NEW SOUTH WALES BAR ASSOCIATION

SUBMISSION IN RESPONSE TO STATE INSURANCE REGULATORY AUTHORITY DISCUSSION PAPER "CLAIMS ADMINISTRATION MANUAL AND GUIDELINES REVIEW"

1.0 Background

1.1 In March 2018 the State Insurance Regulatory Authority ("SIRA") issued a Discussion Paper regarding its proposal to create a Claims Administration Manual ("CAM") to *"assist insurers navigate the legislative landscape"* and to *"create a centralised and connected framework, bringing together legislative and administrative resources to provide clear and consistent guidance on the claims process. Designed with claims managers in mind...."*.

1.2 The development of the CAM is also intended to be *"supported by a process to simplify and consolidate the current suite of workers compensation guidelines"*. The New South Wales Bar Association (the Association) appreciates the opportunity to provide a submission in relation to these issues.

2.0 Some preliminary observations

2.1 Since its insertion into the *Workers Compensation Act 1987* ("WCA") in August 1998, section 192A has referred to *"the Authority"* having the discretion to *"prepare and publish"* a Claims Administration Manual *"for use by licensed insurers."* Section 192A refers to pragmatic matters such as *"procedures for the making of claims"*.

2.2 In October 2001 section192A(3A) was added which provided that the *"WorkCover Guidelines under the 1998 Act can make provision in connection with any matter in connection with the claims manual can make provision"*.

2.3 The 1998 Act referred to is of course the *Workplace Injury Management and Workers Compensation Act 1998* ("WIM"). Section 260 of WIM also refers to the Workers Compensation Guidelines containing provisions with respect to *"the form" and "manner in which a claim is to be made"*.

2.4 The Association's understanding is that when WIM was first passed, the legislative intention was to eventually make it the one statute for most workers compensation matters in NSW and that this would be achieved over a period by gradually transferring into it certain provisions from the WCA in such a way as would eventually permit the repeal of the WCA as a separate Act. For some reason this intention was never brought to fruition. What essentially did occur is that most of the administrative and dispute resolution provisions were eventually either transferred into or duplicated in the WIM whilst the entitlement provisions remained in the WCA.

2.5 The outcome of this process is that the combined Workers Compensation Acts in NSW contain a large amount of unnecessary duplication, outdated provisions and even certain inconsistencies - the legislative

solution to the latter being that the provisions of WIM prevail *"to the extent of any inconsistency"* (see section 2A(3) WCA).

2.6 This is how it is that s.192A WCA and s.260 WIM both provide for the Authority to issue instructions about how claims should be made and happens to provide an example of the unnecessary duplication in the Acts.

2.7 The authors of the Discussion Paper attempts to address the difficult task of making the unnecessarily complicated NSW workers compensation scheme *"easy to navigate and understandable"* by creating the proposed CAM.

2.8 As already noted the Discussion Paper also envisages that *"the current suite of workers compensation guidelines"* will firstly be simplified and consolidated.

2.9 As a general goal the Association would of course welcome the simplification and potential consolidation of some of the guidelines - if doing so produces useful practical changes.

2.10 It is however fundamentally impossible for any guidelines to simplify the complications which arise from the existing overly complex legislation and regulations.

2.11 Hence it is suggested a useful path towards the desired outcome of substantial simplification and consolidation would be for the Authority to make a report to the Minister pursuant to s 22(1)(c) WIM that *"the operation and effectiveness"* of the scheme is being hindered by the existence of redundant, duplicate and inconsistent legislative provisions and that the Minister should give consideration to creating a draft bill and regulation consolidating the existing provisions in the one act and one set of regulations - which suitably remove or revise the provisions which are redundant, duplicated or inconsistent.

2.12 It is also noted that the Minister has already set in train a process of reviewing the dispute resolution system for workers compensation in NSW with a view to creating a single jurisdiction in lieu of the existing three different jurisdictions. It is assumed the legislative changes required to achieve this would at least in part impact on what any revised or consolidated guidelines would need to say.

2.13 It is also understood the Authority and its predecessor has periodically issued "Operational Instructions" to its scheme agents. Some of these involve matters which are obviously not confidential in nature. An example is the Operational Instruction relating to the "Lead Agent Provisions". These provide for one scheme agent to act for multiple employers when a worker's incapacity has arisen from multiple injuries. It would assist workers' solicitors if the details of these arrangements were accessible to them - as knowledge of how such claims are dealt with can reduce the number of parties they need to communicate with.

2.14 Hence it is suggested that any new consolidated claims guidelines should also include the procedures for non-confidential matters currently set out in Operational Instructions.

3.0 Some comments about the potential contents of new claims guidelines

3.1 Given the large scope of matters such guidelines could cover, the comments which follow are not intended to be comprehensive. We hope they provide some practical matters for consideration.

3.2 In recent times the Authority has prescribed certain new standard report of injury forms and medical certificates. They replaced much shorter standard documents, which had been jointly created by the Authority and its equivalents in Victoria and Queensland. In the Association's view the newer forms are inferior as they contain less useful information and have a larger number of pages. There are significant time savings achieved by being able to "open" and look at a single page medical certificate or a concise two page report of injury form. Conversely time is being wasted by the newer longer forms and by medical practitioners in border towns such as Albury having to determine if they should be using the new NSW medical certificate or the Victorian one. It is suggested the scheme revert to the previous shorter forms.

3.3 Workers trying to inform themselves on how to report and make a claim should not have to try to determine this by looking at a complex handbook designed to inform scheme agents. It is suggested that a separate concise handbook should be drafted for workers to access. A separate concise handbook would also be much easier to translate into commonly used foreign languages.

3.4 The impractical requirement for section 60 expenses to be approved in advance needs to be clearly explained and there should be a clear list of the types of expenses, which the Authority has instructed its agents not to require prior approval for. This could be incorporated in the handbook suggested in 3.3 above. There should also be assistance provided with respect to the practices of self and specialised insurers about this to the extent they differ. (Such exemptions would be best made part of the Regulations.)

3.5 The application of section 59A WCA time limits to particular workers can be complex. As long as this unsatisfactory provision is contained in the legislation it should at least be correctly explained in advance. Workers who do not claim any initial weekly benefits are usually informed that medical expenses will cease to be paid two years after the occurrence of the injury. They do not seem to be informed that this period will extend to two years after they are last entitled to weekly benefits if they subsequently claim weekly benefits. They should also be clearly informed about how the period can be further extended after any WPI can be assessed and how they can go about getting it assessed.

3.5 Pre-injury average weekly earnings (PIAWE) continues to be a practical problem. Section 82A WCA indexations (based on CPI movements) seem to be rarely made. The application of Section 82A should be clearly detailed in any CAM and workers should be informed that they can expect their PIAWE to be adjusted upwards at intervals.

3.6 There appears be continued confusion about what artificial aids etc remain payable despite the ending of the section 59A period. There should be a reasonably clear list setting out what remains payable.

3.7 The instruction to scheme agents about not compromising on differing WPI assessments is unhelpful. There would be fewer disputes and more certainty if this instruction was revoked.

3.8 The obligation on scheme agents to provide documentary evidence to workers as annexures to section 74 Notices, even if the evidence is inconsistent with the scheme agent's decision, seems to be frequently disregarded. The scheme agents should be clearly reminded of their obligations to provide such material.

3.9 Workers who are exempted from the harshness of the 2012 Amendments should be able to ascertain this easily and to know what their additional entitlements are. To do this there should be a list of exempted workers in the suggested workers handbook discussed in 3.3 above and a link of some kind to a further handbook, which explains what they are entitled to.

3.10 Coal miners should be specifically informed that accepting a section 66 lump sum continues to create an election to forego any right they may have to seek damages against their employer.

3.11 The standard deed of release being used by icare is excessively broad and includes an inappropriate and very broad indemnity clause. It is understood they may be revising this at present but it may be considered appropriate to give some guidance as to what should not be included in such deeds.

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