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INSURANCE LAWYERS

WORKERS' COMPENSATION CLAIMS WA NEWSLETTER

Level 16, 44 St Georges Terrace Perth WA 6000

T 08 9221 3110 www.srblegal.com.au

REVIEW OF WORKCOVER WA CONCILIATION & ARBITRATION SERVICES 2016

In December 2015, Professor Tania Sourdin, of the Australian Centre for Justice Innovation at Monash University was appointed by WorkCover Western Australia (WorkCover WA) to undertake an independent review of WorkCover WA's Conciliation and Arbitration Services. (CAS).

Professor Sourdin has provided a report on her findings titled "Review of Workcover WA Conciliation and Arbitration Services 2016".

The main issue that was explored throughout the report was whether CAS is delivering dispute resolution services that are:

- cost effective
- timely
- fair and
- accessible.

It was found that WA's Workers' Compensation Conciliation and Arbitration Services are generally considered by stakeholders to work well.

When compared with other workers' compensation schemes in Australia, CAS provides dispute resolutions that are timely, cost effective, fair and accessible. However, Professor Sourdin noted that there is very little up-to-date comparative commentary about the diversity of dispute resolution mechanisms for workers' compensation throughout Australia.

Professor Sourdin's explored the extent to which the CAS are timely and cost effective. Professor Sourdin reported that the dispute resolution services at WorkCover WA are relatively low cost and are effective in managing, settling and finalizing disputes. However, once again there was limited information available about cost effectiveness and in relation to the costs borne by the users of the system.

There was a particular focus in the report for the need for newer technological support to assist with accessibility for individuals living in remote locations, as there are a high proportion of workers in Western Australia who reside outside metropolitan Perth. Skype videoconferencing facilities and circuit court arrangements may support access to remote areas more effectively into the future.

In relation to the Conciliation Services, an issue that was identified was consistency, particularly in regard to the differing approaches between conciliators. Some stakeholders suggested that there were inconsistencies in the way in which the Conciliation process was conducted. Issues raised related to perceptions of fairness.

It was suggested that there was too much variation in conciliators' methods and that it would be useful if conciliators could adopt a more uniform approach.

In relation to the Arbitration Services, Professor Sourdin found while the majority of arbitration matters are dealt with quickly, the time taken can be too long in a number of the matters which proceed to final determination.

Stakeholders indicated that the delays in the Arbitration Processes seems to be as a result of repeated adjournments, delays in obtaining medical reports, unavailability of witnesses and experts and rendering a decision.

Importantly Professor Sourdin noted that simply increasing the numbers of arbitrators will not necessarily lead to any significant improvements in timeliness, as the reasons for delay are predominantly outside the control of the Arbitration Service itself.

Whilst the workers' compensation system in Western Australia seem to be working effectively, the report identified some areas within the CAS that could be improved upon and made a number of recommendations regarding how to improve the experiences of those attending the CAS. Some of the recommendations included:

- that conciliators follow a basic standardised conciliation process model unless there are strong reasons to depart from such an approach;
- Conciliation processes be focused on party needs. The use of visual aids and limited private sessions with appropriate private rooms will assist to support procedural fairness perceptions by reducing 'shuttle processes' and supporting the workers voice in WorkCover WA processes;
- if applications are made with little background or supporting material, the CAS has a duty to reject these applications;
- a simple or expedited matters stream could be set up to deal with simple matters;
- pilot programs should be established in relation to online and telephone conciliation service provisions;
- consideration should be given to whether online, additional telephone, video conferencing or circuit hearing for matters could be of assistance in regional locations.
- online filing be enhanced and consideration be given to implementing a fully online filing and integrated conciliation service within 5 years;
- more training to arbitrators should be provided to develop skills in respect of case management, conducting hearings and in decision making;
- performance protocols should be developed to clearly set out expectations regarding the delivery of arbitration decisions;
- WorkCover WA should explore options to reduce delay with the objective of implementing changes with 12 months;
- consideration should be given to having shorter and easier to read reasons for decisions, having a simple reasons summary and having advisory services support available to assist people understand outcomes;

- sworn witness statements should only be supported by the giving of oral evidence where absolutely necessary and following a leave application to an arbitrator. Where evidence is to be given, it should be given via telephone or video conferencing wherever possible; and
- steps be taken to ensure that all arbitral decisions are published on the WorkCover WA website.

In response to the report and its findings, WorkCover WA have announced that they will pilot a cost effective videoconferencing system in the next financial year, providing opportunities for parties outside the metropolitan area to participate in conciliation conferences and arbitration hearings without the need to travel to Perth.

Mirrabooka / Nollamara Car Transport v. Reginald Rintoul [2016] WADC 58

In this case the worker, Mr Rintoul, was served with a Notice pursuant to s61(1) of the *Workers' Compensation & Injury Management Act* 1981 advising him of his employer's intention to discontinue his weekly payments of compensation.

In response, Mr Rintoul applied under s61(3) for an order of an Arbitrator that the weekly payments should not be discontinued.

The Arbitrator held that she was only required to decide the issue raised in the s61(1) notice, namely whether the weekly payments should be discontinued because Mr Rintoul's current incapacity was no longer as a result of the work injury. She came to the conclusion that in the absence of the s61(1) notice being based, in the alternative, on the intention of the employer to reduce the weekly payments, she was not required or entitled to deal with the question whether Mr Rintoul had a partial or restricted capacity for work and what income he could earn.

The matter was appealed to the District Court before Her Honour Schoombee DCJ.

Her Honour stated that the main issue in contention in the appeal was whether, once the employer had filed a valid notice under s61(1) to discontinue the weekly payments, the Arbitrator has to decide afresh the whole matter of whether the worker is entitled to any weekly payments at all and to what extent.

Her Honour found that it is a requirement of s61(1) that the employer state whether it intends to discontinue weekly payments or reduce them and to what amount (or both) and that it would be against the principles of natural justice if the Arbitrator could make a finding on the worker's retained capacity to work and reduce his payments, without Notice of that intention.

Her Honour also gave her opinion regarding the onus of proof in a s61 Application.

Her Honour concluded that there was no reason to depart from the burden of proof required under s62, in a s61 Application, namely that where the employer makes an Application for a review of weekly payments it carries of the burden to prove that the payments should be adjusted.

Her Honour reasoned that it is the employer who asserts in the medical certificate that the worker has regained total capacity to work or at least partial capacity or that his ongoing incapacity is no longer the result of the work injury. Other than the fact that it is upon the worker to make an Application to the Arbitrator under s61(3) if he or she does not accept the Notice and Certificate, the worker does not apply to change the status quo which he or she has established by the original Application for weekly payments.

If the employer wishes to change the status quo and asserts that the worker has regained full capacity or at least partial capacity or that the incapacity is no longer the result of the work injury, it should carry the legal burden to prove these matters and the worker would have an evidentiary burden to show that the situation had not changed or changed to a lesser degree than asserted by the employer.

Comment: When issuing a Notice under s61(1) it is imperative that, if you wish to reserve the right to argue alternatively that:

1. the worker has attained total capacity for work; alternatively
2. the worker had attained partial capacity for work; alternatively
3. the worker's ongoing incapacity is no longer the result of the work injury,

these must clearly be stated and set out in the s61(1) Notice.

The position taken by Her Honour Schoombee DCJ on the onus of proof is arguably at odds with the longstanding previously held view that the onus was on the worker. Given the Arbitrator will need to make a decision on the overall merits of the case, this may not be a real issue in practical terms.

Kanar v. A&S Sadak Pty Ltd [2016] WASCA 109

The issue for determination was whether the District Court had jurisdiction to hear an appeal from the decision of an Arbitrator in circumstances where no written decision had been requested from the Arbitrator.

The matter was heard before the Full Court of the Supreme Court of Western Australia. Pursuant to the judgment of the Court:

1. it was concluded that the effect of s247 of the Act is that an Appeal to the District Court from the decision of an Arbitrator under Part XI can be commenced only once the Appellant has been given written reasons for the Arbitrator's decision;
2. the Court said that is evident in the language of s247(1) and from the provision in s247(4) that the 28 day time limit for the filing of an application for leave to appeal runs from the time the Appellant is given written notice for decision;
3. the Court said the obvious purpose of doing so is to facilitate the disposal of any Application for Leave to Appeal efficiently and without unnecessary delay by ensuring that written reasons for the decision of the Arbitrator are available from the outset. The Court said that is consistent with the evident intention of the Act to provide for the *"speedy and fair"* conduct of proceedings which are the subject of Arbitration.

The Court noted that if written reasons are not given at the time the Application is determined by the Arbitrator they can be obtained upon a request made within 14 days of the decision (s213(3)(b)).

The Court stated that if reasons were given orally, a written transcript of the part of the proceedings in which the oral reasons were given is sufficient compliance with the requirement under s213(3) for the reasons to be in writing (s213(5)).

The Court however noted that the actual decision comes into effect immediately it is given, or at such later time as is specified in it, subject to any stay that may be granted by the District Court.

In this instance written reasons for decision were not requested and by the time the Application for Leave to Appeal came before the primary Judge it was too late for the Appellant to obtain written reasons. The Court concluded that in order for the District Court to have jurisdiction to hear the Application, the written reasons for decision had to obtained before the Application was filed.

Comment: Given the limited time in which parties are required to file Notices of Appeal, if you wish to preserve your right to do so, it is imperative that written reasons for the Arbitrator's decision be requested within fourteen (14) days of the decision (s213(3)(b)). You must also file any application for leave to appeal not later than 28 days after the day on which the written reasons for the decision to be appealed against were given.

Date: 3 August 2016

Should you require any further information relating to the above decision, please contact one of the following partners on telephone (08) 9221 3110.

Graeme Richards	Partner	Byron Winburn-Clarke	Partner
David Burton	Partner	Josephine Courtney	Partner
Alex Freeman	Partner	Justin Dyson	Partner
Tony Basile	Partner	Trevor Darge	Partner
Hugh O'Sullivan	Partner	Kathy Melville	Partner