



NATIONAL INSURANCE BROKERS ASSOCIATION OF AUSTRALIA (NIBA)

Additional Submission to WorkCover Western Australia

Review of the Workers' Compensation and Injury Management Act 1981: Final Report

31 July 2014

LEGISLATIVE REVIEW

NIBA appreciates the opportunity to provide further comments on the matters raised in the Review of the Workers Compensation and Injury Management Act 1981 Final Report.

Once again, NIBA respectfully suggests WorkCover and the Western Australian Government commit to further consultation on any draft legislation that might be prepared following the Government's consideration of the Final Report and the responses to the Final Report, prior to submission to and consideration by the Parliament.

Fundamentals of Workers Compensation

NIBA reiterates that 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 –

- 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.

This Submission will now address a number of matters set out in the Final Report.

Recommendations 125, 126 – Contractual Indemnities

NIBA notes that the Final Report contains different recommendations to those proposed in the Discussion Paper.

Clearly, this is an area of difficulty and complexity. NIBA respectfully agrees, very strongly, with the statement in paragraph 722 of the Final Report:

“It may not be appropriate to nullify mutual indemnity contractual arrangements between contracting parties through the workers’ compensation statute at this time given the scope for this review.”

Before any legislative amendment is developed in this area, NIBA believes WorkCover must undertake the following analysis:

1. What, exactly, is the concern with contractual indemnities in relation to the Western Australian workers compensation scheme?
2. What is the nature, extent, scale and impact of those concerns?
3. What are the core policy principles that should apply in this area?
4. Bearing in mind these core principles, what is the outcome WorkCover believes legislative intervention should attempt to achieve?
5. What are the options for achieving that outcome? What are the costs, benefits and likely consequences of each of those options for all relevant stakeholders?
6. Having regard to the cost/benefit and related analyses, what is the recommended way forward in this area?



NIBA strongly urges WorkCover and the Government to not proceed with any changes in this area unless and until this analysis has been undertaken.

Recommendations 140 – 145 Burning cost policies

The Discussion Paper outlined the nature of burning cost policies, and proposed that they be regulated. The Final Report outlines the responses from a number of parties, and then states:

“There is clearly a need for statutory recognition of burning cost policies as an alternative and optional premium methodology.”

The Discussion Paper and the Final Report do not explain why burning cost policies need to be regulated. There are no identified issues in relation to the operation of burning cost policies. Those policies are entered into by the employer, with expert advice and support from their insurance broker, and the insurer. They are entered into by consent of the parties, with the fall back being at all times the conventional premium process.

In the circumstances, NIBA continues to submit that there is no need to regulate burning cost policies.

Recommendation 122 - Remuneration declarations in the contract chain

NIBA suggests, as stated in paragraph 700 of the Final Report, that there is no need for confirmation that the contractor’s insurance provides a principal’s indemnity. The key requirement should be evidence of the contractor’s valid certificate of currency.

Recommendation 129 – Requirements for self insurance

The wording of Recommendation 129 (ii) does not reflect current industry terminology. NIBA respectfully recommends WorkCover develop prescribed terms in close consultation with NIBA and the Insurance Council of Australia.

Recommendation 137 – Request for insurance – obligation to quote

NIBA supports the position put forward by the Insurance Council of Australia as outlined in paragraph 747 of the Final Report. This will avoid inappropriate market behavior.

Recommendation 145 – asbestos

Under Australian law, liability for asbestos related disease rests with the entity that caused exposure to asbestos dust. Exposure occurs many years in the past.



The Final Report does not make clear which insurance process will be responsible for the claims of workers and others who may have been exposed to dust some years ago, but whose disease has not yet become apparent. In the insurance industry, these claims are called Incurred But Not Reported.

It is not appropriate to transfer this liability to current and future employers and/or insurers.

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.

Recommendation 17 – Overseas workers

NIBA is concerned that the recommendation does not necessarily deal with all issues associated with overseas workers, and recommends further consultation on this matter.

NIBA also notes that concerns previously expressed in relation to interstate and cross border matters have not been addressed. NIBA believes that it is important the obligations and liabilities of Western Australian employers are clear on these matters.

Recommendation 18 – Psychological injuries – reasonable administrative action

NIBA supports the proposed amendment.

Recommendation 46 – Liability for noise induced hearing loss claims

NIBA strongly recommends that limiting apportionment to 10 years may well be unfair and inequitable for recent employers.

Recommendation 82 - Settlements

NIBA has strong reservations in relation to this matter. The discussion in the Final Report appears to presume that section 92(f) settlements are in some way imposed on injured workers for commercial reasons. This overlooks the fact that the worker invariably has access to legal advice prior to entering into any settlement of this nature.

NIBA firmly believes that there should be no artificial barriers to a settlement by consent between the parties to the claim. Any barrier will promote litigation, prolong disputes and, potentially, add to the costs of the scheme by prolonging the need to continue weekly payments of compensation.

NIBA strongly recommends this recommendation be removed.



If you would like further information in relation to the matters set out in this Submission, please do not hesitate to contact me. Once again, 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.

Dallas Booth
Chief Executive Officer

National Insurance Brokers' Association of Australia

Direct: +61 (0)2 9459 4305
Email: dbooth@niba.com.au

Level 11, 20 Berry Street, North Sydney, NSW, 2060.