

**MEMORANDUM**

**To: SISA MEMBERS**

**From: ROBIN SHAW**

**Date: 19 FEBRUARY 2014**

**Subject: SISA POLICY ON WORKCOVER SCHEME REFORM**

The purpose of this paper is to outline SISA policy on the Government proposals for workers compensation scheme reform published on 24th January 2014. The Opposition, on seeing the proposals, stated that if it sees merit in the proposals, it will carry them out if it wins Government.

While it is obvious that nothing more concrete will be forthcoming before the State election, whoever wins will seek stakeholder views on the proposals. It is also possible that this will happen sooner rather than later following the election, so it is not too early to state our policy position on the proposed reforms.

**Overview**

The Government paper outlines the following:

* Seriously injured workers will be entitled to 100% income maintenance and lifetime care and support.
* Access to common law will be available subject to unspecified restrictions and limitations.
* The causation tests for claims (including psychological claims) will be strengthened.
* The distinction between injuries and secondary injuries will be removed.
* Unspecified strengthening of employer responsibilities to provide suitable employment along with early intervention, employee obligations and the like.
* Income maintenance (IM) to be capped at 2 years from date of injury.
* Medical entitlements to cease 1 year after IM ceases.
* An unspecified ‘new approach’ to dispute resolution.
* Replacement of medical panels with Independent Medical Assessors within the jurisdiction of the Workers Compensation Tribunal (WCT).

**Impact of the proposals**

It is likely that, everything else being equal and legislation is passed that works as intended, the scheme break-even premium rate (sometimes called the ‘hindsight rate’) would drop from 3.34% to around 2%.

The scheme outstanding claims liability would drop to a level close to the scheme’s assets, thereby eliminating the $1.4 billion unfunded portion of the liability.

Self insurers can expect to see similar balance sheet results, if not so dramatic given their much lower liabilities. However, a great many things can erode or wipe out these reductions, not the least being the very real risk of poorly drafted legislation and/or attack on the reforms by the Workers Compensation Tribunal.

The following is the brief SISA response to the elements of the Government paper should be addressed.

***Seriously injured workers***

While the Government paper does not state it, the general consensus is that a 30% or greater whole person impairment (WPI) is envisaged as the definition of ‘seriously injured’. This is a very high hurdle that would guarantee that only a handful of cases would arise each year across the entire scheme. (This assumes that the threshold is not porous and open to attack from the courts).

It may well be that this threshold will be the subject of much more debate and may not remain at that level.

SISA will reserve its position until more detail as to the proposed threshold and entitlements becomes publicly available.

***Common law***

It is noteworthy that while the Government paper mentions unspecified restrictions and limitations on common law access such as a WPI threshold level, limits on quantum or heads of damage.

From an actuarial standpoint, common law on its own could account for anything from 10% to 20% of claim costs for self insurers, depending on how heavily access is limited and limits on heads of damage and quantum. This is a significant point.

This is going to be the single most contentious aspect of the Government proposals. The arguments around common law are looked at in more detail in the paper sent to members on 19th February 2014.

SISA policy is that there is no compelling case to re-introduce common law and a range of very good reasons not to.

***Causation***

There is insufficient information in the Government paper on which to base a definitive position. However, members have long expressed support for a higher standard of work contribution in the causation tests. This being the case, the best we can do is express in-principle support subject to further and better particulars as to how such changes will be worded.

***Removal of the definition of secondary injury***

SISA does not express a view on this since it has no effect on our full members. Insured employers are likely to be highly concerned if no adjustments are made to the experience rating system to even out the impact.

***Strengthen employer and employee obligations, early intervention etc***

Again, there is insufficient information in the Government paper on which to base a definitive position. However, it is clear that any attempt to be more specific on obligations or to regulate the employment relationship is bound to generate a host of unintended consequences and exceptions. This is very much a thing that is easier to say than to do.

***Capped income maintenance***

This proposal will account for the lion’s share of the liability savings stemming from the entire package. It should be noted that the Government has publicly stated that the package will dissolve the unfunded liability in 2 years. The only way this is possible is to apply the 2 year IM cap to existing claims. That is to say, on the day the amendments take effect, all existing IM claims have 2 years of IM left.

This will be the reform that will radically reduce the current outstanding claims liability for the scheme and self insurers alike. It is clearly the lynchpin of the entire package.

***Medical entitlements to cease 1 year after IM ceases***

There is no reason to oppose this proposal outright. However, it is likely that there will be a few cases where a full return to work (RTW) is genuinely dependent ongoing treatment and medication. There needs to be a non-appealable discretion for the compensating authority to continue medical entitlements in these and like circumstances.

***An unspecified ‘new approach’ to dispute resolution.***

Again, there is insufficient information in the Government paper on which to base a definitive position. That said, it is clear from many discussions with other stakeholders that there is a growing view that the WCT should be dissolved and replaced in the first instance by the new SA Civil Appeals Tribunal (SACAT), with appeals going to the District Court.

There is no doubt that the reason why we are discussing these reforms now is the systematic attack and undermining of the work capacity review provisions and destroyed the viability of Medical Panels SA (MPSA). While the root cause of these problems has been badly drafted legislation, the WCT has not hesitated to exploit that and has added considerably to the difficulties faced by the scheme.

***Replacement of MPSA with Independent Medical Assessors (IMA)***

There is no doubt that MPSA has been neutered by attacks from the WCT and plaintiff lawyers making unsupported claims about bias and intimidation in the medical panel process. MPSA has never been allowed to function as it was intended.

Use of medical panels has many advantages if MPSA was to get laws that allowed such use:

* They are visibly independent and transparent.
* They are multi-disciplinary.
* They can provide opinions in reasonable time frames.
* They are cost-effective.
* They treat workers with respect and dignity.

Going back to IMAs would be a step backwards in time – a return to duelling experts, barrackers and mounting costs and delay, (and of course a return of lawyers and judges to the process of resolving medical questions).

SISA policy is to retain MPSA with less brittle legislation.

***Recommendations***

That the following policy position be put to members for discussion and/or endorsement:

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| Seriously injured workers | No position until more detail as to the proposed threshold and entitlements becomes publicly available. |
| Common law | Oppose the re-introduction of common law in any form. In the alternate, heads of damage should be limited, quantum capped and offset against statutory payments. |
| Causation | Agree in principle subject to further and better particulars as to how such changes will be worded. |
| Removal of the definition of secondary injury | No position – does not affect full members. |
| Strengthen employer and employee obligations, early intervention etc | No position until more detail is available, with the observation that this has the potential to create a host of unintended consequences |
| Capped income maintenance | Agree in principle subject to further and better particulars as to how such changes will be worded. |
| Medical entitlements to cease 1 year after IM ceases | Agree in principle subject to a non-appealable discretion to continue entitlements in appropriate cases. |
| Dispute resolution | Insufficient information on which to base an opinion. The WCT should be scrapped and replaced by the SACAT and District Court. |
| Replacement of MPSA with an IMA panel | Oppose – retain MPSA with less brittle legislation |
| Overall | * Do not rush it
* Look at the entire Act, not elements in isolation.
* No cut-and-paste amendments.
* Negotiate and agree *before* going into Parliament on a bi-partisan basis.
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| Other items not covered in the Government paper | * Repeal provisional liability
* Longer registration periods for self insurers
* Repeal section 76AA (discontinuance fees)
* Exempt self insurers from s.28D
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