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The Honourable Bernard Finnigan MLC
Minister for Industrial Relations
Level 6, 45 Pirie Street
ADELAIDE SA 5000

Dear Minister

Workers Rehabilitation and Compensation (Dispute Resolution) Amendment Bill 2010

I refer to our letter of 16 February 2011 and note that you still intend to continue your consideration of the *Workers Rehabilitation and Compensation (Dispute Resolution) Amendment Bill*. The Bill has been considered by the Society's Accident Compensation Committee. We provide the following comments.

The Society maintains its position as stated in our letter of 16 February 2011 that it is premature for the above Bill to be debated whilst the Scheme Review is being undertaken and in circumstances where there are currently two cases stated to the Supreme Court, being *Yaghoubi* and *Campbell*, addressing the constitutional validity in decisions/opinions of Medical Panels and further, leave to appeal has been granted in the matter of *Brown* challenging the constitutional validity of Victorian Medical Panels. We do however make the following points.

On our reading of the proposed amendments, the Ombudsman's powers as to reinstatement of payments under section 36 are to be replaced by the Registrar, who will pursuant to section 90C exercise a judicial function which arguably may well be *ultra vires*. The role and function of the Dispute Resolution Officer (DRO) in hearing matters referred to the DRO could well be hearings by way of summary judgement on the papers without the opportunity for legal representation or submissions.

Whilst the Society acknowledges that there are currently delays in relation to the resolution of disputes pursuant to section 36, as workers compensation legislation is remedial and intended to be beneficial for injured workers, there is no reason to change the process so that parties affected by a determination to receive any lesser hearing in respect to a Notice of Dispute regarding section 36 matters than would otherwise apply in all other matters before the Tribunal.

The Society holds significant concerns in respect to the following provisions:

1. The proposed Section 85B(5) that provides *"In proceedings before a Dispute Resolution Officer (DRO) in relation to a section 36 dispute, the DRO has a discretion as to whether or not a party may appear (and, if so, whether or not a party may appear by a representative)"* amounts to a fundamental denial of right to be heard and a breach of the rules of natural justice.

   This is a fundamental denial of natural justice to parties affected.

2. The proposed amendment to section 90(2a) requires greater specificity in the drawing of grounds in the Notice of Dispute than is required currently in respect to other Notices of Dispute filed in the Tribunal. We consider that unless the Judges require greater specificity in respect to all Notices of Dispute, then it is inappropriate to require one form of specificity in respect to one Notice of Dispute but no particular requirement in respect to others.

3. It is unclear why the time for lodgement of a Notice of Dispute is proposed to be reduced from one month to 28 days. Ordinarily, for all other notices it is one month.

4. It is unclear why in the case of a section 36 dispute, the wording for an extension of time to be only granted "in special circumstances" is proposed. This may give rise to significant litigation arising in respect to section 36 disputes given the recent decision in *Davey v WorkCover Corporation (Construction Industry Training Board)* [2011] SAWCT 1. Indeed, the decision in *Davey* dealt with the requirement that the Compensating Authority is obliged to afford the worker procedural fairness whereas the methodology proposed for the hearing of section 36 disputes by the proposed amendment does not afford either the worker nor the Compensating Authority procedural fairness. It affords even less procedural fairness to the worker in the sense that the worker is filing a Notice of Dispute to a notice issued by the compensating authority which has at its disposal all relevant materials, whereas the worker may not.

5. The proposed powers of the Registrar in section 90C include the power to strike out a Notice of Dispute. This, with respect, is a judicial function and that power, if exercised, should only be exercised by a DRO. Whilst the intention of section 90C is to expedite section 36 disputes, and we agree with prompt resolution of disputes, it should not be in the manner proposed and entitlements should not be subject to summary proceedings nor summary judgement.

6. The proposed Section 90C(8) dispenses with either a conciliation conference or a pre-hearing conference in respect to section 36 disputes, which is not appropriate given that section 36 disputes are commonly extremely complex and workers generally are required to obtain further medical information upon receiving a notice under section 36, which information may well not be able to be provided before a dispute is heard before a Dispute Resolution Officer given the timelines proposed in the proposed Bill.

7. The proposed Section 94BA provides that the DRO "*must, at first instance, consider whether the decision to discontinue or reduce weekly payments can be reviewed on the information provided by the parties… and (if relevant) whether any medical question must be referred to a Medical Panel*".

   A DRO effectively could be determining matters by way of summary judgement. Moreover, there are currently two appeals in the Supreme Court, *Yhagoubi* and *Campbell*, both of which deal with powers of referral from the Tribunal to the Medical Panel and even more fundamentally, whether the Medical Panel is performing a judicial function and therefore is not validly constituted.

   In combination, the insertion of section 94BA (2), (5) and (6) reinforce that the procedures before a DRO are akin to summary judgement.

8. The proposed Section 94BA refers to "*any medical question*". Whilst "medical question" is defined under the Act, if section 94BA(3) were to be passed, it is our view that the following should be inserted:

   "must refer any medical question <u>under section 36(1)(b)</u> to a Medical Panel."

9. The proposed Section 98H(5) suggests that the opinion of a Medical Panel in favour of a worker must be given immediate effect but section 98K(1) then gives the compensating authority as a party the right to review the determination of the dispute by a Dispute Resolution Officer. It is unclear whether rights of review can exist in respect to an opinion of a Medical Panel in respect to an opinion delivered under this proposed Bill compared to the current section 98H(4) that provides:

> *"For the purpose of determining any question or matter, the opinion of a Medical Panel on the medical question referred to the Medical Panel is to be adopted and applied by any body or person acting under this Act and must be accepted as final and conclusive irrespective of who referred the medical question to the Medical Panel or when the medical question was referred."*

It might well be that a Medical Panel may have decided in favour of a worker a work capacity question three months before a fresh section 36 notice is issued, the DRO then refers to the Medical Panel the question and because the Medical Panel only has 14 days to deliver it's opinion, work capacity could be found in circumstances where the Medical Panel cannot comprehensively consider the medical question because of the timelines it is required to adopt. They might therefore find that a worker has work capacity, whereas on a full proper procedural hearing where the worker is afforded procedural fairness and an ability to properly prepare and make submissions, a different outcome could arise.

10. The proposed Section 98K(2) provides:

> *"An application for a review may only be made on one (or more) of the following grounds:*
>
> *(a) A DRO has made a determination under section 94BA but is not capable of support on the evidence before the DRO or at law (or both); or*
>
> *(b) any other ground prescribed by the Regulations."*

Given that effectively the DRO is given powers to determine matters as he or she sees fit dispensing with many previously required procedural issues and requirements of procedural fairness in allowing the parties to fully prepare and make submissions and arguably not have representation, it could well be said that the DRO could determine primarily on the evidence placed before him or her which would largely be the section 36 notice issued to the worker affected. However, we are concerned by the failure by the Bill to actually address what other grounds prescribed by the regulations might exist and why those grounds are not placed in the Bill at this point of time.

Such drafting by regulation could lead to extremely limited grounds of review.

11. The review period under the proposed section 98K(3) should be 28 days and not 14, consistent with the time for appeal in the District and Supreme Court.

12. The proposed Sections 98K(6) and (7) both provide for the referral following review at first instance to a conciliation conference to seek to resolve the matter by negotiation or mediation. One wonders why such a negotiation or mediation is introduced on a review but does not exist and is expressly excluded in respect to hearings of section 36 disputes before a DRO.

In summary, the Society is concerned that hearings as to section 36 disputes will not be dealt with in the same manner as other hearings before the Workers Compensation Tribunal and that workers will be subjected to substantial disadvantage if the Amendment Bill were passed.

I trust these comments are of assistance. Please do not hesitate to contact me, should you require any further information.

Yours sincerely

Ralph Bönig
PRESIDENT