Sunset review of the *Workers' Compensation and Rehabilitation Regulation 2014*

Submission to the Workers' Compensation Regulatory Services, Office of Industrial Relations, Queensland Government

4 April 2025

Level 7, 321 Kent Street, Sydney NSW 2000 I GPO Box 7052, Sydney NSW 2001 I **ABN** 96 086 880 499
T +61 2 (02) 9258 7700 I **E** enquiries@lawyersalliance.com.au I **W** www.lawyersalliance.com.au
Protecting and promoting justice, freedom and the rights of the individual.

Contents

Who we are **4**

Introduction **5**

Scheme efficiency **5**

Costs provisions **5**

Unassessed injuries **6**

Gig reforms **7**

Conclusion **7**

Who we are

The **Australian Lawyers Alliance (ALA)** is a national association of lawyers, academics and other professionals dedicated to protecting and promoting access to justice and equality before the law for all individuals.

Our members and staff advocate for reforms to legislation, regulations and statutory schemes to achieve fair outcomes for those who have been injured, abused or discriminated against, as well as for those seeking to appeal administrative decisions.

The ALA is represented in every state and territory in Australia. We estimate that our 1,500 members represent up to 200,000 people each year across Australia.

Our head office is located on the land of the Gadigal people of the Eora Nation. As a national organisation, the ALA acknowledges the Traditional Owners and Custodians of the lands on which our members and staff work as the First Peoples of this country.

More information about the ALA is available on our website.[1]

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input to the Workers' Compensation Regulatory Services (WCRS) as part of the sunset review of the *Workers' Compensation and Rehabilitation Regulation 2014* ('Regulation').

2. The ALA's submission addresses the following matters:

    a. Scheme efficiency;

    b. Costs provisions;

    c. Unassessed injuries; and

    d. Gig reforms.

3. ALA members are available to participate in stakeholder discussions as part of this review, and to provide feedback on proposed amendments to the Regulation.

Scheme efficiency

4. The ALA submits that the *Workers' Compensation and Rehabilitation Act 2003* (Qld) ('Act'), associated regulations (including this Regulation), the Workers' Compensation Regulator ('Regulator') and WorkCover Queensland are collaboratively operating a very effective, efficient and balanced workers' compensation scheme in Queensland.

5. We contend that ongoing engagement with the ALA and other stakeholders is a key driver to the stable, efficient and low-cost scheme this State has had for the past decade.

Costs provisions

6. The ALA submits that the costs provisions in Part 8 and Schedule 6 of the Regulation could be simplified.

7. Legal costs are only payable for the most seriously injured workers, if they have a whole person impairment of 20% or more. Such claims involve substantial work and, under the current regulations, only limited legal costs are claimable.

8. The current provisions in Part 8 and Schedule 6 of the Regulation are complicated and have been cause for many disagreements. In the ALA's view, these provisions can be simplified.

9. One area of contention in such claims remains whether the cost of a barrister is claimable under the Regulation. The Court of Appeal determined this point in *Anderson v Pickles Auctions Pty Ltd* [2023] QCA 205. Yet, insurers continue to refuse to allow for the costs of barristers. **The Regulations ought to confirm that, in line with the Court of Appeal's determination, the cost of a barrister is recoverable.**

10. A similar issue also arises in relation to the medical reports fees that are payable. An example of this is that the insurer may dispute that an Occupational Therapist's report does not fall under a medical discipline and, therefore, is not an outlay that can be allowed under the Regulation. **In order to avoid future disputes, the Regulation at 137(1)(c) ought to be amended to make it clear what is considered to be a medical discipline**. It is the ALA's view that any profession that can obtain registration with the Australian Health Practitioner Regulation Agency ought to be considered a medical discipline allowed under the Regulation. The ALA notes this does not automatically require the outlay to be paid by the insurer it has to be show the outlay was reasonably relevant and necessary.

11. Further, these provisions have not been amended since 2014, meaning there has been no indexation of the costs provisions. **The ALA suggests the costs provisions ought to be indexed**.

Unassessed injuries

12. Where a claim proceeds to common law, the injured worker is limited to claiming damages only for accepted injuries. However, it is very commonly the case that additional injuries arise throughout the course of the matter and which are not formally determined and accepted by the insurer.

13. The Regulation presently does not specifically cater for this common occurrence. **The ALA submits that the Regulation ought to address unassessed injuries and formulate a simple and clear procedure to deal with such injuries to minimise costs and delays for common law claims**.

Gig reforms

14. While we appreciate that the gig reforms from October 2024 are contained in the Act, rather than in the Regulation, the ALA reiterates our views that the failure of Queensland to implement gig reforms without reliance on the Commonwealth is a disappointing lost opportunity.

15. The ALA reiterates the recommendations we made in our submission to the 2023 review of the operation of the Queensland workers' compensation scheme (***enclosed***).

Conclusion

16. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input to the Workers' Compensation Regulatory Services as part of the sunset review of the *Workers' Compensation and Rehabilitation Regulation 2014*.

17. We also wish to highlight that the Queensland scheme continues to operate effectively and efficiently, at one of the lowest average premiums in the country because of the willingness of all stakeholders to have open discussions. Dialogue between insurers, the Regulator, the legal profession and the Queensland Government is the envy of other jurisdictions, as reported to us by ALA members in other states and territories.

18. The ALA hopes to continue open dialogue and to be engaged with the Regulator, insurers and the Queensland Government, to ensure we continue to have pride in a scheme which provides balanced, affordable and effective coverage to workers and employers across Queensland.

19. The ALA is available to provide further assistance to the WCRS on the matters raised in this submission.

Sarah Grace

President, Queensland Branch Committee

Australian Lawyers Alliance

Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

2023 Review of the Operation of the Queensland Workers' Compensation Scheme

Submission to the Workers' Compensation Regulatory Services

7 March 2023

Level 7, 321 Kent Street, Sydney NSW 2000 I GPO Box 7052, Sydney NSW 2001 I **ABN** 96 086 880 499
T +61 2 (02) 9258 7700 I **E** enquiries@lawyersalliance.com.au I **W** www.lawyersalliance.com.au
Protecting and promoting justice, freedom and the rights of the individual.

Contents

Who we are 4

Introduction 5

Architecture of the Scheme 6

Financial position of the Scheme 7

WorkCover premiums 7

Claims experience 8

Statutory claims 8

Common law claims 9

Specific claim types and scheme trends 10

COVID-19 claims *10*

Occupational dust diseases claims *10*

Presumptive legislation for first responders and eligible employees 11

National Injury Insurance Scheme claims 13

Occupational dust diseases 13

Time limits *14*

Workers with a terminal condition *15*

Claims for psychological injuries 17

Rehabilitation and return to work 18

Occupational dust diseases 19

Dispute resolution 20

Reviews of insurer decisions and Appeals of the Regulator's review decisions 20

Medical assessment tribunals 22

Monitoring and enforcing compliance with the *Workers' Compensation and Rehabilitation Act 2003* (Qld) 22

Self-insurer monitoring and prosecution of offences 23

Changing nature of work 24

The gig economy 24

Advertising restrictions 33

Conclusion 34

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

ALA Queensland has provided support and feedback to Queensland policy makers on workers' compensation policy and legislation for over 25 years.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the Workers' Compensation Regulatory Services' (WCRS) 2023 Review of the Operation of the Queensland Workers' Compensation Scheme in response to the WCRS' Information Paper ('the Information Paper').

2. The ALA believes that Queensland has the best and fairest workers' compensation scheme ('the Scheme') in Australia, both for injured workers and their employers.

3. The ALA believes that the success of the Scheme rests in no small measure on its architecture. We are today benefitting from past legislative changes, along with an ongoing commitment to regular consultation with key stakeholders.

4. The ALA's submission responds thematically to the data, issues and questions presented in the Information Paper, including regarding the architecture of the Scheme, the Scheme's financial position, claims experience, rehabilitation and return to work, dispute resolution, monitoring and enforcing compliance with the *Workers' Compensation and Rehabilitation Act 2003* (Qld) ('the *WCRA*'), the changing nature of work (especially in relation to the gig economy), and a note about advertising restrictions.

5. A core focus of this submission is on the gig economy issue which was canvassed in much detail at and after the 2018 Review of the Queensland Workers' Compensation Scheme ('the 2018 Review').

6. The present five-year review is another opportunity for suggestions and recommendations to refine and improve the Scheme. We would particularly draw attention to the gig economy issues canvassed in our submissions to the 2018 Review (linked below and **attached** to this submission),[2] and the recommendations from that review.[3] The ALA considers it even more important today that this issue is addressed by the Queensland Government.

[2] Australian Lawyers Alliance, Submission to the Queensland Office of Industrial Relations, *2018 Review of the Queensland Workers' Compensation Scheme* (April 2018) 8–15 <https://www.lawyersalliance.com.au/documents/item/2394>. ('ALA Submission to the 2018 Review')

[3] See Professor David Peetz, *The Operation of the Queensland Workers' Compensation Scheme* (Report, 27 May 2018) xxv-xxvi <https://cabinet.qld.gov.au/documents/2018/Jun/Rev2WC/Attachments/Review.PDF>.

Architecture of the Scheme

7. The ALA believes that the Queensland Scheme is achieving its aim of balancing fair and appropriate benefits for injured workers and ensuring reasonable costs for employers. This is evidenced by the information included in the Information Paper that:

    - it has the lowest average premium rate in Australia of $1.20, and this has been the case for the last eight years;[4] and

    - it has the most timely and efficient dispute resolution of all Australian jurisdictions.[5]

8. The ALA believes that the long-term success is due to the fundamentals of the Scheme's hybrid design. We are today benefitting from legislative refinements made through the 1990s, along with an ongoing and commendable commitment to regular and meaningful stakeholder consultation.

9. Three of the core elements of the structural basis of the Scheme, which together have ensured its success, are:

    i. The 'short-tail' nature of the Scheme, which has at the same time managed to retain reasonable wage replacement compensation, medical and rehabilitation expenses, death benefits and no-fault impairment lump sums;

    ii. The manner in which the provisions of the National Injury Insurance Scheme (NIIS) are embedded in the architecture, allowing for a relatively seamless coexistence between the two schemes; and

    iii. The fact that access to common law proceedings has not been constrained by arbitrary and unfair thresholds, which are a feature of some interstate schemes.

10. **The ALA would oppose any changes to the basic fundamental architecture of the Scheme**.

[4] Workers' Compensation Regulatory Services, 2023 Review of the Operation of the Queensland Workers' Compensation Scheme (Information Paper, 2023) 8. ('Information Paper')
[5] Information Paper, 21.

Financial position of the Scheme

11. The Queensland Scheme's financial position is outstandingly positive. A funding ratio of assets over liabilities of 142.5 per cent,[6] against a background of healthy funding ratios across most of the last 20 years, is commendable.

12. Funding ratios of that magnitude provide our Scheme with a buffer against economic and investment headwinds and other cyclical challenges.

13. The ALA notes, again positively, that 66.3 per cent of Scheme expenditure is returned to claimants in Queensland.[7] This stands in stark contrast to Australia's largest jurisdiction NSW, which returns less than half of total scheme expenditure to claimants.[8]

WorkCover premiums

14. Queensland has the lowest premiums in the country for employers, save for Comcare Australia ('Comcare'). Queensland has the lowest premiums across Australia and this is due in our view to three key factors:

    i. Scheme design (referred to above);

    ii. Save for a notable and regrettable short-term exception in 2013-2015, policy makers of all stripes recognise the success of the Queensland Scheme and that its success is largely attributable to the Scheme's architecture;

    iii. Regular good faith stakeholder engagement to continue to strive for refining and improving an excellent model for the Scheme.

15. The ALA submits that Comcare is not an appropriate comparator. Comcare is a scheme largely covering public servants and white-collar entities. Moreover, Comcare is a long-tail scheme with, for practical purposes, no access for injured workers to common law rights.

16. ALA Members have significant experience with the Comcare scheme on behalf of their clients, and have found it is a scheme which treats injured workers unfairly and paternalistically.

[6] Information Paper, 7.
[7] Ibid 8 [Figure 2].
[8] Ibid.

Claims experience

17. Generally, and save for specific issues addressed in this submission, the ALA believes that the current claims management process is adequate to address the wide breadth of injuries and diseases covered by the Queensland scheme.

18. However, the ALA contends that access to justice is not optimally fostered through WorkCover's claims management processes.

19. For example, WorkCover does not encourage or suggest to an injured worker that legal advice would be in their best interest, even where that is obviously the case. Injured workers dealing with complex legal concepts at a time of increased vulnerability are not well-served by a scheme which does not proactively encourage the seeking of legal advice.

20. Employers routinely obtain legal advice, and are thereby equipped to deal with legal issues. However injured workers, often lacking in formal education, are reliant upon WorkCover. WorkCover has a financial interest in not suggesting that workers obtain legal advice. **The ALA strongly contends that that power and knowledge imbalance should be addressed.**

21. The ALA believes that any scheme which claims to be fair and balanced ought to match that assertion with behaviours and systems that truly promote full and equal access to legal advice, and hence access to a full suite of legal options.

22. **The ALA recommends that a communication protocol be developed, with input from key stakeholders including the ALA, which mandates that injured workers be encouraged to seek legal advice at various stages of the statutory process.**

Statutory claims

23. The ALA notes the updated data with average statutory claim duration increased from 45.9 days in 2017-18 to 72 days in 2021-22,[9] and the average cost for the corresponding periods increased from $17,450 to $28,163.[10]

[9] Ibid 11.
[10] Ibid.

24. We note that that period includes disruptions from the COVID-19 pandemic and would be interested to explore with other stakeholders the hypothesised reasons for that updated unfavourable claims data.

25. The ALA also notes a reference in the Information Paper to "behavioural changes from claimants and the medico/legal professions",[11] without any specifics. The ALA does not believe there has been any significant changes in the nature of medico/legal practice in the above period and would be interested to explore the perspectives of others in that regard. We would be interested to explore how it is considered behavioural changes of medico-legal professionals contributed to the claims statistics referred to above.

26. The ALA submits that claims duration is typically a function of many factors but the timing and efficacy of return to work initiatives is a major factor – we refer to our submissions below in relation to that topic.

Common law claims

27. The ALA notes two core metrics:[12]

    - There has been a 4.5 per cent decrease in expenditure on common law claims, down to $520.2 million; and

    - The average settlement cost of finalised claims (excluding nil settlements) has increased by 1.9 per cent.

28. We understand that the metrics provided in the discussion paper are not CPI-adjusted. The ALA submits that a 4.5 per cent decrease in overall expenditure in common law claims is plainly a benign and stable picture.

29. However, when the 1.9 per cent increase is adjusted for CPI over the last couple of years, this demonstrates that common law claimants are worse off – their settlement funds have been eroded in real terms by the effects of escalating inflation for at least the last two years.

[11] Ibid.

[12] Ibid 12.

30. There are a number of initiatives that could be implemented to offset the undesirable effect of inflation on injured claimants including an examination of an adjustment to the discount rate applied to future economic loss.

31. **The ALA would like to explore in the further stakeholder engagement how claimants can have the effects of inflation upon their damages settlements removed or ameliorated**.

Specific claim types and scheme trends

32. The ALA notes that the long-term trend in the rates of claims when measured against workforce size is stable this was the case in 2018, and remains so.[13]

33. Save for an emergent concern about psychological claims, a topic we will deal with separately below, the trends appear benign.

COVID-19 claims

34. We note the data with respect to COVID-19 claims in the Information Paper.[14]

35. Within the medical community there is now emerging, a large volume of epidemiological evidence, nationally and internationally, on the incidence and effects of long COVID.

36. **The ALA submits that the incidence and effects of long COVID will be an issue that workers' compensation schemes like this Scheme will need to address in the near future and should thus commence to consider now.**

Occupational dust diseases claims

37. In the experience of ALA Members, occupational dust disease claims regarding exposure to asbestos, mining dust and silica dust are dealt with by a specialised latent onset injury team at least within WorkCover Queensland. This same approach is not apparent for self-insurers. Engagement with this specialised team has led to a streamlined process in which workers and

[13] ALA Submission to the 2018 Review, 7.
[14] Information Paper, 12.

their legal advisors are able to work effectively and collaboratively, with the case manager for the benefit of the worker.

38. We note that in instances where a claim made under the scheme, and is not able to be assessed within 20 business days, the insurer is to provide a Reasons for Decision outlining why they have not yet decided on the claim. We have observed that WorkCover Queensland has been using its discretion when assessing complex latent onset injury claims, and it is common that these claims are not able to be assessed within 20 business days. In more common dust-related claims, instances where a worker has confirmed that they are obtaining material in support of the claim, often with the assistance of a solicitor, the case manager will use its discretion to allow further time, and navigate the legislative obligations by issuing a Reasons for Decision regarding the delay beyond 20 business days. This is obviously good for workers and the scheme as more claims are accepted and less claims are appealed.

39. In the ALA's view, there is a rise of other claims, particularly for those workers exposed to mould, welding fumes, diesel particulate matter, gases, chemical and other toxic occupational exposures that are causing various health conditions in workers. However, it is becoming apparent this approach is not being extended to all workers with a latent onset injury, or a work-related injury that involves exposure to toxins, fumes or gases. This has resulted in the unfortunate circumstance where some workers with complex chemical or toxin related illnesses are not being provided an opportunity to prepare and serve further material in support of their claim. An example of this is seen with the lack of collaborative engagement with the worker's solicitor in providing further information in support of their claim before a final determination is made. This is obviously bad for workers and the Scheme, as more claims are rejected and more claims are appealed.

40. **The ALA contends that if the claims management process is to be optimised and streamlined, these differing approaches identified must be addressed**.

Presumptive legislation for first responders and eligible employees

41. The ALA notes that there were almost 700 accepted claims for PTSD in the Scheme for 2021-22, encompassing both the standard and presumptive claims pathways.[15] We would be

[15] Ibid 13.

interested to learn of the breakdown and any other metrics around PTSD and the effectiveness of the presumptive legislation.

42. In regards to the presumptive legislation, the ALA has been made aware of decisions being made that are not reflective of the intention of the changes.

43. Despite a diagnosis of PTSD whether it arises from management action or not, practitioners still see the decision at the claims stage being denied due to a GP's initial diagnosis on presentation, rather than when the injured worker is seen by a psychiatrist (sometimes several months away), who then makes the PTSD diagnosis.

44. Recently, the ALA was alerted to two decisions from the Workers Compensation Regulator which we consider are at odds to the nature of the legislation.

45. The first decision found the following:

> …given Mr A is a first responder, section 36ED may apply if there is sufficient medical evidence to substantiate that Mr A has sustained PTSD. In light of Dr S's recent report diagnosing Mr A with PTSD, I consider it necessary to give both WorkCover and QPS an opportunity to consider Dr S's report. In particular, WorkCover is to determine whether there is sufficient medical evidence to determine that Mr A has sustained PTSD and, as such whether section 36ED of the Act is applicable!

46. This matter was returned to WorkCover with directions to obtain Mr A's medical records from his GP. The ALA submits this reasoning is at odds with the legislation when it specifies PTSD is to be diagnosed by a psychiatrist.

47. The second decision relates to a female officer who attended upon a suicide, one of many but one which had a particular effect upon her and which in turn caused her to self-harm and be detailed under a mental health order for treatment. In its decision, the Regulator found that:

> It is not in dispute that Ms G was employed by QPS as a Police Officer. Nor is it disputed by QPS, that Ms G was a General Duties Officer and would be exposed to traumatic events in her QPS career.
>
> …under section 144C of the Regulation, the diagnosis must be that of 'PTSD' and not an aggravation of a pre-existing PTSD diagnosis. Therefore, Ms G's diagnosis of aggravation of pre-existing chronic complex PTSD does not satisfy the legislative definitions under section 36 of the Act for first responders. Consequently, I am not satisfied that Ms G was diagnosed by a psychiatrist in the way prescribed by the Regulation as having PTSD in accordance with section 36ED(1)(a) of the Act.

48. **The ALA contends that this last decision provides grounds to justify amendments to the Scheme to include aggravations and/or chronic complex PTSD.**

49. There are many police officers ALA Members see who have previously been diagnosed with PTSD but managed to return to work successfully for a number of years until some traumatic or minor incident aggravates their condition.

National Injury Insurance Scheme claims

50. The ALA notes that injured workers make up only a small proportion of the total NIIS participant pool with less than 15 injured workers / year becoming participants. This is less than modelled at the inception of the scheme.

51. Eligibility for NIIS can in some cases be medically and legally complex and ALA Members have seen many cases where eligibility was not identified in a timely way or at all by insurers, including WorkCover Queensland.

52. **The ALA recommends that there be increased education of staff both at WorkCover Queensland and self-insurers on NIIS eligibility issues.**

Occupational dust diseases

53. Over the past years, since the 2018 Review, the world of occupational dust diseases (or as they are defined in the *WCRA* as "dust-related conditions")[16] has fundamentally changed.

54. It is plain that the rates of dust-related conditions in a number of industries not the least of which includes stonemasonry, mining and construction, have been immensely affected by silica related disease. It is equally plain, however, that certain aspects of the Scheme are not fit for purpose as it applies to dust-related conditions.

55. In the ALA's view, there are two areas which require reform:

    (a) removal of the six-month time limit as it applies to dust-related conditions; and

    (b) removal of terminal condition life expectancy timeframe of five years.

[16] *Workers' Compensation and Rehabilitation Act 2003* (Qld) Schedule 6.

Time limits

56. Pursuant to section 131(1) of the *WCRA*, a worker must apply for compensation within six months of the entitlement to compensation for the injury arising. In accordance with section 36A of the *WCRA*, section 131 applies to latent onset injuries as if the entitlement to compensation arose *on the day of the doctor's diagnosis.*

57. In the ALA's view, this 6-month time limit is arbitrary and prejudicial against some workers for the following reasons:

    (a) Many workers, especially those from mining and construction industries where it is common for their dust-related conditions to arise after long latency periods of anywhere between 20 and 50 years, undergo numerous pre-employment and/or mandatory chest x-rays which often detect abnormalities which are later confirmed to be early stage dust-related disease. As a result, much uncertainty arises as to whether the relevant section 131(1) time limit has expired and where other factors, like that which is referred to below, are combined, there is potential for significant prejudice to workers to arise.

    (b) In many cases, save for cases of occupational dust-related cancers (like mesothelioma), insurers inconsistently and, often impermissibly, apply the six-month time limit in relation to:

        i. When a diagnosis is actually made. For example, ALA Members have experienced insurers decide that a chest X-ray in the absence of any other diagnostic evidence like a CT scan, lung function test and the opinion of an actual qualified Respiratory Physician as being the relevant date of diagnosis. In another example, a GP's reference in their clinical records regarding the correlation between a patient's diagnosis of Chronic Obstructive Pulmonary Disease and their work as being the sufficient diagnosis 'event'; and

        ii. Which type of doctor is capable of making a diagnosis of a dust-related lung disease. For example, ALA Members have experienced insurers variously indicate that a General Practitioners and non-Respiratory specialists as being the relevant doctor who is capable of diagnosing a dust-related condition. In reality, a GP is in no position to diagnose a patient as suffering

from a dust-related condition as they have neither the expertise, training and experience to do so.

(c) Given the often complex nature of dust-related conditions, it is very difficult for workers to manage the stress of a diagnosis, the impact on their employability (if applicable) and arranging to seek expert legal advice in relation to their potential entitlements let alone do so within a period of just six months. This is especially the case for workers who have had multijurisdictional exposures in Australia and who require specialist legal advice in most cases in order to determine the optimal scheme within which to lodge and pursue entitlements.

58. **In order to remove uncertainty and inherent prejudice to workers with dust-related conditions (or suspected dust-related conditions) in the Scheme, the ALA submits that there should be no time limit within which workers must lodge a claim for dust-related conditions.**

59. This approach is not radical and is in fact reflective of the process adopted in New South Wales, by its workers compensation body iCare Dust Diseases (iCare). iCare's only requirement is for workers with dust-related conditions to lodge their claim within a "reasonable period of time following diagnosis". This approach both satisfies the section 5 objects of the *WCRA* Scheme and addresses the inherent prejudice against workers with dust-related conditions.

Workers with a terminal condition

60. On 1 July 2022, section 39A of the *WCRA* was amended again to limit the scope of workers able to access lump sum benefits pursuant to Part 3, Division 4 of the *WCRA* (terminal condition benefit), to those workers whose condition was expected to terminate their life within five years.

61. We note that on 25 February 2022, the ALA provided detailed submissions in relation to this issue in which it outlined how the introduction of a time limit will cause a significant cohort of workers to be ineligible to receive the terminal condition benefit at or around the time of their diagnosis.[17] This, the ALA submitted, would create an unfair and barbaric circumstance where workers are essentially forced to wait until their condition inevitably progresses and their

[17] See Australian Lawyers Alliance, Submission to the Workers' Compensation Regulatory Services, *Submissions regarding proposed changes to the 'Terminal Illness' definition in the Workers Compensation and Rehabilitation Act 2003* (25 February 2022) <https://www.lawyersalliance.com.au/documents/item/2374>.

condition worsens closer to a premature and preventable death, before they are able to claim for the terminal condition benefit. The ALA further submitted that in the experience of workers, the terminal condition benefit provided an instant financial solution, particularly to those with dependants, for workers who had just been diagnosed with a dust disease and were required, on medical advice, to cease employment in their industry immediately.

62. Now, almost a year on from these amendments, the experience of ALA Members is that these amendments have, in fact, prevented workers who are suffering from a terminal condition from being able to access the terminal condition benefits, as they do not meet the arbitrary five-year life expectancy requirement. This is despite the fact that some young workers nonetheless suffer from a 20- or 30-year overall reduction in life expectancy. In other words, the very risk that the ALA articulated has eventuated – and it has been to the complete detriment of workers.

63. **The ALA submits that this fundamental prejudice inherent in the scheme needs to be addressed and the five-year time limit needs to be scrapped**.

Emerging issues

64. From the occupational dust diseases perspective, one need only look at the recent media coverage of the problem of silica-related disease to understand that this type of injury will persist for decades yet. Indeed, the problem of silica-related disease is not confined to the stonemasonry industry but is widespread in road tunnelling, metalliferous and coal mining, quarrying and general construction.

65. Whilst silica-related disease is no longer an emerging issue, it is very important that the scheme is agile enough to not simply understand the nature of the problem but to evolve to respond to these issues. In this regard, we refer to our submissions in earlier in this section and in the remainder of this submission.

Claims for psychological injuries

66. Psychological claims are increasing through the Scheme in Queensland.[18] This is not just a Queensland trend, nor is it a trend specifically related to workers' compensation. There is increased awareness and reporting of psychological injuries in society in general. The figures presented in the Information Paper are likely reflective of what may have been present but not reported for many previous years.

67. **The ALA does not consider that there is any need for legislative change, save for the claimant experience with the Medical Assessment Tribunal (MAT), when they experience a psychological injury or secondary psychological injury.**

68. Psychologically-injured workers are continually stating that the legislation is unreasonable by expecting a psychologically-injured worker to produce evidence to support the manner in which they sustained their injury. In many instances, the injured worker has no access to information kept in the workplace to prove allegations and/or find that witnesses are unwilling to support versions for fear of repercussions.

69. ALA Members have been made aware that medical practitioners are discouraging psychologically-injured workers from applying for workers' compensation due to the adverse nature of the Scheme and the adverse impact it is likely to have upon their mental health.

70. The ALA notes the average cost per decided claim for workers accessing psychological support services is around $592.[19] We surmise that the claims duration is very short.

71. **The ALA recommends that the Queensland Government and this Review consider whether psychological injuries could be treated the same as physical injuries with respect to initial assessment and assessment of permanent impairment. The current MAT process requires three qualified practitioners to assess the level of impairment as opposed to the current process for physical injuries which is more efficient and less onerous for injured workers.**

72. The ALA would be happy to consult further in relation to this recommendation but considers it to be a key requirement to enhance claimant experience and ensure efficiencies within the scheme in the years ahead.

[18] Information Paper, 15.

[19] Information Paper, 17.

Rehabilitation and return to work

73. The ALA appreciates the ongoing positive engagement with the Office of Industrial Relations in relation to the upgrading and refinement of guidelines.

74. The ALA refers to and **attaches** our submissions on this topic dated:

    - 10 December 2021;[20] and
    - 9 September 2022.[21]

75. **The ALA supports the review and implementation of these guidelines**.

76. **The ALA considers, however, that more will need to be done, particularly with respect to the following in order to ensure that there is improvement in return to work statistics in Queensland:**

    - **education of insurers;**
    - **enforcement of these guidelines; and**
    - **use of external rehabilitation and return to work expertise.**

77. A core initiative, too often lacking, is timely intervention of suitably qualified expert (usually an occupational therapist) to improve the prospects of a return to some form of meaningful employment. We refer to the submissions, above, for reasons substantiating those views.

78. WorkCover Queensland's long-term institutional resistance to embracing a RRTW model which includes external expert providers, should be addressed.

[20] Australian Lawyers Alliance, Submission to the Office of Industrial Relations, *Submissions to OIR re: (a) Injured worker medical consultations + additional consent and (b) 2 x Rehabilitation Guidelines* (10 December 2021) <https://www.lawyersalliance.com.au/documents/item/2371>.

[21] Australian Lawyers Alliance, Submission to the Office of Industrial Relations, *Second Submission to OIR re: (a) Injured worker medical consultations + additional consent and (b) 2 x Rehabilitation Guidelines* (9 September 2022) <https://www.lawyersalliance.com.au/documents/item/2372>.

Occupational dust diseases

79. For workers suffering from dust-related conditions, there are many factors that impact their ability to return to work.

80. Although we note that the Scheme views returning an injured worker to the same job with the same employer as the best outcome which can be achieved on a claim, this often just cannot be the case for a worker with an occupational dust disease. In most circumstances, the worker is required, on medical advice, to cease any further exposure to dust immediately, and therefore can't return to their usual place of employment or any place of employment where even the risk of further dust exposure exists.

81. It has been the experience of many clients of ALA Members that the following factors significantly decrease the ability of a worker with a dust-related condition to be successfully redeployed for the long term:

    (a) The chronic and untreatable nature of their dust related condition: this means that the risk of further dust exposure and the attended requirements to safely return them to work persist in perpetuity;

    (b) Age: Many non-stonemasons are older in the 50's and 60's and this creates a natural barrier against re-training and redeployment;

    (c) Location: Many workers with dust-related conditions live regionally in Queensland and this creates a further natural barrier against re-training and redeployment;

    (d) Prior training, education and experience: Many workers with dust-related conditions who come from a mining and construction background have not undergone any formal qualifications like an apprenticeship or tertiary education which makes their ability to undergo the necessary re-training and re-skilling in non-labour intensive or skills-based role very difficult; and

    (e) The nature, impact and longevity of secondary psychological injuries of workers with dust-related conditions: This is especially so as a dust-related condition is untreatable and whilst symptoms can be managed, the injury cannot be rehabilitated. This often causes a chronic and entrenched psychological injury.

82. Accordingly, the return to work needs of this cohort of worker are unique and a blanket, one-size fits all approach, cannot be taken. Given the complex nature of occupational dust diseases, workers usually need to be re-skilled, or re-trained for a completely different role within the company, if the employer is supportive of this transition. More commonly however, the worker will need to be re-skilled or re-trained for a role in a completely different industry and often in a different region in order for the redeployment to be effective.

83. **Accordingly, the ALA submits that a tailored approach should include**:

    (a) the worker having detailed information presented to them regarding alternate roles and adequate financial and professional assistance in re-training by undertaking further study or practical skills, which may involve temporary or even permanent relocation;

    (b) if the worker wishes to remain with their current employer, having suitable office-based and non-dust exposure roles negotiated with employers by a case manager on the worker's behalf; and

    (c) providing the worker with ongoing support when transitioning into a new role, including offering psychological support to assist with their adjustment post re-deployment. This recommended bespoke approach to RRTW again aligns with our previous submissions on these issues.

Dispute resolution

Reviews of insurer decisions and Appeals of the Regulator's review decisions

84. There are significant time delays with both applications for review and appeals to the QIRC. There needs to be some improvements in these timeframes.

85. Section 545 of the *WCRA* states the Regulator must make a decision within 25 business days. For the past two years the Workers Compensation Regulator review unit has been experiencing a three-month delay in allocating matters to a review officer and a decision being made. This is a multi-year blight on the scheme.

86. This delay adversely impacts injured workers by not allowing them to access treatment quickly to enable a timely return to the workplace, but also can place significant financial burden on injured workers particularly those with mental health problems.

87. The ALA receives voluminous feedback from members raising their concerns about the delays. A common example of a concern raised is this response upon submitting an Application for Review:

> *The Review Unit is currently managing a high volume of complex review applications and this has unfortunately led to delays in allocating matters to Review Officers following registration. We want to reassure you that we are working as quickly as possible to have the application allocated. The review process currently takes approximately 12 weeks. If there is to be any further delay, the Review Unit will be in contact with you to discuss when the review will be allocated. We sincerely apologise for this delay.*

88. The WCRA states that the review decision is to be brought down in 25 business days (i.e. five weeks). Their current estimate is more than double this. There are examples of matters where it took 12 weeks just to allocate it to a review officer and the decision was not made for four months.

89. This is not acceptable (particularly given this issue has existed now for several years), including preceding the COVID-19 pandemic period.

90. These delays are not fair on injured workers and breach the objects of the *WCRA* to ensure they are treated fairly. Workers undergoing reviews are often unable to work and are unable to access prompt rehabilitation and suffer financial hardship. Often, they are reviewing a rejection of a psychological injury and the trauma of the unnecessary delay can cause additional stress.

91. **The ALA considers that there is a resourcing issue here and recommends that it be rectified as a matter of priority. Higher quality decisions being made by WorkCover and self-insurers would also reduce the number of matters needing to be reviewed by the statutory review mechanism.**

Medical assessment tribunals

92. The ALA appreciates the ongoing consultation with the Medical Assessment Tribunal and that working proactively delays and disruptions throughout covid. However, we have now seen the tail end of the impact of the COVID-19 pandemic and the need for improvement here remains.

93. The ALA has discussed these delays at length with WorkCover Queensland and the Regulator and have provided numerous examples of delays. Whilst there has been some improvement, we consider that there is need to improve further.

94. It may be that the recommendation made under psychological injuries will see some vast improvement here as the majority of the delays are for psychological injuries.

95. **The ALA supports the efforts made by the Medical Assessment Tribunal to improve these timeframes for injuries other than psychological injuries, such as the efforts made for additional appointments with specialties, such as Orthopaedics.**

Monitoring and enforcing compliance with the *Workers' Compensation and Rehabilitation Act 2003* (Qld)

96. The ALA notes that there has only been one employer prosecuted for failure to insure their workers. Anecdotally and from reports by ALA Members, it is clear that sham contracting is a widespread phenomenon which is damaging to the revenue base of all workers' compensation schemes.

97. The ALA considers that it is extraordinary that only one employer was prosecuted for failing to insure in the period covered by the statistics. A more structured and vigorous approach to identifying, investigating and prosecuting entities engaged in sham contracting would yield better outcomes for:

    - injured workers;
    - the finances of the Scheme; and
    - employers who follow the rules and are disadvantaged by a non-level playing field with sham contracting.

Self-insurer monitoring and prosecution of offences

98. As above, the ALA is deeply concerned that only one employer has been prosecuted for failure to insure their workers.

99. Injuries and deaths at work in Queensland still occur too frequently, and the Queensland Government must ensure that tougher measures to address these issues are prioritised to protect Queenslanders at work. Effective resourcing of the structures that will come into existence following the recent adoption of industrial manslaughter legislation will be essential to achieving that outcome.

100. The ALA recognises the need for a 'carrot and stick' approach to health and safety enforcement. We believe that, until recently, the focus has drifted more towards rewards and education – the 'carrot' end of the spectrum.

101. The ALA believes that having a properly resourced occupational health and safety unit is critical in adequately regulating industry, ensuring that breaches are properly investigated and that appropriate sanctions are applied.

102. **In our 2018 submission, the ALA called for the following measures to protect Queenslanders at work, and they remain our recommendations to date**:

- more appropriate and effective mechanisms for resolving safety disputes between employers and employees;
- tougher penalties for safety breaches and prosecutions; and
- a commitment to uphold the new offence of 'negligence causing death', as recently proposed by the Queensland Government, to better address instances where workers are being forced to undertake tasks that are in clear breach of safety standards.

103. **The ALA submits that the Occupational Health and Safety (OHS) Unit should be properly funded and resourced to cope with existing requirements, as well as those associated with the newly adopted industrial manslaughter legislation.**

104. **The ALA recommends that the Office of Industrial Relations should explore ways for promoting the Queensland model of workers' compensation nationally as best practice in**

balancing the needs of claimants, scheme sustainability, proactive and reactive focus, as well as access to common law rights.

Changing nature of work

105. **The ALA submits that any review of the Scheme needs to consider the changing nature of the workforce, especially the emergence and rapid growth of the so-called 'gig economy'**.

106. Increases in precarious work and contracting, and the increasing use of technology in the allocation of work all magnify the effects of poor employment practices, which include the exploitation of visa workers, young workers and those seeking to re-join the workforce.

The gig economy

107. The following description from the Fair Work Ombudsman aptly describes the gig economy:[22]

> The gig economy uses mobile apps or websites to connect individuals providing services with consumers. …
>
> In the gig economy, individuals provide services to consumers for a fee via digital platforms or marketplaces. These platforms can provide consumers with greater choice and flexibility in their daily lives.
>
> Common gig economy services in Australia include:
>
> - ride sharing services – for example, where consumers book an individual to drive them somewhere
> - delivery services for a fee – for example, where consumers engage an individual to deliver food or other items to them
> - personal services for a fee – for example, where consumers engage an individual to provide creative or professional services like graphic design and web development, or odd jobs like assembling furniture and house painting.

[22] Fair Work Ombudsman, *Gig economy* (Web Page) <https://www.fairwork.gov.au/find-help-for/independent-contractors/gig-economy>.

108. As of December 2020, approximately 250,000 people were part of Australia's gig economy.[23] There is a huge amount of research and literature on the growth of the gig economy.[24]

109. Thus far, however, participants in the gig economy in Australia have not been the subject of legislative initiatives in response to such rapid growth and the need to offer protections to those individuals and their families, especially in the case of injury or death.

110. Within the gig economy, workers are highly vulnerable to exploitative conduct by the entity connecting those individuals with consumers. Sham contracting is rife, with workers told they must be independent contractors rather than traditional employees. These individuals are then deprived of on superannuation, insurance, workers' compensation, award protections and the other workplace benefits Australian workers have come to expect.

111. Our submission to the 2018 Review said as follows:[25]

> *Over the past two decades, business operators have found ways to avoid their responsibilities under Fair Work legislation and other legal and regulatory structures, including OHS and workers' compensation frameworks. In its report on its inquiry into Corporate Avoidance of the Fair Work Act, the Senate Education and Employment References Committee noted that for this large class of workers:*
>
> > *"There is also no security of income, no insurance for the worker in case of accident, no superannuation, no personal, annual or paid leave of any description."[2]*
>
> *These business operators have moved the public conversation around concerns in employment towards 'who employs whom'. By insisting that people who work for them be self-employed, independent contractors, business operators avoid having to take responsibility for the provision of safety nets that Australians have come to expect: awards-based wages, superannuation, and to be covered by workers' compensation.*
>
> *These business operators adopt 'sham contracting' arrangements between themselves and their contracted staff. This is especially prevalent in low-paid sectors where those*

[23] Actuaries Institute, *The Rise of the Gig Economy and its Impact on the Australian Workforce* (Green Paper, December 2020) <https://actuaries.asn.au/Library/Opinion/2020/GPGIGECONOMYWEBtest.pdf>.
[24] See, eg, Ibid.
[25] ALA Submission to the 2018 Review, 8–11 (All footnotes accessible in the submission, **attached**)

doing the work have little market power, such as cleaners, construction workers, beauticians, call centre workers and drivers.

These new work arrangements are typically discussed in the context of entrepreneurship, technology and customer convenience, but the ALA believes that they are merely another way in which employers are abrogating their responsibilities.

Labour Hire and particularly the rogue, 'invisible' labour hire operators, operate outside employment frameworks and routinely exploit workers. While a number of states are implementing Labour Hire Licensing schemes,[3] there is still the outstanding issue of how federal laws intersect with these schemes, while other states continue to be without a framework.

Technology, and particularly peer-to-peer services, have effectively 'turbocharged' many of these sham contractor arrangements and insecure roles.

There is a mismatch between how gig economy platforms perceive themselves and how they 'stack up' against industry expectations. In its report from its inquiry into Corporate Avoidance of the Fair Work Act, the Senate Education and Employment References Committee cites the case of Deliveroo.[6] In its report, it noted that:

> *8.20 Deliveroo describes itself as a 'food delivery tech business:*
>
> *Our online delivery platform joins up customers who want great food, restaurants who seek additional revenue and riders who are looking for well-paid, flexible work. Customers order via our app from one of our partner restaurants, the vast majority of whom had never considered deliveries before Deliveroo. Riders then collect the prepared food and deliver it to the customer by bicycle or scooter.*

It goes on to note that:

> *From the company's perspective, the platform benefits all involved. Riders enjoy a 'hyper flexible way of working', customers enjoy choice and convenience, and restaurants are able to expand their customer base (and revenue) by offering food delivery.*
>
> *Food delivery riders, Deliveroo confirms, engage with the company as independent contractors. Seventy-five per cent of Deliveroo riders are 18 to 29 years old.[7]*

But what the Committee found was that Deliveroo offers no minimum hourly wage, no minimum shift lengths, no penalty rates, no superannuation, contracts which absolve the company of responsibility for OHS, and unequal pay for equal work.[8]

That same Committee heard of reports relating to Airtasker, a site which matches logged tasks with a service provider, which describes itself as:

> *'a trusted community marketplace for people and businesses to outsource tasks, find local services or hire flexible staff in minutes—online or on your mobile'.[9]*

The Committee noted that tasks which contain significant safety risks appear on the Airtasker website. They cited an example of a logged job seeking 'help with stacking and wrapping pallets'. The Committee, in its report, noted:

> *'It is worth noting that, as independent contractors, whoever "won" the above task to lift and move heavy objects would not have been covered by workplace health and safety laws. It is also worth noting that Airtasker, despite considering workers to be independent contractors, does not in fact verify whether workers have ABNs.'[10]*

The Committee went on to note that skills sought on the Airtasker website also included 'installing a rangehood kit', 'families to host overseas students', 'plumbing work', and 'laying synthetic grass'. It found that 'businesses are increasingly turning to Airtasker to find workers, saving considerable money in the process and undercutting regular workers in the process'.[11]

In the same report, the Australian Manufacturing Workers' Union (AMWU) describes the gig economy as a: 'mutant form of labour hire and contracting...where they effectively remove the contracting company altogether and make the employees into contractors'.[12]

<u>Who is affected?</u>

112. The ALA contends that some of the most vulnerable people in Australia are finding work through the gig economy.

113. This rise in precarious work continues to be a significant factor increasing insecurity among the workforce. The ALA believes that this uncertainty would undoubtedly influence the

behaviour of workers where they would otherwise pursue their industrial rights or access support and compensation if they are injured.

114. Participation in insecure gig economy work is prevalent among cleaners, construction workers, beauticians, call centre workers and drivers. The ALA is aware that these types of labour arrangements are also occurring in the meat industry, and others.

115. One area of additional concern is the prevalence of this style of employment in the health and aged care sectors. the demand for health and personal care workers is increasing. The ALA is particularly concerned about the impact of the increasing casualisation of the disability workforce. The 'Uberisation' of the disability workforce is established and accelerating. This phenomenon has been well reported,[26] and poses a number of safety risks for people living with a disability, including National Disability Insurance Scheme participants.

116. Immigrant populations are often the victims of sham contracting arrangements. There are approximately 650,000 temporary migrants in Australia, a large majority of whom are working. As evidenced from the 7-Eleven scandal,[27] the conditions of their visas are often used against them to claw back salaries or underpay them. Accommodation and transport costs are also used to claw back pay, particularly in the horticultural sector. There are obviously piecework rates in the horticulture sector, where comparable hourly rates of pay are $5 per hour more than what those on sham contracts are receiving.

117. The ALA is also aware of media reports that Deliveroo introduced cover through WorkCover but then drafted contracts to absolve the company from any responsibility for their riders. We should always be cognisant that the business models within the gig economy are designed to exclude a suite of entitlements that works have long taken for granted.

118. Sham contracting and poorly regulated labour hire processes are creating a generation of workers who:

- are not going to benefit from superannuation benefits at retirement;

[26] See, eg, Donna Baines et al, The Centre for Future Work at The Australia Institute, *Precarity and Job Instability on the Frontlines of NDIS Support Work* (Report, September 2019) <https://futurework.org.au/report/precarity-and-job-instability-on-the-frontlines-of-ndis-support-work>.
[27] Adele Ferguson and Sarah Danckert, 'Revealed: How 7-Eleven is ripping off its workers, *The Sydney Morning Herald* (online, 2015) <https://www.smh.com.au/interactive/2015/7-eleven-revealed/>.

- may be underinsured and thereby unprotected in the event of accident or mishap;
- have no security of income;
- do not have the safety net of minimum hourly earnings;
- are not covered for personal, sick, parental or other forms of leave; and
- are not covered by the OHS protections that the rest of the workforce enjoys.

119. **In short, the most marginalised workers are over-represented in the gig economy**.

The common law vs legislative solutions

120. Currently, whether a person engaged in the gig economy is a "worker" is left to a sometimes complicated and inconsistent set of criteria drawn from the common law.

121. **The common law has not kept pace with the nature and evolution of the gig economy, and the ALA strongly contends that legislative solutions are needed**.

122. While the common law jurisprudence on the definition of "worker" is helpful to an extent, it is our view that clearer statutory and regulatory framing of the definition of 'worker' is warranted, to reflect contemporary circumstances.

123. It is important that the conversation is broadened to include labour hire legislation and laws underpinning contracted labour arrangements.

124. Our previous submissions, other inquiries and media coverage have drawn attention to the fact that injuries occur working in the gig economy daily and, tragically, deaths also occur.

125. Commendably, the report arising from the 2018 Review recommended legislative change to regulate the gig economy for workers' compensation purposes:[28]

> 76. There are several possible options for the coverage of gig economy workers in workers compensation systems. Most have a number of drawbacks, especially when applied in a state that operates in the context of a federal system of employment law dominated by the Commonwealth parliament. The preferred approach is to redefine the coverage of workers compensation laws and responsibilities to encompass those

[28] Professor David Peetz, *The Operation of the Queensland Workers' Compensation Scheme* (Report, 27 May 2018) xxv-xxvi <https://cabinet.qld.gov.au/documents/2018/Jun/Rev2WC/Attachments/Review.PDF>.

who work under agency arrangements, and require payment of premiums by the intermediaries or agencies.

> Recommendation 10.1: The coverage of the Act should be redefined to include any person engaged via an agency to perform work under a contract (other than a contract of service) for another person. This would exclude employees of licensed labour hire businesses and employees of firms that engage contractors, and specify that it applied where at least two parties were in Queensland at the time the work was undertaken.
>
> Recommendation 10.2: Intermediaries or agents who engage any person to perform work under a contract (other than a contract of service) for another person should be required to pay premiums, based normally on the gross income received by the intermediaries or agencies.

77. There should also be a program to facilitate the return to work of injured gig workers. It will also be necessary to make both parties aware of the new arrangements. Many gig workers are likely to be ignorant of their rights and responsibilities even after changes are made. It will also be important to make platform firms aware of their responsibility to pay premiums, and they can be used to provide some of the information for employees.

> Recommendation 10.3: The Regulator should have the capacity to exempt intermediaries or agents from the obligation to rehabilitate injured workers. This would normally be done unless the Regulator considered that the agent had the capacity to perform this role. In such circumstances, injured agency workers would immediately come within the scope of WorkCover's proposed extended return to work program, referred to in recommendation 6.5.

78. While this is a matter on which the State can and should take the initiative, there would be benefits from consultation with other states and the Commonwealth, to consider the implications of the changing nature of work for the definition and regulation of work.

> Recommendation 10.4: The Office of Industrial Relations and WorkCover should manage a two-pronged information campaign, designed to build awareness of new arrangements for 'gig economy' workers, making use of both the processes by which workers are signed up to platforms, and the online environment that they frequent.

126. **The ALA strenuously supported the intent of these recommendations**.

127. Subsequent to the release of the last report, the government flagged an intent to move on this issue released a RIS. The ALA participated in several stakeholder forums prompted by the release of the regulatory impact statement and there was an unanimity of views from the legal sector, the labour movement and employer organisations that Queensland had a major opportunity to regulate for workers compensation purposes the gig economy, and that it should do so at the earliest opportunity.

128. The reasons for the need for regulation from the perspective of injured workers have been detailed in previous submissions. The ALA observes that the problem is now bigger and more urgent as there has been in the last five years a proliferation in the number of platforms operating within the Queensland economy and the Australian economy more broadly.

129. From the perspective of employers, it was clear that the employer groups were seeking a fair and level playing field. Employers who abide their obligations to deduct PAYG tax, pay superannuation, and pay workers compensation premiums are placed at a disadvantage by platforms competing for similar types of work. Those platforms have a business model designed to avoid conventional legal obligations including the obligation to pay workers compensation premiums.

130. The common law has not kept pace with the growth and complexity of the gig economy and a legislative remediation of the situation is in our view imperative.

131. The ALA infers from the Information Paper that the present intention is to wait for federal action on this issue.[29] That, in in the ALA's view, is both regrettable and unnecessary.

132. Workers' compensation policy – save for Comcare, Seacare and military compensation – is a State and Territory responsibility. Even if the Federal Government eventually moves in some ways to regulate the gig economy, there is no certainty that workers' compensation would be an element of such hypothesised federal action. It is notorious that on many policy issues, federal bureaucracies often move far slower than States and Territories are capable of.

133. ALA Members on a daily basis to see people injured whilst working in the gig economy, without the benefits of an excellent workers' compensation scheme, to which the vast majority of other Queensland workers have access.

[29] Information Paper, 25.

134. **The ALA contends there is an urgent need for action from the Queensland Government.**

135. Based on the stakeholder forums convened after the 2019 RIS, the Queensland Government ought to, in our view, confidently expect strong stakeholder alignment on the need for reform and action.

136. In other jurisdictions, including the UK, after incredibly protracted litigation, Uber drivers have been accorded "worker" status by the common law.

137. In recent weeks we have seen the tragic death of Uber driver Scott Cabrie, killed in the course of his work in Hervey Bay, Queensland.[30] In cases like this, any children or other dependents of the deceased – even if they are dependent on the deceased's earnings – do not have access to any workers' compensation benefits.

138. Were legislative mechanisms in place, however, to capture Uber drivers and other gig economy workers within the ambit of Queensland's workers' compensation scheme, the children of a deceased and any other dependants would have had access to, inter alia, a dependency benefit up to the statutory maximum.[31]

139. The process which stalled after the 2018 Review's report, subsequent RIS and stakeholder process, should be urgently re-enlivened. That process should not be regarded as being dependent on any hypothesised or potential federal regulation of the gig economy. The beneficiaries of legislation to address the problem will include:

    - Employers, who do the right thing and seek a level playing field with gig economy employers;
    - Injured workers in the gig economy and their families and dependents;
    - The Workcover Scheme through having premium revenue from sources not presently available; and
    - The community generally through safer workplaces due to the scrutiny of the workers' compensation scheme and its regulator.

[30] Jake Kearnan, Lucy Loram, and Grace Whiteside, 'Outpouring of grief for Scott Cabrie, allegedly murdered by teens while driving Uber', *ABC News* (online, 14 February 2023) <https://www.abc.net.au/news/2023-02-14/grief-for-uber-driver-allegedly-murdered-by-passengers/101969694>.

[31] *Workers' Compensation and Rehabilitation Act 2003* (Qld) ss 200 and 201.

140. **The ALA contends that the following recommendations we made in 2018 are also still pertinent to this inquiry**:

- **That the Office of Industrial Relations invest resources in determining a 'definition of worker' which will satisfy the Queensland context. Such a definition should draw on, but not be constrained by, common law jurisprudence on the question of 'worker'.**

- **That the Office of Industrial Relations seek to ensure clearer statutory and regulatory framing of the definition of 'worker', to reflect contemporary circumstances. This process may involve consultation with Senior Counsel.**

- **That the Office of Industrial Relations seek alignment between the outcomes of recent labour hire reform initiatives and issues relating to access to workers' compensation.**

- **That the Office of Industrial Relations explore the possibility of legislating a deeming provision, which would give the regulator the capacity to deem certain cohorts as 'workers' in the context of access to workers' compensation and related benefits.**

- **That the Office of Industrial Relations be conscious of cultural sensitivities in developing responses to emerging workplace issues.**

Advertising restrictions

141. Through a separate process the ALA has been asked to comment upon the present advertising restrictions contained with *Personal Injuries Proceedings Act 2002* (Qld) (‘*PIP Act*’).[32] Those restrictions apply to advertisements that may be directed towards injured workers.

142. There is no evidence whatsoever in jurisdictions which have either never had restrictions of the type contained within *PIP Act*, or had such restrictions and then abandoned them, that those jurisdictions had unfavourable claims experience as a consequence.

[32] See *Personal Injuries Proceedings Act 2002* (Qld) Chapter 3, Part 1, ss 64–66.

Conclusion

143. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the 2023 Review of the Operation of the Queensland Workers' Compensation Scheme.

144. The ALA is available to provide further assistance to the Workers' Compensation Regulatory Services on the issues raised in this submission.

Sarah Grace

President, Queensland Branch Committee,

Australian Lawyers Alliance

2018 REVIEW OF QLD WORKERS' COMPENSATION SCHEME

Submission to the Queensland Office of Industrial Relations

April 2018

CONTENTS

About us 3

Our submission 4

Specific responses to discussion questions 5

ABOUT US

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

The ALA is represented in every state and territory, including Queensland, and it is estimated that our 1,500 members represent up to 200,000 people each year in Australia. The ALA has been closely involved in policy discussions on workers' compensation in Queensland for decades.

OUR SUBMISSION

OVERVIEW

The ALA believes that Queensland has the best and fairest workers' compensation scheme in the country, both for injured workers and their employers. As detailed in the Information Paper which accompanied this Review, it is a scheme that remains in excellent financial health, and offers strong return-to-work incentives and the lowest premiums for employers in Australia.

The ALA believes that the success of the scheme rests in no small measure on its architecture. We are today benefitting from legislative changes introduced in the 1990s, along with an ongoing commitment to regular consultation with key stakeholders.

Three of the core elements of the structural basis of the scheme are:

i. The 'short tail' nature of the scheme;
ii. The manner in which the provisions of the National Insurance Injury Scheme (NIIS) are embedded in the architecture, allowing for a relatively seamless coexistence between the two schemes; and
iii. Access to common law proceedings.

The Queensland scheme has demonstrated how these diverse elements can coexist within the one framework, if appropriate balance and oversight is maintained. This contrasts starkly with schemes in many other jurisdictions, where scheme health and employer premiums have not sustainably improved despite drastic reductions in benefits to claimants.

The ALA is pleased to frame its responses to the second review of the workers' compensation scheme in terms of the five discussion questions listed on page 16 of the Information Paper. The ALA congratulates the Office of Industrial Relations on the framing of these questions – especially the forward-looking nature of the items for discussion.

We believe that any review needs to consider the changing nature of the workforce; specifically the issues of casualisation, contracting, exploitation of work visa holders, and the use of technology as the driver of new work practices. We are pleased to have the opportunity to discuss these matters in our response to Discussion Question 2.

We would be pleased to discuss or provide additional information to the Review Team on any matter raised in this submission.

SPECIFIC RESPONSES TO THE DISCUSSION QUESTIONS

1. Is the Queensland scheme achieving its aim of balancing fair and appropriate benefits for injured workers and ensuring reasonable costs for employers? If not, why not and what needs to change?

- Yes. The ALA believes that the Queensland scheme is achieving its aim of balancing fair and appropriate benefits for injured workers and ensuring reasonable costs for employers. This is evidenced by the information included in the Information Paper,[1] that:
    - it has the lowest average premium rate in Australia of $1.20, and this has been the case for the last 15 years;
    - there has been a 21 per cent reduction in the serious injury rate over last 5 years;
    - it has the fastest dispute resolution of all Australian jurisdictions; and
    - only approximately 3 per cent of claims decisions are disputed.

- The ALA believes that the success of the scheme rests in no small measure on its architecture. We are today benefitting from legislative refinements made through the 1990s, along with an ongoing and commendable commitment to regular and meaningful consultation with key stakeholders.

- Three of the core elements of the structural basis of the scheme, which together have ensured its success, are:
    i. The 'short-tail' nature of the scheme, which has at the same time managed to retain reasonable wage replacement compensation, medical and rehabilitation expenses, death benefits and no-fault impairment lump sums;
    ii. The manner in which the provisions of the NIIS are embedded in the architecture, allowing for a relatively seamless coexistence between the two schemes; and
    iii. The fact that access to common law proceedings has not been significantly constrained by arbitrary and unfair thresholds, which are a feature of some interstate schemes.

- The short-tail nature of the no-fault component limits the period over which weekly benefits and expenses can be claimed, thereby encouraging return to work.

[1] *Refer p.16.*

The costs incurred in the 'compensation' side of the scheme are kept under control through various legislative instruments.

- On the common law side, legislative restrictions and regulatory vigilance over participants' behaviours mean that only claims that are financially viable are pursued. There are practical and financial thresholds limiting unfettered access to common law proceedings, including:

    - Significant restrictions on damages;
    - Onerous requirements in proving liability; and
    - Non-recovery of legal costs in all but a small percentage of claims.

- Importantly, common law claims underwriting performance is sound, and there is broad agreement that actuarial projections in respect of common law claims are benign.

- The ALA is confident that the Review will hear evidence that actuarial data point to a trend of stability in the number of common law and statutory claims, along with no significant increases in the data reflecting amounts paid per claim.

- It is imperative that the common law rights of all injured Queensland workers are protected and preserved within our state's workers' compensation scheme, including the rejection of injury thresholds that have the potential to disadvantage injured workers and their families. This was demonstrated to be an important issue for all Queenslanders in the recent past, when a former government cut common law access by over 50 per cent.

- There are important social benefits to ensuring access to common law rights within a workers' compensation scheme. These include:

    - External scrutiny provided by the legal system encourages employers to examine the cultures of their workplaces which have led to the behaviours causing poor employment practices: safer workplaces are more productive workplaces;

    - Common Law outcomes can influence the price signals, rewarding positive behaviours both at an industry and employer level; and

    - The finality which common law brings usually encourages a return to the workforce in some capacity, and reduces administrative burdens upon the scheme when compared with long-tail schemes.

- The ALA believes that it is no coincidence that Queensland legislation allows full access to common law rights, and yet premiums are the lowest in the country.

- The ALA notes the figures quoted on page 9 of the Information Paper, which show that the long-term trend in the rates of claims when measured against workforce size is stable.

- The ALA notes the rise in the average cost of medical expenses-only claims detailed on page 9 of the Information Paper. We submit that these rises are in line with the current trends in medical inflation.

- The ALA has always argued that one key determinant of the success of any workers' compensation scheme rests in its ability to balance proactive and reactive service provision. The main area for proactive action lies in the enforcement of workplace health and safety regulations.

- Injuries and deaths at work in Queensland still occur too frequently, and government must ensure that tougher measures to address these issues are prioritised to protect Queenslanders at work. Effective resourcing of the structures that will come into existence following the recent adoption of industrial manslaughter legislation will be essential to achieving that outcome.

- Measures to protect Queenslanders at work include the implementation of more appropriate and effective mechanisms for resolving safety disputes between employers and employees; tougher penalties for safety breaches and prosecutions; and, most importantly, a commitment to enforce and uphold the new offence of 'negligence causing death' as recently proposed by the government (to better address instances where workers are being forced to undertake tasks that are in clear breach of safety standards).

- The ALA recognises the need for a 'carrot and stick' approach to health and safety enforcement. We believe that, until recently, the focus has drifted more towards rewards and education – the 'carrot' end of the spectrum.

- ALA members have noticed a shift over the past 12 to 18 months towards sanctions and enforcement, while maintaining a positive approach to educating employers. The ALA commends this shift.

- The ALA believes that having a properly resourced occupational health and safety unit is critical in adequately regulating industry, ensuring that breaches are properly investigated and that appropriate sanctions are applied.

RECOMMENDATIONS

- The ALA calls for:
    - more appropriate and effective mechanisms for resolving safety disputes between employers and employees;

- tougher penalties for safety breaches and prosecutions; and
- a commitment to uphold the new offence of 'negligence causing death' as recently proposed by the government, to better address instances where workers are being forced to undertake tasks that are in clear breach of safety standards.

- The Occupational Health and Safety (OHS) Unit should be properly funded and resourced to cope with existing requirements, as well as those associated with the newly adopted industrial manslaughter legislation.

- The Office of Industrial Relations should explore ways for promoting the Queensland model of workers' compensation nationally as best practice in balancing the needs of claimants, scheme sustainability, proactive and reactive focus, and access to common law rights.

2. Looking ahead, what do you consider to be the emerging issues for the Queensland workers' compensation scheme (eg, 'gig' economy, employment trends, new types of jobs, changes in the industry, occupational or injury mix); and how should these emerging issues be addressed?

- The ALA submits that any Review of workers' compensation needs to consider the changing nature of the workforce. Increases in precarious work and contracting, and the increasing use of technology in the allocation of work all magnify the effects of poor employment practices, which include the exploitation of visa workers, young workers and those seeking to re-join the workforce.

  The Issue:

- Over the past two decades, business operators have found ways to avoid their responsibilities under Fair Work legislation and other legal and regulatory structures, including OHS and workers' compensation frameworks. In its report on its inquiry into Corporate Avoidance of the Fair Work Act, the Senate Education and Employment References Committee noted that for this large class of workers:

  > *"There is also no security of income, no insurance for the worker in case of accident, no superannuation, no personal, annual or paid leave of any description."*[2]

- These business operators have moved the public conversation around concerns in employment towards 'who employs whom'. By insisting that people who work for

[2] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/AvoidanceofFairWork/Report/c08, section 8.2.

them be self-employed, independent contractors, business operators avoid having to take responsibility for the provision of safety nets that Australians have come to expect: awards-based wages, superannuation, and to be covered by workers' compensation.

- These business operators adopt 'sham contracting' arrangements between themselves and their contracted staff. This is especially prevalent in low-paid sectors where those doing the work have little market power, such as cleaners, construction workers, beauticians, call centre workers and drivers.

- These new work arrangements are typically discussed in the context of entrepreneurship, technology and customer convenience, but the ALA believes that they are merely another way in which employers are abrogating their responsibilities.

- Labour Hire and particularly the rogue, 'invisible' labour hire operators, operate outside employment frameworks and routinely exploit workers. While a number of states are implementing Labour Hire Licensing schemes,[3] there is still the outstanding issue of how federal laws intersect with these schemes, while other states continue to be without a framework.

- Technology, and particularly peer-to-peer services, have effectively 'turbocharged' many of these sham contractor arrangements and insecure roles.

- There is a mismatch between how gig economy platforms perceive themselves and how they 'stack up' against industry expectations. In its report from its inquiry into Corporate Avoidance of the Fair Work Act, the Senate Education and Employment References Committee cites the case of Deliveroo.[6] In its report, it noted that:

> *8.20 Deliveroo describes itself as a 'food delivery tech business: Our online delivery platform joins up customers who want great food, restaurants who seek additional revenue and riders who are looking for well-paid, flexible work. Customers order via our app from one of our partner restaurants, the vast majority of whom had never considered deliveries before Deliveroo. Riders then collect the prepared food and deliver it to the customer by bicycle or scooter.*

---

[3] *See, for example, https://www.worksafe.qld.gov.au/news/2018/regulation-of-the-labour-hire-industry-in-queensland; https://economicdevelopment.vic.gov.au/inquiry-into-the-labour-hire-industry; https://www.sa.gov.au/topics/business-and-trade/licensing/labour-hire/labour-hire-licence.*

[6] *https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/AvoidanceofFairWork/Report/c08, section 8.20.*

It goes on to note that:

> *From the company's perspective, the platform benefits all involved. Riders enjoy a 'hyper flexible way of working', customers enjoy choice and convenience, and restaurants are able to expand their customer base (and revenue) by offering food delivery.*
>
> *Food delivery riders, Deliveroo confirms, engage with the company as independent contractors. Seventy-five per cent of Deliveroo riders are 18 to 29 years old.*[7]

But what the Committee found was that Deliveroo offers no minimum hourly wage, no minimum shift lengths, no penalty rates, no superannuation, contracts which absolve the company of responsibility for OHS, and unequal pay for equal work.[8]

- That same Committee heard of reports relating to Airtasker, a site which matches logged tasks with a service provider, which describes itself as:

  > '*a trusted community marketplace for people and businesses to outsource tasks, find local services or hire flexible staff in minutes—online or on your mobile*'.[9]

  The Committee noted that tasks which contain significant safety risks appear on the Airtasker website. They cited an example of a logged job seeking 'help with stacking and wrapping pallets'. The Committee, in its report, noted:

  > *'It is worth noting that, as independent contractors, whoever "won" the above task to lift and move heavy objects would not have been covered by workplace health and safety laws. It is also worth noting that Airtasker, despite considering workers to be independent contractors, does not in fact verify whether workers have ABNs.'*[10]

  The Committee went on to note that skills sought on the Airtasker website also included 'installing a rangehood kit', 'families to host overseas students', 'plumbing work', and 'laying synthetic grass'. It found that '*businesses are increasingly turning to Airtasker to find workers, saving considerable money in the process and undercutting regular workers in the process*'.[11]

---

[7] *Ibid, sections 8.21 and 8.22.*
[8] *Ibid, sections 8.27 to 8.35.*
[9] *Ibid, section 8.38*
[10] *Ibid, sections 8.49 & 8.50.*
[11] *Ibid, section 8.58.*

- In the same report, the Australian Manufacturing Workers' Union (AMWU) describes the gig economy as a: '*mutant form of labour hire and contracting...where they effectively remove the contracting company altogether and make the employees into contractors*'.[12]

The Scale of the Issue:

- Casual work accounts for approximately 20 per cent of the Australian workforce, and a further 3.9 per cent are on fixed-term contracts.[13]

- Independent contractors, as defined by the ABS, make up 8.5 per cent of the Australian working population.

- 'Freelance work' or 'contingent work' refers to work done by independent contractors, either as their main source of income, or 'moonlighting' activities used to supplement other forms of income. Reports suggest that 4.1 million Australians, or around 32 per cent of the workforce, have done some sort of freelance work in the past year.[14]

- Freelancers who shape their careers by working on a 'task-by-task basis', and who are enabled by technology, are colloquially referred to as participants in 'the gig economy'.[15] It has been defined as follows:

> *'The gig economy encompasses markets where buyers and sellers of goods and services are matched or organised via web based platforms.'*[16]

- The Association of Superannuation Funds of Australia (ASFA) estimates that there are approximately 100,000 Australians engaged in the gig economy,[17] although precise numbers are difficult to establish.

- The main proponents of the gig economy tend not to advertise the number of their contracted workforce or number of contracted engagements on their websites. The current magnitude of the gig economy in Australia can be gleaned from various reports, such as:

---

[12] *Ibid, section 8.59.*
[13] *ABS Forms of Employment, p.13. See 'Persons without paid leave entitlements'.*
[14] *http://www.news.com.au/finance/work/at-work/australias-freelance-economy-grows-to-41-million-workers-study-finds/news-story/629dedfaea13340797c68822f4f2a469.*
[15] *Ref: https://www.aph.gov.au/DocumentStore.ashx?id=a6f714ed-dd1b-4374-a748-0c7d4d1a29d1&subId=460121 (p.4).*
[16] *Superannuation and the Changing Nature of Work: Discussion paper (2017), ASFA.*
[17] *Superannuation and the Changing Nature of Work: Discussion paper (2017), ASFA (p.4).*

- Airtasker has 1.8 million members[18] (those registered with the site, either to log a task or to bid to do the work);
- Uber has 82,000 drivers in Australia[19] (excluding Uber Eats); and
- Deliveroo has 3,600 riders in Australia.[20]

- Internationally, the Australian Industry Group (AIG) cites evidence that: '*By 2020, it is forecast that contingent workers will exceed 40 per cent of the US workforce*'.[21]

- The AIG report goes on to note the role of technology in perpetuating the growth of non-traditional work. It notes that: '*Australian platform, Freelancer.com, is the world's largest freelancing and crowdsourcing marketplace, connecting over 19 million employers with contingent workers in 247 countries. Between 2009 and 2014 its number of users grew from one million to ten million.*'

- Precarious work and particularly sham contracting, the abuse of labour hire arrangements, freelance/contingency work and gig economy work outside of regulatory frameworks are increasing year by year. The threats to the premium income of workers' compensation schemes are writ large, and escalating.

  Who is affected?

- This rise in precarious work continues to be a significant factor increasing insecurity among the workforce. The ALA believes that this uncertainty would undoubtedly influence the behaviour of workers where they would otherwise pursue their industrial rights or access support and compensation if they are injured.

- As mentioned earlier, participation in insecure gig economy work is prevalent among cleaners, construction workers, beauticians, call centre workers and drivers. We are aware that these type of labour arrangements are also occurring in the meat industry, and others.

- One area of emerging concern is the prevalence of this style of employment in the health and aged care sectors. With demographic shifts reflecting an ageing population, along with the full scheme rollout of the NDIS, the demand for health and personal care workers is increasing. The potential absence of proper (if any)

[18] http://www.news.com.au/technology/online/social/how-australias-top-airtasker-made-171000-using-the-service/news-story/f986d3d892a354b55ac67c0c27358b76.
[19] http://www.afr.com/business/airtasker-who-makes-100k-a-year-rejects-regulation-call-20180326-h0xyu2.
[20] https://www.smh.com.au/business/careers/minimum-pay-and-hours-demand-for-food-delivery-drivers-20180130-p4yz2d.html.
[21] *The Emergence of the Gig Economy, Australian Industry Group (2016), p.4.*

workforce infrastructure planning for the NDIS, and paucity of regulation, will be of great concern in this emerging market.

- Immigrant populations are often the victims of sham contracting arrangements. There are approximately 650,000 temporary migrants in Australia, a large majority of whom are working. As evidenced from the 7-Eleven scandal,[22] the conditions of their visas are often used against them to claw back salaries or underpay them. Accommodation and transport costs are also used to claw back pay, particularly in the horticultural sector. There are obviously piecework rates in the horticulture sector, where comparable hourly rates of pay are $5 per hour more than what those on sham contracts are receiving.

- Business operators claim that the 'gig economy' offers young migrants an opportunity to join the workforce in a flexible and entrepreneurial way. In its well-researched submission to a recent Senate inquiry into the future of work,[23] the Centre for Multicultural Youth says, in relation to young immigrants:

> '*In the future, young people are likely to be navigating a much more flexible and variable workplace, with less support and where there may be increased risks of exploitation. As such, young people will also need to be equipped with knowledge about their rights and responsibilities in the workplace, as well as with supports to exercise those rights.'*

- In short, the most marginalised workers are over-represented in the gig economy.

The Impacts:

- Some of the practical effects of the growth in precarious work include:
  - workforce participants are being deprived of Workcover coverage to protect them from the consequences of injuries at work;
  - businesses which engage people but abrogate their legal responsibilities for workplace safety are being given an unfair commercial advantage over business which play by the conventional rules; and
  - Workcover is being deprived of premium income it would otherwise have received.

- A recent submission by the Young Workers Centre[24] supplied as evidence to a Senate Committee hearing into Corporate Avoidance of the Fair Work Act included

[22] *https://www.smh.com.au/interactive/2015/7-eleven-revealed/.*
[23] *https://www.aph.gov.au/DocumentStore.ashx?id=3cd33a44-816c-46dc-87ae-5d4709cb98bb&subId=563289.*
[24] *https://www.aph.gov.au/DocumentStore.ashx?id=5e5c5b33-2235-41b6-b7c8-0d681418a250&subId=463879, refer to clause 7.6 of the contract, p.25 of 84.*

a copy of a Deliveroo contract which specifies that the contractor must supply their own insurances, including workers' compensation coverage.[25]

- The ALA is also aware of media reports[26] that Deliveroo introduced Workcover cover but then used contracts that absolved them from any responsibility for their riders.

- Sham contracting and poorly regulated labour hire processes are creating a generation of workers who:

    - are not going to benefit from superannuation benefits at retirement;
    - may be underinsured and thereby unprotected in the event of accident or mishap;
    - have no security of income;
    - do not have the safety net of minimum hourly earnings;
    - are not covered for personal, sick, parental or other forms of leave; and
    - are not covered by the OHS protections that the rest of the workforce enjoys.

- In addition to resulting in unfair treatment of vulnerable workers, depriving these workers of legislative safeguards is likely to lead to increase costs to the public purse: injuries that should have been covered by workers compensation will instead be covered by Medicare, and workers who missed out on superannuation will instead be forced to rely on the pension in their old age.

The Way Forward:

- It is worth noting that, in its final report[27], the Senate Education and Employment References Committee inquiry into Corporate Avoidance of the Fair Work Act made the following recommendation:

> *Recommendation 29*
> *The committee recommends that the federal government work with state and territory safety regulators to review health and safety and workers' compensation legislation to ensure that companies operating in the gig economy are responsible for the safety of workers engaged in the gig economy.*

---

[25] *It should be noted that Deliveroo has questioned the authenticity if this.*

[26] *See for example http://www.news.com.au/finance/work/at-work/senate-inquiry-takes-aim-at-airtasker-and-deliveroo-for-shortchanging-workers-safety-concerns/news-story/e98e7380c049c9e57dc16acbb0121668 see final paragraph under "Apps Short-Changing Workers".*

[27] *https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/AvoidanceofFairWork/Report.*

- While the common law jurisprudence on the definition of 'worker' is helpful to an extent, it is our view that clearer statutory and regulatory framing of the definition of 'worker' is warranted, to reflect contemporary circumstances. The review process to which this submission responds is an excellent opportunity for government to craft a suite of policy responses to the escalating threats and risks that these developing arrangements pose to Workcover, and to many workers in Queensland.

- It is important that the conversation is broadened to include Labour Hire legislation and laws underpinning contracted labour arrangements.

RECOMMENDATIONS:

- That the Office of Industrial Relations invest resources in determining a 'definition of worker' which will satisfy the Queensland context. Such a definition should draw on, but not be constrained by, common law jurisprudence on the question of 'worker'.
- That the Office of Industrial Relations seek to ensure clearer statutory and regulatory framing of the definition of 'worker', to reflect contemporary circumstances. This process may involve consultation with Senior Counsel.
- That the Office of Industrial Relations seek alignment between the outcomes of recent labour hire reform initiatives and issues relating to access to workers' compensation.
- That the Office of Industrial Relations explore the possibility of legislating a deeming provision, which would give the regulator the capacity to deem certain cohorts as 'workers' in the context of access to workers' compensation and related benefits.
- That the Office of Industrial Relations be conscious of cultural sensitivities in developing responses to emerging workplace issues.

The ALA would be pleased to offer to work closely with the Office of Industrial Relations in its ongoing investigations into protecting the rights of workers in the 'gig economy'. We would be pleased to offer our experience and expertise in workplace law to ensure that Queensland capitalises on a timely opportunity to provide national leadership in this critical matter.

3. What, if anything, should be done to increase the proportion of injured workers returning to work or recovering at work, and/or reduce the duration of claims? Should different arrangements be put in place for specific industry sectors or injury types (such as psychological injury)?

- The ALA shares the Office of Industrial Relations' concerns in relation to the need to add specific focus on to the return-to-work processes for people with psychological injuries.
- The ALA notes the statistics detailed on page 10 of the Information Paper in relation to claims for psychological injuries, including that:
    - The average finalised time lost claim for a person with psychological injury is approximately three times that for a physical injury;
    - The proportion of cases involving psychological injury is trending downward; and
    - The presence of a psychological injury impacts the likelihood or a worker returning to work.
- The ALA applauds the initiative of the Office of Industrial Relations and Workcover Queensland in the provision of specialist support for people with psychological injuries who are navigating the claims process. The ALA does not suggest any change to the 'reasonable management action' exclusion in the WCRA.

RECOMMENDATIONS:

- The ALA encourages the Office of Industrial Relations to continue to explore ways to assist claimants with psychological injuries to return to work in a manner which:
    - Is caring and efficient;
    - Is client-focused and user-friendly; and
    - Does not re-traumatise clients.

4. Is the current claims management process adequate to address the wide breadth of injuries and diseases in the Queensland scheme? What improvements, if any, should be made to the current claims management process?

- Generally, the ALA believes that the current claims management process is adequate to address the wide breadth of injuries and diseases covered by the Queensland scheme.
- However, the ALA believes that access to justice is not optimally fostered through Workcover's claims management processes. Workcover does not encourage or

suggest to an injured worker that legal advice would be in their best interest, even where that is obviously the case.

- Injured workers dealing with complex legal concepts at a time of increased vulnerability are not well served by a scheme which does not proactively encourage the seeking of legal advice.

- Employers routinely obtain legal advice, and are thereby equipped to deal with legal issues. However injured workers, often lacking in formal education, are reliant upon Workcover. ALA contends that Workcover has a financial interest in *not* suggesting that workers obtain legal advice. That power and knowledge imbalance should be addressed.

- The ALA believes that any scheme which claims to be fair and balanced, ought to match that assertion with behaviours and systems that truly promote fulsome access to legal advice, and hence access to a full suite of legal options.

RECOMMENDATIONS:

- That a communication protocol be developed, with input from key stakeholders including the ALA, which mandates that injured workers be encouraged to seek legal advice at various stages of the statutory process.

5. What more, if anything, could insurers do to ensure consistent service delivery throughout the state?

- The ALA draws the attention of the Review to the issues surrounding self-insurance.

- The ALA believes that there are two core elements to any discussion around self-insurance, namely:

  i. The solvency and prudential protections approach taken by the regulator; and
  ii. The behaviour of self-insurers in the scheme.

- In relation to the first point, the ALA believes that the current approach to regulating solvency and prudential protections is appropriate and functioning well.

- The ALA recognises that the Office of Industrial Relations has a strong focus on ensuring a robust, consistent, accountable and transparent approach to the regulation of self-insurers.

- In relation to the second point, the ALA is concerned about an observable decline in the behaviours of some self-insurers. Of particular concern are self-insurers which actively flout the Act and fail to observe privacy expectations. We would emphasise that some self-insurers are far less likely to adopt poor behaviours.

- Some examples of poor behaviour include:

    - Unreasonable denial of meritorious claims;
    - Unreasonable delay in meritorious claims'
    - Unreasonable appeals of the regulator's decisions to accept claims;
    - Failure to observe privacy requirements, especially in inappropriate discussions between the HRM and insurance arms of an entity; and
    - Workers being dissuaded from lodging workers' compensation claims, but encouraged instead to access other benefits such as sick leave or annual leave. This practice exposes workers to unacceptable risks:
        - Less than optimal rehabilitation;
        - Adverse financial consequences;
        - Extinguishment of accrued benefits (such as leave);
        - Inability to claim permanent impairment; and
        - Potential inability to make a common law claim.

- The ALA is aware that in 2017 the Office of Industrial Relations commissioned PWC to undertake a review into the processes for licensing self-insurers, claims auditing and compliance activities. We note that the following actions were recommended by the resulting report:[28]
    - *Adopting a risk-based compliance framework for the monitoring of self-insurance performance;*
    - *Establishing clear frameworks for decision-making to enhance consistency across the unit and transparency with self-insurers including reviewing:*
        - *financial viability assessment tool and frameworks;*
        - *the framework for licence renewal periods;*
        - *the framework for assessing performance risk; and*
        - *the non-compliance framework to escalate issues with individual self-insurers;*
    - *Improving audit practices, through reviewing the structure of the unit, the random sampling methodology and the audit report; and*
    - *Greater use of technology.*

- The ALA congratulates the Office of Industrial Relations on initiating this review, and encourages the Office to adopt each of the above recommendations.

---

[28] *Derived from the presentation entitled "Review of self-insurer licensing, claims auditing, and ongoing compliance activities", Janene Hillhouse, 2017.*

- The ALA encourages the Office of Industrial Relations to pursue interventionist strategies where self-insurers flout the Act, or fail to observe privacy principles. Financial and licence consequences must be part of the suite of sanctions available to address such behaviours.

- The ALA notes and commends recent initiatives to ensure there is a greater regional presence of law firms on WorkCover's panel of firms.

RECOMMENDATIONS

- That the Review prioritises recommendations which promote increased vigilance and regulation of self-insurers.

- That the Review endorses the adoption of the recommendations from the PWC report *Review of self-insurer licensing, claims auditing, and ongoing compliance activities*, as noted above.

ALA QLD Submission of Comments to OIR

Submissions to OIR re: (a) Injured worker medical consultations + additional consent and (b) 2 x Rehabilitation Guidelines

10 December 2021

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | **ABN** 96 086 880 499
T +61 2 (02) 9258 7700 | **F** +61 2 9258 7777 | **E** enquiries@lawyersalliance.com.au | **W** www.lawyersalliance.com.au
Protecting and promoting justice, freedom and the rights of the individual.

Contents

Who we are **4**

Introduction **5**

The draft "Injured worker medical consultations", and a draft additional consent **5**

The documents upon which comment was sought under cover of an email from Ms Fiona Martin **7**

Conclusion **8**

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

ALA has been asked to comment upon two classes of draft documents. The requests to comment arrived separately from OIR. As the issues traversed by both cohorts of documents are linked, ALA has one submission encompassing both cohorts. It appears below.

Our submission

We would welcome the opportunity to meet to discuss matters further.

1. <u>The draft "Injured worker medical consultations", and a draft additional consent.</u>

The request for comment on these documents came from Ms Hillhouse at OIR under cover of email dated 15 October 2021 at 2.10pm.

We will comment on each draft document separately:

(a) **"Injured worker medical consultations" draft.**
This document is based upon a WA Regulator document which has been in use for several years.

Members of ALA have for many years been expressing concern about some employers and self-insurers misleading, coercing and bullying injured workers about their rights in respect of medical treatment and consultations. This tends to occur more often with self-insurers. A document of this type is overdue and welcome. It will be important that the document is backed up with action where its terms are not adhered to by employers and/or self-insurers. We consider that there is a high risk of that occurring.

ALA supports the content of the document with these additions and exceptions:

(i) At the end of the section entitled "Employer attendance at medical consultations" add as new paragraph as follows:

"The fact that medical attendances may be paid for by a workers' compensation insurer is also no basis for seeking to attend at a private and confidential medical consultation. Action may be taken against employers who seek to play any role in participating in such private medical or allied health meetings."

(ii) Delete all of the "Case conferencing" section for the reasons set out below.
(iii) Delete all of the "Medical authorities" section for the reasons set out below.
(iv) Replace those deletions with:

"At the commencement of the worker's claim, each worker has signed a consent which authorises doctors, health authorities, allied health providers, rehabilitation providers to disclose to Workcover Queensland and its agents any information about my medical history relevant to the worker's claim. Workcover routinely obtains and evaluates such information relevant to the claim, and monitors new information as it is produced. Workcover also complies with legal privacy

obligations. Our employer return to work guide **[link]** provides further guidance about return to work options and your responsibilities. For some workers, a case conference involving your representative, the worker and their representative and possibly allied health professionals and doctors may be desirable. In such cases, if there is additional information relevant to the worker's claimed injury which is needed, that will be considered before the case conference occurs."

(b) The additional consent form.

ALA strongly opposes the use of this document or any similar iteration of it, because:

(i) The WCRA already imposes clear obligations upon injured workers in respect of disclosure of relevant information,

(ii) Those obligations find expression in the consent contained within the claim form, referred to above. The consent explicitly authorises the provision of "any information about [the worker's] medical history **relevant to this claim**." [our emphasis],

(iii) The additional consent is in our view a solution seeking a problem. There is no evidence that the existing consent is not fit for return to work purposes,

(iv) There is no sound rationale for allowing others access to irrelevant medical material,

(v) Any consent which would permit of the worker's entire medical history to be disclosed to employers and insurers harbours many unacceptable risks, including:

- Many, perhaps most people have matters in their medical history which they would regard as highly sensitive,
- Some employers have no respect for privacy and confidentiality, irrespective of assurances given on the draft consent. Our members see cases where what has occurred in the Workcover process, including discussion of medical issues, has been the subject of discussion, gossip and innuendo later in the broader workplace. To add to relevant medical material other irrelevant, and in many case deeply personal and sensitive information, heightens those risks. Such improper disclosure of medical information distresses workers and engenders deep distrust not only of the employers, but others perceived to be part of the system which permitted the disclosure to occur. It disrespectful to injured workers and antithetical to the objects of the WCRA.
- The disclosure of irrelevant medical information provides Workcover, self-insurers and employers with an unjustifiable, unfair forensic advantage in the litigation process. Relevance has long been the touchstone for disclosure in the Courts. Rightly so. There is no justification, included an asserted benefit to RTW objectives, to allow Workcover, insurers or employers to go on fishing expeditions, trawling through sensitive, irrelevant information.

(vi) The fact that the draft consent is cast as "optional" will not resonate with many workers. Many will perceive it as being required as a matter of law, particularly without the benefit of a lawyer, which is often the case during the statutory phase.

The proposed document should in our view be dispensed with.

2. **The documents upon which comment was sought under cover of an email from Ms Fiona Martin dated 18 November 2021 at 4.20 pm.**

Our comments upon those draft documents appear below.

1. Rehabilitation terms, roles and responsibilities document:

    a. Needs to explain the term "key stakeholders" which is used throughout the other two guidelines. The document entitled "Rehabilitation and return to work plan guideline – for insurers" has a definition on page 5 which is probably suitable.

    b. Terms rehabilitation and return to work co-ordinator – so this is used specifically in the WCRA where certain employers must have such a co-ordinator, either employed or contracted. However, in these documents they tend to refer to this coordinator far more broadly, what I would think is akin to "case management". Therefore, either they need to clarify this and/or specify that a worker has a right to choose their own medical and allied health practitioners, including a coordinator.

    c. We commend the proposition that suitable duties should be meaningful. This will be contextual; but age, education, training and experience are all factors to be considered. Our members routinely hear reports from workers placed in meaningless positions, with the worker often perceiving that the underlying rationale was to protect superiors' "no LTI" financial bonuses.

    d. Page 4 SDP at paragraph 7 – stipulates the SDP must be signed off by treater "if outlined on the Work capacity certificate…". We suggest that all SDP, RTW programs must be reviewed by, and signed off by, a *treating* medical or allied health practitioner.

    e. Page 5 – Worker – paragraph 2 states the worker "should" be consulted. I think the worker "must" be consulted on development of a rehab plan. No, or deficient worker consultation almost guarantees a lack of worker buy-in.

2. Accredited rehabilitation and return to work program guideline – for insurers:

    a. Page 3 – intro – end of 2nd paragraph should include "or maximise independent functioning" because a rehab program is not just about RTW under the WCRA. If not possible to RTW, then the obligation is to maximise independent functioning.

    b. Page 5 – rights and responsibilities – it is vital that this document clearly states that the worker has a right to choose their own medical and allied health providers, that the employer cannot influence this decision, and that the worker must be advised that they do not have to attend an employer doctor (if the employer offers such a service). The issues of company doctor lack of independence and behaviours has been well-ventilated with OIR in the past.

    c. Pages 6 – 7 – Rehabilitation and return to work plans – it must be made clear that such plans must be reviewed by, and signed off by, a *treating* medical or allied health practitioner, and where applicable, the appointed case manager.

3. Rehabilitation and return to work plan guideline – for insurers:

    a. Page 5 last dot point – this goes back to my point 1(b), if the insurer proposes using a case manager to coordinate services, then the worker ought to have a

choice in this the identity of the case manager, including being able to nominate their own.

b. Page 6 – elements of the RRTW plan, dot point 2 – details of other health conditions – is concerning including for the reasons set out above on the additional consent. Relevance must always be the touchstone.

c. Page 6 – elements of the RRTW plan, penultimate dot point – sign off, again clarifying this is to be signed off by treating practitioner and if applicable the case manager.

There also needs to be confirmation from OIR that, if there are any issues/complaints by worker or worker is requested to do anything outside the scope of the plan, they are not required to do that, and should be encouraged to report to employer, insurer and treater.

Finally, we consider that Workcover has under-utilised external case managers in the RTW context for many years. Skilled case managers can be hugely valuable in identifying suitable duties, and being a trusted liaison point between injured workers, their treating practitioners, the employer and insurer. Our members have seen the external case management model produce outstanding outcomes in the CTP and NIIS contexts; and we believe that an opportunity exists to improve RTW outcomes by a more proactive and structured approach to external case management on the workers' compensation context.

.

Conclusion

Should you have any questions about any of the comments above, please do not hesitate to make contact.

Sarah Grace

Queensland President
Australian Lawyers Alliance

ALA Submission to OIR

Second Submission to OIR re: (a) Injured worker medical consultations + additional consent and (b) 2 x Rehabilitation Guidelines

9 September 2022

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | **ABN** 96 086 880 499
T +61 2 (02) 9258 7700 | **F** +61 2 9258 7777 | **E** enquiries@lawyersalliance.com.au | **W** www.lawyersalliance.com.au
Protecting and promoting justice, freedom and the rights of the individual.

Contents

Who we are **4**

Introduction **5**

Our Submission **5**

Solutions **8**

Conclusion **10**

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

Thank you for the opportunity to make further comment on your draft documents. We refer to our previous submissions dated 10 December 2021 **attached** for your reference.

We apologize for the piecemeal approach to our response. Some people wishing to provide feedback were unavailable until early September.

Our comments follow. We are happy to meet, were you to consider it helpful, to discuss the documents in further detail. We preface our comments with strong support for the principle of returning injured workers, as soon as is medically feasible, safely; to meaningful work following a work injury.

Our Submission

The safety and meaningful work aspects are features we would emphasize. A safe return to work usually has both physical and psychological needs to be addressed.

Our members' experience is that the holistic assessment of the needs of injured workers commonly:

(a) Does not occur at all, or

(b) If an assessment of that nature purports to occur, it occurs:

- Later than optimal,
- In a defective way, with this usually being a product of the person conducting the assessment lacking the professional skills and training (usually tertiary qualifications in an allied health discipline) to understand and report upon the often-complex suite of injuries and sequalae thereof, the needs resultant upon the injuries, and the type and cost of rehab measures needed to optimize a return to work, and/or
- In a set and forget way, failing to re-mould a plan as the injured workers' medical circumstances evolve, and their needs and work capacity change accordingly.

Our members have also seen countless instances of injured workers being forced, as they would perceive it, to return to work prematurely and to jobs which were demeaning, misaligned with their skills and experience, and in many cases seen as meaningless.

There are two documents which have much overlap.

The first, "Overview" document is a roles and responsibilities overview and framing document. It seeks to stipulate which entity has responsibility for each core function, and in doing so, demarcates in particular between insurers (including self-insurers), and employers.

The document states an expectation that "a self-insurer maintain structural separation of these obligations." Our members have seen numerous examples of deplorable conduct by many self-insurers, who have not even had a pretense of that structural separation: the HR and rehab roles are interlinked and injured workers exposed to that inappropriate mixing of roles, amongst other undesirable conduct, do not have their rehab needs met. We would be interested to know at a practical, coalface level, how the WCRS would intend to apply vigilance to ensure that the necessary structural separation always occurs. And where it is lacking, what sanctions, including we hope, the potential withdrawal of license, would apply.

Central to our observations is the fact that the insurer has responsibility for the first, and critical steps, being:

(a) Identifying those injured workers needing a RRTW plan,

(b) Discharging its legal obligation under the WCRA, by taking "all reasonable steps to coordinate the development and maintenance of a RRTW plan…"

We agree with the observation that RRTW plans are not "one size fits all". Indeed, our members' experience is that adopting a cookie-cutter approach to assessing needs, and subsequently developing plans to assess those needs, will not enhance rehabilitation and RTW prospects.

Some injured workers usually at the lower end of the injury severity spectrum, once identified and assessed, will be professionally evaluated as only needing a "light touch" RRTW plan. But not always. Some less serious physical injuries can have a profound effect on vocational functioning, and on psychological health. And circumstances and medical insights about the injured worker can change.

For a RRTW to have reasonable prospects of efficacy, those first steps are fundamental. A high-quality, professionally (in the sense of proper qualifications) prepared, individualized and holistic needs assessment is the foundation stone upon which the subsequent steps will proceed. The more serious the injury or mix of injuries, the more critical it is that:

- The injured worker be identified and engaged as early as medically feasible on rehab,
- The person charged with responsibility for formulating the RRTW plan be independent; and have the proper qualifications, skills and experience to do so.

Page 5 of the document states:

The insurer's claim manager [by whatever title] is responsible for … developing, leading, monitoring, reviewing and updating rehabilitation plans…, providing progress updates to all stakeholders when relevant or at completion of the RRTW plan; and keeping all stakeholders advised of any changes to the RRTW plan."

We consider that there is insufficient guidance on these matters, and related problems. We frame those in questions:

1. <u>Whom at the insurer has the task – is the claims manager way out of their depth?</u>

The vast majority of insurance claims managers do not hold tertiary allied health qualifications. Ignorance about injury type, severity, duration, psychological impacts, treatment options and all of the other needs which flow from the injuries will, often irrevocably, lead to the formulation of deficient RRTW plans.

We understand that Workcover Qld employ some staff with allied health qualifications. Their roles, reportedly, include assisting claims managers in various ways to develop bespoke and proactive rehab plans and carefully considered RTW options. Our members have seen little direct evidence of this.

The model, as the overview document contemplates, is of the claim's manager being the fulcrum. The role of the insurer claims manager in the italicized extract above is, in effect, that of a rehabilitation case manager. This person is the hub, from which various spokes emerge and must operate collaboratively towards the common goal of supporting the worker to a timely, safe and meaningful return to work.

Without proper qualifications, and even if the conflicts issue below in 2. were absent, there are serious doubts as to whether the vast majority of insurer case managers have the professional qualifications, skills and experience; to properly discharge the rehab case manager role. Put simply, the documents expect of the case managers, something which nearly all of them lack the professional qualifications and skills to do. This is a fundamental deficit.

2. Is the insurer and hence claims manager conflicted?

This will be an uncomfortable question for both Workcover Qld and self-insurers.

Particularly, but not only, at the more serious end of the injury spectrum, a comprehensive and professionally formulated needs assessment will require expenditure. Also, the implementation of the plans will sometimes require substantial further expenditure. Often, rehab needs assessments identify needs which had been overlooked by the claims manager and sometimes by treating medical practitioners who are time-poor. Common examples include:

- Housing modifications
- Transportation issues
- New injuries not yet accepted formally by the insurer
- Post-surgical therapies to aid recovery
- Paid care
- Psychological supports. Many workers, and blue-collar males in particular, are reticent to reveal their psychological distress.

There are many other examples.

The meeting of those new or upgraded needs will invariably involve expenditure which we regard as an investment in the worker, their optimized recovery and therefore improved prospects of a timely and meaningful return to some form of work.

This expenditure will usually be more than presently allocated for the worker's rehab needs, and more than the financial modelling for the future of that worker's statutory claim.

There is, and will continue to be a tension between insurers' desire to limit claims cost, and the needs and expenditure flowing from a thorough, professional needs assessment. We do not accept that the claims manager can, comfortably and to the benefit of the worker, walk both sides of that street. In our view, the higher the anticipated additional expenditure – a general correlation with injury severity – the more acute the tension and conflict.

In our members' experience, the early investment pays dividends in the form of:

- The worker feeling genuinely supported,
- Other stakeholder being kept informed and their views being respected,
- Improved chances of an RTW in some form

3. Were the skills/qualifications and conflicts issues absent, precisely how would the claims manager discharge their responsibilities?

That is, what guidance do the documents provide on the specific methodologies required to be adopted by claims managers to develop, lead, monitor, review and update RRTW plans and effectively liaise with stakeholders?

The documents are short on this important issue. Whilst the documents clearly require liaison between the claim's manager and each of the worker and employer; the primary deficits we consider exist are at the front end: the holistic evaluation of needs at the earliest opportunity, then a model for acting on such an evaluation.

The documents provide little guidance on how a claims manager will fully evaluate the injured worker's

needs. We emphasize again that such an evaluation, properly conducted, will differ according to many factors. Cookie-cutter formulas are to be avoided. Nevertheless, and particularly due to the absence of formal case-management qualifications in the claim's manager cohort, one would expect a greater level of specificity on how the claims manager would discharge their stated function.

Proposed Solutions:

In our respectful view, the documents would benefit from a structural re-think. Whilst we again endorse the guiding principles, we consider that the documents will have limited utility in improving Queensland's mediocre RTW metrics. In a scheme which we regard as, in many other respects, nation-leading; there is an opportunity for greater improvement.

We believe that a pointer to a key initiative is found in a note forming part of the second document. Page 5 of that document, in referencing workers who have not been able to RTW in their pre-injury role, some of whom will have had their statutory claims closed; states:

"In practice, a referral to the insurer's RRTW program may involve referral to a workplace rehabilitation provider (WRP), who will develop a plan tailored to the individual worker, detailing how they will assist the worker in their rehabilitation now their claim is closed."

In our submission:

1. A referral to an external provider at that late juncture (post statutory claim) might help some injured workers,
2. However, the optimal time for a referral to the external provider is far earlier in the claims process.

Development of a model whereby timely evaluation of injured workers' needs by a firm, independent of the insurer and the employer, is central to our view of remediation of the present draft model. We again apprehend the possibility of discomfort. There are non-workers' compensation scheme injury scheme contexts where such a model resists the flaws borne of the issues explored in the questions posed above.

There is more detail which would need to be developed under each of the below points. At a top level, the guiding principles and design fundamentals for the model we would recommend are:

1. The insurer acts as the insurer, not a rehabilitation case manager. The role of the claim's manager is to manage the claim in accordance with the Act. And, crucially, only within the professional expertise of the claim's manager.

2. As a matter of urgent priority upon a statutory claim being accepted, the claims manager allocates the worker's claim within the insurer:
   (a) To a person with suitable allied health qualifications (ideally in Occupational Therapy), or
   (b) If no such person exists at the insurer, to a suitably qualified external expert.

That person determines if a formal needs assessment is required, and if so the timing thereof and identity of the independent external firm to be commissioned to conduct the needs assessment. A set of criteria be developed to inform the "yes/no" needs assessment decision, and the triage to the independent firm.

3. The insurer makes the referral to the external firm. Employers cannot be trusted to do this properly, consistently.

4. A needs assessment be undertaken promptly. As is indicated above, not all matters will require a needs assessment. Some claims will be plainly straightforward, and where a full recovery and RTW in pre-injury duties reasonably expected. However, some matters which are initially seemingly simple, may be proven to be more complex. For example, an injury originally thought to be a hamstring tear, subsequently diagnosed as referred pain from an intervertebral disc injury, requiring spinal surgery.

5. The firm conducting the needs assessment have demonstrated experience in conducting needs assessments in a vocational rehab context, and staff with the suitable tertiary qualifications. A small panel of providers, perceived to captive to the economic direction of the insurer, is to be avoided.

6. The needs assessment has a major vocational rehab focus. The needs assessment report would be informed by the author of that report liaising with and considering views of all key stakeholders including:
    (i) The worker,
    (ii) The worker's family, especially where cognition and capacity issues may be live,
    (iii) The employer and other key people therein, such as the pre-injury supervisor,
    (iv) Treating medical and allied health practitioners,
    (v) Where additional unmet needs requiring new treatment, treating provider options,
    (vi) The injured worker's lawyer,
    (vii) The insurer.

7. The needs assessment, with (usually) a RRTW plan in it, be delivered within mandated timeframes from the referral in 3, above. Time will usually be of the essence.

8. The insurer trust and abide the professional opinions in the report. The report effectively umpires the injured worker's needs and the content of a RRTW plan. Whilst the report and the needs and costs arising from it, need to be evaluated by the insurer through the prism of the WCRA, the guiding precept must be "hands off – we have commissioned an expert and their professional opinions need to be trusted". That is, neither the insurers nor the employer should seek to nit-pick, dissect or dismiss the report.

9. The firm conducting the needs assessment hold, where necessary, a stakeholder meeting to coordinate the effective implementation of the need's assessment and embedded RRTW plan.

10. Implementation. All stakeholders are kept informed.

11. The external firm monitors, adjusts and keeps stakeholders informed of key refinements to the worker's needs and the RRTW plan.

12. Shortly before the cessation of the statutory claim, consideration of the merits of keeping the external firm, now acting as case manager with oversight of the RRTW plan, involved post the statutory claim. There will be merit in some matters, to a continuum through to the resolution of any common law claim.

13. Dispute resolution throughout, on an informal basis, be encouraged. Skilled rehab case managers are usually adept at reconciling competing views and interests. And where this is unsuccessful, parties have various rights under the WCRA.

Conclusion

Thank you again for the opportunity to comment on this important initiative.

Should you have any questions about any of the comments above, please do not hesitate to make contact. Should you consider it helpful would be happy to meet with you to discuss further at a mutually convenient time.

Sarah Grace

Queensland President
Australian Lawyers Alliance