Submission regarding

Employer concerns around the NSW Workers' Compensation Scheme

May 2019

Master Builders Association
New South Wales

ABOUT THE MASTER BUILDERS

The Master Builders is the oldest industry association in Australia, founded in Sydney in 1873.

Master Builders has approximately 8,000 members and is the only industry body representing all key industry sectors - residential, commercial, engineering and civil construction.

Master Builders' membership is active and comprehensively covers the regional and metropolitan building and construction industry areas.

The membership is organised into 29 Divisions throughout New South Wales; each Division has an elected President and Executive Committee who facilitate regular local member meetings to inform members about the latest building materials, trends and regulatory changes.

Further, the views and interests of local members that are formulated at Division meetings are communicated to the Association's peak decision making body, the Council of Management.

Master Builders Head Office is located at Forest Lodge, Sydney and its Education Centre is located in Norwest Business Park, Norwest.

Master Builders has regional offices in Ballina, Port Macquarie, Newcastle, Gosford, Wollongong, Ulladulla, Albury and Orange.

EXECUTIVE SUMMARY

The Master Builders Association of NSW (Master Builders) has prepared this Discussion Paper (Paper) with support from the legal firm Holding Redlich to highlight weaknesses in the current Workers' Compensation Scheme.

The weaknesses of the Workers' Compensation Scheme include:

- Lack of insurer accountability
- Return to work management failures
- Acceptance of questionable claims
- Inadequate transparency in decision-making
- Lack of effective communication by the Scheme agents.

It is evident Master Builders views are more broadly held as they were reported in the Workers Compensation Independent Review Office Annual Report 2015 and the first review of the Workers Compensation Scheme / Legislative Council, Standing Committee on Law and Justice, 2017 (Report).

The effect of these shortcomings in the Workers' Compensation Scheme is a worker injury management system that is unfair, disjointed and fails to address the needs of employers.

Initially this Paper views the Workers' Compensation Scheme through is legislative and regulatory framework and highlights an imbalance where employers are disempowered but carry the costs of lost time.

The latter part of this Paper provides a case study that speaks of systemic dysfunction in the management of a workers compensation claim and the unfettered accumulation of lost time accrued against an employer.

ISSUES

1. Acceptance of dubious or false claims for workers' compensation

Master Builders reports that the Scheme agents simply accept claims for workers' compensation on face value and accept liability without consideration of employer evidence or the integrity of the claim.

Master Builders provides a case study of a recent workers' compensation claim in which significant cogent evidence suggests the reported injury, which had been accepted by the insurer, was in fact unlikely to be work related or at worst, was simply false.

In this example, the employer had been forced, at its own expense, to investigate the claim because the Scheme agent had accepted liability and refused to appropriately consider the integrity of the claim or the employer's response.

Recent NSW Government Committee Consideration of Employer Concerns

This issue is a common experience among NSW employers who have reported similar concerns to the State Insurance Regulatory Authority (SIRA) and the Working Committee on Law and Justice (Committee). Some of these concerns outlined in the Report include:

> "*The Australian Federation of Employers and Industries expressed concern around the costs imposed on businesses because* [sic] *the way scheme agents go about assessing claims. Mr Garry Brack, Chief Executive, Australian Federation of Employers and Industries, suggested that some agents simply approve claims to the detriment of employers:*
>
> > *Agents have gone to a position where they approve just about everything and are reticent about talking to the employer about the circumstances of the claim. They get it and they approve it. That is lovely. It cuts down the amount of labour involved. The employer is paying the cost and there is no downside to the agent. That is an inadequate strategy if it is operating in that fashion.*
>
> [redacted]

Repeated failure of Scheme agents to transparently consider the integrity of a claim continues to significantly damage Master Builders' members trust in the Scheme and their belief in the NSW Government's ability and conviction to fix an unbalanced system that leaves employers without any effective recourse or voice.

2. Scheme agents are refusing to communicate with employers

Master Builders is concerned at the reports from its membership that the Scheme agents are failing to communicate appropriately, or at all, with its members.

Master Builders Group Training Organisation reports that it has been allocated 10 different Client Service Managers in the past 12 months half of whom had zero contact with Master Builders.

The members are forced to repeatedly follow up with Scheme agents to attempt to receive an update on an employee's claim in order to properly meet its obligations and assist in the injury management process.

This leaves Master Builders and its members in a difficult situation without the necessary information to assist the injured worker's return to work.

Recent NSW Government Committee Consideration of Employer Concerns

This issue is common for employers in NSW who have reported this to SIRA and the Committee. For example, the Report notes, but does not deal with the following concerns:

> "*The committee heard that employers and industry representatives also have concerns about the conduct of scheme agents. WIRO reported that most employer complaints made to its service centre related to communication failures*.
>
> *This trend was reflected in the evidence received in this review. The Australian Industry Group advised that the complaints made by its members included: employers not feeling supported by the scheme agent during a difficult claim; employers having to constantly chase the agent for answers; and the regular change of case managers.*" [Report, 8.49-8.50]

The lack of communication from Scheme agents poses significant roadblocks in a statutory Scheme that aims to provide a balanced and fair claims management process.

3. Scheme agents are failing in facilitating the return to work of injured workers

Master Builders strongly support the widely accepted view that an injured worker's return to pre-injury wellness is best achieved by a return to work as soon as possible.

It is concerning that despite Master Builders members' willingness and drive to assist in the return to work process, Scheme agents fail to appropriately involve employers in transitioning an injured worker back to work. It is of significant concern that the Scheme agent often fails to communicate with the employer or treating doctor about the proposed return to work transition and adjustments required for that transition to be successful.

A significant contributing factor to this issue is the sub-contracting of worker rehabilitation by the Scheme agent. This creates difficulty in communication and decision making for the multiple parties who sit at various distances from the injured worker.

Recent NSW Government Committee Consideration of Employer Concerns

These concerns are not limited to Master Builder's members, as reflected in the following commentary from the Report:

"*Mr* [redacted] *questioned the ability of insurers to adequately assist employers to transition workers back to work following an injury:*

> *We have had reports of companies saying, "We are happy to have the person back and they are happy to be back but there is some aggro amongst the team about how they fit in when they are not doing their normal job." Companies quite genuinely get quite anguished in how to deal with that kind of situation. I do not know how well equipped the agents are to deal with those kinds of issues …*" [Report, 8.51]

"*8.54* [redacted] *a manufacturing company in Western Sydney, told the committee of experiencing unnecessary delays due to the behaviour of a scheme agent:*

> *Procrastination by the agent in having employees signed off as fit for work and returned to work. One of the two recent cases featured a written prognosis by the rehabilitation provider and hand specialist in Sept 2015 that the employee should be signed off as fit for work. Unfortunately we were made to continue making payments until May 2016 because the Scheme Agent delayed the independent medical review and the GP continued to provide work cover certificates. This more than doubled the size of the claim.*

8.55 [redacted] *said that scheme agent representatives were 'overly assertive' and subjected staff to 'veiled threats and* [redacted] *also noted that the scheme agent was lax in the provision of information about recent workers compensation claims and was dismissive of their concerns.*" [Report, 8.54-8.55]

4. Inadequate avenues for employers complaints about insurers

The examples highlighted so far in this Submission are aggravated by the fact that in NSW employers do not have an adequate avenue to make complaints and seek resolution of disputes with insurers.

Master Builders understands that the *Workers Compensation Legislation Amendment Bill 2018 (NSW) (*WCLA Bill), was introduced as a "*package of improvements designed to prevent disputes by making the system simpler, clearer and more consistent*." However, the Bill seeks only to strengthen complaint and dispute resolution mechanisms for workers, not employers. For example, clause 287A only provides the express right for a worker to request an internal insurer review.

Further, disputes about workers' compensation policies are outside the ambit of the *Insurance Contracts Act 1984* (Cth). As such, the following options are the only mechanisms available to employers to attempt to raise an issue regarding an insurer. However, these mechanisms are entirely unsatisfactory as they fail to provide any formal avenue to seek resolution of a dispute or complaint with the insurer:

(a) Seek internal review by the insurer under their own self-regulated scheme, common law or under contract;

(b) Pursuant to section 27(d) of the *Workplace Injury Management and Workers Compensation Act 1988* (NSW) (WIMWC Act), contact the Workers Compensation Independent Review Office (WIRO) for advice about entitlements and obligations and informal assistance in dispute resolution.

However, WIRO cannot compel an insurer to overturn a decision or to take any action. The mandate of WIRO is to only provide an opportunity to open up lines of communication between the employer and the insurer;

(c) Make a complaint to SIRA for review of the insurer's service delivery, or lodge a dispute regarding the claim being fraudulent.

SIRA has expressed the view that it is the insurer's prerogative to accept or decline a claim for workers' compensation and it is not the role of SIRA to disrupt or question such a decision without clear evidence of fraud; and

(d) Sections 287, 288 and 289 of the WIMWC Act purport to permit an employer to lodge a dispute with an insurer in the Workers Compensation Commission for conference and/or arbitration and determination following strict notification requirements.

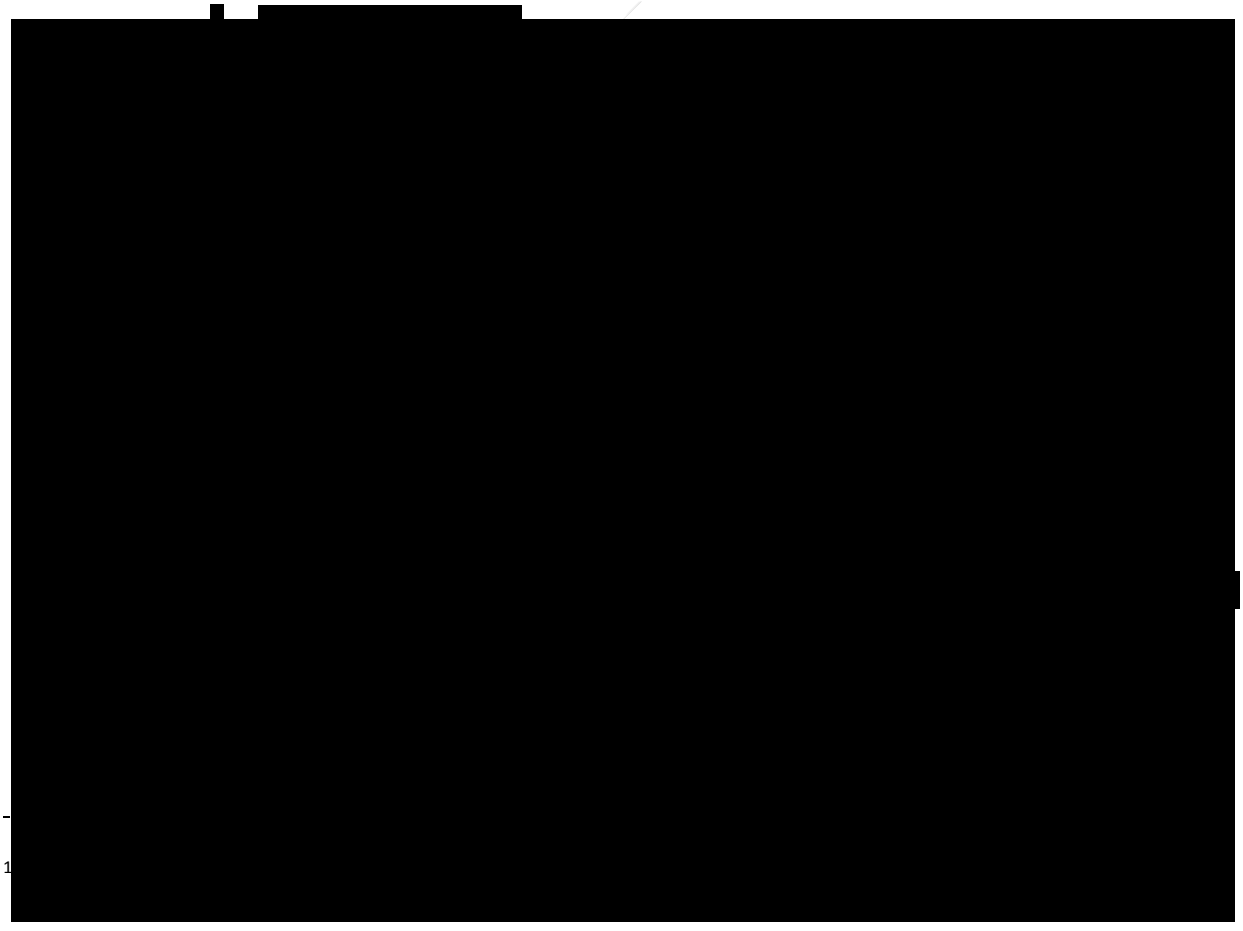
However, once the insurer has accepted a claim for compensation by a worker, the employer cannot avail itself of these rights. In *Dundullimal Holdings Pty Ltd t/as Western Parcel Express v CGU Workers Compensation (NSW) Ltd & Anor [2008]* NSWWCCPD 88 (20 August 2008), the Acting President noted, in rejecting an employer's claim against an insurer regarding the acceptance of liability for a worker's injury, that:

> *"In the present case of course, the proceedings are between the Employer and the Insurer. Perhaps this was an attempt by the Employer to overcome the difficulties with its* [sic] *Application as described by Acting Deputy President Snell, however, in my view it does not: section 289 is fatal to the Employer's Application. The Insurer <u>never</u> disputed liability as required by section 289(1) (a), nor indeed had the Insurer failed to determine the claim as required by section 289(1)(b)."*

Further, the Acting President upheld the arbitrator's legislative construction of the law which was that:

"The legislative intent is clear. The Insurer has the statutory authority to stand in the shoes of the Employer to bring, defend and settle proceedings in respect of claims under the Act. The Employer's rights are subrogated in the Insurer. The Insurer having conceded liability ...arising from an injury on 9 March 2005 the Employer cannot now seek to litigate the issue in the Commission."

"I do not accept the Applicant's submission that section 287 can be read in isolation as a stand-alone provision enabling disputes to be heard as between an Employer and an Insurer, if there is no dispute in respect of the payment of compensation to a Worker."



[redacted]

[redacted]

[redacted]

[redacted]

Conclusion

Master Builders' member's frustration with the NSW Workers Compensation Scheme seems to be an experience shared by many employers in and outside the NSW building and construction industry.

It is fundamentally unfair that employers suffer the costs of an injured worker's lost time in their premiums but are excluded from decision making in relation to the management of an injured workers return to work program.

Employers are marginalised in the Scheme yet they often hold information pertinent to understanding how an injury occurred and the best return to work management program. In the case study [redacted] return to work carer and supervising Doctors were unaware that prior to his injury and during his recovery he was a [redacted] important and pertinent information was not disclosed by [redacted]

The Scheme is very easily 'worked' by an injured worker and an unconcerned Doctor and the employer has no right to be part of the decision making process or request engagement of an alternate professional.

Master Builders submits the following recommendations to recalibrate the unbalanced Workers Compensation Scheme:

(e) review the systematic practice of accepting workers compensations claims and the process for collating all relevant information prior to accepting a claim, during the development of a return to work program and at key milestones in the progress of a claim;

(f) mandate communication between the insurer and the employer before and during a claim process;

(g) make choosing a Doctor a process of agreement between the employer and an injured worker;

(h) demark a point in the progress of a claim beyond which the employer is to be consulted prior to accepting further lost time cost; and

(i) allow an independent right of review for employers who dispute the insurer's coverage of a claim for workers' compensation.