

SUBMISSION TO THE ICARE AND STATE INSURANCE AND CARE GOVERNANCE ACT 2015 INDEPENDENT REVIEW

THE HONOURABLE ROBERT McDOUGALL QC

THE ABILITY TO COMPROMISE CLAIMS WHERE DEATH RESULTS FROM AN INJURY

BACKGROUND

Section 25 of the *Workers Compensation Act 1987* (the 1987 Act) provides for the payment of a 'lump sum death benefit' where death results from a compensable injury. The figure is adjusted at six monthly intervals, and since 1 October 2020 is the amount of \$834,200. The sum is payable to the dependant/s of the deceased worker, regardless of whether a person is wholly or partially dependent for support upon the deceased worker at the time of death, and if appropriate is apportioned where there are multiple dependants. If there are no dependants, the sum is payable to the deceased worker's legal personal representative: s 25(1)(a). Additionally, a weekly payment is payable in respect of dependent children of the deceased worker, currently a figure of \$149.30 per week for each dependent child: s 25(b). Reasonable funeral expenses are also payable up to a figure of \$15,000: s 26 of the 1987 Act.

The amounts payable in respect of the death of a worker are substantial. It is relatively frequent for such claims to involve issues going to the occurrence of 'injury', and causation issues regarding whether death 'results' from 'injury'. There may be issues, in cases involving heart attack and stroke injuries, regarding whether the employment concerned gave rise to "a significantly greater risk of the worker suffering the injury than had the worker not been employed in employment of that nature", a test which requires satisfaction if such injuries are to be compensable: s 9B of the 1987 Act. These issues may be factually, medically and legally complex. It is in the nature of such issues that they may often render the outcome of these matters difficult to predict.

The 1987 Act and the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) do not contain any mechanism which allows the parties to compromise such claims if they are disputed. The lump sum death benefit (and associated compensation entitlements) are either payable in full, or they are not payable at all, depending on the outcome of Commission proceedings. The consequence of this is that, in claims where there may be genuine issues that justify compromise, there is no mechanism through which the parties can achieve a resolution that reflects such issues. In the case of employers, which will normally be insured, the risks of litigation may well balance themselves out in the long run. This is not the case for individual claimants, who may well be dealing with sums of money (if compromised) which have the capacity to be life changing, as they also deal with the passing of (typically) family members. The unavailability of a statutory mechanism to compromise claims pursuant to s 25 may well result in extending the litigation process, which is an unfortunate experience for family members who are also dealing with the loss of a loved one.

RECOMMENDATION

It is submitted there would be utility in recommending the insertion, into Part 3, Division 1 of the 1987 Act, of a statutory provision giving the Workers Compensation Commission power to approve the compromise of a claim for the 'lump sum death benefit' pursuant to s 25, for such sum as appears proper in the circumstances. It would be a matter for consideration whether any such power should extend to other forms of compensation available pursuant to that Division.

Such an amendment would, it is submitted, require adequate protection of claimants. This could be achieved by providing that any such resolution required the approval of a Division Head (and Principal member) of the Commission.

It is submitted that the recommended course would be consistent with the System objectives contained in s 3 of the 1998 Act.