THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: ICC JElw:1059155

27 October 2015

The Hon. Victor Dominello MP
Minister for Innovation and Better Regulation
GPO Box 5341
SYDNEY NSW 2001

By email: office@dominello.minister.nsw.gov.au

Dear Minister,

Workers Compensation – *Cram Fluid Power Pty Ltd v Green*

I write to you on behalf of the Injury Compensation Committee ("Committee") of the Law Society of New South Wales in relation to the media release dated 26 October 2015 advising of a proposed new regulation.

The proposed regulation is in response to the Court of Appeal decision in *Cram Fluid Power Pty Ltd v Green [2015]* NSWCA 250 (*"Cram Fluid")* and it is directed at the retrospective nature of the 2012 legislative amendments to section 66 of the *Workers Compensation Act 1987* ("1987 Act"). The regulation would enable a worker who made a claim for lump sum compensation before 19 June 2012 to make one further claim in respect of the same injury.

The Committee endorses the extension of benefits proposed in this regulation and congratulates the Government for this reform.

However, the Committee considers this an incomplete solution to the current inequities and problems surrounding lump sum compensation. The regulation does not address the unfairness to workers injured after June 2012 who have a medical condition which deteriorates significantly following their one medical assessment or claim. It is important to note that workers' permanent impairment entitlements must be considered in conjunction with the policy introduced in 2012 in section 322A of the *Workplace Injury Management and Workers Compensation Act 1998 ("*1998 Act") of "only one assessment of the degree of permanent impairment" and "only one medical assessment certificate". Problems will also be exacerbated by recent amendments that link the ability to access medical treatment to levels of impairment.

The Committee's submission to the Hon. Dominic Perrottet MP, dated 21 September 2015 with respect to *Cram Fluid* is attached. In it the Committee has recommended :

1. Amendment to the 1987 Act to provide exceptions to the "one claim policy" to permit workers to bring second and subsequent claims for permanent impairment compensation for deterioration in their condition which results in a significant increase in impairment.

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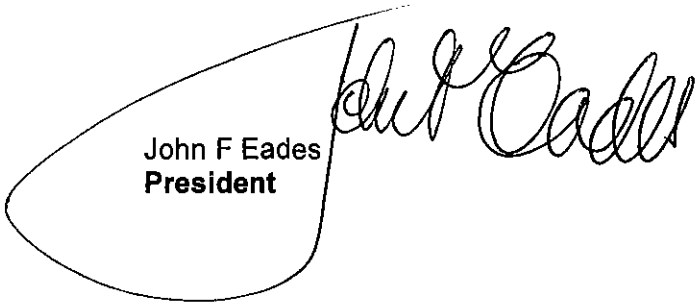
2. Removal of section 322A from the 1998 Act.

Law Society representatives would be happy to meet with your advisers to contribute to the process of further legislative amendments required to address this important issue.

Thank you for considering these submissions. Please contact Michael Tidball, Chief Executive Officer, on (02) 9926 0385 or by email to michael.tidball@lawsociety.com.au should you require any further information.

Yours sincerely,



John F Eades
President

THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: ICC:JLlw1050410

21 September 2015

The Hon Dominic Perrottet MP
Minister for Finance, Services and Property
52 Martin Place
SYDNEY NSW 2000

Dear Minister,

Re: *Cram Fluid Power Pty Ltd v Green* [2015] NSWCA

I write to you on behalf of the Injury Compensation Committee ("Committee") of the Law Society of NSW.

The Committee applauds the aim expressed in your media release dated 28 August 2015 to "deliver a fairer, more sustainable" workers compensation scheme. In particular, the Committee acknowledges the beneficial impact of the increases to the permanent impairment entitlements available to injured workers who sustain injuries after the commencement of the 2015 amending legislation. This change is in keeping with one of the scheme objectives at section 3(c) of the *Workplace Injury Management and Workers Compensation Act 1998* ("1998 Act"), which is to provide "payment for permanent impairment".

Unfortunately, the New South Wales Court of Appeal decision in *Cram Fluid Power Pty Ltd v. Green* [2015] NSWCA 250 demonstrates that there are aspects of the workers compensation legislation that sit very uncomfortably with any concept of fairness.

The decision in *Cram Fluid Power Pty Ltd* clarified the meaning of the words "one claim" in section 66(1A) of the *Workers Compensation Act 1987* ("1987 Act"). It effectively determined that a worker only has one claim ever for permanent impairment compensation. The only exception is for permanent impairment claims made and unresolved prior to commencement of the 2012 legislation on 19 June 2012.

This Committee recognises that it may have been financially desirable in 2012, when there was some evidence of deteriorating scheme performance, to introduce a policy to limit the number of top-up permanent impairment claims available to an injured worker. The Committee also acknowledges that there should be some onus on workers and their legal advisers to exercise caution when choosing the correct time to pursue a claim for permanent impairment compensation. However, in the Committee's view it is manifestly unfair for workers who resolved their permanent impairment claims prior to 19 June 2012, when there was no "one claim" limitation, now to be told that they have already exhausted their permanent impairment entitlements. The unfairness of this outcome was implicitly acknowledged by the then Premier, the Hon. Barry O'Farrell, MP, when he stated to the media on 20 June 2012 that the 2012 legislation was not intended to have retrospective operation.

It is also plainly unfair for workers who resolved their permanent impairment claims for a modest entitlement to now no longer be entitled to further permanent impairment compensation in circumstances where they have subsequently experienced a significant deterioration in their medical condition which could not have been expected at the time when the original permanent impairment claim was particularised. This was clearly a problem envisaged by the Joint Select Committee in its 2012 report on the New South Wales Workers Compensation Scheme, which recommended that further permanent impairment compensation should be able to be pursued if there had been a deterioration of the whole person impairment ("WPI") rating of at least 5%.[1]

It is not just the workers' permanent impairment entitlements that are detrimentally affected by the "one claim" policy. The policy has to be considered alongside, and in conjunction with, a further policy introduced in 2012 of "only one assessment of the degree of permanent impairment" and "only one medical assessment certificate" (section 322A of the 1998 Act). The combined effect of these policies will prevent workers from accessing their entitlements. This is because both the 2012 and 2015 amendments adopt whole person impairment ratings as the threshold means by which workers can access various weekly and medical benefits. Unfortunately, this situation is made even worse by the 2015 legislation, which relaxes the medical treatment restrictions, but only in circumstances where a worker can establish a particular level of impairment rating. In these scenarios there is ample potential for obvious and multiple instances of unfairness.

In the case of workers who resolved their claims prior to 19 June 2012, this means that they are excluded from potential entitlements to weekly benefits and/or medical expenses, given that they are tied to an impairment assessment that was made at a time when there was no limitation on the number of permanent impairment claims that could be pursued, and no limitation on the right to access medical treatment. In the case of workers with a medical condition which significantly deteriorates following their medical assessment or claim, they potentially will be excluded from the appropriate medical treatment and/or weekly benefits to which they should be entitled because of an out-dated assessment of their impairment level.

In addition to the unfairness caused to workers by the impact of the "one claim" and "one assessment" policy, the Committee also questions the long term consequences of adopting this policy. It effectively acts as an incentive for workers to undergo surgery as quickly as possible in order to achieve a higher impairment rating which will then entitle them to access certain benefits that would not otherwise be available to them. In some circumstances, this may even prove to be a sufficiently large incentive for some workers to have surgery which they would not otherwise undergo.

The Committee also has serious concerns about the efficacy of linking the ability to access medical treatment to a worker's whole person impairment rating under the 2015 amending legislation, and will write further in this regard.

The Committee respectfully urges you to take action to address these issues, which have been brought into sharp focus by the recent decision in *Cram Fluid Power Pty Ltd v. Green.* The Committee makes the following recommendations:

1. Amend the 1987 Act to provide exceptions to the "one claim policy", to permit workers to bring second and subsequent claims for permanent impairment compensation for deterioration in their condition which results in a significant increase in impairment.

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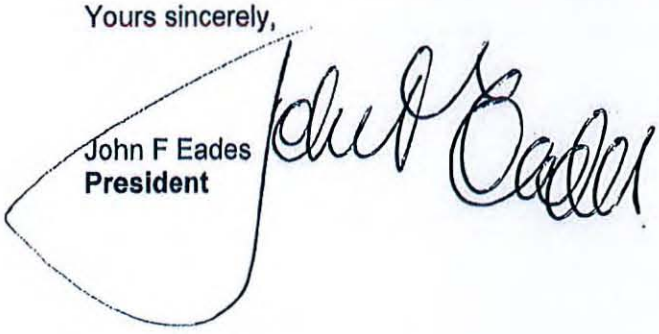
[1] Report on the NSW Workers Compensation Scheme, Joint Select Committee, 13 June 2012, P79

2. Remove section 322A (one assessment of permanent impairment and one medical assessment certificate) from the 1998 Act.

The Committee would be happy to meet with your advisors to discuss any of these issues or to assist in the process of further legislative amendment required to address these pressing issues.

Thank you for your assistance. Please contact Leonora Wilson, policy lawyer for the Committee by phone on (02) 9926 0323 or by email to Leonora.wilson@lawsociety.com.au should you require any additional information.

Yours sincerely,



John F Eades
President