

# 'VICTORIAN WORKERS' COMPENSATION SYSTEM: INDEPENDENT REVIEW INTO THE AGENT MODEL AND THE MANAGEMENT OF 'COMPLEX CLAIMS'

Master Builders Victoria response: 17 September 2020

## 1. Introduction

Master Builders Victoria (MBV) welcomes the opportunity to provide input into your Review of the management of complex workers' compensation claims by WorkSafe agents.

As a representative and advocate for employers in the building and construction industry, MBV is keen to ensure that the review gives careful consideration to the interests of employers in relation to the management of workers' compensation claims and the impact on employers of claims of unnecessarily prolonged duration (even before reaching the point of becoming 'complex' as defined for the purposes of your review). It is noted that by the time a claim reaches 130 weeks the ability of the employer to impact on eventual outcomes is limited, given their involvement will often have ceased much earlier, so their involvement is often limited to the impact on its insurance premium.

MBV acknowledges the important role that employers play in proactively engaging with injured employees in order to have them return to their pre-injury work (or work in any other capacity) as soon as it is safe for them to do so. However, there is only so much that an employer can do. Employers are, to a large extent, reliant on claims being properly and actively managed by WorkSafe's agents.

## 2. Context

In our consultation meeting on 26<sup>th</sup> August you invited participants to share their thoughts on the key factors that drove the Ombudsman to deliver two fairly damning reports in quick succession. We have outlined below our concerns regarding the involvement (or rather lack of involvement) of employers and employer representative groups and consideration of their concerns in both the 2016 and 2019 reports.

Accordingly, MBV welcomes the fact that input is actively being sought from employer associations as part of your Review.

### **2016 report**

The investigation which led to the Ombudsman's 2016 report was very much focused on the impact of action by WorkSafe agents on injured workers.

The 2016 report was the product of an 'own motion' investigation by the Ombudsman in response to more than 500 complaints received by its office during the previous year from "people working in the system".

It is apparent, even just reviewing the investigation's terms of reference, that the interests of employers were not the focus of the investigation. Those terms of reference were to examine whether:

- *agents have unreasonably denied liability or terminated entitlements for workers compensation claims*
- *agents have unreasonably denied liability or terminated entitlements for workers compensation claims to obtain financial rewards available under the remuneration arrangements with WorkSafe*
- *WorkSafe provides effective oversight of agents' claims management, particularly regarding agents' use of IMEs.*

The list of stakeholders identified in the report as having been consulted by the Ombudsman does not include any employers or employer representatives. The report notes that:

“In response to my draft report, WorkSafe noted that the report did not include comments or views from employers. While I understand the important role employers play in the workers compensation system, no employers contacted me to participate in my investigation. I also note that employers should have no role in agent claims management decisions, which was the focus of my investigation.”<sup>1</sup>

While it is correct that employers should not play a role in claims management decisions made by agents, the experiences of employers in dealing with WorkSafe agents (both good and bad) must be relevant to an assessment of agents' claims management practices and the resultant decisions. It is concerning that the Ombudsman did not seek out this input during the 2016 investigation.

## **2019 report**

Despite WorkSafe Victoria implementing each recommendation contained in the 2016 report, the Ombudsman continued to receive complaints “raising the same themes” as the complaints that prompted the 2016 investigation. This prompted a second investigation which culminated in the Ombudsman's 2019 report.

The focus of the second investigation was, like the first, very much focused on the impact of action by WorkSafe agents on injured workers. The following quote from the ‘Foreword’ to the 2019 report highlights this:

**THE FINANCIAL VIABILITY OF THE SCHEME IS IMPERATIVE; BUT THE BALANCE BETWEEN FINANCIAL SUSTAINABILITY AND FAIRNESS FOR INJURED WORKERS HAS TILTED TOO FAR AWAY FROM THE LATTER.<sup>2</sup>**

The 2019 report notes that two employer groups were contacted and afforded the opportunity to provide information but elected not to do so.<sup>3</sup> For the reasons noted above, the input of a broader group of employers, and particularly, employer representative groups into the investigation would have been of significant utility.

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<sup>1</sup> Victorian Ombudsman, Investigation into the management of complex workers compensation claims and WorkSafe oversight, September 2016, p.16, footnote 21.

<sup>2</sup> Victorian Ombudsman, WorkSafe 2: Follow-up investigation into the management of complex workers compensation claims, December 2019, p.5.

<sup>3</sup> Ibid, p.17.



### 3. Key considerations for the Review

MBV is concerned to ensure that the Review recognises that the management of claims, from an early stage, will often determine whether the claim ultimately becomes complex. It is in the interests of all concerned stakeholders, including injured employees, their employers, WorkSafe agents and WorkSafe itself, that claims do not become complex where it is reasonably practicable to avoid this outcome.

In that regard, MBV considers that careful consideration should be given to identifying and adopting measures which are directed at:

- a) identifying - at an early stage - claims which, by virtue of the injuries sustained and the anticipated recovery times and prognoses, have clear potential to become complex claims; and
- b) once those claims are identified, ensuring that appropriately experienced and skilled case managers are involved in the management of those claims.

As was observed by the House of Representatives Standing Committee on Employment and Workplace Relations in its report entitled “Back on the job: Report into aspects of Australian workers’ compensation schemes” (2003):<sup>4</sup>

**WORKERS’ COMPENSATION SCHEMES COMMONLY DO NOT HAVE THE EXPERTISE NEEDED TO ASSIST INJURED WORKERS IN DEVELOPING POSITIVE CAREER PLANS. THE PERSON MANAGING THE INITIAL STAGES OF THE INJURED WORKER’S CASE IS NOT USUALLY ACCOUNTABLE OR RESPONSIBLE FOR THE LONG TERM CONSEQUENCES IF THE CLIENT IS UNABLE TO RETURN TO WORK, OR FOR THE POTENTIAL COSTS IN THE FORM OF COMMON LAW SETTLEMENTS. THERE ARE PARTICULAR SKILLS AND EXPERTISE REQUIRED IN SUPPORTING INJURED WORKERS TO CHANGE CAREERS AND EMPLOYMENT OPTIONS.**

**(EMPHASIS ADDED)**

Bringing those skills to bear, sooner rather than later, can only serve to reduce the likelihood of a claim becoming complex.

This should be coupled with a range of measures directed towards improving the efficiency and efficacy of the claims management process, such as those identified in the report of Dr Elizabeth Kilgour and Dr Agnieszka Kosny entitled “A qualitative enquiry into outcomes for injured workers in Victoria who have longer term claims” (2018), including:

- having claims managers specialise in certain types of injury by severity of injury rather than based on the stage of progression of a claim; and
- holding regular case conferences (in person or by remote means) with all treating practitioners, the injured employee and the claim manager(s), in order to ensure everyone is working based upon a consistent understanding of the injured employee’s condition, prognosis, rehabilitation needs and goals, and the availability of suitable alternative work.

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<sup>4</sup> Paragraph 4.36,



Such measures should serve to give injured employees the best chance of returning to some form of work as soon as possible and reduce the prospect of employees' claims drifting into the complex category.

Further, as noted above, there needs to be careful scrutiny of the extent to which WorkSafe agents are engaging with, and seeking appropriate information from, the injured employee's employer (such as information about the workplace factors which caused or contributed to the injury, the scope of the injured employee's pre-injury duties and the availability of alternate duties). Given the Ombudsman's lack of engagement with employers, further consideration of these matters is warranted.

### The model for complex claims management going forward

One of the suggestions that has been raised during the conduct of the Review is the potential for claims to be transferred to a specialist unit within the WorkSafe agent, or to WorkSafe itself once they reach 130 weeks. MBV considers that significant risks would arise from such an approach. In particular, the report of Drs Kilgour and Kosny (referred to above) indicates that a reduction in changes to claims managers would enhance the recovery of injured employees and reduce the time needed for claims to be resolved.

Accordingly, MBV's preference would be for claims to be managed with the involvement of claims managers with relevant specialist experience, rather than for responsibility to be transferred to a different team or different organisation.

Alternatively, if a 'transfer' approach were to be adopted, MBV believes that the timing of such transfer is a very important issue and one that requires careful scrutiny. Consistent with the views expressed above, any such transfer (whether to a specialist team within a WorkSafe agent or to WorkSafe itself) should occur as soon as possible during the life of the claim.

This should be coupled with careful scrutiny of the process, and associated key performance indicators, for the management of claims to determine whether these need to be modified in any respect to ensure that the focus remains on proper and active management of the injured employee's case, rather than financial incentives.

MBV is grateful for the opportunity to provide input to the Review. Please contact us should you wish to discuss any aspect of this response.

## 4. Contact details

For further information regarding this response, please contact the following Master Builders Victoria team members:

- Rebecca Casson, CEO



- Trudie Balthazaar, Strategy and People Business Partner

