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Mr Robert Byrne
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Dear Rob,

Re: revised discussion paper on self-insurance policy

Thank you for the opportunity to comment on the revised discussion paper on self-insurance policy. Our comments are as follows:

1. SISA does not share the concern about the serious injury support requirements and in particular the repeated mention of an inability to redeem those support costs:
    a. The RTW Act actually narrows the scope for claimants to receive long-term support by limiting it to 30% WPI.
    b. The benefits payable to seriously injured workers are the same as those payable to any long-term claimant under the repealed Act.
    c. In cases of catastrophic, (as distinct from serious), injuries (which are very rare in the self-insured community), redemption would be most unlikely to be an option anyway – a worker would be very poorly-advised to accept any form of lump sum in such circumstances.
    d. For the most part, the private-sector self-insurers did not and do not generally share the Corporation's reliance on redemption payments as a means to reduce liabilities. Returns to work are a prime mover of liability reduction, with redemption playing a lesser role in resolving the relatively few stuck cases. It seems that the Corporation does not grasp this and other essential differences and instead judges self-insurer risks by the standards of its own operations. We see this as a shortcoming in the Corporation's ability to develop effective and coherent policy for self-insurance, and we are keen to work with the Corporation to remedy this.
    e. Some seriously injured workers retain some work capacity and a desire to remain at work.

2. With regard to the consequences of the two-year cap in weekly benefits and the perceived increase in the importance of early intervention and return to work, SISA simply submits that the long-term record of the private sector self-insurers in this regard speaks for itself. The members of SISA have a stronger performance history of successful early intervention than the Corporation itself. We regard this part of the paper as redundant.
3. Our members are all too aware of the economic loss lump sums and have been since before the Act came into effect. The statement that it is essential that self-insurers are aware of this and ensure they can meet their payment obligations promptly seems to us to be entirely redundant.
4. The service standards do not produce any additional challenges for the self-insurers. After the work done by the then WorkCover Ombudsman from 2008 to 2010, the complaints handling systems and service provision of all the private sector self-insurers were approved as meeting expectations. All the standards do is articulate what is already being done.
5. The description of what the Corporation considers 'financial robustness' is rather confusing. The paper states that the *…concept of the employer having to be financially robust goes beyond the minimum level of acceptable performance of being able to meet liabilities* [sic]. The actual draft policy at attachment A to the RTWSA paper lists the ability to fund reinsurance deductibles and lump sums as two of the things within this consideration. As we see it, those two things are components of the basic ability to meet workplace injury liabilities. So we are yet to understand how this notion of 'robustness' "…goes beyond the minimum level of acceptable performance of being able to meet liabilities".
6. The paper states that *by choosing to self-insure, the business is committing to becoming an insurer. This is a long term commitment and the employer needs to have significant capital security committed that is proportionate to the exposure.* This is a rather obvious statement that need not be made. It suggests that at least some self-insurers don't understand the fundamentals of their status, a suggestion that we reject outright.
7. We still disagree with the valuation of catastrophic injury claims at $4.5 million but in view of the change to the proposed minimum guarantee, this is probably a moot point.
8. With regard to the proposed increase of the minimum guarantee to $1.1 million, this is a substantial reduction on the original proposal, but is nevertheless a 31% increase. Given that the revised paper no longer incorrectly asserts that reinsurance would not be available in the event of insolvency, it is clear that the Corporation is indeed protected by the reinsurance and the level of the minimum guarantee does not need to be adjusted at all. SISA therefore submits that without any remaining justification, there should be no increase in the minimum guarantee beyond the normal indexation.

   We would naturally oppose any regulation increasing the minimum and would seek its disallowance in Parliament. If the Corporation were nevertheless able to achieve any sort of increase, it should be phased in over a period of no less than 5 years.

9. We agree with the proposed reduction of the scaling factor to 150%. We have always regarded 200% as being excessive. We observe that it is likely to have the following effects:
    a. It will be of most benefit to companies holding larger guarantees.
    b. It will be no benefit to companies holding the minimum guarantee, (so it does not mitigate any increase in the minimum for members holding the current $840,000 minimum).
    c. It will increase the number of companies holding minimum guarantees.
10. The references to ongoing evaluation are at best nebulous, so in light of the lack of substance, at this stage we will reserve comment until the Code revisions are out for consultation. The references to the service standards are particularly interesting. Conformance with the Schedule 5 standards is under the jurisdiction of the State Ombudsman, who may take a dim view if the Corporation purports to short-circuit the statutory appeal provisions in Schedule 5 by imposing sanctions of its own. So in spite of the paper, the situation is in reality no different than before.
11. With regard to the description of what makes an employer 'fit and proper', we find the concept somewhat odd, since it seems to repeat some things that are already embedded in the existing arrangements and mentions other things so vaguely that there is no indication as to what is intended:

- *the employer's conduct during application and renewal processes* – is already monitored through interactions between the company and the evaluator.
- *the employer's conduct with respect to managing work health and safety matters in the workplace* – is already mandated by subsections 129(11)(d) and (e) of the RTW Act.
- *providing services and support to people injured at work, providing suitable employment, managing and engaging service providers, and managing complaints and disputation* –
    - *providing suitable employment* - already mandated by subsection 129(11)(g);
    - *managing and engaging service providers* – is a delegated power under section 134 with which the Corporation is barred from interfering under section 134(3);
    - *managing complaints and disputation* – already mandated by Part 2 of Schedule 5 and Part 6 of the Act.
- *consistency and reasonableness of the employer's conduct in relation to the Objects and fundamental principles, rights and obligations outlined in the Act* – most properly lies in the jurisdiction of the State Ombudsman.
- *prosecutions for infringements under other federal or state laws* – this has long been a vexed area, since the fact of a prosecution is less important than its outcome. In the event of a conviction, then the Corporation *may* have a legitimate interest depending on the nature of the offence. However this can take years.

- Where a matter is being investigated, the Corporation should simply observe but otherwise proceed with the self-insurance application.
- Where a prosecution has been commenced but not completed, then a self-insurance grant should proceed with conditions.
- Where no conviction is recorded, the conditions should be lifted.
- Where a conviction is recorded, then depending on its nature, the conditions should remain in force, or fresh conditions imposed to ensure any necessary corrective actions are completed. We point out that most such proceedings take years, and by the time a conviction is recorded, the company has long since taken corrective action.

- *the employer's broader record with meeting corporate social responsibilities* – this is so vague that we cannot read any meaning into it at all, though a multitude of irrelevant possibilities suggest themselves.
- *compliance with the legislative requirements of the Act* – this is nothing more than a re-statement of the points above and all of the things currently done in the evaluation process. It is also risky – an over-zealous person might conclude that this actually means that the Corporation can substitute its own version of what is legal in terms of the interpretation and application of the RTW Act when the SA Employment Tribunal is the actual body charged with that role.

Viewed in this way, the 'fit and proper' concept mainly seems to be no more than repetition of existing requirements and is more likely to confuse and complicate than anything else. We don't see it as adding any value at all and we recommend its removal from the policy.

We are as ever happy to enlarge on these comments if need be.

Yours sincerely,

Robin Shaw
Manager