Submission: Regulation of legal costs for work capacity decision reviews

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Focus question 1: Should the regulation provide for payment of legal costs in connection with all work capacity decision review types. i.e. Internal Reviews, Merit Reviews and Procedural Reviews?

Background

The State Insurance Regulatory Authority has approached the New South Wales Bar Association seeking comment on matters relating to the payment of legal costs associated with "work capacity decisions" made pursuant to section 43 Workers Compensation Act 1987. Such costs are to be payable in accordance with contemplated future Regulations. The following abbreviations are used in these submissions: "Guidelines" - WorkCover Work Capacity Guidelines 09/08/13 "WCD" - Work capacity decision “WCA” - Workers Compensation Act 1987 (NSW) "WCR" - Workers Compensation Regulation 2010 “WIM” - Workplace Injury Management and Workers Compensation Act 1998 (NSW) "SIRA" - State Insurance Regulatory Authority "Discussion Paper" - The October 2015 Discussion Paper released by SIRA entitled “Regulation Of Legal Costs For Work Capacity Decisions” The Discussion Paper sets out various questions, which identify certain topics for consideration. These submissions refer to those questions in the order they arise in the Discussion Paper. Some additional matters are discussed as an adjunct to these responses.

1.0 Should the regulations provide for the payment of legal costs in connection with all work capacity decision review types - ie Internal Reviews, Merit Reviews and Procedural Reviews?

1.1 These potential review stages all involve the same initial WCD. The legal services provided to present an Internal Review will typically involve the collation of evidence which will probably be re-presented again in the later reviews. However various circumstances (such as fitness, earnings and ongoing medical treatment) can change during such a multi-stage process, such as to require the collation of additional evidence and to suitably vary earlier written submissions.

1.2 As the Legislative Council Standing Committee on Law and Justice has recognised, it is generally not reasonable to expect injured workers to know what evidence needs to be collated and what submissions they need to make about the complex legislative provisions in the WCA and WIM. The potentially evolving evidence and related submissions need to be carefully collated and presented up to three different times in three different forums. To enable this to be done in a fair and efficient way requires legal services to be performed for each utilised stage of the process.

1.3 It is unrealistic to expect potential providers of such legal services to do this for no remuneration. Hence the only fair system has to be one which provides for the payment of reasonable fees for legally qualified professionals to provide the legal services required by injured workers and employers to present their claims and responses at each utilised stage of the process.

1.4 Another important point to bear in mind is that it is only the initial Internal Review process which has no particular time constraint. The following two stages are confronted with extremely short initiating periods of 30 days (Guidelines 7.3.1 and 7.4). Hence the sensible course for a legal practitioner representing a party with respect to a WCD is to endeavour to collate the required evidence, prior to lodging the initial Internal Review. This body of evidence may then need to be added to as the factual background develops, but the important point to appreciate is that it can be relatively time consuming to collate the required evidence and 30 day periods are completely inadequate to permit this to occur. Hence it is particularly vital for an injured worker to have legal representation prior to the initial Internal Review process.

1.5 Hence the short answer to question 1 is yes.

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?

2.1 It is common practice to provide that "costs follow the event". Hence a plaintiff in court proceedings will typically only recover costs from a defendant if the proceedings produce a beneficial outcome to the plaintiff. However the multi-review process involving WCDs raises a very awkward practical reality, which would prevent this type of approach for workers costs from achieving the desired outcome of workers being able to obtain legal representation.

2.2 The awkward reality is that since the WCD system was implemented in 2012: (a) Workers basically never receive a beneficial outcome from an initial internal review. Hence the rate of success is essentially zero. (b) It is understood that only about 30 to 40% of workers have received a beneficial outcome from Merit Reviews or WIRP procedural reviews. Hence the rate of success for these applications is essentially one in three.

2.3 Hence if costs payable for workers are to "follow the event", the legal representatives will only receive payment for about one in three matters they take on. With such poor prospects of ever receiving remuneration for most of their services the rational approach for a solicitor to take would be to decline to act at all in such matters. This would then prevent the desired outcome from being achieved.

2.4 Accordingly the only method of paying fees which would currently provide representation would be to have realistic fees payable whatever the outcome is. This could still be done with some exceptions to try to discourage applications which should not be brought. For instance, provisions could require a worker to pay an employer/scheme agent’s costs if the claim was fraudulent or made without proper justification.

2.5 It is noted that up to 2012 cost orders in favour of workers in workers compensation disputes were contingent on a worker obtaining some favourable outcome and in this sense they "followed the event". This situation applied to the original Workers Compensation Commission (1926 to 1985),

the Compensation Court (1985 to 2002) and the present Workers Compensation Commission (2002 to 2012).

2.6 This was a workable arrangement, as proceedings brought on behalf of any particular worker over that period would typically include a number of different issues relating to an injury or multiple injuries. For example, the one action may have involved disputes about employment, the occurrence of various injuries, whether and at what rates weekly benefits were payable and whether particular medical treatments were reasonably necessary. It was somewhat rare for a worker to completely fail with all of their claims. Hence solicitors could provide their professional services with tolerable prospects of receiving some remuneration. (For completeness it should be noted that from 1926 to 2012 wholly unsuccessful proceedings brought on behalf of workers did not result in a worker being ordered to pay an employer/insurers costs, unless the proceedings were found to have been brought fraudulently or without proper justification. These submissions return to this point in section 6 below.)

2.7 As noted elsewhere in these submissions, there are now three different workers compensation dispute resolution jurisdictions in NSW. It would make a great deal of sense to return to having one dispute resolution jurisdiction for workers compensation disputes. The historical experience described in 2.6 above suggests that returning to a system involving the one jurisdiction which can deal with all relevant areas of dispute concerning a particular worker would also enable the return to a regime whereby workers' costs follow the event.

2.8 Hence if a costs following the event type regime is implemented with respect to workers' costs, it is probably necessary to return to having one jurisdiction for the determination of disputes.

2.9 For the reasons explained above the Association's short answer to this question is no.

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?

3.1 The workers compensation legislation in NSW is now extremely complex. It would be quite unsound to assume that non-legally qualified individuals would have the required expertise to provide the required services. Since the 2012 amendments some non-legally qualified individuals such as Trade Union officials have done their best to represent injured workers with respect to WCDs. It is the Association's understanding that this has occurred through necessity and their preparedness to try to help - rather than due to any preference on their part to do so.

3.2 The Association's view is that injured workers should have the safeguard of having legally qualified practitioners, with current practising certificates, acting for them.

3.3 The Association is also very much opposed to any regulatory scheme which seeks to restrict the legal practitioners who can be retained by workers. There are significant existing pre-requisites and requirements that have to be satisfied before practising certificates are issued and renewed each year. In addition the Law Society of NSW has a well-established system of accredited specialists which enables members of the public to locate solicitors with expertise in particular areas - including personal injury matters of which workers compensation is a sub-set.

3.4 The experience of the Association over many decades is that workers throughout NSW have generally been very well served by the legal profession in this State. There is no demonstrated need for some organisation to vet and restrict which legal practitioners are permitted to act for such workers. The question may refer to whether practitioners can be paid for their services, rather than whether they can act for workers, but the practical outcome of preventing non-approved members of the legal profession from being paid is to prevent them from acting.

3.5 The suggestion amounts to the Executive forbidding members of the public from retaining particular legal practitioners to act for them by means of by delegated legislation. This is a very concerning and unsound suggestion.

3.6 If it is thought particular legal practitioners are unfit to provide legal services, there are very adequate existing procedures and safeguards which can be implemented through the Legal Services Commissioner. These should be used in such circumstances.

3.7 The Association's short answer to this question is no.

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?

4.1 The fairest method of providing fees for the required legal services is to have a system whereby particular fees are paid for particular pieces of required work. Courts and other tribunals have traditionally done this through the assessment of "party/party costs" calculated by reference to particular scales. This system was applied to costs in workers compensation disputes in NSW from 1926 to 2002 and worked well. Schedule 2 Legal Profession Uniform Law Application Regulation 2015 continues to provide an example of this system - which is still used with respect to coal miners and certain emergency workers.

4.2 Between 2002 and 2012 an alternative system was used for proceedings in the Workers Compensation Commission. This system was based on certain set fees being paid on the basis of various required stages of work, with some higher fees being payable for larger or more complex claims, such as those involving multiple parties. Schedule 6 WCR still contains these schedules. It is the Association's understanding that the WIRO/ILARS scheme continues to use Schedule 6 WCR as a guideline basis for the payment of costs and that the solicitors acting for Scheme Agents are also still being paid generally in accordance with Schedule 6.

4.3 A system of party/party costs based on a revised form of Schedule 2 Legal Profession Uniform Law Application Regulation 2015 would be superior, as it would more accurately assess the required costs. However, if this approach did not find favour it would probably be feasible to create cost schedules for WCD matters, which follow the same general system as Schedule 6 WCR.

4.4 One point worth noting is that the present WCD review process is wholly documentary and the decision makers (as the Association understands it) do not conduct telephone conferences or face to face meetings/hearings. In some quarters it might be thought that this reduces the amount of work required. In the Association's view this is not necessarily the case at all. Carefully recording the required evidence in the detailed statements required in a documentary administrative process can

consume as much or even more professional time than adducing them as oral evidence before a Magistrate or Judge.

4.5 In addition, the amount of work that has to be devoted to preparing written submissions can consume even more time than if they were made in person before the decision maker. This is because an experienced decision maker conducting a face to face meeting/hearing can indicate to a representative that he or she does not need to be addressed about a particular point because they have already come to a favourable conclusion for their client on that issue. In contrast, a representative drafting written submissions can make no such assumptions and has to carefully detail every relevant point.

4.6 The actual costs payable have to provide a reasonable level of fees to cover the cost of providing the professional services including what can be regarded as a reasonable "profit" margin. They also need to pay required disbursements.

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)?

5.1 The amount of professional work required to fairly present a worker's case, at any of the review stages, will obviously vary quite a lot depending on the factual matters in dispute. For example a dispute over a short period of past weekly benefits may involve fairly limited work, but a dispute over the provision of ongoing weekly benefits might require a much larger amount of work. Hence a single fixed figure has the potential to variously overfund or underfund the required work. 5.2 It is not that complex to have a range of fees for particular stages of required work with added discretions to permit higher amounts when it is fair to do so. As previously noted Schedule 6 WCR provides an example of this approach. 5.3 Hence the Association's view is that a single fixed maximum is not appropriate.

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

6.1 The traditional legislative approach to this issue in NSW has been for costs to only be awarded against an unsuccessful worker if the claim had been advanced fraudulently or without proper justification.

6.2 In the Association's view, this terminology strikes a fair balance and provides a clear and important disincentive to fraudulent or inappropriate claims by workers.

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

7.1 The paragraph in the discussion paper under the heading "Compliance mechanisms", which precedes this question, raises concerns that legal practitioners might charge inappropriately high solicitor/client fees in excess of a recoverable scale amount. Hence the sort of "compliance" being raised by the question is "compliance" with an expectation they will only charge reasonable fees.

7.2 The traditional legislative solution to protecting injured workers from excessive solicitor/client bills has been to have statutory provisions which prevent solicitors from rendering any solicitor/client bills for such work. This was the system that existed from 1926 to 2012. In the Association's view it worked perfectly well and provided injured workers with complete protection from this concern. It could simply be reinstated.

7.3 Obviously though the complete protection afforded by 7.2 above requires that the costs recoverable on a scale party/party basis provide a reasonable level of fees to cover the cost of providing the services including what can be regarded as a reasonable "profit" margin.

7.4 In the Association's view any concerns relating to workers being improperly encouraged to advance inappropriate review applications can be dealt with through existing statutory safeguards, which can include referrals to the Legal Services Commissioner.

7.5 Some thought might also be given to monitoring "compliance" by employers, scheme agents and other insurers with respect to the various procedural and other obligations they have under the Acts, Regulations and Guidelines. Their actions can result in unnecessary costs being incurred.

Focus question 8: How should eligible legal costs be billed, paid and claimed?

8.1 The following commentary assumes that a system of scale costs akin to Schedule 6 WCR will be created.

8.2 Following an internal review the scheme/agent insurer should agree to pay the relevant scale costs recoverable, plus reasonable disbursements (see 9.2 below for some comments on disbursements). If they refuse to do this or there is a dispute about what the proper amount is, a procedure should be available to determine the correct amount or to otherwise require payment. This could presumably be done through an application to the Merit Review Service, limited to dealing with the costs payable.

8.3 Following a merit review, the relevant decision maker should make an order (or directive) requiring the payment of the relevant scale costs for the merit review plus reasonable disbursements. This decision maker should have a general discretion to vary the scale costs in appropriate circumstances.

8.4 Following a procedural review to WIRO, the relevant decision maker should make an order (or directive) requiring the payment of the relevant scale costs for the procedural review plus reasonable disbursements. This decision maker should also have a general discretion to vary the scale costs in appropriate circumstances.

8.5 After a costs order/directive is made, the worker's solicitor should submit an assessment of the costs and disbursements to the scheme agent/insurer. The correct amount payable should normally be fairly easy to ascertain and should normally be payable within say 28 days. It would be prudent to provide for interest to be payable if the sum is not paid within say 28 days of any agreement or order/directive relating to the correct amount payable. As an ultimate protection to ensure costs are paid there should be a framework which enables the costs and any applicable interest to be recoverable as a debt in a court of competent jurisdiction.

Focus question 9: What are important operational and administrative matters that must be considered when designing this regulation?

9.1 As noted in 7.3 above the fees have to be realistic in terms of the work required, the costs of providing the legal services and what can be regarded as a type of profit margin. Any assumptions about the amount of time required should be made by individuals with significant actual experience of such work. Alternatively any assumptions or opinions about such matters should be formed after consulting experienced solicitors who perform such work.

9.2 As also noted previously it is important to provide a system which provides realistic higher fees for more complex matters or matters which proceed through various stages. Discretions to permit variations to the costs recoverable in suitable unusual circumstances are also important.

9.3 One important topic not previously covered in these submissions concerns disbursements. These will vary from matter to matter but will largely relate to interpreter's fees and medical report fees. These can also be provided for in schedules, which provide maximum fees payable for certain common disbursements. Of course any relevant maximums have to be realistic.

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

10.1 There are particular difficulties which arise from workers who are illiterate or who have limited fluency in the English language. Many of these workers simply cannot read the communications they receive about WCDs or what they can do about them.

10.2 It would be useful if the initial claim documents could advise whether literacy or fluency is a practical concern. This could be done through questions on claim forms and medical certificates. Scheme agents or insurers can also reasonably be required to note whether there is a practical problem in this regard which otherwise comes to their attention.

10.3 For workers in this situation the WCD documents sent to them should have a suitable notice in their native language advising them that the documents are important and which direct them to a suitable service, which can translate the documents for them. On line FAQ type pages in the more common languages could also assist.

10.4 There may also be scope for liaison with the Law Society to produce lists of solicitors who are fluent in particular languages.

10.5 As the initial internal review stage commences a series of procedures which have to be carried out in very short time periods, it would also be fair to have a standard warning in WCD documents about this with the suggestion that legal advice be sought if a worker is uncertain how or when to proceed with any application.

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?

11.1 A fair number of injured workers have previously been unable to seek to have WCDs reviewed as they have thus far been unable, because of the past cost restrictions, to obtain the services of a solicitor. Although it is obviously fairer for workers in the future to have legal representation - it

would be fairer still if workers previously denied representation were now permitted to bring reviews with the benefit of representation.

11.2 This should be facilitated by provisions which will permit time to be extended for the seeking of such reviews, by workers who have previously been unable to do so.

11.3 There is of course also a fourth potential review stage in the WCD process - in the form of judicial review in the Supreme Court.

11.4 In practice this fourth stage is simply not accessible to workers. This is because they typically only have modest assets and they cannot risk the potential of an adverse costs order if their application is unsuccessful. Hence some workers are disadvantaged because meritorious applications are not being presented to the Supreme Court. The entire Scheme also suffers in the sense that areas of doubt are not clarified and reviews by the Supreme Court, which the legislation refers to, essentially do not exist.

11.5 For this fourth stage to actually be available there needs to be a body which, in obviously meritorious or important matters, can either provide an indemnity to the worker for any costs order or simply direct the insurer/scheme not to enforce any costs order made. (The same practical problem also exists with appeals from Medical Appeal Panel errors.)

11.6 Consideration should also be given to at least the Merit Review decision maker actually meeting an appropriately represented injured worker (in conjunction with any employer/scheme agent representative), to assist the decision maker in forming a view about the person's ability to earn in some suitable employment or occupation. Mere documents cannot convey the detail of a person's appearance, manner, speech or ability to communicate - which are important to potential employers and hence important to their ability to earn income from real world jobs.

11.7 Somewhat more fundamentally it is also worth noting that between 1987 and 2015 the workers compensation legislation and the related regulations in NSW have been allowed to become significantly more complex than other Australian jurisdictions. For example since 2012 there have been three different dispute resolution jurisdictions for most workers in NSW - the WCD system, Approved Medical Specialists and the Workers Compensation Commission. The current undesirable reality is that each of these jurisdictions can come to decisions which are inconsistent with each other. The circumstances of the same worker can also be the subject of forensic consideration in the three different jurisdictions at the same time.

11.8 All of this produces unnecessary complexity, delays and costs. In the medium term there is no obvious reason why the Scheme cannot be revised back into a Scheme with one Act, one series of Regulations and one dispute resolution tribunal - with fair procedures and appropriate representation.