THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Injury:GUlw:1092790

22 February 2016

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 - *Sabanayagam v St George Bank Limited*

As you may be aware, the Law Society has previously raised significant concerns with the dispute resolution system in the workers compensation scheme.

The Law Society has recommended review and rationalisation of that system by implementation of a dispute resolution process which involves one simplified form of dispute resolution notification and one court, tribunal or Commission which deals with all disputes. For your reference I enclose copies of our submissions with respect to benefit reforms dated 8 July 2015, and our most recent submission on the regulation of legal costs for work capacity decision reviews dated 2 December 2015.

The recent decision of Deputy President O'Grady in the Workers Compensation Commission in the matter *Sabanayagam v St George Bank Limited* [2016] NSWWCC PD3 on 21 January 2016 highlights substantial deficiencies in the dispute resolution process, and confirms the concerns raised by the Law Society previously.

The case involved a claim for weekly compensation benefits, where the insurer had initially accepted liability and paid compensation benefits, but then subsequently declined liability essentially on the basis that the claimant had recovered from the effects of her workplace injury. Notification of the decision declining liability was issued in accordance with section 74 of the *Workplace Injury Management and Workers Compensation Act 1998*.

The claimant sought to dispute the decision declining liability before the Workers Compensation Commission and sought reinstatement of weekly payments of compensation. An Arbitrator in the Workers Compensation Commission, and subsequently Deputy President O'Grady, determined that the Workers Compensation Commission did not have jurisdiction to determine the claim for weekly compensation. Essentially the Deputy President decided that it could be inferred from

the nature of the Section 74 Notice issued that a work capacity decision had been made. In these circumstances the Commission was of the view that the claim for weekly compensation had to be the subject of the review process so far as it related to the work capacity decision, and this was not something for which the Workers Compensation Commission had jurisdiction.

The effect of this decision is that the claimant, and many other claimants in this situation, may now be forced to proceed by way of a lengthy review process in order to have the "inferred" work capacity decision reviewed. This process is currently without the assistance of the payment of the claimant's legal costs. This review will not, however, have the result of the reinstatement of weekly payments of compensation because the dispute would then need to return to the Workers Compensation Commission to deal with the primary liability dispute for which the Workers Compensation Commission does have exclusive jurisdiction.

In fact it may not be possible for the claimant to complete the review process in respect of the work capacity decision. This is because the past practice of the Merit Review Service has been to decline to conduct a review of a work capacity decision in circumstances where primary liability for the payment of compensation benefits has been declined, as in this case.

This decision highlights the inadequacies which we have previously identified in the current dispute resolution process and, in the view of the Law Society, require urgent attention.

The Law Society requests that you give urgent consideration to comprehensive reform of the dispute resolution process in the manner which we have previously recommended.

Mr Michael Tidball, the Chief Executive Officer, or I would be very pleased to discuss this issue with you further.

Should any additional information be required your departmental officers are directed to Leonora Wilson, Policy Lawyer for the Injury Compensation Committee on Leonora.wilson@lawsociety.com.au or (02) 9926 0323.

Yours sincerely,

Gary Ulman
President

THE LAW SOCIETY
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Our ref: Injury:JElw:1035208

8 July 2015

Ms Caroline Walsh
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Dear Ms Walsh,

NSW Workers Compensation Scheme Benefits Reform

The Injury Compensation Committee ("Committee") of the Law Society of NSW thanks you for the opportunity to participate in discussions regarding investment of additional solvency funds at the invitation of Mr Vivek Bhatia, Chief Executive Officer of Safety, Return to Work and Support Board. Following the meeting on 30 June 2015 with WorkCover and Law Society representatives, the Committee now provides these comments.

1. Background

The NSW workers compensation system is designed to establish a 'workplace injury management' and compensation scheme. "Compensation" means compensation under the Workers Compensation Acts, and includes any monetary benefit under those Acts.

Pursuant to section 154D(2) of the *Workers Compensation Act 1987* ("the 1987 Act"), the assets of the Workers Compensation Insurance Fund are subject to a statutory trust to be held on trust for the purposes to which assets of the Insurance Fund are authorised or required to be applied by or under this Act and for the benefit of workers and employers as provided by the Act ("1987 Act").

The objectives of the system are defined in section 3 of the *Workplace Injury Management and Workers Compensation Act 1998* ("the WIM Act") as:

(a) To assist in securing the health, safety and welfare of workers and in particular preventing work-related injury;

(b) To provide:

- prompt treatment of injuries, and
- effective and proactive management of injuries, and
- necessary medical and vocational rehabilitation following injuries,

in order to assist injured workers and to promote their return to work as soon as possible;

(c) to provide injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses;

(d) to be fair, affordable, and financially viable;

(e) to ensure contributions by employers are commensurate with the risks faced, taking into account strategies and performance in injury prevention, injury management, and return to work; and

(f) to deliver the above objectives efficiently and effectively.

Section 9(1) of the 1987 Act states:

> A worker who has received an injury (and, in the case of the death of the worker, his or her dependants) shall receive compensation from the worker's employer in accordance with this Act.

The Scheme in its current form now provides only limited compensation to injured workers in the following benefit categories:

- Weekly payments for 'incapacity'
- Medical and treatment expenses
- Permanent impairment lump sum payments
- Death benefits
- Work Injury Damages
-

Access to certain categories of benefits is limited by means of impairment thresholds and only accessible as follows:

- Weekly payments – greater than 20% impairment after 5 years.
- Medical Expenses – greater than 20% impairment if the claim was made before 1 October 2012 and greater than 30% impairment if the claim was made after 1 October 2012.
- Permanent Impairment lump sum compensation – greater than10% impairment .
- Work Injury Damages – 15% impairment (note access restricted to where negligence can be proved on the part of the employer, only limited 'damages' accessible)

Following the 2012 reforms to the NSW workers compensation scheme a $4.1 billion deficit has been transformed into $2.4 billion surplus. Funding ratios are expected to be between 90% and 110% but are currently at approximately 120%. The Government has announced that it will restore about $500M to workers and employers.

Section 154D(4) of the 1987 Act provides that employers are entitled to participate in the distribution of any surplus in the Insurance Fund and are responsible for meeting any deficit in the Insurance Fund by means of the fixing of premiums, levies and contributions as provided by the Act. In 2012 employers were not made responsible for meeting the deficit but instead workers' benefits were significantly reduced. Within 12 months of the reform legislation employers received distribution of the surplus by reduction of premiums and have subsequently received further distribution of the surplus in the Insurance Fund (which is growing) by means of further premium reductions. Since the reform legislation, workers have not received the benefit of any surplus funds, other than the limited extension of medical benefits for existing claims pursuant to the *Workers Compensation Amendment (Existing Claims) Regulation 2014.*

Since 2012, workers' benefits have been reduced further through legislative interpretation of certain provisions of the Acts by the Courts.

Given the level of surplus and diminishing benefit levels as a consequence of further legislative interpretation, the Committee considers there should be measured restoration of benefits to workers commensurate with the expected funding ratio.

2. Medical and Treatment Expenses

The Committee submits that the return of medical benefits to injured workers should be a high priority of any reform package that may be introduced by the Government. Medical and treatment expenses are at the core of the workers compensation system and the key to achieving return to work objectives. The Committee considers that injured workers should receive prompt and appropriate treatment of injuries to enable the worker to return to work, where appropriate, as soon as possible.

The Committee submits that the current arrangements do not achieve the goals intended. The issues involved have been raised extensively and are well documented, including in the Statutory Review of the *Workers Compensation Legislation Amendment Act 2012* and the Review of the Exercise of the Functions of the WorkCover Authority by the Standing Committee on Law and Justice.

As you would be aware, section 59A of the 1987 Act is based on the concept that payments for medical expenses cease 12 months after a worker ceases to receive weekly payments. Three years after its introduction it still remains enormously difficult for a worker and the insurer to determine a worker's entitlement to medical expenses as impacted by section 59A.

Because of the way section 59A operates, members of the Committee are now starting to see evidence of behavioural changes of injured workers, insurers and their legal representatives directed at mitigating the unreasonable consequences of this provision.

Injured workers and their treating medical practitioners are making decisions about medical treatment based on when compensation coverage is to expire as opposed to what is the best treatment for them. The Committee has, for example, observed that many injured workers are now looking for surgery as an early treatment option as opposed to an option of last resort. This is likely to lead to increased costs to the scheme as workers elect to undergo surgery which may have been avoided by longer term conservative treatment. In the long run this may lead to poorer health outcomes and a reduction in the workers' ability to return to work early.

Section 59A also builds in an incentive to stay off work in an attempt to ensure that medical expenses are covered. For example, if workers return to work the current system "penalises" them by having their medical expenses cut in 12 months' time. If they do not work, and continue to receive weekly compensation benefits, they are "rewarded" by continuing to have their medical expenses paid.

It should be noted that those injured workers who have had their benefits cut under section 59A are resorting to the public health system to have their treatment funded. This has some significant impacts. First, there are long waiting times in the public system. As such the workers' ability to have required treatment is delayed and their return to full work is delayed. Secondly, in terms of costs shifted to Medicare, the tax payer pays for the treatment out of general revenue rather than the scheme funding it out of revenue raised from premium collection. Alternatively, treatment provided in a NSW public hospital is met ultimately out of

consolidated revenue. The Committee notes that this results in an underreporting of the true cost to the Government in the operation of the current workers compensation scheme.

The reforms have created great uncertainty, unnecessary litigation, and, potentially significant hardship. The harshness of these provisions cannot be understated. In order to address this and return benefits to injured workers it is recommended that:

1. Section 59A be repealed.

2. In the event that the Government is not minded to repeal section 59A, the Committee submits that the section requires substantial amendment to provide a simple test that applies to all (excluding exempt workers and those with over 20% impairment). For example, the Government might consider payment of medical expenses for a fixed period, for example, of six calendar years after the claim was first made.

3. Section 60(2A)(a) be repealed.

4. A number of injured workers are excluded from accessing prompt treatment in circumstances where provisional liability is not accepted and/or liability is declined at an early stage. This issue could be addressed by providing a fund administered by the WorkCover Authority for the provision of medical treatment to this category of claimant subject to an appropriate monetary and duration cap.

3. Weekly payments

The Committee submits that there is no evidence that the current duration of the entitlement periods encourages early return to work, which is a primary tenet and objective of the system. A limit of 2.5 years of compensation for the great majority of injured workers (including seriously injured workers) is unfair, particularly when the test for receiving weekly compensation beyond 2.5 years is considered. In 2012 the Joint Select Committee recommended that a time cap of:

> no less than five years for seriously injured workers with a more generous time cap for an intermediate category of injured worker and ultimately no time cap (except the Commonwealth retirement age) for the most seriously injured workers.

The Committee considers that the following reforms are consistent with early return to work and fair compensation:

1. Increase the first entitlement period or first 13 weeks of benefits to 100% of pre-injury average weekly earnings.

2. Remove the 52 week "step-down" in the calculation of pre-injury average weekly earnings.

3. Where an employer refuses to provide suitable employment for an injured worker, double the weekly payments entitlement period (to 5 years).

4. Remove the unreviewable subjective discretion of an insurer to determine capacity in section 38 (2) and (3) of the 1987 Act.

5. Recast the 'suitable employment' test to reflect actual labour markets.

6. Ensure that aged workers injured shortly before retirement age receive weekly compensation benefits consistent with those who are injured over retirement age.

4. Permanent Impairment

The erosion of permanent impairment compensation in the 2012 reforms was profound. The amending legislation removed 'pain and suffering compensation' without incorporating that payment into the section 66 permanent impairment lump sum scale. It also introduced two restrictions: a greater than 10% impairment threshold, and a 'one claim' policy.

The 'one claim' and determination of what constitutes a claim for the application of section 66(1A) of the 1987 Act has been the subject of judicial scrutiny for three years (*ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18, *Caulfield v Kartaway Pty Ltd* [2014] WCCPD 34 and most recently in the Court of Appeal in *Cram Fluid Power Pty Limited v Green* on 30 June 2015). While the 'one claim' has been interpreted to date to mean 'one further claim' after 19 June 2012, the decision of the Court of Appeal in *Cram Fluid* may further restrict that interpretation to one claim only, even if this one claim was made before 19 June 2012 when the claimant was not even aware of any restrictions on the number of lump sum claims that the claimant was entitled to pursue. The judicial scrutiny and uncertainty surrounding the lump sum compensation amendments has made it very difficult for lawyers to advise their clients on their lump sum entitlements for the last three years and, unless checked, this uncertainty will continue for the foreseeable future.

The Committee considers that the reforms were unduly onerous and recommends the following:

1. The benefits scale be increased to implement Recommendation 11 of the Joint Select Committee (June 2012) to reflect the non-economic loss scale in the other personal injury jurisdictions in NSW.

2. The threshold for permanent impairment claims be lowered to greater than 5%.

3. Workers be permitted to bring second and subsequent claims for permanent impairment lump sum compensation where there is a deterioration (increase) in their impairment of 5%.

4. The 'one assessment' provision in section 322A of the WIM Act be removed to permit workers to access benefits of differing kinds where an assessment of permanent impairment is required to qualify for benefits.

5. Seriously injured workers

The 2012 reforms were said to benefit seriously injured workers, creating a specific category of worker ("seriously injured workers" with greater than 30% impairment). However, despite various recommendations of the Joint Select Committee, seriously injured workers are not relieved of the onerous requirements or eligibility tests for benefits (see 4 and 5 under 'weekly payments' above). Further, there are now two categories of seriously injured worker:

- those with a greater than 30% impairment;
- those who lodged claims before 1 October 2012 with a greater than 20% impairment.

In June 2014 Minister Perrottet announced:

> A sustainable scheme has also enabled the NSW Government to increase weekly income for seriously injured workers by up to 70 per cent over the amount previously paid under the old system.

However, seriously injured workers remain subject to various restrictions introduced by the 2012 legislation. Seriously injured workers are not relieved of the step downs at 13 weeks, 52 weeks and 2.5 years nor the onerous discretionary tests in sections 38(2) and 38(3) of the 1987 Act to qualify for weekly benefits beyond 2.5 years. There is nothing in the legislation that mandates a seriously injured worker being treated any differently than a less seriously injured worker in terms of satisfying the capacity tests to receive weekly payments. While a seriously injured worker is not obliged to attend a work capacity assessment this does not stop the insurer making a work capacity decision which reduces or stops benefits.

The Committee considers that:

1. The threshold for seriously injured worker should be lowered to 20%.

2. For the purpose of eligibility to be treated as a seriously injured worker, impairments from separate injuries (for which claims have been made and not resolved by final determination) should be permitted to be aggregated.

3. Seriously injured workers should be relieved of all work capacity assessments and should not be made subject to a binding work capacity decision.

4. The time cap for weekly benefits should not apply to seriously injured workers (except for Commonwealth retirement age).

6. Dispute Resolution and settlement

The Committee considers that the current dispute resolution process in respect of claims involving statutory workers compensation benefits has become unnecessarily complex and disjointed.

The process by which disputes were notified prior to the 2012 amendments was problematic and this has been substantially worsened by the imposition of additional notification requirements in respect of work capacity decisions.

An insurer is required to give notice of a dispute in accordance with Section 74 of the WIM Act and in the related regulations. Notification is also required where weekly payments of compensation are to be reduced or terminated, in accordance with the requirements of Section 54 of the 1987 Act.

While a notice issued in accordance with Section 74 of the WIM Act needs to be concise and understandable, the formal requirements of a Section 74 Notice have been read as requiring a high degree of detail and particularisation as well as requiring that all relevant documents be attached to that notice (whether or not they support the decision).

The consequence of a Section 74 Notice being defective or deficient is often that an insurer is precluded from disputing liability before the Workers Compensation Commission ("Commission") on a basis not accurately particularised or detailed in such a notice whether or not such a basis has merit. In addition, an insurer may be precluded from relying on material or documents not provided with the Notice.

Following the amendments to the legislation the extent of a Claimant's entitlement to weekly compensation is determined by means of a work capacity decision (as defined in Section 43 of the 1987 Act).

While Section 43 itself does not contain any specific requirements that an insurer notify a worker of a work capacity decision, Section 54 of the 1987 Act requires that notice be given to a worker where the amount of weekly compensation is to be discontinued or reduced and a series of guidelines issued by the WorkCover Authority in respect of work capacity impose significant obligations on insurers regarding the manner in which work capacity assessments are conducted and the manner in which work capacity decisions are notified. Those guidelines are not only onerous but, in many circumstances, incapable of being complied with by an insurer.

More importantly, the Commission has now been deprived of any jurisdiction in a dispute involving the work capacity decision and is unable to make a decision in respect of a dispute before the Commission that is inconsistent with such a decision.

The consequence of this is that the disputes about primary liability for the payment of statutory compensation are dealt with by an Arbitrator at first instance in the Commission and disputes about lump sum compensation (where liability is not disputed) are dealt with by an Approved Medical Specialist through the Commission.

On the other hand disputes about weekly compensation are now dealt with by a complex and convoluted review process involving, at first instance, an internal review by an insurer followed by a "merit review" by the WorkCover Authority and a "procedural" review by the WorkCover Independent Review Officer. Injured persons are expected to navigate this complex system without the benefit of legal advice given the prohibition contained in section 44(6) of the 1987 Act.

The summary set out above does not fully capture the complexity of the dispute notification process nor to the disjointed process by which disputes which have been notified are resolved. For example, the liability part of a dispute needs to be determined by the Commission whereas the determination of the assessment of the weekly benefits component of any liability finding needs to be made by the insurer and then, if challenged, by the complex review process mentioned above. The requirement for different forms of notification applying to different entitlements to statutory compensation benefits and the requirement that different forms of disputes are subject to different dispute resolution processes is unsatisfactory and is not conducive to the objects of the legislation.

The Committee considers that this process needs to be simplified and rationalised. The starting point should be that there is only one form of notification required to be given to a worker dealing with the nature and extent of any entitlements to statutory compensation benefits and dealing with any dispute as to whether those entitlements exist and the extent of them. The requirements for such a notification should be simple, concise and understandable. In essence the notice need only properly identify the nature of any dispute and the reasons for it. Further, such a notice should not be found to be invalid or of no effect simply by reason of a deficiency in its form or content.

Once a dispute is notified all disputes should be referred to one dispute resolution system. The forum for that single dispute resolution system is not of primary importance although it remains the view of the Committee that such disputes should be dealt with by independent, properly trained and experienced judicial officers. It is accepted that the process by which these disputes are resolved should be effective and efficient in properly identifying the nature of any issues which legitimately need to be resolved and the documentation and information relevant to the resolution of those issues. Small claims or claims involving single or limited issues should be dealt with on an expedited basis (where those claims cannot be conciliated) and complex claims or those involving multiple issues should be determined in a manner which affords justice and procedural fairness to the parties to a dispute.

Importantly the dispute resolution process should allow all parties access to legal representation and legal representatives should be reasonably remunerated.

An important part of the dispute resolution process is that parties will also have available to them reasonable avenues by which claims can be resolved including, if necessary, on a final basis. The WIM Act presently requires that disputes before an Arbitrator cannot be determined without the Arbitrator first using the Arbitrator's best endeavours to bring the parties to a dispute to a settlement acceptable to all of them (Section 355(1)). However this requirement has been frustrated by the fact that flexible settlement options have not been available.

The Committee submits that the restrictions placed on the party's ability to commute a liability for the payment of statutory compensation benefits set out in Section 87EA of the 1987 Act should be removed so that parties can agree to a commutation of statutory compensation entitlements. This should be subject only to the requirement that a Claimant first obtain legal advice concerning any such commutation.

One of the critical objects of the legislation is to assist injured workers in returning to work. In the majority of cases this will involve an injured worker returning to employment with the employer at which the injury was sustained. There are, however, a large number of injured workers who are unable to return to employment with the same employer for a variety of legitimate reasons.

The ability of injured workers in this category to return to employment with a different employer is often compromised simply by reason of the fact that they remain within the workers compensation system. In those cases the ability of injured workers to reach an agreement concerning a settlement on a final basis (whether described as a commutation or otherwise) would enable them to regain financial and practical independence. They could properly pursue a return to employment without the constraints of remaining within the workers compensation system.

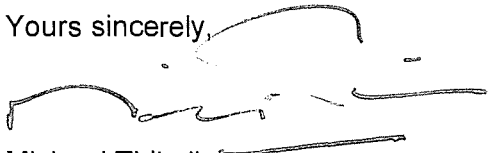
Removal of the restrictions that currently apply to commutations is entirely consistent with the Minister's stated objective of supporting injured workers and getting them back to work.

In summary, the Committee recommends that:

1. The dispute notification process be simplified with only one form of notification required.
2. The dispute resolution process be simplified with one dispute resolution system.
3. All parties should have access to legal representation.
4. The restrictions that currently apply to commutations be removed.

If you require any additional information or have any questions please contact the policy lawyer for the Committee, Leonora Wilson on (02) 9926 0323 or leonora.wilson@lawsociety.com.au.

Yours sincerely,



Michael Tidball
Chief Executive Officer

THE LAW SOCIETY
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Our ref: InjComp:JDlw1066171

2 December 2015

Ms Caroline Walsh
Executive Director
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Dear Ms Walsh,

Regulation of legal costs for work capacity decision reviews

I write to you on behalf of the Injury Compensation Committee ("Committee") of the Law Society of New South Wales in response to the Discussion Paper on the regulation of legal costs for work capacity decision reviews. The Committee's members represent key stakeholders in the NSW workers compensation scheme ("the scheme") including worker, insurer and self-insured representatives. Members include specialist advisers with over 20 years' experience in the various successive schemes in NSW.

Some members were representatives on the now disbanded WorkCover Legal Regulatory and Process Working Group, which did significant work relating to scheme legal costs over the years. I note that members of the Committee together with representatives of the NSW Bar Association and the Australian Lawyers Alliance have also met with the State Insurance Regulatory Authority ("SIRA") representatives to discuss the issues.

The Government's 2015 workers compensation reforms include new provisions that allow for the payment of legal costs in connection with prescribed classes of work capacity decisions ("WCDs") and SIRA is undertaking consultation to inform the drafting of the proposed new regulation.

The proposed section 44BF of the *Workers Compensation Amendment Act 2015* states:

> **44BF Legal Costs**
>
> (1) A legal practitioner is not entitled to be paid or recover any amount for a legal service provided to a worker or an insurer in connection with a review if:
>
> (a) the review is of a prescribed class, or
>
> (b) the regulations do not fix any maximum costs for providing the legal service to the worker or insurer in connection with the review.

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(2) Despite section 341 of the 1998 Act, the regulations may provide that, in prescribed circumstances, a party to a review under this Subdivision (other than an internal review) is to bear the other party's costs in connection with the review.

Background and context

The 2012 changes to workers compensation legislation were far reaching, significantly amending the entitlements that an injured worker had to statutory benefits and in the case of weekly payments how such compensation was determined. The extent of a worker's entitlements to weekly payments is now determined by means of a WCD by an insurer (section 43 of the *Workers Compensation Act 1987* ("1987 Act")).

The 2012 reforms, significantly, introduced a distinction between a 'liability' dispute and a dispute about a 'Work Capacity Decision'.

The amendments provided that the Workers Compensation Commission ("Commission") does not have jurisdiction to determine any dispute about a WCD. Importantly, the Commission is also prohibited from making a decision in relation to a dispute before it that is inconsistent with a WCD of an insurer.

The 2012 legislation also introduced a new process to resolve a dispute about a WCD. The process is prescribed in section 44 of the 1987 Act and involves an internal review by the insurer, a merit review by the Authority and a procedural review by the Workers Compensation Independent Review Officer ("WIRO").

The review processes are supported by Guidelines issued under section 44(1)(a) and section 44A(5) of the 1987 Act and section 376 of the *Workplace Injury Management & Workers Compensation Act* 1998 ("the 1998 Act"). The current Guidelines are the Guidelines for Work Capacity Decision Internal Reviews by Insurers and Merit Reviews by the Authority dated 4 October 2013 and the Work Capacity Guidelines dated 4 October 2013 ("Guidelines").

Section 44(6) of the 1987 Act prohibits a legal practitioner for a *worker* from receiving payment for the provision of advice or assistance with respect to WCD reviews. Clause 9 of Schedule 8 of the *Workers Compensation Regulation 2010* prevents a legal practitioner for an insurer from being paid in connection with an internal or other review in relation to a WCD.

It is these prohibitions that the proposed section 44BF will affect.

Complexity of the current processes

The Guidelines set out both mandatory and suggested procedures *for insurers* in relation to the:

- processes leading to the making of a WCD (including the process of conducting a work capacity assessment (this will be discussed below)
- method of notice and communication of the intention to make a WCD and the processes
- making of a work capacity decision including the form and content of a WCD
- procedures for conduct of an internal review
- procedures for responding to an application for merit review
- procedures for responding to an application for procedural review.

The Guidelines also set out the procedures for *workers* to seek internal review, merit review and procedural review and the effect of a decision made at each stage of the review process.

The processes imposed by the Guidelines are lengthy, complex and unclear.

The complexity of the WCD process, and in turn the various review processes, is, of course, relevant to the issue of what is fair and reasonable remuneration for the provision of necessary legal services.

The Committee believes that addressing this problem in isolation and in advance of a complete overhaul of the dispute resolution system is a piecemeal solution which will only increase the scheme's dysfunction. The inherent unfairness to injured workers of the current WCD system will also remain. In the meantime, allowing payment for legal representation in relation to WCD reviews is a positive step.

Legal Costs

The 2012 legislative reforms also effected major changes to the system for payment of legal costs. The statutory provisions for costs are found in Part 8 Divisions 1 - 4 of the 1998 Act and in Part 17 of the *Workers Compensation Regulation 2010*.

Prior to an amendment in 2012, costs followed the event, meaning that a successful worker's costs were paid by the insurer following an award of costs by the Commission. An unsuccessful worker was not required to pay the insurer's costs. Then, as now, costs were modest and regulated and lawyers were prohibited from charging solicitor-client costs.

Prior to June 2012, section 341 provided:

> **341 Costs to be determined by Commission**
>
> (1) Costs to which this Division applies are in the discretion of the Commission
>
> (2) The Commission has full power to determine by whom, to whom and to what extent costs are to be paid
>
> (3) The Commission may order costs to be assessed on the basis set out in Division 1 of Part 3.2 of the *Legal Profession Act 2004* (or in relevant regulations under Division 4 of this Part) or on an indemnity basis
>
> (4) The Commission may not order the payment of costs by a claimant unless the Commission is satisfied that the claim was frivolous or vexatious, fraudulent or made without proper justification
>
> (5) If the Commission is satisfied that a part only of a claim was frivolous or vexatious, fraudulent or made without proper justification, the Commission may order the claimant to pay the costs relating to that part of the claim
>
> (6) Any party to a claim may apply to the Commission for an award of costs.

It was initially proposed in the *Workers Compensation Legislation Amendment Bill 2012* that section 341 be amended as follows:

> **Omit** section 341 (4) and (5). Insert instead:
>
> (4) Subject to this Division, if the Commission makes any order as to costs, the Commission is to order that the costs follow the event unless it appears to

> the Commission that some other order should be made as to the whole or any part of the costs, or as the regulations otherwise provide.

Following parliamentary debate on the Bill in 2012, section 341 of the 1998 Act was amended and now provides that *each party bear its own costs as follows:*

> **341 Costs**
>
> (1) Each party is to bear the party's own costs in or in relation to a claim for compensation.
>
> (2) The Commission has no power to order the payment of costs to which this Division applies, or to determine by whom, to whom or to what extent costs to which this Division applies are to be paid.

In addition, sections 342, 343 and 345 of the 1998 Act were repealed. These were important provisions which supported section 341 in its pre-2012 version, specifically:

- Section 342 gave power to the Commission to order costs to be paid if they were 'unreasonably incurred';
- Section 343 prevented recovery of costs unless those costs were awarded by the Commission and prevented legal costs from being deducted from a worker's compensation payment;
- Section 345 provided costs penalties where appeals were unsuccessful.

In order to address the unfairness created by the 2012 amendment, by which injured workers were required to fund their own legal costs regardless of the outcome, the Government invested in the WIRO the authority to administer the payment of a worker's legal costs through an administrative legal assistance scheme. The Independent Legal Assistance and Review Service ("ILARS") of the WIRO was established to pay a worker's legal and associated costs in the making or disputing of a claim.

Maximum legal costs

Section 337 of the 1998 Act provides that the regulations may make provision for the fixing of maximum costs for *legal services* or *agent services* and for services which are not legal services or agent services but which relate to a claim for compensation including medical report fees, expert reports, witnesses' expenses and the like. This includes the power to make regulations to provide that no amount is recoverable for a particular service, with the result that a legal practitioner (or agent) will not be entitled to be paid or recover any amount for the service or matter concerned.

Section 337(3) provides:

> A legal practitioner is not entitled to be paid or recover for a legal service or other matter an amount that exceeds any maximum costs fixed for the service or matter by the regulations under this section.

Relevantly, despite the repeal of section 343, section 337(5) provides:

> This section does not entitle a legal practitioner to recover costs for a legal service or matter that a court or costs assessor determines were unreasonably incurred.

Prior to 2012, Schedule 6 of the *Workers Compensation Regulation* 2010 dealt with maximum costs for workers' and insurers' lawyers in compensation matters.

This Schedule remains applicable to claims from workers not affected by the 2012 amendments namely, police, firefighters, paramedics and coal miners.

For other claims, the Commission's power to award costs has been removed by the repeal of section 341. The Commission has confirmed that following the 2012 amendments it does not consider that it has any jurisdiction as to costs.

Schedule 6 underwent scrutiny by the Law Society and WorkCover in 2010 with considerable work completed to make relevant amendments to the Schedule (Parts A and B) to address anomalies identified by the legal profession and to bring the events in line with the Commission's practice and procedure. The amended schedule was approved by WorkCover and the Law Society in 2010 but never gazetted. These anomalies remain and new problems have arisen with the Schedule as a result of changes to the scheme and increased complexities post 2012.

Schedule 6 remains as the basis for the payment of legal costs to the insurers' legal practitioners post 2012 and by the ILARS scheme.

The Committee submits that the cost figures in the Schedule require amendment to reflect the work actually done by lawyers who have historically subsidised the scheme by performing work which is unremunerated and by working at an unsustainable rate. The Schedule was designed to encourage the early settlement of disputes with 'front end loading'. This is difficult to achieve due to the complexities of the 2012 amendments.

Regulatory controls and prescribed classes of review

Focus Question 1: Should the regulation provide for payment of legal costs in connection with all work capacity decision review types – ie Internal Reviews, Merit Reviews and Procedural Reviews?

The Committee considers that injured workers and insurers should have access to paid legal advice and assistance with respect to all three reviews, if required.

The Committee notes that the Law Council of Australia's Policy Statement with respect to Rule of Law Principles dated March 2011 provides that everyone should have access to a competent and independent lawyer of their choice in order to establish and defend their rights.

The Committee considers that the first internal review is most important and will be where the majority of legal assistance will be required. Such an approach is consistent with the stated objective of supporting workers to achieve early and sustainable return to work.

In fact, a considerable amount of work is required prior to applying for an internal review principally because the WCD guidelines require that a worker be given notice of the intention to make a WCD and be invited to provide further information that may influence the work capacity decision to be made. This may be the first opportunity that a worker has to engage in the decision-making process and it would be appropriate that a worker be able to access legal advice in relation to engaging in that process at that point in time. The guidelines require an insurer to contact the worker at least 2 weeks prior to the making of a work capacity decision and inform the worker:

- that a review of their current work capacity is being undertaken and that a decision is going to be made

- that the review of work capacity may include further discussions with others such as the employer, nominated treating doctor or other treatment providers

- the potential outcome of the review of work capacity detailing the information that has led the insurer to their current position

- that they have an opportunity to supply any further information to the insurer for further consideration

- when the work capacity decision is expected to be made.

Then this must be confirmed in writing in the form of a letter commonly called a "Notice of Intention to Make a Work Capacity Decision."

If the worker is able to obtain legal advice and legal assistance at this point, the worker may be encouraged to forward further information to the insurer to influence the decision. Such actions would be in keeping with the aim of the proposed regulation of encouraging and supporting early agreement on work capacity and promoting sound judgment and effective primary decision-making.

However, the Committee considers that before a legal costs regulation is framed, the processes should be rationalised. The merit review and procedural review should be one process. The internal review, although an opportunity for the insurer to make the 'decision that is more than likely to be right', essentially requires a doubling of effort to make a WCD. That process could be removed.

This rationalised process should be removed from a separate review body and placed with the Commission.

Focus Question 2: Should the regulation provide for payment of legal costs only where the review results in a recommendation to change the work capacity review decision?

There are essentially only 2 options available in relation to payment of costs:

1. Costs follow the event
2. Costs paid regardless of outcome.

There is potential for a hybrid of these options. However any hybrid costs regulation would be unlikely to fulfill the design criteria of the regulation (referred to on page 4 of the Discussion Paper).

1. Costs follow the event

The Committee does not support this option under the current WCD regime. As a result of the design of the review processes and the underpinning legislation, in particular the definition of "suitable employment" in section 32A of the 1987 Act, a worker has quite poor prospects of success at any of the reviews. Anecdotally, the Committee understands the prospects of success at the internal review stage are less than 35%, less than 40% on merit reviews and approximately 15% at procedural review. Generally, a legal practitioner will engage in a matter if there are "reasonable prospects" of success, a test which is not satisfied in the WCD arena. Few legal practitioners would be prepared to undertake work

in this area on a costs follow the event basis when the chances of success are so low. The ability of legal practitioners to provide high quality work or advice would be limited if engaged on this basis, which may defeat the purpose of these changes.

For reasons stated in the previous paragraph, the Committee submits that a success-based costs system is unworkable within the current dispute resolution system. If costs are to follow the event, "success" must be defined in such a way that it does not merely include the achieving of a stay of the original WCD. Success must be defined broadly to include recommendations on merit review and recommendations on procedural review that result in **a new WCD**, not necessarily a WCD where a change of quantum is provided.

This is because the Guidelines provide that the aim of the WCD process is to ensure sound, evidence based decision making and the making of decisions that are more likely than not to be correct. Where an insurer has failed to follow procedure or is criticised on the merits of their decision, and where the outcome is a recommendation that they re-issue a WCD to address the criticism, that should be sufficient to attract costs.

2. Costs paid regardless of outcome

The Committee notes that all three 'stages' of the review process can be initiated by workers only.

Assuming that the processes will remain the same and that there will be no substantial change to the Guidelines, the dispute resolution system or section 341, and assuming the ILARS scheme continues to fund worker's liability disputes, then the Committee submits that costs should be paid regardless of outcome. The Committee queries why a lawyer should be paid regardless of success in a liability dispute but not in a WCD dispute.

This focus question is extremely difficult to answer definitively without proper consideration of the following:

- Substantial change to the review processes including rationalisation of the current reviews into one review
- Rationalisation of the dispute resolution systems into one (with a preference for the Commission to manage WCD reviews)
- reinstatement of sections 341,342 and 343 of the 1998 Act if various reforms of the dispute resolution systems and other problems were addressed.

Focus Question 3: Should a new class of review be prescribed to regulate legal costs, such as reviews where legal services are provided by approved providers, or reviews where the worker first engaged an approved advocacy service?

The Committee considers that the scheme should only be meeting the costs of assistance and advice to workers or insurers provided by "Australian legal practitioners" as defined in the Legal Profession Uniform Law. The complexity of workers compensation law in New South Wales is now such that only fully legally qualified professionals should be able to advise vulnerable individuals. The Committee notes that insurance cover is mandatory and guaranteed in the case of legal professionals.

It is unsatisfactory for legal services in respect of reviews only to be performed by a panel of approved providers. Not only does this unnecessarily limit the ability of workers to engage a lawyer of their choice but it can also lead to difficulties being experienced by

workers seeking access to lawyers in rural and regional areas where there may not be any approved providers. If a worker wishes to know whether a lawyer has significant experience in the workers compensation field, then the Specialist Accreditation Scheme run by the Law Society is an excellent starting point.

Maximum legal costs

Focus Question 4: What is a fair and reasonable maximum cost for provision of legal services in connection with a work capacity decision review, and what criteria should be used to determine a fair and reasonable maximum cost?

The Committee considers it appropriate that the work capacity review work is regulated by way of fixed maximum costs. Workers compensation legal work has been subject to a fixed costs regime for many years and is appropriately accommodated by Schedule 6, which was an event based methodology. The Committee considers that the criteria should be fair and reasonable remuneration at an appropriate commercial rate for the work done.

The Committee has prepared a Schedule itemising some of the work required for the review processes of a WCD based on the current processes and the Guidelines. The document has been prepared with the assistance of a lawyer employed by a union whose main role since 2013 has been to conduct reviews for the union's members. The experience of that union lawyer has been that it is important that the worker engage with a lawyer early in the process and before the WCD is received. Further, the experience is that both procedural and merit issues must be identified and developed at the initial internal review stage and that this is where most work is required.

The Schedule divides work capacity decisions into two categories involving either:

1. PIAWE decision (pre injury average weekly earning)
2. Capacity, suitable employment or weekly payments.

Category 1 matters are likely to take 10 to 15 hours' work.
Applying an hourly rate of $375[1] produces a range of $3,750-$5,625.

Category 2 matters are likely to take no less than 15 - 20 hours' work
Applying an hourly rate of $375 produces a range of $5,625-$7,500.

Less work will be required at the merit review stage because much of the documentation will have already been assessed at the internal review stage. However, where the merit review process calls for further material, evidence or responses to either parties "submissions" the work, and the consequent cost, will increase exponentially.

More work will be required where there are multiple work capacity decisions affecting the entitlement of a single worker or where there are multiple insurers. These complex matters should be considered for a higher maximum fee or a 'complexity' uplift.

From a worker's perspective, all three review processes would require legal assistance. A worker cannot be expected to navigate the processes unassisted nor understand the complexities of what is a review of the merits or procedure of a decision, particularly when the Guidelines are complex.

[1] Surveys of legal firms conducted by consultants FMRC have found that $386 is the average quoted employed solicitor hourly rate for firms with more than 50% of work in compensation.

Legal costs of other party

Focus Question 5: Should the regulation use a single fixed maximum cost that will generally apply across all eligible reviews, or should the regulation use a more complex maximum cost structure to more directly influence behaviour (such as sound primary decision making) and achieve positive regulatory outcomes (such as early and sustainable return to work)?

As outlined above, the Committee considers that the maximum cost for a merit review will be substantially less than that for an internal review, with the bulk of work conducted at the internal review stage. The Committee considers that a more complex costs structure is warranted as it is for the legal work conducted in the Commission and set out in Schedule 6 of the *Workers Compensation Regulation* 2010. In order to achieve 'sound primary decision making' and to 'achieve positive regulatory outcomes' the costs should be front weighted. However, to achieve these outcomes the Committee considers the system of reviews, including the Guidelines, needs considered rationalisation and change. As discussed and noted in various submission, the Law Society would welcome the opportunity to discuss with SIRA reform of the dispute resolution systems.

Legal costs of the other party

Focus Question 6: In what circumstances should one party be required to bear the other party's legal costs?

As stated, the 2012 amendments effected a fundamental change to the way legal costs are paid under the scheme. Each party now pays their own costs, with the worker's legal costs funded by ILARS.

The Committee submits that except in cases that are fraudulent or vexatious, a worker should never be exposed to payment of insurers' legal costs. This has always been the position with respect to workers compensation in New South Wales.

The issue is then whether the worker's legal costs for those reviews are funded in the same way as legal costs with respect to other disputes or funded directly by the insurer responsible for the decision or funded from the scheme.

The Committee submits that the pre 2012 regime, whereby costs followed the event, worked well. However, the difficulty now in making such a recommendation is that the existing scheme is far more complex. In addition, the prospects of success in a WCD review are far lower than the prospects of succeeding on a 'liability' dispute. A legal practitioner's ability to accurately predict the outcome of a review is therefore made much more difficult.

This is partly due to the design of the review processes, and partly due to the legislation, particularly part(b) of the definition of *'suitable employment'* in section 32A of the 1987 Act and the insurer's discretionary assessment provision in sections 38(2) and 38(3) of the 1987 Act, with both provisions weighted heavily against a worker.

There are also issues about workers being disadvantaged due to an inability to fund independent expert reports, for example by vocational and functional assessors.

Of course there is also some difficulty advising with respect to an area of work where legal practitioners to date have little or no experience and where merit review decisions have in the main remained unpublished.

Compliance Mechanisms

Focus Question 7: What measures might be included in the regulation to better promote and encourage compliance?

The Committee notes the comments made with respect to compliance mechanisms and the issue of whether a worker should be able to fund additional costs beyond any maximum amount.

The Committee submits that the issue of additional legal costs should not arise if the maximum fees are set fairly and reflect the work required to conduct this work at a satisfactory and competent standard. Section 116 of the 1998 Act prevents payment of solicitor-client costs (unless awarded by the Court).

With respect to the issue of costs unreasonably incurred, the Committee notes that section 115 of the 1998 Act provides that the Court (or Commission) is not to make an order for payment of costs that it finds were unreasonably incurred.

In terms of regulation the Committee points out that a new regime governing solicitors' costs in NSW, namely the Legal Profession Uniform Law, commenced on 1 July 2015. Section 172 provides that costs must be fair, reasonable and proportionate.

The Committee notes that it is open for a complaint about a solicitor's conduct to be referred to the Legal Services Commissioner. The Committee submits that if the Government considers that these safeguards against over-charging are sufficient in the context of unregulated legal costs, then no further regulation is required in a fully regulated scheme.

The Committee does not understand the reference to cost disclosure in an environment where the 1998 Act provides in Division 1 of Part 8 an appropriate framework for regulation of legal costs. In particular, section 337 (1) of the 1998 Act provides that the regulations may fix maximum lawyer and agent costs in connection with any workers compensation matter. Section 337(3) provides that a legal practitioner is not entitled to be paid or recover for a legal service or other matter, an amount that exceeds any maximum costs fixed for the service or matter by the regulations under this section. Section 337(6) provides that the regulations can provide that no amount is recoverable for a particular service or matter or class of services or matters, with the result that a legal practitioner is not entitled to be paid for that service. In an environment where it is proposed that there be fixed fees regardless of the circumstances under which they are paid, cost disclosure to the authority is an unnecessary administrative burden that can achieve no purpose.

Operational and administrative considerations

Focus Question 8: How should eligible legal costs be billed, paid and claimed?

If the costs are to be met through an administrative scheme such as ILARS, then the process for billing, claiming and payment should be administered through that scheme in the way the ILARS scheme is administered at present. The Committee would recommend a simple system where a pro forma tax invoice could be lodged online.

If costs were to follow the event in an overhauled streamlined system discussed later at Focus Question 11, and to be met by the insurer on success (section 341, pre June 2012) then it would make sense to have a reinstatement of the costs powers to the Commission, specifically sections 342 and 343. The billing processes, payment and costs claims process are already housed in the legislation.

Focus Question 9: What are the important operational and administrative matters that must be considered when designing this regulation?

Issues relevant to this question have been discussed elsewhere in this submission. The Committee cautions against setting up another administrative bureaucracy to deal with costs under the WCD dispute resolution regime. It is important to avoid further increasing the complexity of an already cumbersome and difficult scheme.

Innovation

Focus Question 10: Do you have any innovative ideas that might be incorporated into the legal costs regulation or otherwise enhance the regulation?

Focus Question 11: Are there any other matters relevant to the legal costs regulation that have not been addressed elsewhere in the SIRA discussion paper or your submission?

The Committee has consistently advocated for the repeal of Section 44 (6) of the 1987 Act to allow for the payment of legal costs with respect to reviews of WCDs. However, the Committee has also pointed out in various submissions that the 2012 amendments have created a range of unnecessarily complex disjointed and dysfunctional dispute resolution pathways. There appears to be consensus amongst scheme stakeholders that the current dispute resolution processes are in urgent need of simplification and rationalisation. Disputes about primary liability for the payment of statutory compensation are dealt with by an Arbitrator at first instance in the Commission and disputes about lump sum compensation are dealt with by an Approved Medical Specialist through the Commission. Disputes about weekly compensation are of course dealt with by the complicated multi stage review process under consideration in the Discussion Paper.

The Committee has recommended on a number of occasions that there should be one dispute resolution forum, and the existing Commission would seem to be the obvious choice. The Commission would need to review and revise the current processes to accommodate the single forum for resolution of all disputes and adapt a more simplified expedited pathway for "minor" or urgent disputes. The Commission already has processes with varying levels of formality including an expedited and small claims process and an Arbitrator pathway with conciliation processes incorporated for more complex matters and a medical assessment pathway for pure medical disputes. It has established rules, practice guidelines and procedures for the resolution of disputes between workers and employers/insurers concerning workers compensation.

The Committee also considers that the scheme would be significantly improved if a single form of Dispute Notice was introduced that was simple, concise and understandable.

In any new streamlined dispute resolution system, workers and insurers would be permitted to engage legal advice in respect of any worker's compensation issue. Workers' legal costs could be met through ILARS.

Alternatively, under a simplified and unified dispute resolution system jurisdiction for costs could be returned to the Commission and the pre-2012 costs system (old sections 341, 342, 343 and 345) reinstated. Under this system costs would follow the event in most cases. The worker would only in exceptional circumstances be exposed to payment of insurer costs. As stated, such a system would only be workable if there are amendments to the legislation underpinning WCDs, namely section 32A and section 38(3) of the 1987

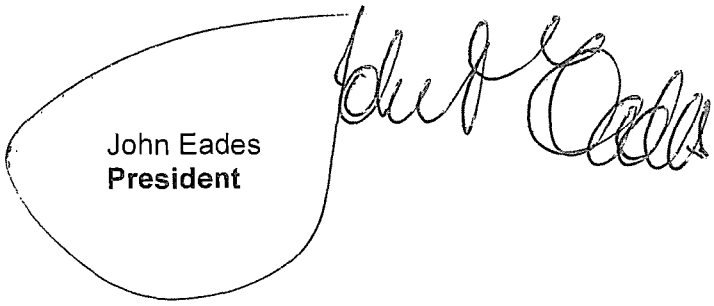
Act. Workers' prospects of obtaining a beneficial outcome from each of the reviews need to be significantly enhanced to the level of reasonable prospects.

An updated, simplified and rationalised Schedule 6, setting minimum fees, would apply to all legal practitioners. Once again, if the dispute resolution system was overhauled the Schedule could be correspondingly altered to encourage early resolution of disputes.

The Committee reiterates that the whole scheme dispute resolution system urgently requires reform by way of rationalisation and simplification.

The Committee thanks you for the opportunity to comment. Should you require any additional information or have any questions please contact the policy lawyer for the Committee, Leonora Wilson by email at leonora.wilson@lawsociety.com.au or by phone on 9926 0323.

Yours sincerely,



John Eades
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