THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Injury:REIw860345

30 May 2014

Ms Sarina Fisher
The Centre for International Economics
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SYDNEY NSW 2000

By email: sfisher@theCIE.com.au

Dear Ms Fisher,

Statutory Review of 2012 Workers Compensation legislative amendments

The Injury Compensation Committee ("the Committee") of the Law Society of New South Wales ("the Law Society") welcomes the opportunity to provide this submission to the Review being undertaken by the Centre for International Economics on behalf of the Office of Finance and Services.

The Law Society is the State's peak legal representative body and our members represent key stakeholders in the NSW Workers Compensation Scheme ("the Scheme") including worker, insurer and self insurer representatives. Many of the Committee's members are specialist advisers in the Scheme as well as members of expert industry groups including the WorkCover Legal Stakeholder Reference Group.

The Law Society understands that the key driving factor behind the 2012 legislative amendments was the financial deterioration of the Scheme. An actuarial report in March 2012 had estimated a Scheme deficit of over $4 billion as at December 2011[1]. According to the report this deficit was partly due to external influences impacting on investment returns and partly due to a deterioration in claims management experience.

Following the sweeping amendments in 2012, which included major cuts to benefits and extinguishment of benefits available to injured workers, it was announced that the Scheme had returned to surplus by October 2013, despite a 7.5% reduction in premiums effective in June 2013. Mr Playford of PricewaterhouseCoopers ("PWC"), the Scheme's actuary, gave evidence this month to the Standing Committee on Law and Justice's Review of the exercise of the functions of the WorkCover Authority ("WorkCover Review") that the Scheme is now in surplus in the order of $1.3 billion, with a billion dollar improvement in the last six months alone even after a further 5% premium reduction in December 2013.

[1] PriceWaterhouseCoopers, WorkCover NSW: Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011, 12 March 2012.

The Committee notes the answers to the Standing Committee's questions about the impact of investment returns on WorkCover's solvency position. The solvency trajectory under actual investment returns for the period December 2011 to December 2013 indicates that, in the absence of the 2012 amendments, by June 2014 the referencing deficit may have reduced to perhaps $2 billion and the Scheme may have been approaching full funding by 2021.[2]

In view of the improved investment conditions, it appears likely that the Scheme would have been heading towards a recovery *without* the 2012 amendments. The massive reduction in compensation payable to sufferers of work-related injury has contributed significantly to the dramatic turnaround from the perceived "crisis" position in 2012.

It is submitted that the amendments in 2012 have resulted in a Scheme which is failing to achieve its fundamental legislative purpose which is to provide appropriate support to workers who suffer injury and illness at work. In fact, the Committee considers that the reforms have moved further away from meeting the system's objectives as set out in section 3 of the *Workplace Injury Management and Workers Compensation Act 1998* ("the WIM Act").

The Committee contends that the 2012 amendments have failed to deliver with respect to the guiding principles associated with best practice forming part of the Terms of Reference for this Review and which were identified in the 2012 Issues Paper as seven reform principles'[3].

The guiding principles are:

1. Enhance NSW workplace safety by preventing and reducing incidents and fatalities;

2. Contribute to the economic and jobs growth, including for small businesses, by ensuring that premiums are comparable with other states and there are optimal insurance arrangements;

3. Promote recovery and the health benefits of returning to work;

4. Guarantee quality long term medical and financial support for seriously injured workers;

5. Support less seriously injured workers to recover and regain their financial Independence;

6. Reduce high regulatory burden and make it simple for injured workers, employers and service providers to navigate the system; and

7. Strongly discourage payments, treatments and services that do not contribute to recovery and return to work.

This submission will recommend changes to the Scheme to address the issues which the Committee believes are in urgent need of attention, namely:

1. Scope of benefits

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[2] Letter from Mr Playford of PWC to Mr Gary Jeffrey of WorkCover entitled "Impact of investment returns on WorkCover solvency position – December 2011 to December 2013", dated 1 April 2014.

[3] NSW Workers Compensation Scheme Issues Paper, April 2012.

2. Dispute resolution
3. Governance and inefficiencies of the Scheme

1. Scope of benefits

1.1 Medical and related expenses

Prior to the 2012 amendments, the employer was liable to pay the costs of reasonably necessary treatment, medical services and related travel costs. While the basic liability of employers to pay these costs has not changed, section 59A of the *Workers Compensation Act 1987* ("the 1987 Act") introduced a 12 month limitation on cost payments. Section 59A terminates liability to pay medical and related expenses 12 months after the claim for compensation was first made or 12 months after the entitlement to weekly benefits ceases, whichever is the earlier.

For workers injured prior to 1 October 2012 this change took effect from 31 December 2013, unless they remained entitled to weekly benefits. These provisions do not apply to a "seriously injured worker" who is described as a worker having a degree of whole permanent impairment that has been assessed to be more than 30%. Permanent impairment at this level will only capture victims of catastrophic injury. The 2012 legislation applies retrospectively so that even where workers have been granted ongoing medical and related expenses in a decision of the Workers Compensation Commission or the Compensation Court, such decisions will be void.

The Workers Compensation Amendment (Medical Expenses) Regulation dated 20 December 2013 allowed for the payment of compensation for certain specified medical treatments for which no compensation would otherwise be payable, after the cut-off date of 1 January 2014, but only if they were approved by the insurer before that date. That Regulation allowed an 11 day window of opportunity for injured workers to get pre-approval of medical expenses to extend the deadline. The Committee is of the view that the Regulation had little practical benefit. As there was no warning that this Regulation was going to be made many workers were deprived of the opportunity to be afforded vital medical treatment because the incumbent position was that not only approval, but the treatment had to take place before 31 December 2013. At the very least, the Regulation should have contemplated and extended to cover cases where the Workers Compensation Commission had made a determination before 31 December 2013 that medical expenses be paid.

The costs of medical treatments, services, medications and aids must now be borne by the Medicare system or the workers themselves. It has been reported that the withdrawal of benefits will be particularly problematic in areas of ongoing physiotherapy treatments, ongoing medication for pain relief, repeat surgery consequent on injury (for example knee replacement) and the requirement for replacement equipment such as prostheses, spinal cord stimulators or hearing aids.

The 2012 amendments also introduced a new requirement that injured workers must obtain pre-approval for medical treatments before attending appointments or surgery. This provision encourages insurers to undermine medical recommendations by delaying or refusing approval which in turn can delay a worker's recovery. This encouragement is enhanced by the convoluted dispute resolution process applicable to medical treatment, as discussed under "Dispute Resolution" below.

The new restrictions are particularly harsh when a worker has returned to work but requires medical treatment to remain in employment or maintain a level of involvement in the workplace.

It is the experience of members of the Committee that many injured workers are typically only able to return to work because they have the support of a physiotherapist or pain management medication. Any resulting inability to work caused by the cessation of medical treatment would appear contrary to the stated intention of having a compensation scheme that encourages a timely, safe and durable return to work.

The Committee considers that the 2012 amendments in relation to medical expenses do not meet the objectives of guiding principles 4, 5 and 6 set out above. Furthermore, section 59(A) combined with section 60(2A)(a) prevents the Scheme from fulfilling its fundamental function of providing prompt treatment of injuries, effective and pro-active treatment of injuries and necessary medical and vocational rehabilitation following injury.

Recommendations

A. Repeal section 59 A of the 1987 Act.

B. Introduce a provision that payments pursuant to section 60 are payable until retirement age with certain exceptions such as prostheses.

C. Remove the pre-approval requirement for all but non-exempted treatment in section 60(2A). In addition, consideration could be given to amending section 60(2A) so that there is a presumption that treatment recommended by the injured worker's doctors within the first 12 months after the injury, is reasonable. This would need to be united with a more effective dispute resolution mechanism for medical disputes. See recommendation under "Dispute Resolution".

1.2 Suitable Employment

Fundamental to the return to work focus of the 2012 reforms was the notion of "suitable employment" in section 32A of the 1987 Act. This amended definition of what is a suitable job for the injured worker's return to work decreed that employment is considered to be suitable regardless of whether such a job is available in the employment market and regardless of what was the nature of the worker's pre-injury employment or place of residence.

The Committee believes that if a workers compensation system is to have return to work as a key objective then it must adopt a realistic approach to what alternative employment is suitable in the labour market reasonably accessible to the worker. Any system that entitles an employer to disregard factors such as outlined above only encourages insurers to adopt unrealistic approaches to return to work and to use the work capacity decision process as a means to simply terminate a worker's benefits rather than to achieve a sustainable and realistic return to work objective.

One area in which the common law has grappled with the potential availability of alternative work following a work injury is in the area of total and permanent disability insurance ("TPD"). In TPD matters, the trustee typically is required to determine under the policy of insurance whether the worker is likely ever again to be able to work for reward or engage in any gainful occupation for which the worker is reasonably qualified by education, training or experience. The Courts (for example in *Ye Hu v Rees & Miea* [1997] 160 FCA) have held

that the realities of the labour market must be taken into account in determining whether the worker was likely ever to be able to work in a job for which the person was so qualified.

The Courts have held that in such cases the trustee must consider the member's particular circumstances and actual job prospects in the real world and make their determination on that basis. For instance in *Muinos v Johnson & Johnson Retirement Benefits Pty Limited* (BC 9605916, unreported, 5th December 1996) the Federal Court stated as follows:

> "[the trustee's] consideration of the matter culminating in its decision to decline the member's claim was vitiated by its concentration on the medical evidence to the apparent exclusion of any, or certainly any adequate, attention being paid to the question of whether the member's education, training or experience rendered him reasonably suitable for any occupation of the kind for which he was fit in a medical sense, or the reasonable availability of any such occupation for such a person as the member".

The risks posed by the existing definition of what is "suitable employment" in section 32A can be reflected in the burgeoning area of vocational capacity assessment. It is the experience of Committee members that there are numerous organisations performing these types of assessments to determine what work is suitable for the worker and that these organisations tend to focus almost exclusively on the hypothetical availability of a job in the open labour market for which the injured worker may be physically and psychologically suited. These organisations often avoid consideration of whether this type of job is realistically available to the worker in the current labour market or whether the suggested job is realistically suitable having regard to the worker's training and work history.

Recommendation

A. In order to maintain a real focus on sustainable return to work and in keeping with the case law in the area of TPD claims the Committee submits that paragraph (b) in the definition of suitable employment in section 32A of the 1987 Act should be removed.

1.3 Weekly Benefits and return to work objectives

All the discussions and inquiries leading to the 2012 amendments emphasised the importance of timely return to work for injured workers. There is much evidence that these workers recover faster if they can return safely to a suitable working environment as soon as possible. However, it should always be remembered that the purpose of the legislation is to provide injured workers with support during incapacity (section 3(c) of the WIM Act) and that termination of benefits while a worker is incapacitated is contrary to the intent of the legislation.

It could be argued that the 2012 changes place significant obligations on workers to return to work as quickly as possible without imposing reciprocal obligations on employers to provide suitable employment. Avoiding the requirement to provide suitable employment duties is a practice that should be further discouraged. The Committee takes the view that the mutual obligations of workers and employers with respect to seeking suitable duties and the provision of them should be strengthened by the introduction of a regime of positive incentives. These should not just be centred for the employers on premium relief, but involve genuine return to work opportunities including where necessary vocation retraining and workplace rehabilitation.

The Committee contends that the current regime for weekly benefits does not adequately meet the aims set out in the guiding principles numbered 3 and 7.

Recommendation

A. Failure to comply with the requirements under these provisions should have consequences for both worker and employer. Consideration could be given to providing that a failure by an employer to provide suitable employment would double the second entitlement period for weekly compensation (for example, 2.5 to 5 years). A failure by a worker to return to work when suitable employment is offered would reduce the entitlement period by 50%.

1.4 Seriously injured workers

A seriously injured worker, for the purpose of the Workers Compensation legislation, means a worker whose injury has resulted in permanent impairment and the degree of permanent impairment has been assessed to be more than 30%. The definition has relevance in the area of work capacity assessments as seriously injured workers are exempted from this regime and their entitlement to weekly benefits does not cease after 5 years.

Seriously injured workers are also exempt from the 12 month limitation on the payment of medical expenses after cessation of entitlement to weekly benefits. A 30% whole person impairment represents catastrophic injury and consequently only a small number of injured workers fall into this category. The Committee contends that anyone with whole person impairment of 15% much less 30% would have to be regarded as seriously injured and would be unlikely to work in any physical occupation again.

Regardless, a seriously injured worker is not protected from an insurer making a work capacity decision which may very well deprive the worker of ongoing benefits and subject those very injured workers the reform legislation sought to protect to the same perils any other injured worker faces, especially in relation to disputing the validity of the decision.

The Committee considers that the 2012 amendments do not meet the guiding principle that the Scheme should guarantee quality long term medical and financial support to seriously injured workers.

Recommendation

A. The Committee recommends that the definition of a seriously injured worker be amended to lower the whole person impairment threshold.

1.5 Lump sum compensation for permanent impairment and pain and suffering.

Prior to the 2012 legislated changes a worker was entitled to lump sum compensation in respect of permanent impairment pursuant to section 66 of the Act. Now no lump sum compensation is available where a worker suffers 10% whole person impairment or less.

Previously section 67 of the 1987 Act provided for compensation for pain and suffering up to $50,000 where related to permanent impairment of at least 10%. There is now no lump sum compensation for pain and suffering.

The Committee submits that section 67 is the only way to subjectively measure and compensate for pain and suffering in the Scheme. Further, the benefits payable under section 67 had not been increased in 25 years.

Recommendations

A. With respect to section 66, the Committee is of the view that consideration should be given to lowering the threshold to enable a lump sum payment for an injury resulting in a degree of permanent impairment of 5% or more.

B. The Committee believes reinstating section 67 entitlements for whole person impairment of at least 10% should be considered.

C. In the event that the proposal in the last bullet point is unacceptable, then the Committee believes that a significantly increased pain and suffering component should be built into the section 66 lump sum for those who have achieved an impairment rating of at least 10%.

1.6 Journey Claims

The 2012 changes inserted section 3A which limited the effect of section 10(3) of the 1987 Act by introducing a requirement that there must be a real and substantial connection between the employment and the accident or incident out of which the personal injury arose for a journey claim under section 10(3) to succeed. It has been reported that the vast majority of journey claim incidences are no longer captured by the Workers Compensation Scheme. The costs flowing from a journey accident including motor vehicle accidents are now shifted to other sources of funding such as third party motor vehicle insurance, Centrelink or Medicare.

It is the Committee's view that journey claims make up a relatively small part of Scheme liability (Joint Select Committee report in 2012 stated journey claims represented only 2.6% of claims)[4], and are not premium impacting. A significant number of these claims result in a recovery to the Fund by other forms of insurance, particularly CTP.

Recommendation

A. The Committee recommends that consideration should be given to the reintroduction of compensation coverage for journey claims but only in circumstances where the worker is not at fault.

2. Dispute Resolution

Significant problems have developed as a consequence of the new Division 2 subdivision 3 of the 1987 Act dealing with work capacity assessments, work capacity decisions and in particular, the review process for such decisions by insurers.

Virtually any decision of an insurer which affects a worker's weekly benefits or makes a determination of a worker's capacity for work constitutes a work capacity decision[5]. When a work capacity decision is disputed an injured worker is mandated to follow a specific procedure as prescribed by section 44 of the 1987 Act. Failure by the worker to complete any of the steps in the defined sequence precludes the worker from taking the review to the next level.

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[4] Joint Select Committee on the NSW Workers Compensation Scheme Final Report 13 June 2012

[5] Section 43 *Workers Compensation Act 1987*

Pursuant to section 44, if a worker disputes a work capacity decision the worker must:

(a) Lodge a work capacity Application for internal review by insurer form with the insurer. Applicants should be informed of the insurer's decision within 30 days.

(b) If the worker disputes the decision then an application for merit review by the WorkCover Authority must be lodged within 30 days of receipt of the decision of the insurer or 30 days from the due date if the insurer fails to make a decision.

(c) The worker may make an application to the WorkCover Independent Review Office ("WIRO") for a review of the insurer's procedures in making the work capacity decision (not the merits of the case). This application must be made within 30 days after the receipt of the merit review decision.

(d) The final avenue of appeal is to the Supreme Court for judicial review.

The Workers Compensation Commission does not have jurisdiction to determine any dispute about a work capacity decision of an insurer.

The whole work capacity assessment/decision regime is multi-tiered, multi-faceted and extremely complex as it also encompasses subordinate legislation in the form of various guidelines which have been constantly revised with consequent multiple versions.

The Committee is critical of the lack of independence of the reviewers in the current dispute resolution system. The insurer undertaking first stage internal review clearly has a vested interest and is not independent. WorkCover's function as the nominal insurer of the scheme creates a conflict of interest situation when it acts in its role as merit reviewer of insurers' decisions. This issue has been canvassed in the Law Society's submission to the Inquiry into the Functions of the WorkCover Authority.

It should be pointed out that many injured workers have experienced considerable delays of several months in the merit review process undertaken by WorkCover. This issue was explored at the recent hearings that took place as part of the WorkCover Review.

Most importantly during this whole review process, workers are left to navigate this complex system without the benefit of legal advice. Pursuant to section 44(6) of the 1987 Act, a legal practitioner acting for a worker is not entitled to be paid or recover any amount for costs incurred in connection with a review of a work capacity decision of an insurer. That is, a worker is prevented from seeking independent legal advice even when the worker is prepared and able to bear that expense personally.

The Committee has received regular feedback from practitioners who have been placed in the difficult position of explaining to an injured worker that they are prohibited from being paid for any advice with respect to a work capacity decision and are therefore unable to help them. Of course there will have been instances where solicitors for a variety of reasons have provided free advice to injured workers in these circumstances. In the absence of such free advice there is no alternative avenue for the worker to seek legal advice. The advisory service established by WorkCover disavows itself of such a responsibility. What typically follows is that a worker whose entire working life has been spent in manual labouring jobs (often with language and/or psychological difficulties) is expected to navigate a maze of legislation and guidelines and then be confronted with an experienced and well trained claims officer and/or reviewer on the other side. This is clearly an unfair and unsatisfactory state of affairs.

It should be pointed out that although the mechanisms for resolution of other disputes which may arise under the Scheme are different, they are also complex. Disputes about an insurer's primary liability to pay compensation for example, are heard at first instance by an Arbitrator at the Workers Compensation Commission. Appeals are heard by a presidential member and then by the Court of Appeal. Disputes about lump sum compensation are not capable of early or cost effective resolution as a result of restrictions in the Scheme. For instance, the parties are unable to reach a middle ground compromise should there be different medical findings of whole person impairment. A dispute must therefore proceed for resolution to the Workers Compensation Commission, then to a medical specialist, then a medical appeals panel and then to the Supreme Court. These difficulties in achieving an early and cost effective resolution were discussed in the WIRO submission to the WorkCover Review.

It is submitted that the current dispute resolution mechanism relating to medical treatment as provided by section 60(5) does not operate efficiently. A less formal and quicker resolution of such disputes is required. The Committee also considers that it should not be mandatory for every medical dispute about future medical treatment to go to an Approved Medical Specialist. Early intervention is the key and delayed access to medical treatment can have dire consequences for both a worker's physical and psychological state.

There are also specialised workers compensation arrangements which apply to specific industries such as the coal industry, police and firemen.

The Committee contends that the current restrictions on the ability of the interested parties to negotiate a full and final settlement are disadvantageous to all the parties and the Scheme generally. The benefits of commutations were recognised in the report of the Joint Select Committee in May 2012 which had recommended that the NSW Government liberalise the availability of commutations. In fact Schedule 8 to the 2012 amending legislation gave the opportunity to WorkCover to liberalise the availability of commutations, but this schedule has never been proclaimed. Benefits include the effective management of long term tails, reducing the ongoing administrative costs of claims and providing injured workers with some individual autonomy and the opportunity for the worker to get on with their life.

This increased focus on individual autonomy is consistent with recent developments with the National Disability Insurance Scheme ("NDIS") and with the Lifetime Care & Support Authority where the benefits of direct funding to participants to cover their medical treatment and care needs have been readily acknowledged.

The Committee considers that the current dispute resolution system is in direct contradiction to the guiding principle 6 to "reduce high regulatory burden and make it simple for injured workers, employers and service providers to navigate the system".

<u>Recommendations</u>

A. The Committee considers that there would be a vast improvement and benefit to the Scheme if the dispute resolution process as a whole was rationalised and simplified.

B. All disputes arising under the Scheme (including disputes relating to work capacity decisions) should be resolved in the same place, be it the Workers Compensation Commission or some other tribunal. The Committee is suggesting a "one stop shop" perhaps with a medical unit attached. All workers compensation related matters could be heard here, even if different legislation was applicable such as that covering workers in the NSW Coal Industry. Importantly the Commission or tribunal should be staffed with judicial officers who are completely independent from WorkCover.

C. The prohibition against payment of lawyers during the review process contained in section 44(6) should be removed, and lawyers should be brought into the merit review process in whatever 'one stop shop' is considered appropriate to determine the dispute. This process should involve face to face conciliations or mediations early in the process with a built in costs incentive to resolve disputes at this early stage along with appropriate cost penalties (perhaps a percentage deduction off the regulated costs) in the event the matter is not properly prepared.

D. It is submitted that the current dispute resolution mechanisms with respect to medical treatment pursuant to section 60(5) should be reviewed. A mediation type scheme might be effective to deal quickly and cheaply with preliminary disputes. It is further recommended that the mandatory AMS referral requirement in section 60(5) should be removed.

E. Barriers should be removed that prevent the early settlement of claims and thereby allow for the escalation of costs, for example parties should have the ability to compromise different WPI findings.

F. The Government should re-implement the ability of parties to negotiate an outcome and have proper settlement options available. Parties should be able to resolve claims on a full and final basis by way of commutation. The threshold requirements in section 87EA of the 1987 Act should be removed. WorkCover should not have a role in the approval process.

3. Scheme governance and inefficiencies

The 2012 Parliamentary Inquiry into the Workers Compensation Scheme identified various problems with claims management practices and with scheme governance generally. This Committee has addressed some of these issues in its submission to the WorkCover Review. In particular, that submission addressed the fundamental conflicts of interest which arise in various situations as a result of WorkCover's role as nominal insurer.

The legislative scheme is extremely complicated and involves the interplay of two Acts, regulations and countless constantly changing Guidelines. Despite one of the aims of the 2012 changes being to reduce 'red tape' the Scheme is increasingly overloaded with bureaucracy. One should be mindful of the significant extra cost to the Scheme of maintaining such increased layers of bureaucracy involved with the current three stage review process. The Committee contends that the legislative amendments have not met guiding principle 6 to "reduce high regulatory burden and make it simple for injured workers, employers and service providers to navigate the system".

Recommendation

A. The Committee refers the CIE to the Law Society's submission to the WorkCover Review and the recommendations therein.

The Committee thanks you for the opportunity to provide this submission. If you require any additional information or have any questions, please contact the Committee's Policy Lawyer, Leonora Wilson on (02) 9926 0323 or leonora.wilson@lawsociety.com.au.

Yours sincerely,

Ros Everett

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