



## **NATIONAL INSURANCE BROKERS ASSOCIATION OF AUSTRALIA (NIBA)**

### **Submission to WorkCover Western Australia**

#### **Legislative Review 2013**

**February 2014**

#### **ABOUT NIBA**

NIBA is the peak body of the insurance broking profession in Australia. NIBA represents around 400 member firms and over 3000 individual Qualified Practising Insurance Brokers (QPIBs) throughout Australia. In total NIBA represents an estimated 90% of all insurance brokers in Australia.

NIBA –

- Represents and speaks on behalf of its members to governments, Members of Parliament, regulators, the media and other interested stakeholders;
- Promotes the professionalism of insurance broking through industry based training and professional qualifications (NIBA College) and through a strong, independently administered and monitored Code of Practice for members;
- Communicates the importance of insurance and the role of insurance brokers to the community; and
- Provides a number of services to its members, including member communications and an annual industry Convention.

The 400 member firms all hold an Australian financial services (AFS) licence, issued by the Australian Securities and Investments Commission under the Corporations Act, which enables them to deal in or advise on Risk Insurance products.

NIBA Members include large multinational insurance brokers, large Australian-owned insurance brokers, and around 380 small to medium sized insurance broker businesses located in the cities, towns and regions across Australia.

#### **ABOUT INSURANCE BROKERS**

The traditional role of insurance brokers is to:

- assist customers to assess and manage their risks, and provide advice on what insurance is appropriate for the customer's personal or business needs;



- assist customers to arrange and acquire insurance; and
- assist the customer in relation to any claim that may be made by them under their insurance program.

In doing the above the insurance broker acts on behalf of the client as their representative or agent. Insurance brokers offer many benefits to clients and consumers, including:

- assistance with selecting and arranging appropriate, tailored insurance policies and packages
- detailed technical expertise including knowledge of prices, terms and conditions, benefits and pitfalls of the wide range of insurance policies on the market;
- assistance in interpreting, arranging and completing insurance documentation;
- experience in predicting, managing and reducing risks; and
- assistance with claims and the resolution of claims.

In limited cases insurance brokers may act as agent of the insurer (not the insured) but where such a relationship exists the customer is clearly advised up front.

Insurance brokers handle around 90% of the commercial insurance transacted in Australia, and play a major role in risk assessment, risk financing and insurance distribution, handling over \$17.8 billion in premiums in the 12 months to 30 June 2013, and placing around half of Australia's total insurance business. Insurance brokers place most insurance business with Australian authorised insurers, but also place substantial insurance business into overseas markets for large and special risks.

### **Role of Insurance Brokers in the Western Australian Workers Compensation Scheme**

Consistent with the broad role and responsibilities of insurance brokers outlined above, insurance brokers in Western Australia play a vital role in the Western Australian workers compensation scheme. Insurance brokers –

- assist clients understand their roles and responsibilities in relation to the risk of workplace injury and disease;
- advise on risk management strategies and actions that can be taken to minimize or remove those risks from the workplace;
- represent their clients when obtaining workers compensation insurance coverage, including advising on the nature and extent of cover provided by the statutory policy, the potential need for additional and complementary cover, and the operation of the insurance markets generally;
- negotiate pricing of workers compensation insurance on behalf of their clients;
- advise and assist client employers in relation to claims that may be made by their workers, including the resolution and closure of those claims.



The WorkCover WA Employer Survey published in December 2011 found –

- “Two thirds of employers surveyed buy their policy through a broker – making brokers a very important channel.”
- “Both Brokers and Insurers perform exceptionally well during the purchase and claims process. They should be congratulated.”

### **LEGISLATIVE REVIEW 2013**

NIBA appreciates the opportunity to provide comments on the Review of the Workers Compensation and Injury Management Act 1981 Discussion Paper.

NIBA commends WorkCover WA for the effort that has been applied to identifying a large number of areas where legislative improvements are desirable. Most of the proposals set out in the Discussion Paper would be regarded by NIBA as non-contentious, but as with most legislative schemes, the actual drafting of the new provisions will be critical.

NIBA respectfully suggests WorkCover and the Western Australian Government commit to further consultation on any draft legislation that might be prepared following the current review, in order to give all stakeholders an opportunity to consider the reforms in detail, prior to submission to and consideration by the Parliament.

### **Fundamentals of Workers Compensation**

An effective and efficient workers compensation scheme must be founded upon a number of key basic requirements. These are:

- The definition of employer – who is required to take out workers compensation insurance?
- The definition of worker – who is to be covered for workplace injury and disease under the mandatory workers compensation insurance policy taken out by employers?
- The definition of wages and remuneration – what is the nature of remuneration that is taken into account for the purposes of determining premiums, and for determining the basis of compensation for loss of earnings or loss of earning capacity;
- Injuries and disease – what injuries and disease are, and are not, covered by the workers compensation insurance policy, and the compensation and benefits provided by the legislation.

These key concepts must be clear to all parties, so that –



*National Insurance Brokers Association.*



- Employers, and their insurance brokers, can clearly and readily understand their obligations in relation to workers compensation insurance coverage – which workers they are required to be insured for, and which workers do not fall within their workers compensation policy;
- Injured workers can easily determine their entitlement to claim, and the nature of the benefits they are entitled to receive for a workplace injury or disease; and
- Insurance companies can assess and determine the nature and value of liabilities that are transferred to them when insurance policies are taken out, and can also determine which claims are valid, and which claims are not valid and are to be resisted.

Clarity in these key concepts is also essential in order to minimize the number of disputes, and to provide clear guidance to conciliators, arbitrators, and ultimately the Courts of Western Australia regarding the obligations and entitlements that are created by the legislation.

There have been many discussions over the past 20 years in relation to the harmonization of workers compensation schemes across Australia. The core concepts mentioned above have been considered in detail in all the major workers compensation jurisdictions over the past 10 years, and Western Australia can now take account of the ways in which other schemes have defined these matters. NIBA respectfully submits there is now a significant opportunity for Western Australia to move towards national consistency, and to adopt and apply core concepts and definitions that have been tried and tested in other jurisdictions and have been found to work successfully for all stakeholders.

This Submission will now address Part 5 of the Discussion Paper (Liability and Insurance) and will then comment on other matters in the Discussion Paper or matters that have not been mentioned in the Discussion Paper but which NIBA believes are worthy of consideration as part of the current Review.

### **Discussion Paper Part 5 – Liability and Insurance**

#### *Proposal 129 – policy of insurance terminology*

NIBA supports the proposal to bring consistency in relation to references to the workers compensation insurance policy.

#### *Proposal 130 – exclusion of war*

NIBA notes that the war exclusion does not apply in other workers compensation jurisdictions. Current circumstances around the world also raise difficult questions as to what constitutes war, military or usurped power. In the circumstances, the proposal to remove the exclusion of war is supported.



### *Remuneration and records*

NIBA notes that there is no clear, widely accepted and applied definition of remuneration in the Western Australian workers compensation scheme. Insurance brokers report differing approaches and interpretations among insurers.

As noted above, a clear, consistent and readily understood definition of remuneration is vital for an efficiently functioning scheme. NIBA respectfully submits this matter receive further detailed consideration as part of the current Review.

### *Proposal 131 – audit of remuneration declarations*

NIBA supports measures to ensure the correct reporting of remuneration, supported by ongoing auditing and enforcement where warranted. Proposal 131 is therefore supported.

### *Proposals 132, 133 – remuneration declarations and record keeping*

NIBA supports the proposals to clarify the keeping and retention of appropriate records of remuneration and occupations of all workers.

### *Proposal 134 – remuneration declarations in the contract chain*

For the reasons set out in the Discussion Paper, NIBA supports proposal 134.

### *Contractual indemnities*

NIBA supports the proposal in the Discussion Paper to retain the capacity to have “upward” indemnities from a contractor to a principal. The insurance process recognizes these arrangements at the present time, and both contractors and principals are fully and properly insured under current arrangements.

NIBA also believes that it is appropriate for liabilities that are routinely covered by public liability insurance policies to remain covered by those policies, and for liabilities that are (or should be) covered by workers compensation insurance policies to be covered by those policies. It is also recognized that at times there will be circumstances where a workplace injury is the result of negligence on the part of the employer and another party. Usual principles of contribution and recovery from joint tortfeasors should always be available.

However, the more recent development of so called “sideways” indemnities between a number of contractors is likely to distort the correct allocation of the cost of workplace injury to the correct insurance policy/policies.

NIBA therefore supports the proposals to “void” the so called sideways indemnities.



This is an area of extreme legal and technical difficulty. The drafting of the legislation to give effect to these proposals will be critical to their ultimate success. NIBA strongly urges WorkCover to consult fully on the draft legislation giving effect to these proposals.

#### *Self Insurance*

A number of larger companies operate as self insurers in the Western Australian workers compensation scheme. Because these companies retain financial responsibility for their workers compensation liabilities, it is appropriate that WorkCover have legislative power to monitor and oversee their management of those liabilities, and ensure the companies maintain sufficient reserves to ensure valid claims are paid, over time, as and when they fall due for payment.

In these circumstances, the proposed changes relating to the regulation of self insurance are regarded as reasonable from NIBA's perspective.

One of the proposals is to require an annual actuarial assessment of outstanding liabilities. There are standards (published by the Australian Prudential Regulation Authority and the Institute of Actuaries) for the assessment of liabilities of this nature, including provision for an appropriate risk margin. NIBA suggests any actuarial assessment of self insurer liabilities should meet these standards.

Most self insurers would arrange insurance protection to limit their financial exposure in cases of major incidents or claims. The review of the WA legislation should ensure that in the event of a self insurer going into administration or liquidation, any insurance policies that have been taken out in relation to workers compensation liabilities remain available to meet those liabilities, and do not form part of the general estate of the failed company.

#### *Licensed Insurers*

NIBA supports the revised legislation giving WorkCover sufficient power to licence and monitor insurance companies operating in the Western Australian workers compensation market. NIBA believes it is important that any licensed insurer should be one that is authorized to operate as an insurance company in Australia by the Australian Prudential Regulation Authority. This makes the insurer subject to the full prudential regulatory regime maintained by APRA.

#### *Proposal 147 – insurer to act on behalf of employer*

This proposal indicates a reference to an employer should be taken to include a reference to an insurer. NIBA notes that there are many functions which always remain the responsibility of the employer – the duty to take out insurance, the duty to maintain safe systems of work, obligations to provide return to work opportunities to injured workers, and so on. Clearly, these duties must always remain with the employer, and are not transferred to the insurer by the insurance policy.



Where duties or obligations are transferred to the insurer under the insurance policy, it is reasonable that the insurance company be held accountable for the performance of those duties and functions.

NIBA therefore believes it will be necessary to be more specific as to the duties and responsibilities which are intended to be caught by proposal 147.

*Proposal 148 – approved insurer – requirement to quote*

At the present time NIBA understands all insurers are required to (and in fact do) provide a quote for workers compensation cover when requested. NIBA is not sure of the intent behind this proposal, and would appreciate clarification of the proposal in due course.

*Proposals 149, 150 – approved insurer – requirement to provide insurance*

NIBA has no difficulties with the proposals to require the insurer to indemnify all workers, and to remove the capacity to refuse indemnity where there was a lack of full disclosure of the nature of work and occupations.

*Burning Cost Policies*

The Discussion Paper notes that burning cost policies are used in the WA workers compensation by (typically large) employers as a mechanism to be more directly involved in the management of their workers compensation liabilities, and to provide greater flexibility in relation to workers compensation premiums.

NIBA notes that in one sense there is no such thing as a burning cost “policy”. The insurance policy is always the policy prescribed by the legislation. There is no difference between the policy associated with a traditional insurance premium, and the insurance policy associated with a “burning cost” premium.

The main difference is the arrangement that is entered into between the employer and the insurer, inevitably with the assistance of the employer’s insurance broker, for the payment of premium referable to the relevant policy. These arrangements are voluntary, and the insurer cannot impose a burning cost arrangement on the employer, and the employer cannot force an insurer to operate a burning cost premium arrangement.

NIBA believes WorkCover’s interests in this area relate to (1) the need for the employer to be fully insured in accordance with the obligations set out in the legislation; and (2) premium reporting obligations on the insurer are met.



Burning cost arrangements transfer the financial risk of workplace injury and disease to the insurer, on exactly the same basis as the more traditional premium arrangements. WorkCover can therefore be satisfied that even in the case of burning cost arrangements, the employer is meeting its obligations set out in the legislation.

Burning cost arrangements gives a degree of flexibility to employers and insurers who wish to implement those arrangements. Further, there is no single burning cost arrangement – a range of options can and are utilized in this area.

An important feature of the Western Australian workers compensation scheme is the fact that underwriting by private sector insurers, and the involvement of expert advice and assistance from insurance brokers, allows this degree of flexibility in the scheme's operations.

The Discussion Paper does not indicate why burning cost policies need to be regulated, nor does it set out how the regulation would occur, and what is to be achieved by the regulation of burning cost premium arrangements. The Discussion Paper does not identify any issue or concern with current arrangements.

In the circumstances, NIBA respectfully suggests there is no need for any greater level of regulatory activity by WorkCover in this area. NIBA believes these proposals should not proceed unless and until a clear issue or concern is identified, and the desired outcome of a greater level of regulatory activity is explained.

#### *Lapsing or cancelling policies*

NIBA believes it is important that the legislation clearly states when a workers compensation insurance policy has lapsed or is cancelled. Employers must have confidence about when an insurance policy will nor will not respond. NIBA therefore supports proposals 157 – 161, but would appreciate the opportunity to review any draft legislative provisions giving effect to these proposals.

#### *Regulation of insurance policies*

It is important that the legislation clearly sets out the terms and conditions of the statutory insurance policy.

NIBA notes that in most cases, the premium is determined in advance for each policy period. This means that once the premium is determined, the liability to which that premium relates (ie the terms and conditions of the policy) should not alter until that policy expires. It is critical that any changes to terms and conditions of the insurance policy are determined and agreed well in advance of those changes taking effect, so that employers, their insurance brokers, and insurers can assess and understand the changes, and make any necessary changes that may be required as a result of the changes to the policy terms and conditions.



### *Insurance Commission of Western Australia*

NIBA supports the proposal to deem ICWA to be an approved insurer for the purposes of the Western Australian workers compensation scheme. In the interests of competitive neutrality, transparency and accountability, ICWA should be required to abide by the obligations placed on licensed insurers and self insurers, and should be required to assess and determine workers compensation liabilities in accordance with APRA standards for the determination of liabilities of this nature.

### *Asbestos related diseases*

NIBA notes the proposal to discontinue existing arrangements for certain diseases sustained by mining employees.

While most workers compensation claims relate to injuries sustained in a particular incident, asbestos related diseases usually occur after exposure to asbestos over a number of years, and this exposure occurs 15 – 40 years before the disease manifests itself.

Having asbestos related claims managed under a single fund removes the need for employers and insurers to determine the insurance policy (policies) in operation at the time of the exposure to the asbestos dust.

The Discussion Paper is not clear about what will happen to existing liabilities, and claims arising out of asbestos related disease where the exposure has already happened but the disease has not yet become apparent.

NIBA respectfully request much greater information on the proposed operation of asbestos related provisions so that employers, their insurance brokers and their insurers can fully understand the nature of the arrangements being proposed in this area.

### **Other matters**

There are a number of other proposals where NIBA would like to offer comments in order to assist the ongoing review of the legislation and the preparation of a new Act of Parliament.

### *Definition of worker*

As noted at the start of this submission, the definition of worker, and therefore who is covered and who is not covered by the workers compensation insurance policy of the particular employer, is a fundamental concept in workers compensation.

Employers, and their insurance brokers, must have clear guidance from the legislation regarding their workers compensation insurance obligations. Insurers must have a clear understanding of the



people covered by their policies, and therefore the nature and extent of risk being transferred to them under the workers compensation insurance policy.

NIBA does not object to the proposed move towards a “results test” definition of worker. However, NIBA respectfully suggests that the review of the legislation provides an opportunity for movement towards national uniformity in this area, and for the adoption of a definition of worker that is operating and accepted in other jurisdictions across Australia.

NIBA supports the proposal to clarify and confirm the position in relation to overseas workers (Proposals 15, 16). Once again, this is an area where clarity and certainty is needed by all parties.

On a similar note, NIBA also believes the legislation should be clear regarding the position of workers who are temporarily located interstate and within Australia.

#### *Medical Certificates*

NIBA questions the need for allied health professionals being authorized to issue medical certificates for workers compensation purposes. NIBA believes no change should occur in this area unless and until there is a clear explanation of any current issues or concerns, and a clear indication is given as to who would be prescribed as being authorized to issue medical certificates. The Discussion Paper is silent on these matters.

#### *Access to medical and other information*

As noted in the Discussion Paper, successful assessment, management and resolution of claims requires access to all relevant information relating to the circumstances of the injury, the nature and extent of medical issues arising out of the injury, the capacity for work and return to work, and information relating to prior injuries or incidents which might impact on the claim.

Insurance brokers regularly assist their employer clients in the management and resolution of claims. NIBA believes it is vital, for the effective and efficient operation of the workers compensation scheme, that employers, their insurance brokers, insurers and others have full access to all relevant information, medical and otherwise. This will ensure valid claims are assessed and paid quickly and efficiently, and claims that are not in accordance with the statute are identified and resisted as appropriate.

NIBA therefore supports Proposals 22 and 23.

#### *Pended claims*

NIBA notes the proposals in the Discussion Paper relating to Pended Claims (Proposals 26 – 28), and the revised proposal set out in the Acting Chief Executive Officer’s letter of 3 December 2013.



Mandating the payment of compensation prior to formal acceptance of a claim by the insurer has the potential to impose a cost burden on the employer (which might not be recovered if the insurer ultimately denies liability), or it may act as an incentive to insurers to deny indemnity early, while investigations continue.

NIBA acknowledges the important need to ensure proactive claim and injury management early in the life of the claim, with a strong emphasis on return to work as soon as the injured workers' medical condition allows. NIBA believes it is important that there is a degree of flexibility which allows employers and insurers the capacity to start the claims assessment process, but also start a process of encouraging the worker to return to whatever duties he or she is capable of performing. NIBA also does not wish to jeopardize the position of client employers who might be forced to meet costs and subsequently find they are not recoverable from their insurer.

In the circumstances, NIBA respectfully suggests further dialogue between employer groups, insurers and NIBA representatives to ensure any change in this area achieves a positive outcome for all relevant stakeholders. NIBA is concerned that the mandating of certain obligations may result in unnecessary delay, and may formalize claims and disputes when the focus should be on return to work and closure of the matter on a once and for all basis.

#### *Statutory Settlement Pathways*

NIBA has concerns with the proposed introduction of statutory settlement pathways consisting of a primary pathway and secondary pathway, in special circumstances.

We respectfully suggest the existing settlement opportunities should continue to be available for all stakeholders' consideration. Claims can be complex and litigated resulting in uncertainty for stakeholders. As such, a significant burden can be imposed on stakeholders from financial, administration and personal perspectives.

Commercial settlement of the claim by informed consenting parties is an effective claim management tool, allowing closure for all stakeholders.

#### *Calculation of weekly payments*

The current process in determining the correct weekly rate of pay is often complex and difficult for all stakeholders.

Therefore, NIBA support the proposal to simplify the method of calculating weekly payments by basing the calculation for all workers on pre-injury earnings as per the unproclaimed amendments in 2011.



### *Compensation for Permanent Impairment*

NIBA is concerned that the payment of compensation for permanent impairment without entering into a settlement could lead to claims being prolonged, with a potential adverse impact on overall scheme costs.

NIBA respectfully suggests it is in the interests of all parties to have a claim fully assessed, agreed and resolved, unless there is serious permanent disability requiring ongoing support to the extent permitted by the legislation.

### *Lump sum death benefit*

NIBA acknowledges the arguments in favour of increasing the level of compensation following the death of a worker in Western Australia.

### *Discontinuation of weekly payments*

NIBA notes the proposals to re-write section 61 of the Act relating to circumstances where weekly payments may be terminated or reduced by an employer.

While it is important that the legislation place obligations on employers to offer return to work opportunities as soon as the medical recovery of the injured worker allows this to occur, it is also important that the legislation place obligations on the injured worker to take an active interest in return to work assessments and plans, medical and rehabilitation assessments, and case conferences. Failure to take a genuine interest and participate in medical and rehabilitation assessments, and return to work opportunities, should place at risk the worker's ongoing right to receive weekly payments. Proposal 113 goes some way towards implementing this position, but care will be needed to ensure the remedy (for the employer) can be obtained quickly and efficiently in appropriate circumstances.

### *Regulation of workplace rehabilitation providers*

NIBA supports proposals for the effective regulation of workplace rehabilitation providers. However, it must also be recognized that where rehabilitation providers are proving to be less effective in the outcomes they are achieving, insurers will most likely cease using those providers.

The regulation of providers must not only be available in theory, it must be implemented and administered effectively so that the rehabilitation and return to work objectives of the legislation are being achieved in the most efficient and cost effective manner possible.



If you would like further information in relation to the matters set out in this Submission, please do not hesitate to contact me. NIBA would also be very pleased to arrange a meeting or meetings between WorkCover representatives and insurance brokers who are highly experienced in Western Australian workers compensation matters.

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