

Victorian Workers' Compensation System: Independent Review into the Agent Model and the Management of Complex Claims

Joint Written Submission from the Common Law Bar Association and Compensation Law Bar Association

Background

1. The Common Law Bar Association comprises 343 members of the Victorian Bar who practise in common law matters.
2. The Compensation Law Bar Association comprises in excess of 100 members of the Victorian Bar who practise in matters concerning statutory entitlements pursuant to the *Workplace Injury Rehabilitation and Compensation Act 2013* (and the *Accident Compensation Act 1985*), the *Transport Accident Act 1986* and the *Safety Rehabilitation and Compensation Act 1988* (Cth).
3. Both associations serve to keep members updated about recent developments in legislation and case law.
4. Members of the Victorian Bar who practise in personal injury law may hold membership of both organisations.

Identifying, assessing and case management of complex claims

5. As practising barristers, we do not feel that we have the necessary expertise to comment on questions 3-7.

Financial Incentives and Agent Decision-Making

6. Our members regularly express disquiet as to the financial incentives, methods of remuneration and Key Performance Indicators which are utilised to incentivise the agent insurers in the current agent model.
7. Our concern is the nature of the role played by the incentives in driving the behaviour of decision-makers in the agent model, when applied to individual claims management decision-making and management of claims litigation generally and more particularly, whether these incentives are the paramount drivers of behaviour in decision-making at the agent insurers.
8. Our members recount numerous experiences of seeking instructions from agent insurers or having our instructing solicitors seek instructions from agent insurers at court, and being advised directly or indirectly that various instructions cannot or will not be given because it would cause or create “difficulties” with the relevant KPI and/or would not meet the relevant agent insurer KPI.
9. Critical and relevant factors such as the soundness or correctness of the agent insurer decision, the effect of the decision upon the relevant worker, any additional monies which might be expended in legal costs to defend the decision and sometimes judicial indication that more efforts ought be made

for the parties to reach agreement about a matter seem to take less priority than the much discussed KPIs.

10. Overall, our submission is that these drivers of behaviour appear to play far too great a role in claims management, claims decision-making and litigation, to the detriment of other matters outlined above and that financially-driven (by incentives) decision making by the agent insurers in the current agent model is a major systemic issue which requires review.

11. In terms of alternative incentives (financial or otherwise) or drivers of behaviour, we suggest some of the following might be considered which may lead to better or more optimal outcomes for injured workers and users of the agent model:

- a. incentivising the length of time it takes to make decisions, particularly in respect of medical and like decisions;
- b. incentivising the length of time it takes to resolve litigation;
- c. incentivising the decisions made by the agent insurers being upheld by the relevant conciliator or court i.e. the quality of the decision-making; and
- d. incentivising the worker's satisfaction with the claims process and/or return to work program, when a claim is finalised.

Oversight of Agents by WorkSafe

12. There are 5 separate agent insurers overseen by WorkSafe in the current “agent model” - Employers Mutual Ltd, Gallagher Bassett, CGU, Allianz and Xchanging.
13. Many are individually large insurance organisations, with their own commercial culture and identity. The divisions of these companies that deal exclusively with WorkCover insurance in Victoria are often a small part of a much larger corporate entity or insurance group.
14. Whilst we are not privy to the contractual arrangements between WorkSafe and the agent insurers pursuant to the agent model, we were advised at the consultation review meeting that WorkSafe’s contracts with the agent insurers are “lengthy” and provide WorkSafe with “a lot of prescriptive power” in relation to the agent insurers.
15. In our view it is necessary to obtain consistency between agents in the decision-making process. This task is more difficult if claims agents have different cultures within their own organisations. Worksafe should seek to ensure that there is a common culture among the agents in relation to complex claims.
16. This is particularly desirable in the context of decisions which seek to comply with the applicable Model Litigant Guidelines.
17. Additionally, the 5 separate agent insurers procure legal advice from 7 different legal firm panel members, who also have their own cultures and

identity, and are separately incentivised with KPIs imposed by WorkSafe, which are often different to the agent insurer incentives.

18. In our submission, the ability for WorkSafe to have oversight of this type of agent model must necessarily be limited by the degree of complexity in the sub-strata of agent insurers and legal panel firms which underpin the agent model.

19. Our members' experience is that, if any control of agent insurer claims management or decision-making, or management of claims litigation, is vested with WorkSafe by virtue of its contracts with the agent insurers, then that is not immediately evident "on the ground".

20. If oversight was being exercised in relation to claims decision-making and claims litigation by WorkSafe, then we might reasonably expect a more consistent approach between the agent insurers.

21. One suggestion made in the consultation review meeting to ensure consistency of approach is that WorkSafe provide the instructions in statutory benefits litigation (as it does in common law litigation) in an effort to standardise the approach and minimise the potential inconsistencies in the current agent model.

Evaluation Measures

22. We suggest some of the following might be considered by way of evaluation measures for injured workers which may lead to better or more optimal outcomes in the agent model:

- a. evaluating the satisfaction with the length of time it takes to make decisions at the agent insurer;
- b. evaluating the satisfaction with the length of time it takes to resolve litigation by the agent insurer and/or legal panel firm;
- c. evaluating the satisfaction with the quality of the decision-making at the agent insurer; and
- d. evaluating the worker's satisfaction with the claims, and/or return to work process, when his/her claim is finalised.

23. These are identical to the suggestions made for incentivising agents, that is, we suggest that incentives for decision-makers and managers of the agent model should match evaluation for users of the agent model who are directly affected by such decisions.

The Current Agent Model and alternative models

24. In our members' view, the current agent model has limitations, some of which have been described above. Those limitations are all the more evident when dealing with "complex claims".

25. At the very least, high level training of decision-makers is essential.

Becoming familiar with medical terminology, causation concepts and assessing work capacity is challenging and underpins quality decision-making in injury compensation schemes. Quality decision-making often involves questioning medical practitioners, interpreting medical practitioner reports, understanding the relevant medical terminology, inspecting and

interpreting medical records, and applying a degree of practicality and realism to such evidence. Significantly the agent's decision may well be capable of constituting an admission in a subsequent common law proceeding.

26. In complex claim decision-making, the agent is regularly dealing with the growing area of "pain medicine"; an area in which there remains much debate about the medical efficacy of treatments (such as for chronic pain) and the cross-over between organic and non-organic bases for injuries.

27. One model which has been used for comparison purposes, and was discussed at the consultation review meeting, is the TAC model of claims management, which some members believe leads to better quality decision-making and claims management and also outcomes for injured persons.

28. Some features which might be taken from the TAC model for consideration in the agent model are as follows:

- a. greater utilisation of staff who come from allied health professions in claims management;
- b. regular multi-disciplinary meetings between claims and legal staff to drive better outcomes both in claims management, claims litigation and outcomes for injured persons;
- c. applying the same KPIs to both claims and legal staff to encourage acting in concert to achieve optimal outcomes;

- d. simplifying KPIs which are adjusted to drive better client outcomes;
- e. an organisation-wide focus on the injured person as everyone's "client", who is at the heart of the scheme.

29. However, there are significant challenges in attempting to re-create the TAC model in the WorkSafe jurisdiction which ought to be acknowledged:

- a. the injury mix for injured workers is different, and more varied, involving fewer frank injuries and more repetitive strain type injuries;
- b. there is an important additional stakeholder in the agent model - the employer, whose premium is directly affected by outcomes; and
- c. the TAC scheme is much smaller by number of claims, all staff are housed in the same building and work is not sent out to agent insurers or legal panel firms generally which minimises complexity.

30. In terms of the application of the TAC model more specifically to complex claims, we note the TAC have implemented a "triage system" whereby their complex claims are triaged early in claim life and allocated to a different division in the TAC called Independence (formerly the Major Injury Division).

31. These claims usually involve injured persons ("clients") who have serious brain or mobility type injuries and will likely be reliant upon the TAC for life. All aspects of those claims, once triaged into the Independence Division, are managed within that division, including legal work on eligibility, claims management and claims decision-making. There is considered decision

within the TAC that these claims, however so defined from time to time, are to be dealt with “differently” and collectively to drive better outcomes for the client and the organisation.

Victorian Ombudsman 2016 and 2019 Reports

32. Our members view is that change in such a complex area is incremental and it might take some time for any changes implemented following the Ombudsman’s 2016 or 2019 report to be evident to our members in more litigation focussed areas.

33. A general consensus is that changes did occur subsequent to both the 2016 and the 2019 reports but the changes were mostly reported as being incremental, and there is an appetite for a more wholesale or fundamental change to the system rather than “a tinkering around the edges” of the agent model.

34. Our members were divided as to whether a transfer to an approach managed by WorkSafe of the agent model, or a dedicated unit within the current agent model, might lead to the best outcome for injured workers in complex claims, as discussed in the consultation review meeting.

Further Considerations

35. The Independent Review Service referred to at 2.2 of the Discussion Paper is a relatively new development. Anecdotally some of our members have said that they have seen some positive outcomes as a result of it, and

therefore it might be worthwhile giving the Service a reasonable opportunity to become established in relation to complex claims as well.

Dated 18 September 2020