

NSW Business Chamber

Submission to Department of Finance Services and Innovation
(DFSI) on the dispute resolution system for workers
compensation in NSW

February 2018

Overview

The NSW Business Chamber (the Chamber) welcomes the opportunity to provide a submission to the Department of Finance Services and Innovation (DFSI) on the dispute resolution system for workers compensation in NSW.

The Chamber is one of Australia's largest business support groups, with a direct membership of more than 20,000 businesses, providing services to over 30,000 businesses each year. Tracing its heritage back to the Sydney Chamber of Commerce, established in 1825, the Chamber works with thousands of businesses ranging in size from owner operators to large corporations, and spanning all industry sectors from product-based manufacturers to service provider enterprises.

The Chamber is a leading business solutions provider and advocacy group with strengths in workplace management, work health and safety, industrial relations, human resources, international trade and business performance consulting.

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Note

The Chamber's submission will follow the order of questions in the online form.

The Chamber consents to its submission being published.

The Case for Change

Do you support developing a single system for resolving personal injury disputes?

In principle, the Chamber supports the development of a single system for resolving personal injury disputes insofar as they relate to the workers compensation, as long as it:

1. Delivers real efficiencies within the system and improves access to dispute resolution services.
2. Appropriately recognises and accommodates for the differences that exist between the different types of disputes that occur within the system.
3. Ensures current inefficiencies (for example, the illogical and ineffective sequence of the dispute resolution processes that currently exist in relation to challenging a work capacity decision) are removed from the system.
4. Removes any perception of bias.

What do you think might be the benefits and/or costs of a single system?

The benefits should include reduced operation costs (through economies of scale), greater consistency and certainty in respect to the operation of the system.

Special consideration should be given to ensure the avoidance of:

- The system becoming too unwieldy and difficult to navigate.
- Financial strain on the fund, arising from a potential increase in legal and related services.

Does the case for change outlined here reflect your experience or knowledge of the system?

The Chamber believes the case for change is far stronger than is described in the discussion paper.

One issue not addressed sufficiently is the bias within the system towards the needs of workers often to the detriment of employers (both in terms of access to the system and outcomes).

It needs to be remembered that statutory obligations are not only imposed upon employers individually but are upon employers in conjunction with other stakeholders within the system.

The Chamber notes examples from business where concerns raised about the bona fides of a worker's compensation claim are ignored or disregarded with the business informed by their insurer that "*it is easier to simply accept the claim*".

Another example of a systemic problem is the insufficient level of consultation or communication with employers to identify suitable duties and facilitate an injured worker's return to work.

The Chamber submits that, in order to achieve a truly efficient and effective dispute resolution system for workers compensation, there must be a consolidation of all three pieces of legislation that currently regulate the system coupled with a re-design of the system.

Currently, the legislation is overly complex which adds to confusion especially in relation to the dispute resolution system.

The legislation should also be updated, for example, Part 2 of Chapter 2 of the *Workplace Injury Management and Workers Compensation Act 1998*, provides a list of functions that are assigned to “the Authority” which no longer exists.

Options for Preventing Disputes

Should any of these options for preventing disputes be implemented? Which one/s and why?

Reforming the independent medical examination system

In principle, the Chamber supports the reform of the independent medical examination system.

However, the Chamber submits the proposed reform, namely being able to choose from three nominated Independent Medical Examiners (IMEs) coupled with the independent allocation of IMEs, does not adequately address concerns raised in the discussion paper (especially those concerning the expertise and impartiality of some IMEs and the impact of requests for multiple re-examinations on claimants).

The Chamber submits more needs to be done to:

- Regulate the competency of medical practitioners within the system (including their familiarity with the system).
- Ensure all relevant stakeholders are adequately consulted (especially insofar as the identification of suitable duties is concerned).
- Resolve any differences of opinion between medical practitioners to avoid the unnecessary deferral of treatment being administered to the injured worker.

The Chamber notes the observation that “*icare has implemented some reform in this area, including allowing claimants to choose from three nominated IME providers.*”

The Chamber maintains transparency of processes undertaken by government agencies, including icare, is of paramount importance and submits that more work needs to be done to bring the current level of transparency within the system up to an acceptable level.

Establishing a single claim identifier and improving data collection

The Chamber strongly supports the introduction of a single claimant (rather than claim) identifier across all forms of personal injury insurance that could allow data linking across motor accidents and workers compensation claims. Data captured through such an identifier would greatly assist in the resolution of issues relating to liability and strengthen the integrity of the system as a whole.

In addition to adopting such a measure, the Chamber submits that clear rules surrounding the acceptable use of such information (including the data) need to be established and effectively communicated to all stakeholders so the collection of such information can add value to the system.

Under the current system, requests for information made by an employer disputing (or even querying) liability are met with a refusal, citing privacy issues as the reason for such refusal.

It is a peculiar design of a dispute resolution system where better and fairer outcomes are only possible from an employer bringing legal proceedings in a court of law.

Commutation, or lump sum exit from the scheme

At the outset, the Chamber wishes to acknowledge that it does not have access to any data or modelling that has been created or prepared to support this proposal.

However, the Chamber understands a similar measure has been introduced in Western Australia and has resulted in an unacceptable level of injured workers exiting the system prematurely without having fully recovered from their injuries and not having the ability to opt back into the system

The Chamber is concerned that, should the requirements of the current mechanism for commutation be relaxed, it will result in the mechanism being routinely utilised as a claims management strategy.

It also has the potential to drive up the costs of the scheme (and therefore the premiums charged to employers) through the amount being paid out exceeding the costs of the claim (should the claim not be commuted).

Consequently, the Chamber does not support this measure being adopted.

Simplify insurers' notices to claimants

The Chamber supports measures being taken to improve a stakeholder's understanding of the workers compensation system but warns against sacrificing clarity and comprehension about an issue for "simplification".

For example, a work capacity decision involves the consideration of matters that are unrelated to liability.

The Chamber notes one of the reasons for this proposed course of action is "*that the length and complexity of these notices made them incomprehensible to the average person*". The Chamber submits there would be significant benefit from the simplification of the information contained in these notices, the inclusion of graphics (where appropriate) and the provision of a service where legal concepts contained in notices are explained to those having problems comprehending them.

Provide simpler, clearer public information about dispute resolution options and processes

The Chamber supports this measure and is heartened by recognition of the fact that not all stakeholders feel comfortable with accessing online services.

However, rather than suggesting that the measures to be adopted "could" be extended to employers, the Chamber submits they "should" be adopted for employers in recognition of the fact they are stakeholders within the system (not only as employers of the claimants but as funders of the scheme) and deserve equal recognition alongside the injured workers, especially given the emphasis of the system on ensuring a "successful" return to work.

Options to Reform the Dispute Resolution System

Which option do you prefer and why?

The Chamber prefers Option 3 as it:

- Removes many problems that currently exist within the system (for example, unnecessary duplication of dispute resolution services and the number of entities operating within the system).
- Does not unnecessarily delay the reform process that is urgently needed (as Option 4 would).
- Still allows for the remaining aspects of Option 4 (and the economies of scale that it may bring) to be introduced in the future.

However, the Chamber submits Option 3 must also accommodate the need for specialists within the system to possess expertise in both physiological and psychological treatments.

Options for Broader System Improvements to Improve Dispute Resolution Processes

Insurers to conduct internal review of all disputed decisions

Do you think insurers should be required to conduct internal reviews of all disputed decisions as the first step in the formal dispute resolution process? Please explain why or why not.

Based on the feedback obtained from its members, the Chamber:

- Does not support the proposal to retain internal reviews for disputed work capacity decisions.
- Strongly opposes the extension of the insurer's internal review processes to encompass other types of disputed decisions.

In addition, the Chamber submits the current method of handling disputes regarding work capacity decisions is illogical and convoluted, especially as an internal review is followed by a merit review then followed by a procedural review of the earlier internal review.

In relation to any decisions made by an insurer (especially Insurance and Care NSW), there should be a requirement to comply with an overarching framework prescribed either by the regulator or Australian Standards.

In relation to such a decision, any complaint made by an aggrieved party should be referred to an independent tribunal for a procedural review from which an appeal to a court of law should be made available.

The Chamber looks forward to its continued involvement in this consultation to assist with the design of the new dispute resolution system.

Less information required to commence a formal dispute

Do you think removing the requirement for full documentation before conciliation would be beneficial? Please explain why or why not.

The Chamber does not think the removal of the requirement for full documentation before conciliation would be beneficial as it could result in important information (especially as to liability) being excluded.

In the Chamber's opinion, the advantages of having all the relevant information being considered at the conciliation proceedings far outweigh any disadvantages that the additional delay in obtaining that information would bring.