Consultation on the McDougall Review, COVID-19 and future opportunities for personal injury schemes

November 2021

BUSINESS NSW

INTRODUCTION

Business NSW welcomes the opportunity to provide input to contribute to the *Consultation on the McDougall Review, COVID-19 and future opportunities for personal injury schemes*.

As NSW's peak business organization, Business NSW has more than 30,000 member businesses across NSW. We work with businesses spanning all industry sectors including small, medium and large enterprises. Operating throughout a network in metropolitan and regional NSW, Business NSW represents the needs of business at a local, state and federal level.

BUSINESS NSW'S SUBMISSION

PART A: REFORM OPTIONS FOR CONSIDERATION

7.2 Further assessment of degree of permanent impairment

Q2. What limitations and controls should be placed upon a further assessment of impairment?

Recommendation 1:

That any further assessment of impairment includes an assessment of the degree to which the deterioration is attributable to the injury (as defined under the legislation) which is the subject matter of the claim.

Business NSW remains concerned that claims are being managed by the Nominal Insurer without sufficient regard being had to the legislative requirements.

In relation to permitting a further assessment of degree of permanent impairment, Business NSW would like to see controls put in place to ensure that the deterioration being assessed has been caused by the (workplace) injury as opposed to other causes unrelated to that injury.

Q4. Should a further assessment of impairment be limited to certain injuries - for example, those prone to deterioration over time?

Recommendation 2:

That the question whether a further assessment of impairment be limited to certain injuries should be informed by the data collected within the scheme which records:

- the nature and type of injuries that have deteriorated over the life of a claim; and
- whether that deterioration has a sufficient nexus to the injury (as defined under the legislation) which is the subject matter of the claim.

Any decision to place a limit on conducting a further assessment of impairment on an injured worker's injuries needs to be evidence-based and designed to ensure the schemes objectives, particularly in relation to return to work outcomes and the delivery of those outcomes in an efficient and effective manner, are not impeded in any way.

7.3 ‘Reasonably necessary’ test

Q5. What are the advantages and disadvantages of replacing the words ‘reasonably necessary’ in section 60 of the Workers Compensation Act 1987 with the words ‘reasonable and necessary’?

Recommendation 3:

That, as a matter of urgency, the NSW government:

- prioritize improving efficiencies within the NSW WC scheme in order to reverse the continuous declining return to work outcomes and reduce the overutilization of medical costs; and
- defer any consideration of replacing the ‘reasonably necessary’ test with a ‘reasonable and necessary test’ until after these results have been achieved.

The discussion paper

The question posed by this discussion paper assumes a need to consider an alternative test (being ‘reasonable and necessary’ as opposed to ’reasonably necessary’) and purports to rely on one of the recommendations[1] made by Mr. McDougall in his report, being:

“That the legislature give consideration to amending section 60 of the Workers Compensation Act 1987 to replace the words ‘reasonably necessary’ with the words ‘reasonable and necessary’.”

However, in order to ‘give consideration’ to amending the section, evidence is needed to both support the need for change and show why the proposed test is the preferred solution.

Instead, the discussion paper simply makes the following statements:

- that the ‘reasonable and necessary’ test is used in the CTP scheme;
- in his report[2], Mr. McDougall found that the test of ‘reasonably necessary’ “*is unlikely to be straightforward*”[3].
- that feedback was given to the Mr. McDougall that the reasonable and necessary test:
  - “*would introduce a more restrictive test and raise the bar for medical payments*”;
  - allows for *“‘low value’ or potentially harmful treatments to be approved*”; and
  - “*explains the rising healthcare costs in the workers compensation system*” but notes that “*it has only been since 2016 that there has been a rapid increase in workers compensation healthcare costs*”.

[1] Recommendation 39, paragraph 151 at page 275.

[2] icare and State Insurance and Care Governance Act 2015 Independent Review, Report by the Hon Robert McDougall QC, Independent Reviewer, 30 April 2021

[3] [140] at page 274

The paper then concludes that changing the current test "*requires further consideration of the issues raised by the McDougall Review and stakeholders, to ensure the test adopted delivers the best possible outcomes for injure people*."

However, for each of these points, there is relevant information that can aid the discussion and warrants consideration.

The reasonable and necessary test being used in the CTP statement

The fact that the NSW workers compensation scheme (the NSW WC scheme) and the NSW compulsory third party scheme (the NSW CTP scheme) use different tests, without more, is not a sufficient reason for changing the definitions.

Consideration needs to be given to the fact that each of the two schemes has a different:

- underwriting model;
- threshold test for eligibility, and
- unlike the NSW CTP scheme, the statutory objectives of the NSW WC scheme include:
    - "*to provide— prompt treatment of injuries, and effective and proactive management of injuries, and necessary medical and vocational rehabilitation following injuries, in order to assist injured workers and to promote their return to work as soon as possible*"; and
    - "*to deliver the above objectives efficiently and effectively*".

Mr. McDougall's statement that the test 'is unlikely to be straightforward'

It is difficult to see how this is relevant, given the test has been successfully used since 1987.

The proposed test being 'more restrictive' and 'raising the bar' on medical payments

The NSW WC scheme is a scheme that consists of a statutory trust funded by employers.

It has a number of statutory purposes which must be achieve in an efficient and effective manner.

The discussion paper has not shown how using a more restrictive test to 'raise the bar' to medical costs will help achieve those purposes and/or not create further inefficiencies within the system.

Allows for 'low value or potentially harmful treatments to be approved'

No evidence to support this statement has been provided.

However, there is evidence to the effect that there has been an overutilization of medical costs and that evidence has not been included in this paper.

'Explains the rising healthcare costs'

It is difficult to see why the paper includes this statement as a relevant consideration, given it clearly refers to feedback given to the McDougall review and has not been accompanied by the resultant finding by Mr. McDougall[4] which was that:

[4] [1419] at page 275

"*there is insufficient evidence to allow me to come to a clear decision one way or the other on the cost issue. Likewise, I cannot come to a clear decision on the relationship (if any) between the present test and medical outcomes*".

Other information missing from the discussion paper

The 2020 review of the Workers Compensation Scheme

On the same day Mr. McDougall's report was released, the Legislative Council's Standing Committee on Law and Justice ('the committee') also released a report (Report No 75) following its *2020 review of the Workers Compensation Scheme*.

During the committee's hearings, Ms. Carmel Donnelly (former CEO of SIRA) gave evidence that:

- the rate of growth in medical costs for the Nominal Insurer outpaced the experience of other insurer types and that this could not be attributed to new claims because the "*number of claims going to the Nominal Insurer are relatively stable— they do not have a problem with a whole lot of new claims, significantly. It is the number of people who are staying on benefit for longer because return to work has declined … Utilisation, which is using more services for the same profile of injured people, is accounting for about 52 per cent of the increase*";

- a review commissioned by SIRA found inadequate controls in one in four medical payments, demonstrating that significant room for savings existed in its medical costs through better administrative practices; and

- the 'reasonably necessary' test has been in place since 1987, and that what she does "*not understand is why it worked for 30 years and now, in the past three years, there has been an issue*".

Mr Peter McCarthy, a retired actuary from EY, also gave evidence to the Standing Committee saying that, in relation to medical costs "*icare lost control of medical costs on claims which resulted in significant over servicing and over billing by medical and allied health professionals*', and that '*…it is clear that there is inadequate scrutiny of medical treatment and invoices by icare*'.

The NSW WC scheme's return to work rates are still in decline

SIRA's dashboard confirms that return to work rates are still in decline.

Conclusion

All of this additional information is relevant to the matter being considered.

Given this further information, question 5 then begs the question "*is there are need to replace the "reasonably necessary" test with the 'reasonable and necessary test?*"

Business NSW's answer to that question is "*no, but there is a need to identify and implement ways to overcome the current inefficiencies within the system that are driving the poor return to work outcomes.*"

7.4 Commutation and settlement

Q7. Given historical experience, what controls are appropriate in expanding access to commutation?

Recommendation 4:

A targeted commutations program be introduced so that the cost of the program does not add to scheme costs or promote a lump sum culture among claimants.

Business NSW notes that, historically, making it easier for injured workers to access lump sum payments in lieu of the receipt of benefits over the period of their claim tends to drive a 'lump sum culture' and may motivate individuals to 'game the system'.

In addition, if claims agents and/or scheme agents are remunerated in a way that incentivizes commutations, it is possible that commutations will be reached at the expense of the injured worker if agreed upon before the injured worker's injuries have fully settled.

Commutations can be an effective strategy for managing long tail claims and providing long term claimants with both the incentive and means to move away from scheme dependency.

However, given that the NSW WC scheme is an injury management and return to work scheme underpinned by insurance principles, care needs to be taken that all other options have been exhausted before commutation is considered

A targeted commutation program in the 1990's was initially successful allowing long tail claimants to move on while reducing scheme liabilities. That initial success was lost when commutations became a convenient way for the then licenced insurers to reduce their tail.

The development and passage of this program can be used as a starting point should the NSW government be minded to expand access to commutation.

7.6 Definition of suitable employment

Q11. Is the definition of suitable employment used prior to the 2012 reforms more appropriate than the current definition? What risks would you see with re-instating the previous definition?

Recommendation 5:

That the current definition of suitable employment be retained, because it clearly differentiates between issues relating to the injury (which is compensable under the scheme) from labour market issues (not compensable under the scheme).

Business NSW understands that the reason why one of the outcomes of the 2012 reforms was the amendment of the definition of 'suitable employment' was to clearly differentiate issues relating to the injury (which is compensable under the scheme) from issues relating to the labour market (not compensable under the scheme).

The NSW WC scheme needs to be protected from matters that lie outside the scheme's control. Therefore, the definition should remain.

Q12. What might be an alternative solution or definition and why?

Recommendation 6:

That consideration be given to amending the legislation in relation to:

- improving the quality and quantity of work capacity decisions by:
  - having them conducted more regularly; and
  - ensuring that there is an adequate level of consultation early in the life of the claim with rehabilitation providers and the injured worker's pre-injury employer to best achieve the statutory objective relating to return to work outcomes;
- oversight in relation to Certificates of Capacity; and
- non-compliance with return to work obligations.

Recommendation 7:

That the premium formula be revised to ensure that, where:

- an injured worker has some work capacity,
- their pre-injury employer can and has offered suitable employment to the injured worker; and
- the injured worker has refused to take up the offer of suitable employment,

costs relating to time lost (following the above events) is not included in the premium-impacting costs.

The NSW WC scheme's objectives[5] include:

(b) to provide—

- *prompt treatment of injuries, and*
- *effective and proactive management of injuries, and*
- *necessary medical and vocational rehabilitation following injuries,*

in order to assist injured workers and to promote their return to work as soon as possible,

(c) to provide injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses,

(e) to ensure contributions by employers are commensurate with the risks faced, taking into account strategies and performance in injury prevention, injury management, and return to work,

[5] Section 3, *Workplace Injury Management and Workers Compensation Act 1998 No 86*

(f) to deliver the above objectives efficiently and effectively.

These objectives are not being realized.

It is well known that, within a workers' compensation scheme, poor injury management practices result in poor return to work outcomes.

In any workers' compensation scheme, there are three questions that need to be asked:

1. Does the injured worker have work capacity?

2. If so, can they undertake 'suitable employment?

3. If so, is 'suitable employment' available?

Member feedback obtained by Business NSW indicates that significant drivers of the scheme's poor return to work outcomes consist of:

- work capacity decisions not being undertaken regularly or in a timely manner (Business NSW understands that, if an injured worker has not returned to work within six months from the date of injury, it is highly unlikely that they will return to the workplace at all);

- poor oversight in relation to:

    - Certificates of Capacity; and

    - breaches of section 48 of the 1998 Act;

- workers being permitted to refuse (without good reason) to return to their pre-injury place of work despite there being suitable employment available to them; and

- injured workers changing their place of residence, moving to a vicinity where the employer cannot offer suitable employment.

Business NSW notes than none of the drivers outline above lie within the employer's control, yet experience-rated employers are, in effect, penalized for the outcomes they cause.

PART B: IMPACT OF COVID-19 ON PERSONAL INJURY SCHEMES

8.1 Addressing the impacts of COVID-19 in a sustainable way

Q15. How can the needs and interests of scheme participants be balanced during COVID-19 so that there are optimal outcomes for injured people and scheme sustainability for policyholders?

Recommendation 8:

Where workers are required to be fully vaccinated (whether it be pursuant to a public health order or subject to an employer's mandate) and suffer serious adverse side-effects from having received a vaccine dose, those adverse side-effects should be regarded as being an "injury" having arisen out of or in the course of employment.

How someone can be said to have a COVID-19-related illness

Broadly speaking, an individual can experience ill-health from COVID-19 in one of two ways, from either:

- contracting COVID-19; or
- suffering from an adverse side-effect from a vaccine designed to protect the individual from the severity of COVID-19, should they contract it.

Currently covered by the 1987 Act – contracting the virus

Currently, section 19B of the 1987 Act (and its accompanying regulations) provides that COVID-19 is presumed to be an occupational disease if it has been contracted in particular circumstances.

Those circumstances relate mainly to customer-facing occupations where a diagnosis can only be confirmed after a particular type of COVID test has been conducted.

However, this presumption can be rebutted, and the NSW government's contact tracing and genomic sequencing activities are useful in this respect.

Not currently covered – adverse vaccine side-effects

Earlier this year, vaccines designed to protect an individual against the severity of COVID-19 became available, albeit in cohort-dependent stages.

The ability to re-open the NSW economy is heavily dependent on a sufficient number of people getting themselves vaccinated.

To be fully vaccinated, you need to have received two doses of the vaccine, which is administered as two separate injections spaced a number of weeks apart.

Unfortunately, some people who receive a COVID-19 vaccine became extremely ill from the vaccine, sometimes needing hospitalization.

In some industries, under public health orders, workers are required to be fully vaccinated before they are allowed to return to work.

Individual employers have also been requiring their workers to be fully vaccinated before they allow them to return to work.

If a worker is vaccinated subject to a public health order or an employer's mandate, then, given the obvious nexus to the workplace, the ability to claim workers compensation for any serious adverse side-effect should not require legislative change.

However, if legislative change is required, instead of expanding section19B (for reasons set out below) consideration should be given to inserting a section similar to those covering journey claims, recess claims and claims made by trade union representatives.

Q16. Should there be a statutory review of, or limits (such as time limits), placed on measures taken in response to the COVID 19 pandemic like the workers compensation COVID-19 presumption?

Recommendation 9:

That there be a statutory review to consider whether, given COVID-19 will soon shift from being a pandemic to being endemic, section 19B remains fit for purpose or whether other mechanisms would be more appropriate for differentiating those COVID-19 injuries that should be covered by the NSW workers compensation scheme and those that are the properly responsibility of the public (and private) health system.

There is no doubt that the COVID-19 pandemic wreaked havoc on people's health and livelihoods and that steps needed to be taken to support front-line workers who were at greatest risk of contracting COVID-19 when it first arrived in Australia in early 2020.

However, the situation (both from a health and from an economic perspective) is beginning to look very different that it did even six months ago.

It is unlikely that Australia will ever get to zero-COVID, as first thought, and we would be naïve to think that new strains which are vastly different from previous strains (such as the delta strain when compared with the alpha strain) won't enter the country.

We are also seeing an increase in the volume and variety of medical solutions such as vaccines, rapid-antigen testing and therapeutic treatments being developed and made readily available. These developments are running in parallel with the inevitable phasing out of contact tracing and genomic testing.

We are hopefully at the tail end of the pandemic phase of COVID-19 and about to shift into the endemic phase.

Given this change in risk profile, it is time to re-assess how the NSW workers compensation system can be adapted so it remains both sustainable and fit for purpose as we learn to 'live with' COVID-19.

PART C: FUTURE OPPORTUNITIES FOR PERSONAL INJURY SCHEMES

Shaping the future compensation system and aligning support for people injured on the road or at work

Q20. Are there opportunities for alignment across schemes that would improve outcomes for injured people, premium affordability and scheme sustainability?

Q21. How could thresholds and entitlements be modernised to meet best practice and be closer aligned to value-based care?

Q22. How can there be greater alignment of the workers compensation and CTP schemes so that people with the same type of injury receive the same type of treatment and outcomes?

Recommendation 10:

Business NSW is opposed to any further alignment between the two schemes and would prefer to see the government focusing all of its efforts on adopting whatever measures are necessary to improve the Nominal Insurer's injury and claims management practices and reverse the continuous decline in return to work outcomes.

However, should the NSW government decide to proceed with such an alignment, steps need to be taken to ensure that regard is had to:

- the fundamental differences between the two schemes; and
- whether such an alignment will result in both schemes becoming more efficient and more effective at achieving their respective statutory objectives, with return to work being a notable one.

The ability to achieve these outcomes must be apparent from the business case that needs to be produced to support such a fundamental change in the legislative framework governing both of NSW's personal injury schemes.

Business NSW has long been advocating for the different pieces of workers compensation legislation to be consolidated and streamlined and is very much looking forward to contributing to that process and agrees that it presents a unique opportunity for NSW.

However, we caution against adopting a course of action (such as further aligning the NSW WC scheme with the NSW CTP scheme) which appears attractive at face value but which may not be able to accommodate the fundamental differences between each of the two schemes.

Care also needs to be taken to avoid unintended consequences, such as forum-shopping.

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