



THE LAW SOCIETY  
OF NEW SOUTH WALES

22 March 2012

The Hon. Greg Pearce, MLC  
Minister for Finance and Services  
Governor Macquarie Tower  
Level 36, 1 Farrer Place  
SYDNEY NSW 2000

**BY EMAIL:** [office@pearce.minister.nsw.gov.au](mailto:office@pearce.minister.nsw.gov.au)

Dear Minister,

**Proposed changes to the NSW Workers Compensation System**

The Law Society appreciates the opportunity to meet with you to discuss proposed changes to the NSW workers compensation system. The Law Society's Injury Compensation Committee (the Committee) is aware of recent public discussion about changes to the system and is concerned about the proposals for reform which are emerging.

The need for reform of the WorkCover scheme is complex and the Committee believes that many of the factors driving the existing deficit as well as the projected deficit may be incapable of correction in the short term. While some of the more systemic problems with the scheme require broad legislative reform, the potential impacts have not been fully analysed or debated. Much of the debate has been focused on the financial performance of the scheme and whilst this is understandable the Committee notes that the scheme exists for the benefits of persons injured at work. In this regard, any cut to benefits would have a devastating effect on these already significantly disadvantaged members of our society. It is also noteworthy that levels of benefits do not appear to be a key driving factor in the current deficit nor the projected deficit.

The keys factors driving the deficits are, in the Committee's view, the poor performance of the scheme's fund managers and a claims management model and set of guidelines that encourage the growth of a tail of claims that is not sustainable. It is said that work injury damages claims are also a key factor, however, the Committee queries whether that argument is sustainable given the actual number of work injury damages claims compared to the projected deficit. For example, last year there were approximately 800 work injury damages claims of which only 88 proceeded to the District Court of NSW (and an even smaller number to judgment). This is about 400 more than the 400 or so work injury damages claims that ordinarily existed in the system before the apparent 'spike' in claims. The average cost of a work injury damages claim is reported to be \$350,000.00. It follows then, that for the additional 400 work injury damages claims, the increased actual cost to the system is under approximately \$140,000,000.00 per annum. Claims estimating and premium modelling should more than comfortably accommodate fluctuations of this nature.

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Other proposals apparently under consideration include aspects of various state schemes, notably the Victorian scheme, by which it is proposed benefits in NSW should be terminated after two years. The Committee is concerned about this proposal given that ordinary and statutory benefits claims costs are not driving the deficits and even in Victoria, while statutory benefits are limited, common law entitlements are not.

Some additional statistics the Committee would like to bring to your attention are as follows:

1. The number of litigated major injuries has halved since 1996;
2. The number of disputes by scheme agents is one-third the 1996 rate;
3. Payments to scheme agents have risen from approximately \$70,000,000 per annum in 1999 to over \$630,000,000 per annum in 2010; and
4. The total cost to the scheme of managing a dispute has risen sixteen-fold in the past decade (1999-2009).

These statistics are openly available from an analysis of the annual reports of your department, the former NSW Department of Industrial Relations, the WorkCover Authority, the Compensation Court of NSW and the NSW Workers Compensation Commission. They support the Committee's view that the issues driving scheme performance have little to do with benefits, or culture, or the behaviour of lawyers – all of which have been proffered as grounds for change in the past.

The scheme clearly is in need of a review and the Committee is keen to play a significant role in any analysis of the scheme. The Committee recognises that there are some immediate concerns for the Government. The projected deficit needs to be swiftly brought under control. The existing deficit requires a considered response.

Considering the vulnerability of the persons most in need of the protection of the scheme, care must be taken not to over-react to the current situation by taking the focus off the real issues driving scheme performance and shifting it entirely to matters of a financial nature. In this regard, the Committee recognises that the projected deficit could have a significant impact on the state budget. The Committee understands the financial imperatives and the political consequences. However, the Committee believes that the immediate implementation of some short term reforms (coupled with ongoing consultation) will preserve the state's budgetary position and ensure that the scheme returns to a satisfactory position.

The Committee recommends the following proposals for immediate implementation:

1. Amend the regulations and claims guidelines to allow scheme agents to obtain independent medical examination reports at any stage of the life of the claim. The importance of getting an early independent medical examination report is that it states the boundaries of the dispute at a very early point in time. Is it important that this proposal be accompanied by the proposals below. The other advantage of an early independent medical examination report is that the existence of such an opinion at an early point in time will more often than not help curtail or resolve work injury damages claims. It is noteworthy that when independent medical examination reports could be obtained without restriction, the number of work injury damages claims was significantly less and the tail of claim less cumbersome. The correlation between the two cannot be ignored.



2. Re-introduce commutations across the board and without restriction. It is imperative that a large section of the tail of claims that exists in the scheme is extinguished and the most obvious way of doing this is by way of commutation. The Committee would propose amendments to the legislation to enable commutations to take place on all claims. The process for approval should comprise the completion of a simple standardised form by which certification from a legal practitioner is provided followed by registration of that document in the Workers Compensation Commission. There is no need for WorkCover to be involved in this process and cutting out this unnecessary involvement will improve efficiency. The immediate re-introduction of commutations will result in the resolution of potentially thousands of disputes and non-disputed claims. This will inevitably include a very large number of claims that are making up the projected deficit both as statutory claims or work injury damages claims.
3. Amend the claims estimate guidelines to apply a 50% discount to any estimate for any claim that is considered to be capable of a commutation. If the restrictions on commutations are removed, a significant discount could be applied to all claims in the scheme which would therefore, artificially perhaps, have an immediate impact on the projected deficit because the total estimates on all claims would reduce. It is important however that a wholesale settlement program be undertaken to ensure those savings are realised. The advantages are lower estimates, thereby curtailing premium and reducing the deficit.
4. Amend the current claims guidelines and reverse the direction against settlements to scheme agents enabling parties to negotiate between positions. The Committee sees no merit in the current process where scheme agents are prohibited from settling matters in between the applicant and respondent evidence and claims are required to proceed to determination where one or either of those assessments is not accepted.

In the Committee's view the above proposals could be implemented without any significant legislative reform and are likely to receive support from the legal profession, worker's groups including unions and employer groups. Employers should not object to the proposals as they help maintain the financial viability of the scheme.

There may be opponents to the above proposals who might argue that such proposals encourage compensation behaviour. Those arguments need to be analysed within the broader context of the scheme and the Committee is willing to participate in any formalised review which properly analyses those arguments. In any event, the current financial position of the scheme suggests that such arguments ought to be given little to no weight and moreover, if claims are properly considered then the correct value for those claims will be applied. The fear mongering that is generated by those who argue that a compensation mentality can grow suggests that the scheme agents for whom WorkCover pay over \$600,000,000.00 per annum are incapable of undertaking their contracted roles correctly. The Committee does not have such little faith in professionally skilled organisations, although whether they are currently performing to the standard they should be is a matter which requires detailed analysis.

The longer term reforms of the scheme could take various forms. The Committee is in favour of a broad-ranging independent inquiry conducted in relation to the scheme's performance since 2001. It is not appropriate in this correspondence to

detail what the Committee believes some of those longer term reforms could be. In summary, management of and by scheme agents, estimating and claims management issues and the curtailment and proper control of rehabilitation services and costs are, in the Committee's opinion, the critical factors. Ideally, the Committee advocates for an independent judicial inquiry to be conducted, to not only identify how the scheme has come to be in the current state, but more importantly, to give to you a balanced and independent suite of recommendations.

Given the importance of this matter, the Law Society appreciates the opportunity to meet with you at short notice. The Committee would also like to offer to make itself available to you to assist in the urgent development of any amendments to legislation, regulations and guidelines. Many of the Committee's members have provided services through a range of scheme designs and are expert advisers in the current scheme, as well as members of expert industry groups including the reference group with WorkCover NSW. The Committee is therefore well-placed to assist with the current situation.

Please do not hesitate to contact me or the Chief Executive Officer, Michael Tidball, if you would like to discuss any of the issues raised in this letter. Should your officials require further detail, the policy lawyer with responsibility for this matter, Patrick McCarthy, can be contacted on (02) 9926 0323.

Yours sincerely,



Justin Dowd  
**President**