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Tips for a Successful Statutory Review

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Speaking Notes

Introduction

1. The purpose of this talk is to look at statutory review processes relevant to workers' compensation and to provide some suggestions about how to best use those processes to advance your client's interests.

2. Ultimately, the point of engaging in a statutory review process is to attempt to persuade a decision-maker to resolve some kind of dispute in a way that is favourable to your client. Like any attempt at legal persuasion, that requires an understanding of the legal framework, marshaling evidence to support the case, and showing the decision-maker why the evidence should be accepted as proving the necessary elements of the claim.

3. I will speak around the following main topics:

   (a) What is a statutory review?

   (b) What is a successful statutory review?

   (c) Being flexible.

   (d) Dealing with law and policy.

   (e) Dealing with facts and evidence.

   (f) Being persuasive.

What is a statutory review?

4. A statutory review is, of course, a creature of statute. Here, I am focusing on mid-tier review processes – that is, internal or external reviews that sit a tier below formal reviews and appeals in bodies like the QIRC or AAT. Be sure to look at what the particular statute

requires or permits and what powers the decision-maker has.

5. For workers' compensation, the most relevant statutory review processes in Queensland are:

   (a) Regulator's review of decisions in Queensland workers' compensation – *Workers' Compensation and Rehabilitation Act 2003* (Qld), Ch 13, Pt 2.

   (b) Comcare or insurer's review of decisions in Commonwealth workers' compensation – *Safety, Rehabilitation and Compensation Act 1988* (Cth), Part VI.

6. Other relevant or related reviews processes might include:

   (a) Internal review by NIISQ Agency – *National Injury Insurance Scheme (Queensland) Act 2016*, Ch 6, Pt 1.

   (b) Internal review by NDIA – *National Disability Insurance Scheme Act 2013*, Ch 4, Pt 6.

   (c) Internal review by Centrelink – *Social Security (Administration) Act 1999*, Pt 4.

   (d) Various military compensation review processes.

7. The relevant legislation will provide the framework, including the decision-maker's powers, and your client's rights and obligations.

8. Generally, the process will provide for a "merits review" of the original or primary decision. Subject to the particular legislation, that usually means:

   (a) The reviewer is either a more senior person within the organisation (internal review) or a person in a separate organisation (external review).

   (b) The reviewer reconsiders the issues afresh, including the law, the facts, the policy aspects, and any discretions.

   (c) The reviewer is not bound by findings of fact made by the original decision-maker.

   (d) The reviewer is not limited to the original evidence, but may have regard to all relevant evidence available at the time of the review.

   (e) The reviewer will apply the law and policy applicable at the time of the review.

9. The review will generally be a review of the original ***decision***; not a review of the ***reasons*** for

that decision. That generally means:

(a) The reasons for the original decision might provide insight into the issues that are likely to be contentious or that need to be addressed, but there is no requirement to show that the reasons are flawed.

(b) If the reasons for the original decision are compelling or persuasive, you probably need more evidence to avoid the same result on review.

(c) If the reasons for the original decision are flawed or weak, do not let that distract from ensuring the claim and evidence is strong.

10. Usually, there is no legal onus of proof in a statutory review process – but the practical onus is almost always on you to convince the decision-maker of the findings that you seek.

What is a successful statutory review?

11. The most common scenario is that a claim or request has been declined and wants to reverse that outcome and have the claim or request accepted. Naturally, if that result is obtained, then plainly enough the review will have been successful.

12. There are other circumstances in which it may be that a successful review means having the original decision set aside and the matter returned to the original decision-maker for further investigation or reconsideration. Give consideration to whether that is preferable outcome.

13. Sometimes, "success" might be more modest. Even if the outcome of the review is still adverse, there might be benefits in obtaining a decision which is based on more favourable findings of fact. Whilst the next level of review (assuming there is one) will not be bound by those favourable findings, the other party might be persuaded to abide by those findings and thereby narrow the issues in dispute.

Being flexible

14. Each case really does turn on its own facts and evidence, so it is important to be flexible in approach. Be cautious about using templates or standard precedents.

15. Adapt to the nature of the case. For example, consider:

(a) Are there any features of the statutory framework that have particular significance for

this case?

(b) Is there some policy or guideline that is especially relevant?

(c) Is there some compelling or unusual feature of the evidence that might be helpful? A photograph? A quote from the 'adverse' evidence that is actually helpful?

(d) Are there broader social or industry circumstances that inform the issues?

16. Adapt to the decision-maker – know your audience, if you can. See if you can ascertain whether the decision-maker is likely to be legally qualified. See if you have dealt with this decision-maker before, or if colleagues have.

17. Overall, know when to 'break the rules'. There is no single correct or 'one size fits all' approach, because each scheme and each case will have its own peculiarities.

Dealing with law and policy

18. As mentioned, it will be difficult to 'know your audience' in a statutory review, because you might not know the identity of the reviewer or the qualifications and experience of the reviewer. The reviewer might be a 'subject matter expert'; might be a lawyer; might be both; might be neither. It is probably safest to assume the reviewer will be reasonably well informed, but not an expert in the law or the subject-matter.

19. Avoid dealing with too much law when making submissions. In fact, I normally suggest dealing with as little law as possible. The basic legal rules probably need to be identified, and the nature of some statutory schemes means that references to multiple legislative provisions and tests becomes necessary. However, pages and pages of detailed legal principles and analysis will rarely be helpful.

20. Refer to case-law sparingly and only deliberately. If a particular principle is relevant and derives from case-law, state the principle and give the citation. However, if the principle is uncontroversial you might not need to refer to the case. In any event, overly detailed analysis of authority should generally be avoided. Where some legal principle is contentious, a reviewer will (in my experience) almost always follow the 'company line'.

21. Review the relevant policy documents and guidelines. Many reviewers find their organisation's policies and guidelines to be more persuasive that case-law. Look for guidance

or examples in those documents that assists your client's case. Show the review why a policy applies to your client, or does not apply.

Dealing with facts and evidence

22. Prepare a chronology. Make it detailed. For every entry, include references to the best evidence to support the event or description in the chronology.

23. Consider whether to give the review a chronology – it is often a useful way to frame the case. If you give the reviewer a chronology, it should probably be a curated version of the detailed chronology that you prepare for your own use.

24. Work out which facts are truly undisputed and make sure that is clear to the reviewer. The undisputed facts might provide a useful starting point for considering the case, but be careful not to assume a fact is not disputed. If in doubt, treat all facts as being in dispute.

25. Identify which facts are in dispute and whether those facts matter. Focus on the facts that matter, in the sense that they might influence the outcome. Those are the facts that need the most evidence to support them.

26. Evidence is always what matters most. Get the evidence that supports the facts you need. In doing so, use the rules of evidence to your advantage:

    (a) Assuming the rules of evidence do not apply, take advantage of that by getting supportive evidence that might not otherwise be admissible in a Court. However, make sure that evidence truly is supportive and helpful – for example, maps, charts, statistics, photographs, weather data, etc.

    (b) When you have evidence that does comply with the rules of evidence, use that to emphasise the weight of the evidence. Point out that a witness has sworn an affidavit. Show that an expert has gotten the facts right and articulated compelling reasoning.

27. Expert opinions will often be crucial. If the original decision rejected or criticised your expert's report, review whether some further evidence is required. Consider speaking with the expert and obtaining a signed file note that addresses the key concerns.

28. Be careful of inferences. They can be useful and are sometimes the only way a fact can be proved. For example, a state of mind or causal connection might depend upon inferences

drawn from the surrounding circumstances. However, where possible, avoid asking a reviewer to draw an inference about an important fact if it is instead possible to prove that fact by direct evidence.

29. Consider the persuasiveness and usefulness of the evidence:

    (a) Are statements sufficiently detailed?

    (b) Are there cultural or language issues that should be clarified?

    (c) Are there medical terms or concepts that need to be defined or explained?

    (d) Are there questions about credibility (honesty; accuracy; reliability)?

    (e) Are there gaps that need to be filled?

Being persuasive

30. Written submissions are commonly required or used in statutory review processes. Submissions should help the reviewer to make sense of the evidence; they are not a substitute for evidence. In other words, if a fact is asserted in the submissions it needs to be supported by the evidence.

31. The are no strict rules for preparing written submissions, but all the usual requirements of good written advocacy apply. Some particular considerations include:

    (a) Be concise. Some reviewers say they do not want anything more than 5 pages. Go into as much detail as you need to, but remember that sometimes ‘less is more’.

    (b) Use plain, straightforward language. Be precise with language, but not pretentious.

    (c) Think about how to frame the issue or issues. Use the first page to tell the reviewer what the case is really about.

    (d) Avoid overly emotive or emphatic language, because it usually distracts more than anything.

    (e) Avoid large quotations from the evidence. Brief quotations might be appropriate, and summaries can be helpful. If a lengthy passage in the evidence is important, direct the reviewer to it and say what the key point is.

(f) When referring to evidence, be accurate and pinpoint where the reviewer can find the evidence.

(g) Grapple with the adverse evidence and show the reviewer why that evidence does not defeat the claim.

(h) Make sure you identify precisely for the reviewer what findings you want and what outcome you want.

32. Sometimes there will be an opportunity to make oral representations. Consider:

(a) Find out whether the reviewer will listen to oral evidence from a witness, and determine whether that is likely to assist the case.

(b) Avoid treating an oral hearing with a reviewer as if it is a court or tribunal hearing.

(c) Speak to the reviewer like a colleague.

(d) Use questions – give answers.

33. Ultimately, in either written or oral submissions, have the aim of trying to help the reviewer make sense of the case and reach a decision. Make it as easy as possible for the reviewer to make the decision you want. Ensure you have given the reviewer everything they need to make that decision.

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