



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ICC:RHap1966562

1 September 2020

The Hon Wes Fang MLC
Committee Chair
Standing Committee on Law and Justice
Legislative Council
Parliament House, Macquarie Street
Sydney NSW 2000

By email: law@parliament.nsw.gov.au

Dear Mr Fang,

2020 Review of the Workers Compensation Scheme

Thank you for the opportunity to provide answers to questions the Law Society of New South Wales took on notice during the hearing on 3 August 2020 as part of the Standing Committee on Law and Justice's (Standing Committee) 2020 review of the workers compensation scheme.

The President of the Law Society, Mr Richard Harvey, and Deputy Chair of the Law Society's Injury Compensation Committee, Mr Tim Concannon, appeared on behalf of the Law Society before the Standing Committee.

The Law Society's responses to the two questions taken on notice during that appearance are provided below.

Section 151A of the *Workers Compensation Act 1987* (NSW) ('*Workers Compensation Act*')

Question

Mr DAVID SHOEBRIDGE: Either an industrial relations claim, or there may be a disability discrimination claim, or there may be an harassment claim and there can be similar factual underpinnings. Is that when 151A becomes a problem?

Mr CONCANNON: Correct.

Mr DAVID SHOEBRIDGE: Do you see a rationale for 151A to work in that way, to terminate compensation benefits in those circumstances?

Mr CONCANNON: I think the decision of the president in the name of the case that unfortunately escapes me does create real practical difficulties, even if the settlement of that claim specifically excluded workers compensation or common law work injury damages rights. I think some rewording of that provision needs to be seriously looked at in light of it.

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Mr DAVID SHOEBRIDGE: If either of you wanted to give some further detail on that on notice, that would be useful.

Mr CONCANNON: Yes.

Mr BUTCHER: I am happy to as well.

Answer

The Law Society draws the Standing Committee's attention to the decision of *Gardiner v Laing O'Rourke Australia Construction Pty Ltd* [2020] NSWCA 15 (*Gardiner*), which was handed down by the NSW Court of Appeal on 23 July 2020.

The decision in *Gardiner* established the principle that payments made under other statutory schemes, including the statutory protections provided by the *Anti-Discrimination Act 1977* (NSW), do not affect a worker's entitlements to compensation under the workers compensation scheme where those entitlements are excluded from the settlement.

Noting this decision now provides the relevant authority, the Law Society does not consider an amendment to section 151A of the *Workers Compensation Act* is necessary at this time.

However, and in line with our previous submissions, the Law Society suggests that one solution to deal with any perceived or lingering issues associated with section 151A of the *Workers Compensation Act* would be to deal with the problems associated with commuting out of the scheme (under section 87EA of that Act). In our view, if the restrictions to commutation are removed and the regulatory controls under section 87EA loosened, there would be less need for claimants to seek alternative ways to exit the scheme. Such a situation would also allow compensation and 'industrial' entitlements to be resolved at the same time.

Section 248 of the *Workers Compensation Act*

Question

The Hon. ANTHONY D'ADAM: We heard evidence in our earlier hearing from Unions NSW about the operation of section 248, the section around the protection of injured workers from a dismissal. I am happy to open it up to any member of the panel to offer some views about whether that section is operating as it was originally intended?

Mr CONCANNON: I must say from my perspective as a private lawyer practising in workers compensation, it is rare that I have seen that actually being used to benefit workers in my experience. It seems to be honoured perhaps more in the breach than in terms of compliance.

The CHAIR: Does any other member wish to make a contribution to that?

Mr BUTCHER: I think that is a fair comment that Mr Concannon has made. Personally I did not come across it very often in my in my practice dealing mostly with statutory benefits. I think if you speak to injured workers they will tell you that they do not feel very protected from employer's actions, at least the clients I speak to anyway.

The Hon. ANTHONY D'ADAM: Does anyone on the panel have any recommendations about how the provision might be strengthened to provide greater protection for workers?

Mr CONCANNON: I think we would have to take that question on notice.

Answer

Law Society members have advised that in their experience, this section is rarely relied on. We understand that where a work injury and associated workers compensation claim was the reason for the dismissal, claimants would be more likely to utilise the federal employment jurisdiction and an unfair dismissal, general protections or disability discrimination claim.

The Law Society does not have any further comments on this provision.

Thank you again for the opportunity to contribute to this inquiry. Should you require any further information, please contact Adi Prigan, policy lawyer on 9926 0285 or adi.prigan@lawsociety.com.au.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'R Harvey', with a stylized flourish at the end.

Richard Harvey
President