



30 November 2015

Mr Anthony Lean
Chief Executive
State Insurance Regulatory Authority

By email: 2015benefitsreform@sira.nsw.gov.au

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Re: Regulation of Legal Costs for work capacity decision reviews

Dear Mr. Lean,

The NSW Business Chamber (the Chamber) appreciates the opportunity to provide feedback to the State Insurance Regulatory Authority (SIRA) on the regulation of legal costs for work capacity decision reviews.

As you may be aware, the Chamber is one of Australia's largest business support groups, with a direct membership of more than 19,000 businesses, providing services to over 30,000 businesses each year. Tracing its heritage back to the establishment of the Sydney Chamber of Manufactures in 1825, the Chamber works with 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. Operating throughout a network of offices in metropolitan and regional NSW, the Chamber represents the needs of business at a local, regional, state and federal level, advocating on behalf of its members to create a better environment for industry.

At the outset the Chamber, continues to question the basis upon which this current review is being conducted. As it put forward in earlier discussions with SIRA's predecessor WorkCover and the Parkes Inquiry conducted by the Workers Compensation Independent Review Office (WIRO), the Chamber's view is that despite many of the frameworks and processes surrounding workers compensation in NSW being complex and confusing, this, in itself, does not justify the greater participation of legal professionals in the system. Instead, where confusion and complexity exists as a result of these frameworks, steps should be taken to simplify and address them at a policy or system level.

Work capacity assessments were established as a means to provide a systematic and efficient system of tiered reviews to ensure that workers who are capable of recovering from an injury at work do so. The main focus and outcome of a work

capacity review is to determine the return of the injured worker to work in a timely and sustainable manner, and this should be considered paramount.

The current system allows for a three tiered system of review of work capacity assessments:

- **Internal Review:** Undertaken by the Insurer
- **Merit Review:** Undertaken by SIRA
- **Independent Review Officer Procedural Review:** Undertaken by the WIRO

Under the 2012 changes to the Workers Compensation legislation, Section 44(6) of the amending Act prohibited legal practitioners from being paid or recovering costs when acting for workers in relation to any of these reviews.

As the Discussion paper correctly indicates, this arrangement has led to some stakeholders perceiving that injured workers are unfairly affected as despite this mirroring provisions that deny insurers from utilising legal advice in these reviews, this is hard to police with insurers having access to in-house counsel.

While this perception may exist, it is not borne out in the decisions of the WIRO. A review of the decisions for the WIRO for 2015 indicates:

Summary of Decisions	Count	%
Dismissed	103	57.9%
Set Aside	75	42.1%
Total	178	100.0%

This table indicates that for 2015, of the 178 cases reviewed by the WIRO 57.9% of those case resulted in the WIRO finding that the insurer or regulator had followed the correct procedure in coming to its decision. In the other 42.1% of cases, the WIRO found that the incorrect procedure had been utilised and in those circumstances the original decision was set aside with new orders made. On the basis of these figures, it would not appear that the utilisation of legal advice (if indeed that advice is being sought by insurers) is impacting in a significant way the decisions of the WIRO.

With the work capacity process being relatively new, the Chamber is aware of there being, at least initially, a number of issues in relation to the process of assessment. From the decision data above and feedback from stakeholders we believe that the system is bedding down appropriately and the greater participation of legal professionals in the process is neither advisable or desirable.

Although the WIRO does report on work capacity decisions, and insurers are working to ensure that their procedures are correct, employers, like workers, are often left with a decision in limbo. We do not believe however that the greater participation of legal professionals in the process will serve to facilitate faster or fairer decisions from the WIRO.

For these reasons, in principle, the Chamber does remain opposed to the further participation of legal professionals in workers compensation matters.

Given however that as a result of legislation having passed which allows SIRA to draft regulations in relation to the role of legal costs for work capacity and its intention to do so, the Chamber has considered a potential framework and suggests that the regulation should limit the legal costs recoverable in relation to work capacity decision reviews and costs should not be recoverable where they are incurred from:

- An internal review;
- A merit review;
- Any review that results in a recommendation to not change the original decision; and
- Any review where legal services are not provided by an approved provider.

The Chamber supports effective primary decision-making by insurers and regulatory mechanisms that discourage reviews being requested where it is clearly apparent that the review will not find fault with the procedure of the decision. This ensures that there is no wastage of resources on frivolous requests and that more resources are dedicated for reviews that raise legitimate and worthy concerns.

If the regulation is created, it should be reviewed within two (2) years and costs consistently monitored to ensure any adverse impacts on the workers compensation scheme are addressed as soon as they are identified.

In addition to the points made above, the Chamber strongly supports an innovative approach to workers compensation regulation and remains committed to ensuring that employers play an active role in creating safe and healthy workplaces and returning injured workers to work. We support further education and awareness raising activities and proactive advice and workplace visits by the WHS regulators to assist businesses in achieving their safety goals.

For more information, please contact Craig Milton, Policy Analyst on (02) 9458 7913 or craig.milton@nswbc.com.au

Yours sincerely

A handwritten signature in black ink that reads "Paul Orton".

Paul Orton
Director, Policy and Advocacy