



How to prepare a quality Section 74 Notice

Author: Christopher Michael
Accredited Specialist



edwards michael lawyers

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1. When is a Section 74 Notice required?

- 1.1 A Section 74 Notice must be issued when an insurer disputes liability "*in respect of a claim or any aspect of a claim*".
- 1.2 If a Notice has already been given under Section 54 of the 1987 Act, and that Notice contained the required statements and information, further Notice is not required to be given under Section 74.
- 1.3 In order to comply with the legislation, it is necessary for an insurer to conduct an internal review of the decision to dispute liability before issuing a Section 74 Notice:- Section 74(5).

2. What is a "quality" Section 74 Notice?

- 2.1 Complies with all legislation ie. contains all the information required by Section 74(2) of the *Workplace Injury Management Act* and Clause 34 of the *Workers Compensation Regulation 2003*.
- 2.2 Raises all issues relevant to the dispute.
 - 2.2.1 In the Notice itself and not only in the annexures
 - 2.2.2 Articulates the issues and not just sections of the Act
 - 2.2.3 Is customised to the particular claim (i.e. does not generalise issues and does not refer to irrelevant issues)
- 2.3 Attaches all relevant evidence.
- 2.4 Is in plain language (i.e. easily understood by the "*ordinary reader*").

3. Information required by the legislation

Section 74 WIM and Clause 34 WCR

The notice must contain the following:

- 3.1 a statement of the reason the insurer disputes liability, including provisions of the workers compensation legislation on which insurer relies to dispute liability, and of the issues relevant to the decision,
- 3.2 a statement to the effect that the worker can request a review of the claim by the insurer,
- 3.3 advice as to the procedure for requesting a review of the decision,
- 3.4 a statement to the effect that the worker can refer the dispute for determination by the Commission,

- 3.5 if the insurer has referred or proposes to refer the dispute for determination by the Commission, a statement to that effect specifying the date of referral or proposed referral,
- 3.6 a statement to the effect that the matters that may be referred to the Commission are limited to matters notified in the notice, or in a notice after a further review or in correspondence prior to any such referral concerning an offer of settlement or in a request for a further review,
- 3.7 a statement identifying all the reports and documents submitted by the worker in making the claim for compensation,
- 3.8 a statement identifying all the reports of the type to which Clause 37 applies that are relevant to the decision, whether or not the reports support the reasons for the decision,
- 3.9 a statement advising that a copy of a report required to be provided by the insurer under Clause 37 (3) (except as provided by Clause 37 (5) or (6)) accompanies the notice,
- 3.10a statement to the effect that the worker can seek advice or assistance from the worker's trade union organisation, from a lawyer or from the WorkCover Claims Assistance Service,
- 3.11 the street address and the email address of the Registrar of the Commission or the Registrar of the District Court, as appropriate."

A notice under this section must be expressed in plain language (s.74(2B)).

4. Raising all Issues Relevant to the Dispute

4.1 Statutory Provisions

Section 289A of the *Workplace Injury Management Act 1998* provides:

- (1) A dispute cannot be referred for determination by the Commission unless it concerns only matters previously notified as disputed.
- (2) A matter is taken to have been previously notified as disputed if:
 - (a) it was notified in a notice of dispute under this Act or the 1987 Act after a claim was made or a claim was reviewed, or
 - (b) it concerns matters, raised in writing between the parties before the dispute is referred to the Registrar for determination by the Commission, concerning an offer of settlement of a claim for lump sum compensation.

- (3) The Commission may not hear or otherwise deal with any dispute if this section provides that the dispute cannot be referred for determination by the Commission. However, the Commission may hear or otherwise deal with a matter subsequently arising out of such a dispute.
- (4) Despite subsection (3), a dispute relating to previously unnotified matters may be heard or otherwise dealt with by the Commission if the Commission is of the opinion that it is in the interests of justice to do so.

4.2 Case Law

4.2.1 *Goundar v Warren's Motor Village Limited* [2002] 24 NSW CCR,

Neilson J observed at [33]:

"It must be recalled that the Notices are not required to be in any particular form although there is provision in the Act for a form to be prescribed. Furthermore, the forms are to be composed not by barristers and solicitors but by employers and their insurers. It may have been prudent for the insurers to have sought advice from a barrister or solicitor as to an appropriate precedent and if that had been done then the current arguments may well have been obviated ..."

In *Goundar*, Neilson J held that errors of fact in a Section 54 Notice (e.g. date of injury etc) will not make the Notice ineffective if the worker was aware of the correct date and any misinformation was not acted upon to the worker's detriment.

Goundar is also authority for the proposition that the information and statements required by the legislation may be either included in a formal Notice, or in a document served on the worker at the same time which, when read with the Notice, provides the required information.

- 4.2.2 In situations where legislation does not prescribe a statutory form of Notice, it is well established that whether a Notice includes the relevant information is to be determined on a commonsense reading of the Notice. **No particular form of words is needed, and it must be asked whether the Notice conveys the requisite statements to the ordinary reader:** *B W Esler Services Pty Ltd v Dulhunty* [2000] NSW/CA 349 Giles J A [52].

4.2.3 *Rinker Group Limited v Mackell* [2008] NSW WCC PD 100

Roche DP considered that simply referring to Notice Provisions of the Act was not sufficient compliance.

4.2.4 *Gray v Busways Gosford EMP Pty Limited* [2009] NSW WCC PD 124.

Roche DP felt reminder to the insurance industry was necessary:

*“Insurers are **again** reminded that Section 74 Notices must be properly prepared and must fully and clearly state in plain language the issues in dispute. The repeated failure of insurers to comply with the clear terms of Section 74 is unacceptable. If an insurer seeks to rely upon Section 11A(1) of the Workers Compensation Act 1987, full and proper particulars of the specific part of the section must be provided. There are seven parts to Section 11A(1) and a worker is entitled to know precisely which part the insurer relies upon. No proper particulars have ever been provided in the present case and the worker has been left to guess as to which part of Section 11A(1) allegedly defeats her claim. This is a totally unsatisfactory situation that should not occur”.*

4.2.5 *Gibson v Royal Lifesaving Society of Australia* [2009] NSW WCC PD 137

A further reminder from Roche DP:

*“The amended Section 74 Notice purports to rely on 20 issues alleged to be relevant to the decision to deny liability. The practice of denying every conceivable issue regardless of its relevance to the claim at hand does not comply with Section 74 of the Workplace Injury Management and Workers Compensation Act 1998 and **must** stop. In the present matter the first 8 issues in the Notice relate to incapacity and have no relevance to the present claim because the Applicant has not claimed weekly compensation. The issues said to relate to the claim for medical expenses are not expressed in the terms of the legislation. Moreover, the Notice does not indicate if injury is disputed”.*

4.2.6 *Mateus v Zodune Pty Limited (trading as Tempo Cleaning Services)* [2007] NSW WCC PD 227.

Roche DP stated that Section 74 Notices must state in plain language, in the body of the document, the reason the insurer disputes liability and the issues relevant to the decision. It is not acceptable for the insurer to expect a worker to discern the issues in dispute from documents attached to the Notice.

The employer was not permitted to rely on the Notice provisions of the Act because despite the fact that relevant sections were particularised, the Notice provisions were not properly identified as an issue in the Section 74 Notice.

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4.2.7 *Sydney Night Patrol Inquiry Co Pty Limited v Spaseveski [2010] NSW WCC PD 7.*

Roche DP considered the following issues raised in a Section 74 Notice:

- (a) *"Your client has not complied with the requirements of the Legislation [so] far as the notification of injury and the claiming of compensation benefits is concerned".*
- (b) *"In declining liability the sections of the Legislation on which we rely are Sections 4, 9, 9A, 10, 33, 40 and 60 of the Workers Compensation Act 1987 and also Sections 74, 254, 255, 260 and 261 of the Workplace Injury Management and Workers Compensation Act 1998".*
- (c) *"Whether your client has satisfied the requirements of the Legislation so as to give rise to any entitlement to compensation and whether your client is otherwise precluded from receiving the payment of compensation benefits".*

The Deputy President stated:

"The Commission has repeatedly held that the broad-brush assertions of the kind set out above do not comply with Section 74 of the 1998 Act...If any insurer disputes liability in respect of a claim, or any aspect of a claim, it is required to give the claimant proper notice of the dispute. The Notice must be expressed in plain language and must clearly and succinctly identify the reason the insurer disputes liability and the issues relevant to the decision. A general assertion that an insurer relies upon one or more of the Sections of the Legislation is unacceptable.

It is also unacceptable for an insurer, or a solicitor acting for an insurer, to make a general allegation that the worker has not 'satisfied the requirements of the legislation so as to give rise to any entitlement of compensation' and that a worker 'is otherwise precluded from receiving the payment of compensation benefits'. Such an allegation does not properly identify the issues in dispute and does not comply with Section 74.

The practice of referring to multiple Sections of the Legislation, regardless of their relevance to the particular claim, and of making generalised denials of entitlement to compensation is unacceptable and must cease”.

4.2.8 *Hobden v South East Illawarra Area Health Service [2010] NSW WCC PD 13*

President Keating considered another claim for psychological injury where proper notice had not been provided in relation to an employers Section 11A defence:-

“The Section 74 Notice issued by the employer was defective and is unacceptable. The broad-bush assertion that the worker ‘acted reasonably in their actions’ does not comply with the requirements of Section 74. It does not properly identify the action or actions the employer relied upon as having been the whole or predominant cause of the psychological injury. That is not sufficient.If an insurer or an employer disputes liability in respect of a claim, or any aspect of a claim, it is required to give the claimant proper notice of the dispute. A Section 74 Notice must be in plain language and clearly and succinctly state the reasons the insurer disputes liability and the issues relevant to the dispute. If Section 11A is relied on, the insurer must state which of the various parts of Section 11A(1) it relies upon (transfer or demotion or promotion etc) and the basis for that reliance. The Section is not invoked merely because an injury resulted from the employer’s reasonable actions”.

4.2.9 *Department of Ageing, Disability and Homecare v Mariniello [2010] NSW WCC PD 17*

This case highlights Roche DP’s further frustration in relation to the form and content of Section 74 Notices:-

“Given the decision of Maguire CCJ, it was not open to the insurer to dispute that Ms Mariniello injured her back in the course of her employment on 26 July 1991 and the reference to Section 4 was inappropriate. The reference to Section 9A was fundamentally misguided as that Section was not introduced until 1997 and the injury occurred in 1991. In any event, employment does not have to be a substantial contributing factor to the need for medical treatment. The references to Sections 33, 36, 37 and 40 were also otiose because the worker made no claim for weekly compensation. This case graphically illustrates, yet again, the insurance industry’s complete inability to comply with Section 74”.

4.2.10 *Irvin v LA Logistics Pty Limited & Anor [2010] NSW WCC PD 40*

President Keating referred to the above decisions and stated:

“It has been held in numerous recent cases in this Commission that referring to sections of the Legislation, without clearly articulating the issues in dispute, it not proper compliance with Section 74”.

His Honour observed that the use of Section 74 Notice and Teleconference procedures were designed to ensure that parties clearly understand the issues to be determined by an Arbitrator if the parties are unable to resolve the dispute themselves. His Honour considered that technical defences which have not been clearly identified should not be permitted:-

“This is so even if the technical defence is obliquely mentioned amongst a morass of issues in a carefully crafted Section 74 Notice which is clearly focused on preserving the Respondent’s rights on all issues, rather than stating in plain language the reason the Respondent disputes liability, as is required by Section 74”.

5. Attaches all Evidence

- 5.1 If an insurer fails to provide a copy of a report as required by the Regulations, the report is not admissible in proceedings in relation to the dispute concerned: Section 73(3)(b) and Section 119(6)(b) WIM.
- 5.2 All specified documents that are relevant to the claim or any aspect of the claim “to which the decision relates” must be provided, whether or not they support the reasons for the decision: Clause 37(4) WCR.
- 5.3 A wide selection of documents, including medical reports, medical certificates, factual reports, wages material etc, are to be provided: Clause 37(1) WCR.
- 5.4 The documents are to be provided in relation to decisions requiring notice to be provided under Section 54 WCA or Section 74 WIM, or on a review under Section 287A WIM that confirms the original decision: Clause 37(2) WCR.
- 5.5 The documents must be provided as an attachment to a Notice under these Sections: Clause 37(3) WCR.
- 5.6 The requirements of Sections 73 and 119 are absolute and do not provide any room for discretion to be exercised if reports are not provided as required by the Regulations: *Chown v. Tony Madden Refrigeration Transport Limited [2005] NSW WCC PD 159*.

6. Common Pitfalls

6.1 Not raising questions of “injury” to disputed body parts in permanent impairment claims. Consequently:

- all claimed body parts are referred for AMS Assessment
- the insurer is deemed to have admitted injury for all body parts.
- the AMS will assume there are no issues in relation to the injury and will assess each body part referred.
- There will be no basis for an appeal in relation to questions of “injury”.

The correct procedure where “injury” is disputed for some or all body parts is:

- raise clearly in a Dispute Notice precisely which body parts are disputed in terms of “injury”.
- when an Application to Resolve a Dispute is received, write to the Commission and request a Teleconference so that the disputed issues can be determined prior to AMS referral.

6.2 Not attaching relevant evidence when “injury” disputed.

Such evidence should include:

- Claim forms
- Medical certificates
- Reports from treating doctors
- Contemporaneous statements (eg. to factual investigators/rehabilitation providers etc)
- clinical notes (if available).

6.3 Incorrectly Raising Section 9A (Substantial Contributing Factor)

- If employment was a substantial contributing factor to the injury, then Section 9A is not relevant eg. to questions of incapacity
- in cases where an aggravation or the effects of injury have ceased, Section 9A should not be raised unless there is evidence that employment was not a substantial contributing factor to the initial “injury”.

6.4 Not properly particularising Section 11A defence.

- Notices should state the actions of the employer which are considered to be reasonable and particularise relevant Section 11A factors (demotion, performance, appraisal, dismissal etc)

7. Conclusion

In order to prepare a quality Section 74 Notice, **the following elements are essential:**

- 7.1 The minimum criteria required by Section 74(2) and Regulation 34 must be provided in the Notice.
- 7.2 The notice must raise all issues in dispute in plain language that is readily understood by the "ordinary reader".
- 7.3 It is not sufficient to simply identify Sections of the Act relied upon. Further and easily understood narrative is required.
- 7.4 Irrelevant sections of the legislation and issues must not be raised.
- 7.5 All evidence relevant to the decision (whether it supports the decision or not) must be attached to the Notice, otherwise the evidence is inadmissible.

Christopher Michael, Partner

Edwards Michael Lawyers

Level 11, 75 Elizabeth Street,
Sydney 2000

DX 1209 Sydney

Phone: (02)9232 5033

Fax: 02)9223 3626

em@edwardsmichael.com.au

www.edwardsmichael.com.au



edwards michael lawyers