Industrial Relations Commission of NSW* [2010] HCA 1.

Put simply, that decision highlights the significant difficulty in preventing administrative appeals to the Supreme Court from administrative decision-making bodies. Both CARS and MAS are such administrative decision-making bodies and there is a regular flow of litigation to the Supreme Court from CTP insurers challenging decisions at CARS and MAS.

It is noted that there are significantly fewer administrative appeals brought by claimants. It might be suggested that this is because the claimant has the right to have a CARS assessment re-heard in the District Court, whereas the insurer's only remedy is an administrative appeal. However, the scheme has now reached the stage where it is reported by SIRA that there are more administrative appeals challenging CARS assessors' determinations being lodged in the Supreme Court than there are District Court re-hearings by claimants.

In short, the category of party that has a statutory right to challenge a CARS assessor's determination (the claimant) is challenging those determinations less than the party that does not have such a right (the CTP insurer).

One of the effects of *Kirk* is that administrative decision-makers become more and more conscious of making decisions that will not attract an administrative challenge from an insurer. Processes become increasingly formal, rigid and structured. There are no short-form decisions without detailed reasons.

Within the current system it is not uncommon for MAS to receive 10 to 20 pages of written submissions from CTP insurers as to how a particular decision should be made. After a MAS decision is made, there might be a *Bhardwaj*[1] request for the decision-maker to re-consider. There can then be an administrative appeal against the decision.

So far, SIRA has not reined in the increasing use by CTP insurers of administrative appeal rights. This in turn has a trickle-down effect across the scheme, leading to greater bureaucracy and more complex and time-consuming decision-making.

There is, of course, the "NSW workers compensation system" solution to this problem. Administrative appeals by insurers can be eliminated if the scheme is designed so that insurers' decisions prevail.

[1] See *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

Claimants will not bring administrative appeals where they have no legal representation and no advocates with the skills to identify error and pursue such rights. Self-evidently, the legal profession does not support such a solution.

There is a need for some decisions within the current CTP scheme to be made more quickly and efficiently. The idea that MAS can take six months and run up $5,000 or more in scheme costs to resolve a dispute over several hundred dollars in medical treatment is unacceptable.

The legal profession would support the development of some form of "small claims" decision-making process for low level medical disputes. However, the risk of creating such a forum is that insurers will make far more use of it to oppose claims – see above.

These are not simple subjects to address. The idea that these issues can be properly considered and resolved in the space of a two-week consultation period suggests that the outcome of the consultation process is a foregone conclusion and SIRA are moving inexorably towards the imposition of a workers compensation-style system onto the NSW CTP scheme without due consideration of the merits or failings of that system.

The 20 questions for discussion

1. What do you believe are the major issues, cultural or otherwise, for insurers, and other service providers, in moving to a defined benefits scheme?

The legal profession does not support moving to a predominantly defined benefits scheme. Over the last 16 years, SIRA and the MAA have had negligible success in changing insurer culture. From our experience with the workers compensation scheme, it seems that the only cultural change that will come with defined benefits is that claimants will lose their capacity to challenge insurer decision-making.

2. What do you believe are the key considerations in establishing the support and advocacy service?

3. Which support and advocacy service option do you think would deliver the best outcomes for claimants and why?

4. What do you believe should be the powers of the Claimant Advocate?

5. Which services should be provided and what skills or qualifications should be required?

The legal profession does not support establishing any "support and advocacy service" other than the quality support and advocacy service that already exists – the legal profession. This service is truly independent, professional, highly experienced, regulated, cost effective and insured.

6. Which services would best be provided by SIRA, as regulator, and which services would best be provided by the Claim Advocate?

It should not be the role of SIRA to provide advice to claimants as to pursuit of their claim unless SIRA is prepared to retain qualified lawyers with appropriate professional standards and indemnity insurance to provide such advice. The reason why the role of the legal profession needs to be corporatised and bureaucratised under SIRA's banner is unclear.

7. Should it operate as a separate independent entity with no direct lines to the regulator, enabling it to clearly advocate for injured people and review decisions?

The current independent entity providing advocacy services (i.e. the legal profession) should continue to provide such services.

8. If so, would that enable SIRA to become more directly involved in dispute resolution, to avoid them being escalated?

The legal profession does not support SIRA becoming more directly involved in dispute resolution by removing claimants' rights to advocacy. Meaningful reform would however occur if SIRA were to escalate its regulation of insurers to reduce instances of insurers needlessly disputing claims.

9. How is access determined? Is it only for specific issues or events? Is it means tested? Is it time limited?

No comment for the reasons outlined above.

10. What are the most appropriate delivery methods and channels? As communication evolves are these services best delivered by one or a combination of phone, face to face, social media, on line, or via a third party agent?

The legal profession is evolving and delivering advice services by phone, face-to-face and online. The legal profession will continue to evolve. There should be no role for SIRA in providing advice to claimants in place of lawyers.

11. What involvement should SIRA have in the lodging and management of claims? Should there be early intervention or outreach for newly injured people?

12. How is success measured?

No comment for the reasons outlined above.

13. What are your views on introducing term licences, rather than perpetual licences?

We note that the only question being raised regarding the regulation of insurer conduct in developing a dispute resolution model is the introduction of term licences. We are not aware of an insurer's licence being suspended to date. Any such decision would undoubtedly lead to judicial review. Rather, SIRA should be looking to introduce lower level sanctions to be applied to insurers who fail to meet obligations. A system of fines that would allow claimants to be reimbursed for the inconvenience caused by insurer behaviour contrary to regulations and guidelines should be introduced. The legal profession has been suggesting this for some time.

14. What are your views on the dispute resolution model, particularly the type of disputes dealt with at each tier?

The legal profession does not support any of the alternate dispute resolution models put forward. Internal review by CTP insurers has been and will continue to be inadequate. The experience of injured persons within the proposed defined benefits system is likely to be similar to that of injured workers within the NSW workers compensation scheme who are first required to challenge work capacity decisions of insurers by requesting internal reviews. The experience there has been that a very high proportion of workers give up on the review process at the first hurdle when they learn that they have to navigate the dispute resolution

system without legal representation. Independent, external dispute resolution, with neutral and independent arbiters (such as CARS assessors) should be retained. Independent advocacy for the injured should be retained.

15. What are your views on aspects of dispute resolution being provided by an independent tribunal and which types of disputes or appeals, if any, would be best dealt with by that tribunal?

The legal profession continues to support all serious disputes being subject to determination by an independent tribunal. There is scope for low level disputes over modest amounts to be dealt with differently and more cost effectively.

16. Given each dispute resolution option has advantages and disadvantages, what do you see as the best option in a hybrid scheme and why?

17. Do you believe any further powers would be required for internal claims assessors than currently exist for the Principal Claims Assessor or other SIRA staff assessors? Given each dispute resolution option has advantages and disadvantages, what do you see as the best option in a hybrid scheme and why?

The legal profession does not accept the premise of the question, namely, the adoption of a hybrid (predominantly defined benefits) scheme.

We acknowledge that there does need to be a better system for resolving low level medical disputes. The current mechanism that takes six months and costs the scheme upwards of $5,000 to resolve a dispute over $700 in medical expenses is unwarranted and unsustainable. However, efforts to simplify dispute resolution are not straightforward, particularly where, for example, insurers are able to proceed to the Supreme Court with an administrative appeal against any adverse decision provided an error of law can be shown.

18. Would having more assessors on staff, rather than relying on external assessors be of benefit, particularly in countering perceptions of conflict of interest and a lack of true independence from the industry?

The legal profession supports external independent assessors being retained, rather than in-house assessors at SIRA. In-house assessors have far less independence than external assessors. The “coal-face” experience of CARS assessors has proven to be one of the key strengths of the existing dispute resolution system.

19. Are there opportunities to pursue positive incentives for good claims management outcomes, along with the proposed actions already being taken by SIRA to address current claims management behaviours in the scheme?

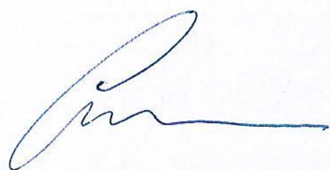
The legal profession is disappointed that the discussion paper does not address positive incentives for good claims management. The question appears to be being asked without any mechanism having been identified as to how it might be achieved. The legal profession would be interested to hear as to what actions are already being taken by SIRA to address current claims management behaviours other than the pending introduction of revised Claims Handling Guidelines.

20. Any other item of relevance or importance requiring comment?

Additional matters cannot be dealt with in any level of detail in the course of a truncated consultation.

Should you have any questions or require further information, please contact Leonora Wilson, the Policy Lawyer for the Injury Compensation Committee of the Law Society on 9926 0323 or email: Leonora.Wilson@lawsociety.com.au.

Yours faithfully,



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