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## **State Insurance Regulatory Authority**

### **Discussion paper on regulation of legal costs for work capacity decision reviews**

**Submission from Insurance & Care NSW**

**workcover insurance / lifetime care / dust diseases / self insurance / sporting injuries**

icare is the brand of Insurance & Care NSW, and acts for the Workers Compensation Nominal Insurer and provides services to Workers Compensation (Dust Diseases) Authority, Lifetime Care and Support Authority, Sporting Injuries Authority and NSW Self Insurance Corporation.

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## Introduction

icare supports SIRA in its aim to create a fairer, more sustainable and customer focused system. This includes the regulation of legal costs in connection with work capacity decisions. To achieve this aim, it is critical that the impact upon the key stakeholders, employers and injured workers, is considered. It is essential therefore that the new regulation is appropriately designed and effectively implemented. The outcome should be a cost effective and sustainable framework that embodies a philosophy of simplicity and transparency.

Currently, disputes about work capacity lead to uncertainty, and often anxiety, for injured workers. This is because the process is unclear and difficult to navigate, causing confusion as to available options. This is exacerbated by complex timeframes that are imposed by legislation under separate jurisdictions and at different stages of the process. The process is protracted and has multiple touch points which results in even greater costs to all stakeholders.

The New South Wales Workers Compensation Insurance Scheme is funded by premiums from the State's employers, and it is recommended that any legal costs model consider the direct and indirect costs to these employers. It is also recommended that employers form an integral part of the consultation process.

In the development of the regulatory framework, icare suggests a number of guiding principles be taken into account, including that:

- incentives be incorporated into the new arrangements to ensure legal services are directed at improving the outcome of the work capacity decision making and review process for injured workers;
- the impact on the long-term sustainability of the Scheme be considered;
- the regulation be designed to allow simple application and avoid any unnecessary administrative burden or cost;
- further consideration be given to simplification of the dispute resolution process to ensure it is transparent, timely and cost effective, with reference to the models adopted by Victoria and Queensland;
- the regulation be robust to avoid undesirable or unintended behaviours from all stakeholders resulting in escalating cost to the Scheme; and

- a legal costs scale will not necessarily reflect the time spent on individual matters, because the position of each injured worker is different.
- costs to follow the event unless icare believes it has merit for clarification and benefit to the Scheme.

In addition, icare suggests the following options be considered.

#### Option one

- The provision of flat legal costs for lawyers acting on behalf of injured workers in relation to interpretation and clarification of an adverse work capacity decision, in order to avoid any potential dispute.
- Lawyers for both injured workers and insurers could be remunerated for resolving matters before a merit review has been completed. icare suggests that lawyers be entitled to a flat fee for reviewing and clarifying the decision of an insurer on behalf of an injured worker or insurer, and providing advice. The lawyer can recover the fee if the matter is resolved before a merit review proceeds. This approach would reduce uncertainty and anxiety for injured workers, the costs to employers and insurers, and the costs to SIRA in conducting merit reviews.

#### Option two

- Provision of legal costs where a decision is made by SIRA following a merit review, which is more favourable to their client (the injured worker or insurer) than the decision made following internal review by the insurer.
- If the matter is not resolved and a merit review takes place, a lawyer may only be entitled to recover a further fee if the outcome of the review is more favourable to their client (the injured worker or insurer) than the decision made by the insurer following internal review. The Merit Review Service will state whether the decision is more favourable.

#### Option three

- Provision of legal costs for adverse work capacity decisions to be granted only after all internal reviews have been exhausted.

## **Conclusion**

icare would be pleased to provide any further information required to assist with the development of a regulation that provides a fair, effective and timely process for resolving disputes about work capacity, while maintaining the financial sustainability of the Scheme.

We note however that provision of legal costs support is not a complete solution to the issue of providing more certainty to stakeholders and icare would recommend that any proposed solution takes into account the opportunity to develop a clearer and effective dispute resolution process, with fewer touch points and jurisdictions, when considering submissions.

## **APPENDIX**

### **Pre-2012 reforms**

Reforms to workers compensation legislation introduced in 2001 established the then WorkCover's Claims Assistance Service, which provided impartial telephone-based advice to assist injured workers navigate the Scheme. Customer Service Centres for icare, SIRA and SafeWork NSW continue to provide this service.

The reforms also established the Workers Compensation Commission, an independent judicial body that provides a system of non-adversarial dispute resolution directly involving the parties in an accountable and accessible process.

These changes created a significant reduction in workers compensation disputes.

When lodging a dispute, injured workers were able to access legal representation but did not pay the associated costs. A legal costs scale was introduced to reflect the new procedures for dispute resolution, and ensure that lawyers were rewarded appropriately in resolving disputes about workers compensation claims.

It was necessary to regulate legal costs because the person lodging a dispute bore little or no risk, and therefore the arrangements did not discourage the pursuit of disputes that were unviable or vexatious.

Despite the regulation in place, legal costs were consuming 16 per cent of the annual gross cost of claims in 2001/02. Further down the track, the Comparative Performance Monitoring Report for the 2009/10 financial year showed New South Wales had the highest expenditure on 'services to workers', including legal costs.

### **2012 legislative reforms**

Under further legislative reforms introduced in 2012, a new administrative process was put in place whereby insurers make work capacity decisions about workers, which can have a significant impact on the amount of compensation payable.

Past experience had shown the importance of balancing the benefits available under the Scheme in relation to legal and other costs, with the ability of New South Wales employers to fund them through their premiums.

It was necessary to limit the possibility of increased legal costs due to the introduction of the worker capacity decision process, and to discourage vexatious legal disputes that could cost the Scheme large sums of money and put its sustainability at risk.

The legislation introduced in 2012 provides for workers to seek an administrative review of a work capacity decision via a three stage process:

- Internal review undertaken by the insurer
- Merit Review undertaken by the State Insurance Regulatory Authority (SIRA)
- Procedural review undertaken by the Workers Compensation Independent Review Office (WIRO).

Section 44(6) of the amended *Workers Compensation Act 1987* provides that a legal practitioner acting for a worker is not entitled to be paid or recovery any amount for costs incurred in connection with a review under this section of a work capacity decision of an insurer. This was the result of a non-Government amendment implemented during the passage of the 2012 workers compensation reforms.

The reforms also included the establishment of the Independent Legal Assistance and Review Service within the Workers Compensation Independent Review Office (WIRO). The Review Service facilitates free independent legal advice to injured workers, in circumstances where there is a dispute regarding entitlements. It has been designed to ensure the efficient, fair and equitable resolution of disputes, without unnecessary financial burden on workers. However, the Review Service does not have jurisdiction to assist with disputes about work capacity decisions.

### **Independent reviews**

The Standing Committee on Law and Justice *Review into the exercise and functions of the WorkCover Authority*, and the Centre for International Economics *Statutory review of the Workers Compensation Legislation Amendment Act 2012*, conducted extensive stakeholder consultation in relation to the New South Wales workers compensation system in 2014, which has been considered in developing further proposed reforms.

Specific to the reviews, the Law and Justice Committee 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.’*

The Centre for International Economics Review similarly noted that:

- legal costs reforms have resulted in unintended consequences that *‘are arguably counter to the spirit of the objectives of reform’*
- such restrictions on legal costs do not exist in any other jurisdiction
- lawyers arguably filter out nonsensical claims and provide advice, which is mostly free.

This review also 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.

It 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’.*

### **Stakeholder feedback/input**

The changes made to legal cost arrangements under the 2012 legislative reforms have not been well received by stakeholders. The arrangements have proved problematic in that workers do not have access to the same legal advice for decisions that affect their benefits as insurers do through internal counsel and panel solicitors. This has led to the perception by workers that they are treated unfairly by insurers who have significant responsibilities in relation to decisions surrounding their workers compensation claim.

Workers have also indicated that the current system is too complex, difficult to understand and unfairly prejudices workers.

The Law and Justice review noted feedback from stakeholders on legal cost arrangements. For example, one injured worker commented that:

*‘it seems ridiculous that I am expected to understand and respond to this new legislation without the right of acquiring legal representation’.*

Some stakeholders highlighted the issues the lack of legal representation can cause for injured workers from different educational and cultural backgrounds.

The Centre for International Economics’ statutory review also included extensive stakeholder consultation and found that:

*‘the merit review process is believed to lack full independence because of the dual role of WorkCover and the lack of legal representation for workers with respect to work capacity decisions, creating the perception of being ‘pro insurer/employer’.*

Submissions and feedback provided to the review contained criticisms of the current arrangements, including that:

- *‘the restrictions placed around legal representation in the merit review process do not exist in any other jurisdiction, where injured workers are typically afforded legal representation’;*
- *‘injured workers are unlikely to be able to put together the documents and gather and present lay and expert evidence necessary to support their claims for a merit review’;*
- *‘the merit review process will therefore favour the insurers and WorkCover who are primarily concerned with reducing employer and fund liability’; and*
- *‘...the work capacity decision process can be used to terminate a worker’s benefits rather than to achieve a sustainable and realistic return to work objective’.*

## **icare**

icare is a single service entity that delivers person centred services to WorkCover Insurance, Lifetime Care and Support, the Dust Diseases Scheme and SICorp as individual schemes, in the same way Safety, Return to Work and Support did previously.

It aims to be a centre of excellence for providing insurance services, return to work solutions, and care for people who have been severely injured in the workplace or on the road.

Based on its current assets of \$30 billion, and liabilities of \$26 billion, icare is the largest general insurance service provider in Australia..