



Regulation of legal costs for work capacity decision reviews – Discussion paper

October 2015

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Introduction

In August 2015 a range of reforms were introduced to the NSW workers compensation system by the passing of the *Workers Compensation Amendment Act 2015*. The core goal of the reforms was to create a fairer, sustainable and more customer-centric workers compensation system.

The [\\$1 billion reform package](#) included enhanced [benefits for injured workers](#), incentives for safe work through [premium discounts](#), and formal [separation of the government's regulation and operation of the workers compensation system](#).

At the time of the reforms the Minister for Finance, Services and Property, The Hon. Dominic Perrottet MP, signalled that an important next step in implementing the reforms would be to consult stakeholders on the development of a regulation that could provide for payment of legal costs in connection with work capacity decision reviews.

The 2015 reforms include provisions to regulate limited payment of legal costs in connection with work capacity decision reviews. Currently payment for legal services in connection with work capacity decision reviews is prohibited (under Section 44(6) of the 1987 Act, and Schedule 8, Clause 9 of the Regulation) so legal practitioners cannot be paid or recover costs for such work.

The State Insurance Regulatory Authority (SIRA) is keen to hear from stakeholders on how the new provisions relating to the payment of legal costs for work capacity decision reviews should operate. This paper sets out some key considerations and presents targeted questions for discussion.

We encourage you to have your say and let us know how we can build a fairer, sustainable and customer focused workers compensation system.



Anthony Lean
Chief Executive – State Insurance Regulatory Authority
October 2015

Context and background

The NSW workers compensation system

The objectives of the workers compensation legislation are set out in Section 3 of the *Workplace Injury Management and Workers Compensation Act 1998*. They are:

- secure workers' health, safety and welfare while preventing work-related injury
- provide prompt treatment and rehabilitation to assist injured workers to return to work
- provide income and treatment payments to injured workers and their families
- provide a fair, affordable and financially viable system
- to deliver an efficient and effective system.

State Insurance Regulatory Authority (SIRA)

The 2015 workers compensation reforms included significant changes to governance arrangements. In particular the reforms dissolved the former WorkCover entity and created in its place three new entities:

- Insurance & Care NSW (icare) – insurance and care service provider
- State Insurance Regulatory Authority (SIRA) – independent insurance regulator
- SafeWork NSW – independent workplace safety regulator.

These new entities commenced on 1 September 2015.

SIRA is responsible for the regulatory functions in relation to workers compensation insurance, motor accidents compulsory third party (CTP) insurance and home building compensation. The Workers Compensation Regulation division within SIRA is responsible for workers compensation matters, including the development of policy to guide the creation of the new legal cost regulation for work capacity decision reviews.

Work capacity decision reviews and legal costs

Changes to workers compensation laws in 2012 introduced a new administrative process whereby insurers make work capacity decisions about workers. As work capacity decisions can have a significant impact on the amount of compensation that is payable to a worker, the legislation also provides for workers to seek an administrative review of the work capacity decision. The legislation ([Section 44 of the 1987 Act](#)) provides for three types of review:

- **Internal Review:** An internal review of the work capacity decision, undertaken by the insurer
- **Merit Review:** An independent review of the work capacity decision, undertaken by the regulatory authority (SIRA)
- **Independent Review Officer Procedural Review:** A procedural review of the work capacity decision, undertaken by the Workers Compensation Independent Review Office (WIRO).

Section 44(6) prohibits legal practitioners from being paid or recovering costs when acting for workers in connection with any of these reviews. Clause 9 of Schedule 8 to the Workers Compensation Regulation 2010 contains a similar provision for the legal costs of insurers for work capacity decision reviews. The prohibition on payment for legal services was considered in a number of recent public reviews on the operation of the workers compensation system in NSW.

For example, the [Statutory Review of the Workers Compensation Legislation Amendment Act 2012](#), undertaken by the Centre for International Economics in 2014, found that with regard to work capacity, both workers and employers were uncertain about outcomes and entitlements, and were frustrated when a work capacity decision was overturned late in the review process. The report also noted that:

The intent of the changes was to limit the potential for an escalation in legal costs associated with the introduction of the worker capacity decision assessment. It is often cited that when South Australia introduced work capacity assessments in 2008 they experienced a significant increase in the cost of legal services and Scheme administration.

The [Review of the Exercise of the Functions of the WorkCover Authority](#) undertaken by the NSW Parliament's Law and Justice Committee in 2014, noted the concerns of review participants with regard to the complexity of the workers compensation legislation and the difficulties faced by many injured workers in understanding their rights and responsibilities following a workplace injury. In summary the review recommended:

That the NSW Government consider amending section 44(6) of the Workers Compensation Act 1987 to allow legal practitioners acting for a worker to be paid or recover fair and reasonable fees for the work undertaken in connection with a review of a work capacity decision of an insurer, subject to an analysis of its financial impact.

A prominent concern raised by stakeholders is the perception that injured workers are unfairly affected by the prohibition because insurers may access in-house legal advice.

Scope of reform

In order to create a fairer, more sustainable and customer focused workers compensation system, the government's 2015 workers compensation reforms included new provisions that will allow for limited payment of legal costs to be paid in connection with prescribed classes of work capacity decision reviews.

Specifically the proposed [Section 44BF](#) of the 2015 amending Act states:

44BF Legal costs

- (1) A legal practitioner is not entitled to be paid or recover any amount for a legal service provided to a worker or an insurer in connection with a review if:
- (a) the review is of a prescribed class, or
 - (b) the regulations do not fix any maximum costs for providing the legal service to the worker or insurer in connection with the review.
- (2) Despite section 341 of the 1998 Act, the regulations may provide that, in prescribed circumstances, a party to a review under this Subdivision (other than an internal review) is to bear the other party's costs in connection with the review.

As the regulator of workers compensation in NSW, SIRA will develop a regulation that will ensure the new provisions are appropriately designed and effectively implemented. In doing so SIRA will consult with stakeholders to seek their views prior to developing a regulatory approach that meets the government's intent of creating a fairer, more sustainable and custom focused system. The regulation will be designed to:

- provide fair, equitable and appropriate access to professional legal services
- target key risks and drive desired outcomes
- not be unnecessarily complex and written in a way that is easy to understand
- impose minimal regulatory and administrative costs on individuals and business
- establish pricing controls that will assist to maintain the system's financial sustainability without unduly compromising the quality or availability of services
- encourage and support early agreement on work capacity
- promote sound judgement and effective primary decision making
- focus on supporting workers to achieve early and sustainable return to work.

The above criteria will underpin SIRA's design for regulating legal costs in connection with a work capacity decision review, and should be used to guide discussion and test regulatory options.

Consultation

Consultation on the new legal costs provision will commence with the publication of this discussion paper and an accompanying public call for submissions (Links to be published on the SIRA website, former WorkCover website, Insurance Reforms website and NSW Government 'Have Your Say' website). SIRA will also directly contact selected stakeholders to invite their review and submission, however all interested parties are welcome to review the discussion paper and make submissions.

Using the feedback generated by the discussion paper, SIRA will undertake detailed analysis of stakeholder recommendations. This process may include further stakeholder forums and/or discussion.

In December 2015 SIRA will publish a summary of the feedback received through the submission process. The publication of the summary paper will mark the end of the dedicated consultation process; however SIRA will continue to engage with stakeholders as part of any future development, implementation and evaluation activities.

Key dates

Consultation activity	Dates
Discussion Paper published on the SIRA/WorkCover website and the NSW Government 'Have Your Say' websites	29 October 2015
Submissions received by SIRA	29 October 2015 – 26 November 2015
SIRA reviews submissions and prepares summary of feedback	27 November – 17 December 2015
Submissions summary paper published	18 December 2015

How to make a submission

SIRA welcomes comment and feedback from all stakeholders. The preferred format for providing a response to this discussion paper is via a written submission.

Written submissions can be made using the [online form on our website](#) or emailed to SIRA at 2015benefitsreform@sira.nsw.gov.au.

Written submissions may be published on the SIRA/WorkCover website. If you do not want your submission or any part of it published, you must clearly indicate this at the time of submission.

Key considerations and focus questions

The issues and questions set out in this section are intended to prompt and focus discussion – they are not intended to be exhaustive or otherwise restrict commentary on broader or related matters.

Regulatory controls

The 2015 amending Act provides for three main regulatory controls:

- prescription of certain classes of reviews for which legal costs are not payable
- fixing of maximum legal costs
- prescription of circumstances in which one party would be required to bear the other party's legal costs.

Prescribed classes of review

The amending legislation provides for a regulation to prescribe classes of reviews for which a 'legal practitioner is not entitled to be paid or recover any amount for a legal service provided to a worker or an insurer in connection with a review'. For example, the regulation might prescribe that a class of review where legal costs are not payable is:

- an Internal Review
- any review that results in a recommendation to not change the original decision
- any review where legal services are not provided by an approved provider.

FOCUS QUESTION 1: Should the regulation provide for payment of legal costs in connection with all work capacity decision review types – ie Internal Reviews, Merit Reviews and Procedural Reviews?

FOCUS QUESTION 2: Should the regulation provide for payment of legal costs only where the review results in a recommendation to change the work capacity review decision?

FOCUS QUESTION 3: Should a new class of review be prescribed to regulate legal costs, such as reviews where legal services are provided by approved providers, or reviews where the worker first engaged an approved advocacy service?

Maximum legal costs

Fixing maximum costs for legal services payable in connection with work capacity decision reviews provides protection against insurance costs and premium volatility, as well as protection against driving behaviours that may discourage, rather than encourage, early and sustainable return to work.

The regulatory approach for fixing the maximum cost might be as straightforward as prescribing a single maximum service cost per review, or it might be considerably more complex, whereby different maximum amounts are fixed for different circumstances. For example, Merit Reviews and Procedural Reviews might have a different maximum cost fixed; similarly cases where there is more complexity such as multiple injuries or psychosocial injuries might be subject to a higher maximum cost.

In regulating payment of any costs consideration must be given to the service and market impacts, such as the quality of service that can be reasonably provided within the fixed price range, and/or the want of commercial service providers to operate in a market where maximum costs are regulated. In the case of payment for legal services, it is important to consider matters such as pro bono service provision, incentives to minimise speculative or unsubstantiated review requests, and the relationship to paid services. To this end it is necessary for SIRA to make some judgement as to what is fair, reasonable and sustainable with respect to a maximum cost.

FOCUS QUESTION 4: What is a fair and reasonable maximum cost for provision of legal services in connection with a work capacity decision review, and what criteria should be used to determine a fair and reasonable maximum cost?

FOCUS QUESTION 5: Should the regulation use a single fixed maximum cost that will generally apply across all eligible reviews, or should the regulation use a more complex maximum cost structure to more directly influence behaviour (such as sound primary decision making) and achieve positive regulatory outcomes (such as early and sustainable return to work)?

Legal costs of other party

The 2015 Act makes provision for the regulation to prescribe circumstances in which one party will be required to bear the legal costs of the other party. This provision is designed to encourage effective primary decision making on behalf of insurers as a means of decreasing review requests, and may also provide a regulatory mechanism to discourage reviews being requested where it is apparent that the review will not find fault with the original merit or procedure of the decision. While a complex area, this provision might be designed as a default mechanism whereby one party becomes liable for the other party's legal costs based on the review findings. Alternatively the regulation might be designed as more discretionary to be applied as part of the review finding/determination.

FOCUS QUESTION 6: In what circumstances should one party be required to bear the other party's legal costs?

Compliance mechanisms

In designing a regulatory approach compliance considerations are important. For example, a scenario might be that if a maximum cost for legal services was set to a level to account for more complex matters, then some services providers might charge the maximum fee regardless of the extent of services performed. Similarly, if a maximum cost is prescribed, and a worker chooses to fund additional legal services beyond the maximum cost, should this be permitted or expressly prohibited – should cost disclosure be required? What action might the regulator take to monitor, encourage or otherwise address non-compliance behaviours such as over-servicing or overcharging, or unnecessarily pursuing or encouraging workers to request reviews? Are existing professional standard mechanisms for the legal services industry sufficient (eg professional associations), or should additional compliance and enforcement measures be included in the regulation – for example cost disclosure obligations?

FOCUS QUESTION 7: What measures might be included in the regulation to better promote and encourage compliance?

Operational and administrative considerations

There are a range of operational and administrative matters that will need to be addressed within the regulation, including details of how and when costs are billed and paid to respective parties.

FOCUS QUESTION 8: How should eligible legal costs be billed, paid and claimed?

FOCUS QUESTION 9: What are the important operational and administrative matters that must be considered when designing this regulation?

Innovation

In keeping with the government's focus on innovation as a means of delivering improved outcomes, stakeholders are encouraged to propose innovative concepts that might be implemented to complement these regulatory reforms. For example, education and awareness initiatives that might improve the quality of decision making and review processes, thereby reducing the number of reviews needed, or a funded advocacy model whereby a pool of independent legal professionals provide funded advocacy services for workers in connection with reviews.

FOCUS QUESTION 10: Do you have any innovative ideas that might be incorporated into the legal costs regulation or otherwise enhance the regulation?

FOCUS QUESTION 11: Are there any other matters relevant to the legal costs regulation that have not been addressed elsewhere in the SIRA discussion paper or your submission?

Next steps

SIRA will review all submissions and prepare a summary of the feedback received. The feedback summary will be published on the SIRA/WorkCover website.

The information provided through this consultation process will be used to develop detailed regulatory options for consideration by government, with the view to finalisation and implementation of the new regulation no later than June 2016.

SIRA will continue to consult and engage with stakeholders throughout the development and implementation phases.

Any questions or enquiries in relation to this discussion paper should be emailed to 2015benefitsreform@sira.nsw.gov.au.



