NEW SOUTH WALES BAR ASSOCIATION

SUBMISSIONS TO THE STANDING COMMITTEE ON LAW AND JUSTICE CONCERNING ITS REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE WORKCOVER AUTHORITY

INTRODUCTION

1. The New South Wales Bar Association is grateful for the opportunity of making submissions on the operation of the WorkCover Scheme.

2. It is now over 18 months since the passage of the Government's Workers Compensation reforms. It is the effect of those reforms which are of particular concern.

3. All current claims except for those relating to occupations exempt from the reforms will by now have been transferred into the new scheme by the operation of its transitional provisions.

4. The New South Wales Bar Association opposed many aspects of those reforms while also recognising that the workers compensation scheme must facilitate the return to work of injured workers and be affordable.

5. The Workcover Authority says that the reforms are retrospective. The extent of any retrospective application is still to be determined.[1]

6. At the time of publication of the annual reports into the WorkCover Authority and WorkCover Scheme, the projected figures showed an improvement in the scheme's financial position from a $1.5 billion deficit in 2012 to a $380 million surplus in 2013. It will however take some time for the true position to emerge. The independent auditor highlighted the significant uncertainty which attends any estimate of ongoing liabilities due to the short period since the implementation of the current legislative scheme in the New South Wales WorkCover Scheme Report 2012-2013.

7. Outstanding claims have been estimated at $13.5 billion, down $576 million on the previous year. These figures do not provide a true indication of ongoing liabilities, due to the large number of injured workers who have been transferred into the new scheme under transitional arrangements since the end of the last financial year.

8. Traditionally the rights of injured workers have been protected by a degree of supervision either by the WorkCover Authority, the Compensation Court or the Workers Compensation Commission. The 2012 reforms brought about a reversal of that position so that now an injured worker is compelled to deal directly with an insurance company with little if any legal assistance.

9. It is not possible to evaluate the current operation of the WorkCover scheme on the basis of relevant data. It is simply not available.

   The particular areas which require scrutiny are:

   a) Work capacity assessments;

   b) The cessation of medical and related expenses after 12 months; and

   c) The cessation of weekly benefits for those who are incapacitated for work but have been unable to secure suitable employment in excess of 15 hours per week;

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[1] *ADCO Constructions v Goodapple & Anor* (S96/2013 HCA)

d) Those who have a very serious injury but do not reach the 30% whole person impairment assessment necessary for a finding of serious injury; and

e) The availability of legal representation.

WORK CAPACITY ASSESSMENTS

10. The fact that only 31 of these have been determined by the WorkCover Independent Review Office ("WIRO") is most likely an indication that very few injured workers have been able to deal with the insurer on a level playing field. All of the 31 determinations published by WIRO have overturned the insurer's original decision.

11. How a huge number of claims have come down to only 31 decisions raises a number of questions. In order to understand how these assessments are progressing it will be necessary to have figures in relation to:

    a) The number of workers compensation recipients who received a determination from an insurer as to their work capacity after implementation of the reforms;

    b) How many of those determinations reduced or terminated an entitlement to weekly payments;

    c) How many applications for review of that decision were made to the Workcover Authority; and

    d) How many of those decisions were then the subject of an application for review at WIRO.

12. It is probable that there are an enormous number of work capacity assessments which are yet to be challenged. Statistics must be kept which will clearly show the number of any such decisions by an insurer, the result of a decision, the result of an internal review, any form of Workcover review and any WIRO determination.

13. There will be a significant cost associated with work capacity assessments. Insurers will be paid for the work undertaken in the initial assessment and in any review, there will be a cost to Workcover and there will be the cost of funding WIRO. All of those costs should be monitored. There must be an opportunity to examine whether the perceived costs benefit of denying injured worker's legal representation is genuine having regard to the costs incurred under the new system.

THE CESSATION OF MEDICAL AND RELATED EXPENSES AFTER 12 MONTHS

14. The operation of the reforms in this area are harsh and unjust. No doubt the committee will receive numerous submissions about individuals who have been treated unfairly by operation of the provisions relating to medical and related expenses. Extremely seriously injured workers with lifelong medical conditions will be forced to rely on the public hospital system and become a burden on the taxpayer. Necessary surgical procedures will be delayed or will not be performed at all. The victims of work injuries will be unable to choose a medical practitioner and they will have no control over their medical treatment.

THE CESSATION OF WEEKLY BENEFITS FOR THOSE WHO ARE INCAPACITATED FOR WORK BUT HAVE BEEN UNABLE TO SECURE SUITABLE EMPLOYMENT IN EXCESS OF 15 HOURS PER WEEK

15. Those who have a whole person impairment less than 30% are subject to this requirement. Anyone experienced in the area knows that a person with a whole person impairment of greater than 10% is likely

to have a significant ongoing restriction in their ability to work. The introduction of a requirement for minimum work hours is not an incentive to encourage people to return to work. It is a penalty to those who are unable to secure that level of employment. It should not be assumed that workers compensation recipients will automatically be entitled to Centrelink benefits if they cannot find work. That is plainly wrong. Anyone who has a married spouse will be precluded from receiving Centrelink benefits. There will no doubt be many seriously injured workers who do not meet the legislative definition of "serious" injury who have no income at all as a result of the operation of this aspect of the legislation.

THOSE WHO HAVE A VERY SERIOUS INJURY BUT DO NOT REACH THE 30% WHOLE PERSON IMPAIRMENT ASSESSMENT NECESSARY FOR A FINDING OF SERIOUS INJURY

16. Anyone with a whole person impairment of 20%, much less 30% would have to be regarded as seriously injured. They would be unlikely to work in any physical occupation again yet they receive no protection from the harsh and unjust aspects of the legislation.

LEGAL REPRESENTATION

17. The Bar Association maintains its position that injured workers should be entitled to legal representation at all stages of a dispute with a workers compensation insurer.

31 January 2014