

Standing Committee on Law and Justice

# **First review of the workers compensation scheme**

Ordered to be printed 9 March 2017

New South Wales Parliamentary Library cataloguing-in-publication data:

**New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice.**

First review of the Workers Compensation Scheme / Legislative Council, Standing Committee on Law and Justice. [Sydney, N.S.W.] : The Committee, 2017. – [xvi, 180] pages ; 30 cm. (Report ; no. 60)

Chair: The Hon Shayne Mallard MLC.

“March 2017”.

ISBN 9781922258328

1. Workers' compensation—Law and legislation—New South Wales.
- I. Title
- II. Mallard, Shayne.
- III. Series: New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice. Report ; no. 60

368.41009944 (DDC22)

## Table of contents

	<b>Terms of reference</b>	<b>vii</b>
	<b>Committee details</b>	<b>viii</b>
	<b>Chair’s foreword</b>	<b>ix</b>
	<b>Key issues</b>	<b>x</b>
	<b>Recommendations</b>	<b>xii</b>
	<b>Conduct of review</b>	<b>xv</b>
<b>Chapter 1</b>	<b>Overview</b>	<b>1</b>
	<b>Oversight role of the committee</b>	<b>1</b>
	<b>Overview of the workers compensation scheme</b>	<b>1</b>
	SIRA	2
	icare	5
	SafeWork NSW	7
	Workers Compensation Independent Review Office	7
	<b>Recent moves to reform the scheme</b>	<b>8</b>
	2012 reforms	8
	2014 reforms	9
	2015 reforms	10
<b>Chapter 2</b>	<b>Scheme performance</b>	<b>13</b>
	<b>Key performance measures</b>	<b>13</b>
	Scheme viability	13
	Scheme efficiency	19
	Insurer profitability	20
	Claims experience	21
	<b>Return to work</b>	<b>22</b>
	Return to work rates	22
	Measures to improve return to work rates	23
	Concerns regarding return to work	25
<b>Chapter 3</b>	<b>Recommendations from the previous scheme review</b>	<b>31</b>
	<b>Recommendations from the 2014 review of the exercise of the functions of the WorkCover Authority</b>	<b>31</b>
	Abolishing the WorkCover Authority of NSW and establishing discrete organisations to assume its responsibilities	31
	Workers Compensation Independent Review Office	33
	Medical treatment	34

	Work capacity decisions and access to paid legal representation	38
	Return to work	39
	Stakeholder engagement and access to information and guidelines	40
	Phoenix companies and the chain of responsibility	44
	Self insurers	45
	Comcare	46
	Disability sector	47
<b>Chapter 4</b>	<b>Work capacity decisions</b>	<b>49</b>
	<b>Overview</b>	<b>49</b>
	<b>Work capacity assessments</b>	<b>50</b>
	The conduct and purpose of assessments	51
	Nominated treating doctors	52
	<b>Work capacity notices</b>	<b>55</b>
	<b>Suitable employment</b>	<b>59</b>
	Second limb of definition	59
	Vocational assessments	61
	<b>Calculation of pre-injury average weekly earnings</b>	<b>62</b>
	Concerns about PIAWE calculation	63
	Options for reform	65
	<b>Stay provision</b>	<b>67</b>
<b>Chapter 5</b>	<b>Dispute resolution</b>	<b>69</b>
	<b>Dispute resolution process for work capacity decisions</b>	<b>69</b>
	Internal review	72
	Merit Review Service	73
	Procedural review	76
	<b>Dispute resolution process for liability decisions</b>	<b>78</b>
	<b>Bifurcation of the dispute resolution process</b>	<b>79</b>
	<i>Sabanayagam v St George Bank Ltd</i> [2016] NSWCA 145	81
	<b>Options for reform</b>	<b>82</b>
<b>Chapter 6</b>	<b>Entitlements</b>	<b>87</b>
	<b>Recent entitlement reforms</b>	<b>87</b>
	<b>Entitlement to payment of medical expenses</b>	<b>89</b>
	Linking access to medical benefits to whole person impairment	90
	Time limits on medical benefits	90
	Proposal to remove limits on medical benefits	91

	<b>Entitlement to permanent impairment compensation</b>	<b>93</b>
	Single claim for permanent impairment	93
	Single assessment of permanent impairment	94
	<b>Entitlement to weekly payments</b>	<b>97</b>
	Access to weekly payments after the second entitlement period	98
	Minimum weekly payment for workers with highest needs	99
	Cessation of weekly benefits after five years	100
	<b>Entitlement to commutation</b>	<b>107</b>
<b>Chapter 7</b>	<b>First responders</b>	<b>109</b>
	<b>Exemption from reforms</b>	<b>109</b>
	<b>Claims experience for first responders</b>	<b>109</b>
	Police	110
	Firefighters	112
	<b>Psychological injuries for first responders</b>	<b>113</b>
	Proposal regarding presumptive psychological injuries	116
	<b>Surveillance</b>	<b>117</b>
	Regulation of covert surveillance	118
	Use of covert surveillance	119
	Stakeholders' experience of surveillance	119
	Value of surveillance on a person with a psychological injury	122
	Desktop investigations	123
	Code of practice	124
<b>Chapter 8</b>	<b>Scheme agents</b>	<b>127</b>
	<b>Role of scheme agents</b>	<b>127</b>
	<b>Scheme agent deed</b>	<b>128</b>
	Scheme agent remuneration	129
	Remuneration provisions	129
	Deed renewal	130
	<b>Concerns about scheme agents</b>	<b>131</b>
	Adversarial environment	132
	Exerting undue pressure and intimidation	132
	Lack of consistent decision making	133
	Delaying treatment and payment	133
	Psychological impact of protracted interactions with scheme agents	134
	Employer concerns	136
	<b>Case managers</b>	<b>138</b>
	Oversight	140
	Qualifications and training	141
	Turnover	143

	<b>Independent Medical Examiners</b>	<b>145</b>
<b>Appendix 1</b>	<b>Submissions</b>	<b>149</b>
<b>Appendix 2</b>	<b>Witnesses at hearings</b>	<b>152</b>
<b>Appendix 3</b>	<b>Minutes</b>	<b>155</b>
<b>Appendix 4</b>	<b>Dissenting statements</b>	<b>179</b>

---

## Terms of reference

1. That, in accordance with section 27 of the *State Insurance and Care Governance Act 2015*, the Standing Committee on Law and Justice be designated as the Legislative Council committee to supervise the operation of the insurance and compensation schemes established under New South Wales workers compensation and motor accidents legislation, which include the:
  - (a) Workers' Compensation Scheme
  - (b) Workers' Compensation (Dust Diseases) Scheme
  - (c) Motor Accidents Scheme
  - (d) Motor Accidents (Lifetime Care and Support) Scheme.
2. In exercising the supervisory function outlined in paragraph 1, the committee:
  - (a) does not have the authority to investigate a particular compensation claim, and
  - (b) must report to the House at least once every two years in relation to each scheme.

The terms of reference were referred to the committee by the Legislative Council on 19 November 2015.<sup>1</sup>

---

<sup>1</sup> *Minutes*, NSW Legislative Council, 19 November 2015, p 623.

## Committee details

---

### Committee members

<b>The Hon Shayne Mallard MLC</b>	Liberal Party	<i>Chair</i>
<b>The Hon Lynda Voltz MLC</b>	Australian Labor Party	<i>Deputy Chair</i>
<b>The Hon David Clarke MLC</b>	Liberal Party	
<b>The Hon Trevor Khan MLC</b>	The Nationals	
<b>The Hon Daniel Mookhey MLC</b>	Australian Labor Party	
<b>Mr David Shoebridge MLC</b>	The Greens	

---

### Contact details

<b>Website</b>	<a href="http://www.parliament.nsw.gov.au/lawandjustice">www.parliament.nsw.gov.au/lawandjustice</a>
<b>Email</b>	<a href="mailto:lawandjustice@parliament.nsw.gov.au">lawandjustice@parliament.nsw.gov.au</a>
<b>Telephone</b>	02 9230 3067

---

## Chair's foreword

This committee has played a role in overseeing insurance and compensation schemes in New South Wales for many years. In 2014 the committee conducted a review of the functions of the WorkCover Authority. However, following significant reforms to the workers compensation system in 2015, WorkCover was abolished and three new agencies assumed its roles – the State Insurance Regulatory Authority (SIRA), Insurance and Care NSW (icare) and SafeWork NSW. This is the committee's first review of the scheme since those changes.

In addition to these structural reforms, the entitlements available to injured workers as part of the scheme have also undergone considerable change in recent years. In particular, the scheme's improved financial performance following the 2012 reforms has allowed the government to improve the benefits available to workers. This was most apparent in 2015, when the NSW Government introduced a \$1 billion reform package that expanded access to medical and other benefits for workers, and reduced premiums for business. The committee recognises that there continue to be opportunities to enhance workers' entitlements and, where appropriate, we have made recommendations to the NSW Government for action in this area.

One key issue throughout this review was the complexity of the bifurcated dispute resolution processes for work capacity decisions and liability decisions. While the administrative review process for work capacity decisions was intended to provide a quick, cost-effective dispute resolution mechanism, in some ways it has generated more problems than it solves. The current system is impenetrable for many scheme participants. To address these concerns, the committee has recommended the government establish a 'one stop shop' dispute resolution forum – a single jurisdiction that can determine all workers compensation disputes.

During this review the committee's attention was repeatedly drawn to issues with insurer conduct, particularly the conduct of case managers. It was disappointing to receive evidence suggesting that scheme agents are not adequately supporting injured workers and in some instances not appropriately following guidelines issued by SIRA and icare, especially in relation to the use of surveillance, Independent Medical Examiners and nominated treating doctors. We view the upcoming negotiations for a new deed between icare and the scheme agents as an ideal opportunity to address some of these concerns.

On behalf of the committee, I would like to thank all stakeholders who participated in this review. I also acknowledge my committee colleagues and extend my appreciation for their insightful contributions. Finally, I would like to thank the committee secretariat for their ongoing work in supporting this committee.



Hon Shayne Mallard MLC  
**Committee Chair**

## Key issues

### Previous review of the exercise of the functions of the WorkCover Authority

This committee previously examined the workers compensation scheme as part of a review of the exercise of the functions of the WorkCover Authority in 2014. During that review the committee considered the role of WorkCover and the 2012 reforms to the workers compensation system. As part of those reforms, the NSW Government sought to ensure the viability of the scheme by altering the eligibility requirements and entitlements available to injured workers. In its report, the committee made a number of recommendations, including that the government separate the regulator and nominal insurer roles in the scheme.

### 2015 workers compensation reforms

In 2015, the NSW Government introduced a suite of legislative reforms to the state's insurance and compensation schemes. As part of these reforms the WorkCover Authority was abolished and its functions assumed by three discrete new organisations: the State Insurance Regulatory Authority (SIRA) for workers compensation regulation; Insurance and Care NSW (icare) for workers compensation insurance; and SafeWork NSW for work, health and safety regulation. The NSW Government implemented a \$1 billion package that expanded access to medical and other benefits and reduced premiums.

### Entitlements

The committee notes that certain benefits have been returned to workers as a result of the committee's previous recommendations. In saying this, evidence presented during this review suggests that there are opportunities to further improve access to entitlements. For example, we recommend that the NSW Government investigate the possibility of allowing up to two assessments of permanent impairment for certain clearly defined injuries prone to deteriorate over time. This recommendation will go some way to alleviating stakeholders' concerns that injured workers with such injuries are disadvantaged by the current provision, which allows for only one assessment of permanent impairment.

### SIRA and icare

In respect to the recently created organisations, SIRA described itself as an 'active' regulator. However, it was clear from the evidence presented during the review that SIRA needs to provide more guidance to scheme participants, particularly insurers, to ensure the system operates effectively. As such, we have directed a number of recommendations to SIRA to better meet the needs of scheme participants. For example, in light of stakeholders' concerns, we have recommended that SIRA expedite its consultation process about the calculation of pre-injury average weekly earnings and develop a regulation on this issue as a matter of urgency.

In regards to icare, the committee views the upcoming negotiations for a new deed with scheme agents as an opportunity for the nominal insurer to consider the concerns raised during this review about the conduct of insurers. We have made numerous recommendations regarding matters to be included in the new deed, including penalties for scheme agents who exert undue pressure on nominated treating doctors and for those that fail to comply with guidelines concerning Independent Medical Examiners. We have also recommended that the new deed require scheme agents to comply with the NSW

Government's *Model Litigant Policy for Civil Litigation*, as well as with a proposed qualifications and training framework for case managers.

### **Dispute resolution**

A major issue that arose during this review was the complexity of the two separate dispute resolution processes for resolving disputes over work capacity decisions and liability matters. Indeed, a number of stakeholders referred to these systems as 'dysfunctional'. While our report also considers specific concerns with regard to the two separate dispute resolution processes, ultimately the most pressing issue was the bifurcated nature of the dispute resolution system itself. Review participants argued that bifurcation is inefficient, causes delays, and results in inconsistent decision-making and a system that is difficult for scheme participants to navigate. To overcome these concerns, stakeholders advocated dismantling the current dispute resolution system and establishing a 'one stop shop' – a single jurisdiction that can determine all workers compensation disputes. We have come to the same conclusion and have therefore recommended that the NSW Government establish such a forum.

### **Notices of workers compensation disputes**

In light of evidence that stakeholders find the workers compensation notices issued by insurers confusing and overwhelming, we have made recommendations to facilitate more accessible notices. These recommendations consider the format of notices, the use of plain English, injured workers' access to supporting documents and, following on from the proposed 'one stop shop' for dispute resolution, a single, joint notice for both work capacity decisions and liability decisions.

### **Surveillance**

Finally, stakeholders expressed concern about the use of surveillance by scheme agents on injured workers, particularly first responders and those workers with a psychological injury. While insurers provided evidence that surveillance was only used in a very small number of cases and in accordance with the relevant guidelines, we do not believe that vulnerable scheme participants are adequately protected. As such, we have recommended that icare expedite work on a mandatory surveillance guideline for scheme agents which sets objective standards for when surveillance should be used.

## Recommendations

- Recommendation 1** 19  
That icare provide more detailed information about how premiums are calculated.
- Recommendation 2** 29  
That SIRA and icare collect clearer data regarding the circumstances in which an injured worker returns to work and maintain statistics in relation to that worker for at least 12 months following their return to work, and that the return to work data specifically identify workers who have returned to work for insignificant periods or have had their benefits terminated for a reason other than return to work.
- Recommendation 3** 29  
That SIRA develop a guideline for use by scheme agents which outlines how rehabilitation services should be utilised during the case management process.
- Recommendation 4** 34  
That the NSW Government consider the need for the Workers Compensation Independent Review Office to complete the Parkes Review.
- Recommendation 5** 37  
That SIRA issue a guidance note explaining how the new *Guidelines for claiming workers compensation* operate with respect to s 60(2A) of the *Workers Compensation Act 1987*.
- Recommendation 6** 55  
That icare, in the new scheme agent deed, consider including penalties for scheme agents who exert undue pressure on nominated treating doctors.
- Recommendation 7** 55  
That icare collaborate with scheme agents to provide guidance to nominated treating doctors about their legal obligations in workers compensation matters.
- Recommendation 8** 58  
That icare work with scheme agents to:
- ensure that notices are written in plain English
  - consider options to shorten the format of notices.
- Recommendation 9** 58  
That SIRA amend the *Guidelines for claiming workers compensation* so that injured workers are provided with any supporting documents relevant to a work capacity decision in real time or at pre-determined stages throughout the life of a claim, rather than only as attachments to a work capacity notice.
- Recommendation 10** 67  
That SIRA expedite its stakeholder consultation process regarding the calculation of pre-injury average weekly earnings and develop a regulation on this issue as a matter of priority.

- Recommendation 11** 68  
That SIRA issue a guidance note explaining the appropriate operation of s 44BC of the *Workers Compensation Act 1987*.
- Recommendation 12** 72  
That icare develop a mandatory standard for the use of interpreters and translation services by scheme agents during the life of a workers compensation claim.
- Recommendation 13** 72  
That the NSW Government investigate removing the distinction between work capacity decisions and liability decisions in the workers compensation scheme.
- Recommendation 14** 86  
That the NSW Government establish a ‘one stop shop’ forum for resolution of all workers compensation disputes, which:
- allows disputes to be triaged by appropriately trained personnel
  - allows claimants to access legal advice as currently regulated
  - encourages early conciliation or mediation
  - uses properly qualified judicial officers where appropriate
  - facilitates the prompt exchange of relevant information and documentation
  - makes use of technology to support the settlement of small claims
  - promotes procedural fairness.
- Recommendation 15** 86  
That the NSW Government introduce a single notice for both work capacity decisions and liability decisions made by insurers.
- Recommendation 16** 86  
That the NSW Government consider the benefits of developing a more comprehensive specialised personal injury jurisdiction in New South Wales.
- Recommendation 17** 97  
That the NSW Government investigate the possibility of amending s 322A of the *Workplace Injury Management and Workers Compensation Act 1998* to allow up to two assessments of permanent impairment for certain clearly defined injuries that are prone to deteriorate over time, such as spinal injuries.
- Recommendation 18** 100  
That SIRA amend the *Guidelines for claiming workers compensation* concerning s 38 of the *Workers Compensation Act 1987* to set out an objective test for insurers to adhere to when determining the requirements for continuation of weekly payments after the second entitlement.
- Recommendation 19** 100  
That the NSW Government clarify the intended scope of s 38A of the *Workers Compensation Act 1987* and if necessary, extend the minimum weekly compensation payments for injured workers with highest needs to existing recipients of weekly payments, subject to an analysis of its financial impact.

- Recommendation 20** **106**  
That SIRA use the data collected from icare and self and specialised insurers concerning the first cohort of workers affected by the operation of s 39 of the *Workers Compensation Act 1987* to identify workers in need of intensive case management and work placement, and provide these opportunities to eligible workers before the expiration of weekly benefits.
- Recommendation 21** **117**  
That icare monitor the outcomes of the Work Injury Screening and Intervention protocol trial, and subject to results, roll out the protocol to all scheme participants.
- Recommendation 22** **126**  
That icare and SIRA expedite work on a mandatory surveillance guideline for scheme agents which sets objective standards for when surveillance should be used.
- Recommendation 23** **131**  
That icare release the remuneration provisions in the new scheme agent deed, including incentive-based remuneration provisions.
- Recommendation 24** **135**  
That icare, in the new scheme agent deed, require scheme agents to comply with the NSW Government's *Model Litigant Policy for Civil Litigation*.
- Recommendation 25** **143**  
That icare:
- develop a single, comprehensive qualifications and training framework for all case managers, incorporating specific skills to identify and deal with mental health issues
  - make compliance with this framework mandatory under the new scheme agent deed.
- Recommendation 26** **148**  
That icare, in the new scheme agent deed, include sanctions for scheme agents who fail to comply with the applicable guidelines on the use Independent Medical Examiners.

## Conduct of review

The committee commenced this review on 12 August 2016.

The committee received 84 submissions and 4 supplementary submissions.

The committee held two public hearings.

Prior to the hearing, the committee forwarded written questions on notice to the SIRA and icare based on the committee's 2014 review of the WorkCover Authority, the annual reports of the WorkCover Authority from 2013-14 and 2014-15, the NSW workers compensation statistical bulletins published since the committee's 2014 review and submissions received by the committee. The committee also requested an update on the government's response to the recommendations in its report on the review of the WorkCover Authority.

Review related documents are available on the committee's website, including submissions, hearing transcripts, tabled documents and answers to questions on notice.



## Chapter 1 Overview

This chapter provides an overview of the workers compensation scheme, including the role of the committee in overseeing the scheme, and the roles of the State Insurance Regulatory Authority (hereafter, SIRA), Insurance and Care NSW (hereafter, icare), SafeWork NSW, the Workers Compensation Independent Review Office (hereafter, WIRO) and scheme agents. It also considers recent reforms to the workers compensation scheme.

### Oversight role of the committee

- 1.1 In accordance with s 27 of the *State Insurance and Care Governance Act 2015*, the operations of the workers compensation scheme are required to be supervised by a committee of the Legislative Council.
- 1.2 The Standing Committee on Law and Justice has been designated as the committee to perform this oversight role. The resolution appointing the committee requires the committee to report to the Legislative Council in relation to the scheme at least once every two years. The same resolution also requires the committee to supervise the operation of other insurance and compensation schemes established under the state's workers compensation and motor accidents legislation, including the Compulsory Third Party scheme, Workers' Compensation (Dust Diseases) scheme and the Motor Accidents (Lifetime Care and Support) scheme.<sup>2</sup>
- 1.3 The committee reported on the Compulsory Third Party scheme in August 2016 and will conduct separate reviews of the Workers' Compensation (Dust Diseases) scheme and the Motor Accidents (Lifetime Care and Support) scheme.
- 1.4 Although this report is entitled *First review of the workers compensation scheme*, the committee has previously monitored and reviewed the scheme as part of its 2014 *Review of the exercise of the functions of the WorkCover Authority of NSW*. The NSW Government's response to these recommendations is examined in Chapter 3.
- 1.5 Information on the committee's 2014 review of the WorkCover Authority can be found on the committee's website at: [www.parliament.nsw.gov.au/lawandjustice](http://www.parliament.nsw.gov.au/lawandjustice).

### Overview of the workers compensation scheme

- 1.6 The New South Wales workers compensation scheme is the largest defined benefit system in Australia. In the 2015-16 financial year, the system insured \$226 billion in wages and received 91,977 new claims.<sup>3</sup>
- 1.7 The four key segments of the insurance system are:
  - the nominal insurer – a statutory insurer responsible for the Workers Compensation Insurance Fund which is administered by icare

<sup>2</sup> *Minutes*, NSW Legislative Council, 19 November 2015, p 623.

<sup>3</sup> SIRA, *Annual report 2015/16*, 2016, p 15.

- specialised insurers – private insurers licensed to operate within certain industries
- self insurers – large employers licensed to self insure
- government self insurers – government self insured employers, including the NSW Police Force, NSW Ambulance, and NSW Fire and Rescue, covered by the Treasury Managed Fund (TMF). The TMF is administered by the NSW Self-Insurance Corporation (SICorp). SICorp is administered by icare.<sup>4</sup>

**1.8** icare advised that, as the nominal insurer, it provides one of the world’s largest workers compensation schemes:

icare’s Workers Insurance protects 3.1 million workers in more than 284,000 NSW [New South Wales] businesses and has the strength of being one of the world’s largest workers compensation schemes (‘Nominal Insurer’). Workers Insurance cared for over 60,000 injured workers last year alone and paid \$1.7 billion in claims.<sup>5</sup>

**1.9** Additionally, icare’s Self Insurance insures over 300,000 workers in the public sector through the TMF.<sup>6</sup>

**1.10** Licensed insurers, including the nominal insurer, can contract scheme agents to act on their behalf.<sup>7</sup> There are five scheme agents operating within the workers compensation scheme: Allianz Australia Workers’ Compensation (NSW); CGU Workers Compensation (NSW) Limited; Employers Mutual NSW Limited; GIO General Limited; and QBE Workers Compensation (NSW) Ltd. Scheme agents do not insure or underwrite the workers compensation system nor manage any funds of the scheme.<sup>8</sup> The role of scheme agents is examined in Chapter 8.

**1.11** Employers finance the scheme through the payment of insurance premiums. All employers in New South Wales (except exempt employers) must have a workers compensation policy.<sup>9</sup>

**1.12** The role of insurers in the scheme is to issue insurance policies, manage the collection of premiums, process claims, inform employers and workers of their obligations and responsibilities, and help workers recover and return to work.<sup>10</sup>

## **SIRA**

**1.13** SIRA was established as part of the 2015 reforms to workers compensation. SIRA is the statutory body responsible for regulating the workers compensation scheme to ensure that the

---

<sup>4</sup> SIRA, *NSW workers compensation inaugural system performance report 2014/2015*, 2016, p 5.

<sup>5</sup> Answers to pre-hearing questions on notice, icare, 27 October 2016, p 1.

<sup>6</sup> Answers to pre-hearing questions on notice, icare, p 1.

<sup>7</sup> See, SIRA, *Workers compensation*, <http://www.sira.nsw.gov.au/workers-compensation>; Evidence, Ms Vicki Mullen, General Manager Consumer Relations and Market Development, Insurance Council of Australia, 7 November 2016, p 63.

<sup>8</sup> Evidence, Ms Mullen, 7 November 2016, p 63.

<sup>9</sup> Exempt employers include those that: pay \$7,500 or less in annual wages; do not employ an apprentice or trainee; are not members of a group for premium purposes.

<sup>10</sup> SIRA, *Workers compensation*, <http://www.sira.nsw.gov.au/workers-compensation>.

system is sustainable, fair and affordable and provides support for workers with a work-related injury.<sup>11</sup> SIRA sits administratively within the Better Regulation Division of the New South Wales Department of Finance, Services and Innovation. The Deputy Secretary of the Better Regulation Division is also the Chief Executive of SIRA.<sup>12</sup>

**1.14** SIRA's regulatory functions are set out in ss 22 and 23 of the *Workplace Injury Management and Workers Compensation Act 1998*. These functions are supplemented by the specific functions detailed in s 24 of the *State Insurance and Care Governance Act 2015*.<sup>13</sup>

**1.15** SIRA describes its role as:

- supervising insurers so they comply with legislation, and understand their obligations to workers and employers
- helping employers understand their roles and obligations within the workers compensation scheme
- educating injured workers about their rights and responsibilities
- managing the accreditation of health providers so that injured workers receive effective treatment to enable return to work.<sup>14</sup>

**1.16** As the regulator, SIRA does not issue insurance policies or manage claims.<sup>15</sup>

**1.17** SIRA is overseen by a board whose responsibilities include determining SIRA's general policies and strategic directions; overseeing SIRA's performance; and keeping the Minister for Innovation and Better Regulation informed of SIRA's activities.<sup>16</sup>

### ***Role in overseeing scheme agents***

**1.18** SIRA supervises icare and holds the agency accountable for the performance of any service providers, including scheme agents, that icare engages to undertake workers compensation functions of the nominal insurer or the TMF.<sup>17</sup>

**1.19** Since being established SIRA has reviewed and issued a number of guidelines as part of its oversight and supervision of insurers.<sup>18</sup> These guidelines are discussed in Chapter 3.

**1.20** SIRA uses a number of regulatory tools, including enforcement and intervention activities, to monitor, guide and evaluate the behaviour of scheme agents.<sup>19</sup> SIRA advised of the enforcement actions that have been taken since the regulator was established:

<sup>11</sup> SIRA, *Our role with insurers*, <http://www.sira.nsw.gov.au/workers-compensation/for-insurers/our-role-with-insurers>.

<sup>12</sup> Answers to pre-hearing questions on notice, SIRA, 27 October 2016, p 1.

<sup>13</sup> Submission 74, Australian Lawyers Alliance, p 4.

<sup>14</sup> SIRA, *Our role with insurers*, <http://www.sira.nsw.gov.au/workers-compensation/for-insurers/our-role-with-insurers>.

<sup>15</sup> SIRA, *Workers compensation*, <http://www.sira.nsw.gov.au/workers-compensation>.

<sup>16</sup> Answers to pre-hearing questions on notice, SIRA, p 1.

<sup>17</sup> Answers to questions on notice, SIRA, 2 December 2016, p 8.

<sup>18</sup> Answers to pre-hearing questions on notice, SIRA, p 5.

<sup>19</sup> See, Answers to questions on notice, SIRA, p 8 and p 11.

Since its establishment, SIRA has taken enforcement action including placing restrictions on the licensing term, of four insurers and required greater security of one of these four insurers. There have been no licence cancellations or suspensions. The most frequent intervention has been escalated complaints from SIRA to the insurer requiring an explanation of the sub-optimal action or risk and the action the insurer will undertake to address the problem.<sup>20</sup>

**1.21** SIRA also engages directly with insurers to ensure compliance with legislation and to discuss performance.<sup>21</sup>

**1.22** The committee heard that under the direction of its board, SIRA is working to establish a regulatory framework for insurers that is grounded in ‘genuine consultation’.<sup>22</sup> Further, SIRA views itself as having an active role as a regulator and signalled its intent to move away from monitoring compliance towards driving outcomes and improving performance.<sup>23</sup>

**1.23** For example, in 2016, SIRA released a proposed self insurer licensing framework for consultation which is discussed in detail in Chapter 3.

**1.24** SIRA expects to roll out the same framework across the rest of the workers compensation system through a new insurer supervision model.<sup>24</sup> SIRA described the proposed insurer supervision model as ‘proactive, evidence-informed, outcome focussed and risk-based’<sup>25</sup> and advised of how insurers’ compliance and performance may be assessed:

Insurer risk will be assessed under two categories: compliance and performance. Each category is broken further into three components for assessment and benchmarking purposes:

- Financial management
- Claims management
- Conduct.<sup>26</sup>

**1.25** SIRA also intends to review the licensing conditions for specialised insurers. SIRA expects that this framework will include a greater focus on improving performance to better meet the needs of injured workers and employers.<sup>27</sup>

**1.26** Ms Carmel Donnelly, Executive Director, Workers and Home Building Compensation Regulation, SIRA, advised that the SIRA will use the information collected from the proposed new licensing models to improve scheme agents’ performance:

Our intention is to be able to hold a mirror up to the whole system, whether it is the nominal insurer, the Treasury Managed Fund [TMF] managed by icare or the self

---

<sup>20</sup> Answers to questions on notice, SIRA, p 11.

<sup>21</sup> Answers to questions on notice, SIRA, p 8.

<sup>22</sup> Evidence, Mr Anthony Lean, Chief Executive, SIRA, 7 November 2016, p 33.

<sup>23</sup> See, Evidence, Mr Lean, 7 November 2016, p 33; Evidence, Ms Carmel Donnelly, Executive Director, Workers and Home Building Compensation Regulation, SIRA, 7 November 2017, p 47.

<sup>24</sup> Evidence, Mr Lean, 7 November 2016, p 33.

<sup>25</sup> Answers to pre-hearing questions on notice, SIRA, pp 18-19.

<sup>26</sup> Answers to pre-hearing questions on notice, SIRA, pp 18-19.

<sup>27</sup> Evidence, Ms Donnelly, 7 November 2017, p 40.

insurers and specialised insurers. We want to create visibility and incentives to improve with a balanced set of measures.<sup>28</sup>

- 1.27** SIRA also operates a Customer Service Centre to triage complaints about scheme agents and reported that the service received 54,897 ‘SIRA-related’ enquiries from September 2015 to 30 June 2016.<sup>29</sup> SIRA advised that, depending on the seriousness of the complaint, potential outcomes include referral back to the insurers, a regulatory response or appeal and internal reviews.<sup>30</sup>
- 1.28** Mr Anthony Lean, Chief Executive, SIRA, described SIRA’s complaints mechanisms as a ‘fall back’ should the insurer agent be unable to deal with a concern.<sup>31</sup>
- 1.29** In addition, the SIRA Merit Review Service deals with disputes from injured workers about insurers’ work capacity decisions. The service receives approximately 700 applications per year.<sup>32</sup> The Merit Review Service and the administrative review process are examined in detail in Chapter 5.

#### **icare**

- 1.30** icare was established as part of the 2015 reforms and is a public financial enterprise governed by an independent board of directors that delivers insurance and care services. The board consists of the chief executive officer and eight non-executive directors. The board is directly accountable to the Minister for Finance, Services and Property. The Minister appoints the board.<sup>33</sup>
- 1.31** The committee heard that icare’s functions include:
- acting for the Nominal Insurer in accordance with section 154C of the *Workers Compensation Act 1987*
  - providing services (including staff and facilities) for any relevant authority, or for any other person or body, in relation to any insurance or compensation scheme administered or provided by the relevant authority or that other person or body
  - entering into agreements or arrangements with any person or body for the purposes of providing services of any kind or for the purposes of exercising the functions of the Nominal Insurer
  - monitoring the performance of the insurance or compensation schemes in respect of which it provides services
  - such other functions as are conferred or imposed on it by or under this or any other Act.<sup>34</sup>

<sup>28</sup> Evidence, Ms Donnelly, 7 November 2017, p 40.

<sup>29</sup> SIRA, *Annual report 2015/16*, 2016, p 21.

<sup>30</sup> Answers to questions on notice, SIRA, p 12.

<sup>31</sup> Evidence, Mr Lean, 7 November 2016, p 39.

<sup>32</sup> SIRA, *Annual report 2015/16*, 2016, p 22.

<sup>33</sup> icare, *who we are*, <https://www.icare.nsw.gov.au/about-icare/who-we-are>.

<sup>34</sup> Submission 74, Australian Lawyers Alliance, p 4.

**1.32** icare advised that since being established, its ‘... focus has been on delivering a world-class experience by better understanding the needs and goals of injured workers and employers, and delivering our services seamlessly through integrated channels.’<sup>35</sup> Mr Vivek Bhatia, Chief Executive Officer, icare, advised that a key element to facilitate this approach is icare’s work on a co-design principle to move towards person-centred service delivery.<sup>36</sup> Other activities undertaken by icare during this time include:

- designing and delivering a new training model for case managers
- developing fairer processes for workers required to attend medical examinations
- developing Workers Care in conjunction with Lifetime Care
- trialling the use of the Work Injury Screening and Intervention protocol to identify injured workers who may be at risk of secondary psychological injury or delayed return to work
- releasing two multi-language online service tools for employers and workers.<sup>37</sup>

**1.33** In addition, icare has various mechanisms for monitoring complaints and feedback about scheme agents, including net promoter scores and an online portal on its website. Net promoter scores are used to measure customer loyalty and customer experience.<sup>38</sup> icare advised that since the program was introduced in March 2016, it has sent 143,000 surveys to customers and received 11,500 responses, most of which have been positive or neutral.<sup>39</sup> The scores are monitored daily to identify, and where necessary immediately address, concerns raised by workers.<sup>40</sup>

### ***Workers Care***

**1.34** icare advised that Workers Care is a joint initiative between Workers Insurance and Lifetime Care to simplify and improve claims management for severely injured workers:

To simplify and improve claim management for severely injured workers, icare Workers Care (a joint initiative between Workers Insurance and Lifetime Care) is rolling out a strategy to centralise claim management and support consistent treatment, rehabilitation and care planning.<sup>41</sup>

**1.35** Mr Don Ferguson, Executive General Manager, Workers Care, icare, stated that the purpose of the program is to ensure that injured workers receive the same quality of services as those

---

<sup>35</sup> Answers to pre-hearing questions on notice, icare, p 1.

<sup>36</sup> Evidence, Mr Vivek Bhatia, Chief Executive Officer, icare, 7 November 2016, p 17.

<sup>37</sup> Answers to pre-hearing questions on notice, icare, 27 October 2016, pp 1-2.

<sup>38</sup> See, Evidence, Mr John Nagle, Executive General Manager, Workers Insurance, icare, 7 November 2016, p 18; Answers to questions on notice, icare, 2 December 2016, p 1.

<sup>39</sup> Answers to questions on notice, icare, p 2.

<sup>40</sup> Answers to questions on notice, icare, p 2.

<sup>41</sup> Answers to pre-hearing questions on notice, icare, p 6.

people injured in motor vehicle accidents.<sup>42</sup> Mr Ferguson said the key benefits of the program are consistency and specialisation, both of which help to drive quality.<sup>43</sup>

- 1.36** Workers Care was initiated in October 2015 and severely injured workers are being transferred to the program in stages until June 2017. icare said this approach will ensure the transition is a ‘seamless and positive experience’.<sup>44</sup>
- 1.37** The Department of Finance and Services advised that program participants do not have to meet a whole person impairment threshold; but rather are assessed according to functional and severe injury criteria.<sup>45</sup>
- 1.38** The committee was informed that the definition of ‘severe injury’ has also been adopted from the Lifetime Care model and includes moderate to severe brain injury, spinal cord injury, specific amputations, full thickness burns, and permanent blindness.<sup>46</sup>
- 1.39** Mr Ferguson noted while there has been no quantifiable evidence so far concerning the outcomes of the program, early anecdotal feedback has been positive.<sup>47</sup>

### **SafeWork NSW**

- 1.40** SafeWork NSW was established as part of the 2015 reforms and is the workplace health and safety regulator for New South Wales. SafeWork NSW’s key roles are to:
- provide advice on improving work health and safety
  - provide licences and registration for potentially dangerous work
  - investigate workplace incidents
  - enforce work health and safety laws.<sup>48</sup>

### **Workers Compensation Independent Review Office**

- 1.41** WIRO was established as part of the 2012 reforms. The office has the following functions:
- dealing with complaints from injured workers about the conduct of their claims by insurers

<sup>42</sup> See, Evidence, Mr Don Ferguson, Executive General Manager of Workers Care, icare, 7 November 2016, p 24; Evidence, Mr Bhatia, 7 November 2016, p 24.

<sup>43</sup> Evidence, Mr Ferguson, 7 November 2016, p 24.

<sup>44</sup> See, Answers to pre-hearing questions on notice, icare, p 6; Evidence, Mr Ferguson, 7 November 2016, p 24.

<sup>45</sup> Answers to questions on notice, General Purpose Standing Committee No. 1, Budget Estimates 2016-17, Department of Finance and Services, p 1.

<sup>46</sup> See, Answers to questions on notice, Department of Finance and Services, Budget Estimates 2016-17, General Purpose Standing Committee No. 1, p 2; Evidence, Mr Ferguson, 7 November 2016, p 24.

<sup>47</sup> Evidence, Mr Ferguson, 7 November 2016, p 24.

<sup>48</sup> SafeWork NSW, *What we do*, <http://www.safework.nsw.gov.au/about-us/What-we-do>.

- handling disputes between employers and scheme agents
- conducting procedural reviews of work capacity decisions issued by insurers
- conducting reviews of the workers compensation scheme and reporting to the Minister
- funding injured workers' legal costs in relation to disputes with insurers through the Independent Legal Review Service.<sup>49</sup>

1.42 WIRO also regularly communicates with stakeholders across various platforms to keep them informed of current developments in the scheme including through newsletters and publication of information gathered from its complaints centre.<sup>50</sup>

1.43 WIRO is funded from the Workers Compensation Operational Fund. This fund is maintained by SIRA which, as previously mentioned, is part of the Department of Finance, Services and Innovation. WIRO advised that this funding arrangement limits the independence of the office.<sup>51</sup> For example, WIRO was unable to complete two inquiries it has initiated – the Parkes Project and the Effeney Review of Hearing Loss – as funding was withdrawn by the department.<sup>52</sup> This issue was subject to a recommendation in the committee's 2014 review and is discussed further in Chapter 3.

## Recent moves to reform the scheme

1.44 There have been a number of moves to reform the workers compensation system over recent years. These are outlined in the following sections.

### 2012 reforms

1.45 The 2012 reforms to the workers compensation scheme were significant.<sup>53</sup>

1.46 The NSW Government implemented the initial reforms in stages from June 2012. The committee's 2014 *Review of the exercise of the function of the WorkCover Authority of New South Wales* summarised the reforms to entitlements as follows:

- removal of journey claims where there is no real or substantial connection to work
- limited lump sum payments for permanent impairment
- removal of nervous shock claims
- change of weekly benefits for seriously injured workers (those with an assessed whole person impairment of more than 30 per cent)
- capped weekly benefit entitlements to 260 weeks (five years)

<sup>49</sup> See, Submission 54, WIRO, p 2; *Workplace Injury Management and Workers Compensation Act 1998*, s 27.

<sup>50</sup> Submission 54, WIRO, p 12; Evidence, Mr Kim Garling, Workers Compensation Independent Review Officer, WIRO, 7 November 2016, p 14.

<sup>51</sup> Submission 54, WIRO, p 2.

<sup>52</sup> Submission 54, WIRO, p 8.

<sup>53</sup> *LA Hansard*, 19 June 2012, Hon Mike Baird, Treasurer, p 13,015.

- capped medical and related payments at 12 months for most workers after a claim is made or, where weekly payments of compensation are made, for 12 months after the worker ceases to be entitled to those weekly payments
- introduction of work capacity assessments
- establishment of a new three-tiered review process for work capacity assessment decisions.<sup>54</sup>

1.47 Work capacity decisions are discussed in detail in Chapter 4 and the dispute resolution process for these decisions is examined in Chapter 5.

1.48 Certain occupations or classes of workers including police officers, paramedics and fire fighters were exempt from the 2012 reforms. The claims experience of first responders is discussed in detail in Chapter 7.

1.49 As noted in the committee's 2014 report, the 2012 reforms provoked significant debate.<sup>55</sup> Indeed, many stakeholders during this review continued to maintain that these reforms were harsh and unfair.<sup>56</sup>

### 2014 reforms

1.50 Following a significant improvement to the scheme's financial position, the then Minister for Finance and Services, the Hon Dominic Perrottet MP, advised in 2014 of several improvements to the 2012 workers compensation reforms. The changes, applicable to those workers who received an injury and made a formal claim on or before 1 October 2012, included:

- ensuring continued access to hearing aids, prostheses and home and vehicle modifications and related treatment until retirement age
- extending medical benefits for workers with whole person impairment assessed between 21 per cent to 30 per cent, until retirement age
- providing workers injured in the 12 months before retirement age with the same entitlements as those who were injured at or after retirement age
- ensuring workers continue to be eligible for weekly benefits until a disputed work capacity assessment has been resolved
- clarifying the entitlement to a 'second surgery' period for workers where the initial surgery requires a second surgery falling outside 12-month medical cap.<sup>57</sup>

<sup>54</sup> Standing Committee on Law and Justice, NSW Legislative Council, *Review of the exercise of the functions of the WorkCover Authority* (2014), p 9.

<sup>55</sup> Standing Committee on Law and Justice, *Review of the exercise of the functions of the WorkCover Authority*, p 10.

<sup>56</sup> See, Submission 4, Shop, Distributive and Allied Employees' Association, Newcastle and Northern Branch, p 4; Submission 6, NSW Bar Association, p 5; Submission 7, The Australian Workers' Union New South Wales Branch, p 1.

<sup>57</sup> Standing Committee on Law and Justice, *Review of the exercise of the functions of the WorkCover Authority*, pp 10-11 quoting Media Release, Hon Dominic Perrottet MP, Minister for Finance and Services, 'Workers Benefit From NSW Government's Sound Financial Management', 26 June 2014.

## 2015 reforms

- 1.51** In August 2015, the NSW Government announced a further \$1 billion reform package to deliver a ‘fairer, more sustainable and customer-centric workers compensation system’.<sup>58</sup> The government reported that these reforms were focused on helping injured workers with the highest needs, assisting return to work, and applying benefits more equitably.<sup>59</sup> The benefits, introduced in stages, included:
- increased maximum lump sum compensation for permanent impairment up to \$577,050
  - increased death benefit lump sum amount up to \$750,000
  - weekly payments extended for 12 months beyond retiring age
  - extension of the medical entitlement period for all workers
  - lifetime compensation for artificial aids, home and vehicle modifications for all approved claims
  - lifetime medical expenses for injured workers with high needs (more than 20 per cent permanent impairment)
  - minimum weekly compensation payments for injured workers with highest needs
  - suspension of a work capacity decision pending the result of the review
  - secondary surgery now available for all eligible workers.<sup>60</sup>
- 1.52** Additionally, SIRA advised in November 2015, the Workers Compensation Regulation 2010 was amended to enable workers who made a claim for lump sum compensation before 19 June 2012, to make one further claim if their condition significantly deteriorates.<sup>61</sup>
- 1.53** As discussed above, the 2015 reforms also significantly altered the governance and regulatory arrangements for the state’s statutory insurance and compensation schemes.

### *Committee comment*

- 1.54** The committee notes that there have been numerous reforms to the workers compensation scheme in recent years, including significant changes in 2012 which the committee considered as part of its 2014 review of the WorkCover Authority of NSW.
- 1.55** Following that review, the NSW Government introduced a suite of legislative reforms to the state’s insurance and compensation schemes in 2015. In abolishing the WorkCover Authority and splitting its functions into three discrete new organisations, the government responded to concerns noted by this committee in relation to potential conflicts of interest in WorkCover’s multiple roles. The committee commends the government for introducing these important structural reforms.

---

<sup>58</sup> NSW Government, *Insurance & Regulation Reform Package 2015*, 2015, <http://insurancereforms.nsw.gov.au>.

<sup>59</sup> NSW Government, *Benefits for workers*, 2015, <http://insurancereforms.nsw.gov.au/benefits-for-workers>.

<sup>60</sup> Answers to pre-hearing questions on notice, SIRA, p 2.

<sup>61</sup> Answers to pre-hearing questions on notice, SIRA, p 2.

- 1.56** The committee notes that following the improved financial position of the scheme after the 2012 reforms, the NSW Government has since increased the entitlements available to injured workers. The \$1 billion reform package introduced in 2015 demonstrates the government's capacity to listen to stakeholders and to provide injured workers, particularly those with the highest needs, greater access to benefits.
- 1.57** The 2012 reforms have seen significant cuts to the benefits payable to the majority of injured workers. The committee does accept that the two tranches of changes since then have increased benefits to some classes of workers and has improved the fairness in the scheme for many workers. At the same time, employers have received significant benefits in the form of premium cuts that are on average 15 per cent of the premiums paid.



## Chapter 2 Scheme performance

This chapter examines the performance of the workers compensation scheme since the committee's 2014 review. It also considers scheme effectiveness in the context of return to work measures.

### Key performance measures

2.1 As with this committee's first review of the Compulsory Third Party insurance scheme in 2016, this report considers the performance of the workers compensation scheme using four key performance measures. These measures are reflected in the inaugural performance report of SIRA and are as follows:

- viability
- efficiency
- insurer profits
- claims experience.

### Scheme viability

2.2 The committee considered the viability of the workers compensation scheme by reference to the scheme's current surplus and target funding ratio, as well as the pricing of insurance premiums for employers.

### *Scheme surplus and target funding ratios*

2.3 In its 2014 review of the exercise of the functions of the WorkCover Authority, the committee noted a significant improvement in the financial viability of the Workers Compensation Insurance Fund as a result of the reduced claims liabilities brought about by the 2012 reforms, combined with significantly improved investment returns. As at May 2014, the fund's surplus had grown to approximately \$1.3 billion from a projected deficit of \$4 billion at 31 December 2011,<sup>62</sup> with the then board setting a target funding ratio of 110 per cent.<sup>63</sup>

2.4 In this review, icare advised the committee that as at 30 June 2016, the funding position of the Workers Compensation Insurance Fund was at 123 per cent, representing a total asset position of 'circa \$17.5 billion'.<sup>64</sup> Put simply, this means that the fund's assets are currently 23 per cent more than its liabilities.

<sup>62</sup> Standing Committee on Law and Justice, NSW Legislative Council, *Review of the exercise of the functions of the WorkCover Authority* (2014), p 8.

<sup>63</sup> Standing Committee on Law and Justice, *Review of the exercise of the functions of the WorkCover Authority*, p 40.

<sup>64</sup> See, Evidence, Mr Vivek Bhatia, Chief Executive Officer, icare, 7 November 2016, p 19; Evidence, Dr Nick Allsop, Chief Actuary, icare, 7 November 2016, p 19.

- 2.5** At the hearing, Mr Vivek Bhatia, Chief Executive Officer, icare, estimated that the current funding position of 123 per cent would ‘probably’ equate to a surplus in the region of \$1.5 to \$2 billion.<sup>65</sup> However, icare was unable to advise the committee of the precise amount that the scheme is currently in surplus. Dr Nick Allsop, Chief Actuary, icare, explained that this is because icare is moving away from the current target funding ratio of 110 per cent and is working with SIRA to develop a new capital management policy that is ‘in line with icare’s needs and SIRA’s expectations’.<sup>66</sup> The purpose of this new policy is ensure the ongoing viability of the workers compensation scheme, whilst at the same time not placing icare at a disadvantage when compared to its competitors – the specialised insurers and the self insurers.<sup>67</sup>
- 2.6** icare informed the committee that the capital management policy it has proposed to SIRA involves a funding ratio falling within a percentage range, rather than a single target. The proposed range is a funding ratio of between 120 and 140 per cent, with liabilities assessed at the 75 per cent probability of adequacy rather than the current 80 per cent.<sup>68</sup> icare explained that, assuming this policy had been in place in 2015-16, the nominal insurer’s assets in excess of liabilities were \$3.8 billion, which would place icare within the proposed operating range.<sup>69</sup>
- 2.7** The committee received additional information about the recent financial position of the scheme from the Law Society of New South Wales. In its submission to the review, the Law Society stated that it had received advice from icare that in 2015, the scheme was in surplus by \$3.992 billion, with \$2.7 billion of that representing the amount of net assets over the 110 per cent target funding ratio. It went on to state:
- The scheme’s funding ratio in 2015 was 131 per cent, significantly higher than it was at the last Standing Committee on Law and Justice review of the scheme in 2014. Notably for the 30 June 2015 valuation, a risk margin of 16.2 per cent over the central estimate has been adopted to provide an estimated 80 per cent probability of sufficiency ... These figures are significantly higher than those adopted previously and the Law Society concludes that the scheme was in a very strong financial position as at 30 June 2015.
- 2.8** The Law Society also noted that the most recent valuation results provided to it disclosed that for the period to 31 December 2015, the surplus has shrunk to \$2.905 billion, including ‘an allowance for the 2015 benefit reforms and the anticipated premium discounts provided as part of the 2015 reform package’.<sup>70</sup>

---

<sup>65</sup> Evidence, Mr Bhatia, 7 November 2016, p 16.

<sup>66</sup> Evidence, Dr Allsop, 7 November 2016, p 19.

<sup>67</sup> See, Evidence, Mr Bhatia, pp 22-23; Evidence, Mr Anthony Lean, Chief Executive, SIRA, 7 November 2016, p 34.

<sup>68</sup> Answers to questions on notice, icare, 2 December 2016, p 4. Probable adequacy refers to the level of confidence that the outstanding claims provision will be sufficient to pay claims as and when they fall due.

<sup>69</sup> Answers to questions on notice, icare, p 4.

<sup>70</sup> Submission 65, Law Society of New South Wales, p 1.

- 2.9** As noted in Chapter 1, icare confirmed that the 2015 reform package included a one-off spend of \$1 billion of the available funds above the minimum surplus returned to workers in benefits, while the remaining balance was returned to business as lower premiums.<sup>71</sup>
- 2.10** Stakeholders made numerous suggestions about how the current surplus in the scheme ought to be managed, including:
- restoration of medical treatment expenses<sup>72</sup>
  - removing the time limit in relation to compensation claims for workplace injuries<sup>73</sup>
  - reduced premiums.<sup>74</sup>
- 2.11** On the other hand, the committee was also urged to exercise caution in relation to recommending any immediate action with respect of the surplus, with employer stakeholders noting there was:
- historical eagerness to spend significant surpluses on increased benefits resulting in a ‘very significant deficit’<sup>75</sup>
  - previous evidence from actuaries who indicated that there needs to be three to five years’ worth of data before there can be an assessment of scheme performance with a reasonable degree of confidence<sup>76</sup>
  - insufficient information about how premiums are calculated, so that any call for reduced premiums could not be properly supported by evidence.<sup>77</sup>
- 2.12** Proposals for the restoration of medical benefits and the removal of limits on access to entitlements are discussed in detail in Chapter 6. The issue of premiums is discussed below.

### ***Premiums***

- 2.13** As noted in Chapter 1, employers pay premiums to finance the operation of the workers compensation scheme. In addition, employers may be liable for additional claims contributions as a result of their employees’ workers compensation claims. In 2015-16, icare received approximately \$2.2 billion in premiums and claims contributions from the Workers Insurance scheme, with claims paid out over the same period totalling approximately \$1.8 billion.<sup>78</sup>
- 2.14** As the nominal insurer, icare sets insurance premiums. In 2015, icare introduced a new model to calculate premiums which incentivises good return to work and injury prevention practices.

<sup>71</sup> Answers to pre-hearing questions on notice, icare, 27 October 2016, p 2.

<sup>72</sup> Evidence, Mr Tim Concannon, Member, Injury Compensation Committee, Law Society of NSW, 4 November 2016, p 13.

<sup>73</sup> Evidence, Mr Concannon, 4 November 2016, p 13.

<sup>74</sup> Evidence, Mr Garry Brack, Chief Executive, Australian Federation of Employers and Industries, 4 November 2016, p 54.

<sup>75</sup> Evidence, Mr Brack, 4 November 2016, p 56.

<sup>76</sup> Evidence, Mr Brack, 4 November 2016, p 58.

<sup>77</sup> Evidence, Mr Brack, 4 November 2016, p 54.

<sup>78</sup> icare, *Insurance and Care NSW Annual Report 2015-2016*, 2016, p 8.

icare advised that under this model, approximately \$188 million is being returned to high performing employers for the 2015-16 financial year in the form of lower premiums.<sup>79</sup>

**2.15** icare explained that the new premium model provides a more direct link between the claims experience of the employers and the premium that they pay.<sup>80</sup> icare outlined the benefits of this model:

[The new model] ensures greater predictability for employers and helps them to realise savings through reduced injury rates and successful return to work programs. It also removed any disincentive for employers to support early medical intervention.

The new premium performance discount model is about recognising individual safety efforts and incentivising improvements. Around 70 per cent of employers perform better than the scheme average and are being rewarded with premium discounts.<sup>81</sup>

**2.16** Specifically, premium discounts are available as follows:

- An employer safety incentive, which is a 10 per cent discount at the beginning of each policy period to help employers invest in making their workplace safe. The discount may be retained if all injured workers are returned to employment within four weeks of their injury.<sup>82</sup>
- An employer safety reward, which is a five per cent discount offered to experience rated employers at the end of each policy period if they have not incurred any premium-impacting claims during the previous four periods.<sup>83</sup>
- A return to work incentive, which gives small employers a 10 per cent discount in place of the employer safety incentive if all injury workers are returned to employment between four and 13 weeks after their injury. Experience rated employers can receive a discount of five, 10 or 15 per cent on the cost of each claim with a sustainable return to work outcome within the first 52 weeks post injury.<sup>84</sup>

**2.17** In terms of poorer performing employers, icare advised that:

- Poor performing employers are given the opportunity to improve their work health and safety and return to work performance. This is achieved through transitional measures which are available up to and including the 2016-17 policy period, and will include a 30 per cent cap on premium increases and special circumstances reviews.<sup>85</sup>
- icare will be working with the worst performing employers through the Loss Prevention Program to help these employers identify areas for improvement and assistance with

---

<sup>79</sup> Answers to pre-hearing questions on notice, icare, p 2.

<sup>80</sup> Answers to pre-hearing questions on notice, icare, p 3.

<sup>81</sup> Answers to pre-hearing questions on notice, icare, p 3.

<sup>82</sup> Answers to pre-hearing questions on notice, icare, p 3.

<sup>83</sup> Answers to pre-hearing questions on notice, icare, p 3.

<sup>84</sup> Answers to pre-hearing questions on notice, icare, p 3.

<sup>85</sup> Answers to pre-hearing questions on notice, icare, p 3.

implementing change with a view to improving injury rates and lowering premium costs.<sup>86</sup>

**2.18** The committee heard a number of concerns expressed by stakeholders in relation to the calculation of premiums and the merits of the new premium model.

**2.19** For example, the committee heard that the new premium model was introduced in circumstances where employers had prepared forecasts and budgeted for their insurance premium based on the old calculation. Indeed, the Australian Industry Group described the introduction of the new premium model as a ‘terrible shock.’<sup>87</sup> The committee heard that, in some instances, premium increases of up to 30 per cent were not reviewable on request.<sup>88</sup>

**2.20** Another concern raised by employer groups was the lack of transparency and guidance around how premiums are calculated. For example, the Australian Federation of Employers and Industries noted that the full formula for calculating the premium model is not published.<sup>89</sup> The federation asserted that this lack of transparency has prevented the industry from being able to assess the performance of the scheme because ‘nobody has actually been able to look at that beyond the bureaucracy.’<sup>90</sup> The federation also suggested there was a degree of cynicism among some employers about the genuineness of the 10 per cent employer safety discount.<sup>91</sup>

**2.21** More generally, the Australian Industry Group gave evidence that some employers lacked understanding about how the premium incentives operated, with Ms Tracey Browne, Manager, National Safety and Workers’ Compensation Policy and Membership Services, Australian Industry Group, telling the committee:

I am not sure that larger employers understand that they can get 10 per cent up front. From my discussions with our members, they definitely do not understand the return to work incentive that has been provided to large employers in the current premium mix of reductions of claims costs at 13 weeks, 26 weeks and 52 weeks. They do not understand. There is no guidance about how it is applied.<sup>92</sup>

**2.22** Similarly, the NSW Business Chamber observed that it was not always clear how the balance between low claims costs and low premiums had been achieved:

We are seeing employers saying that under the new premium formula they have these are really low claims costs ... because of what has been pulled out, but now their premiums have gone through the roof and they do not understand.<sup>93</sup>

<sup>86</sup> See, Answers to pre-hearing questions on notice, icare, p 3: SIRA, *State Insurance Regulatory Authority Market Practice Premiums Guidelines* 2016, p 4.

<sup>87</sup> Evidence, Ms Tracey Browne, Manager, National Safety and Workers’ Compensation Policy and Membership Services, Australian Industry Group, 4 November 2016, p 59.

<sup>88</sup> Evidence, Mr Brack, 4 November 2016, p 59.

<sup>89</sup> Evidence, Mr Brack, 4 November 2016, p 57.

<sup>90</sup> Evidence, Mr Brack, 4 November 2016, p 58.

<sup>91</sup> Evidence, Mr Brack, p 63.

<sup>92</sup> Evidence, Ms Browne, 4 November 2016, p 63.

<sup>93</sup> Evidence, Mr Greg Pattison, Consultant, NSW Business Chamber, 4 November 2016, p 58.

- 2.23** The committee also heard that employers were receiving premium notices that compared their claims experience to that of all employers in the scheme. The NSW Business Chamber queried how helpful this was, particularly for employers in high risk industries, preferring instead the previous premium notices which compared that employer's premium with other businesses within the same industry.<sup>94</sup>
- 2.24** Notwithstanding these concerns, Ms Browne stated that there are some positive aspects of the new premium model, including the inclusion of a clear schedule applying to maximum and minimum multipliers so that employers can forecast the maximum they will pay in premiums.<sup>95</sup>
- 2.25** In relation to regulatory supervision of premiums, SIRA informed the committee that it had introduced the *Market Practice and Premiums Guidelines* providing for licensed insurers to submit premium filings for review and assessment by SIRA.<sup>96</sup> These guidelines apply to the nominal insurer and specialised insurers, while self-insurers, the Self Insurance Corporation (SICorp) and Coal Mines Insurance are exempt.<sup>97</sup>
- 2.26** The guidelines seek to facilitate the objectives outlined in s 3 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) by ensuring that policies of insurance and premiums are fair, affordable and commensurate with each employer's risks.<sup>98</sup> SIRA noted that this is a significant change to the regulatory supervision of workers compensation premiums in New South Wales.<sup>99</sup>

### ***Committee comment***

- 2.27** As noted in our 2014 review, it is critically important that the financial viability of the workers compensation scheme be maintained, in order both to provide the best possible support for injured workers and the lowest possible premiums for New South Wales businesses. However, it has been challenging for this committee to assess the financial performance and viability of the scheme in the absence of a target funding ratio.
- 2.28** The committee considers the formulation of a new capital management policy and funding ratio range to be a matter for consideration between SIRA and icare. Given the competitive prudential environment within which icare operates, we believe it is important that the right balance be struck between safeguarding the scheme with an adequate funding ratio, and enabling the nominal insurer to compete in the market place without unnecessary strictures. The committee will keep a watching brief on the outcome of icare's submission to SIRA in this regard, and looks forward to receiving a complete picture of the scheme's financial performance in its next review.

---

<sup>94</sup> Evidence, Mr Pattison, 4 November 2016, p 58.

<sup>95</sup> Evidence, Ms Browne, 4 November 2016, p 59.

<sup>96</sup> Answers to pre-hearing questions on notice, SIRA, 27 October 2016, p 8. As noted in Chapter 1, s 168(1) of the *Workers Compensation Act 1987* allows SIRA to issue guidelines with respect to policies of insurance.

<sup>97</sup> SIRA, *State Insurance Regulatory Authority Market Practice Premiums Guidelines* 2016, p 7.

<sup>98</sup> SIRA, *State Insurance Regulatory Authority Market Practice Premiums Guidelines* 2016, p 4.

<sup>99</sup> Answers to pre-hearing questions on notice, SIRA, p 8.

- 2.29** The committee is concerned about the lack of transparency for employers around how their premiums are calculated. Understanding premium calculations works to ensure that employers are better placed to forecast their future premiums and to take genuine advantage of the available discounts. We therefore recommend that icare provide more detailed information about how premiums are calculated.

---

### Recommendation 1

That icare provide more detailed information about how premiums are calculated.

---

- 2.30** It was not clear that a compelling case has been presented at this stage for an increase from the current funding ratio of 110 per cent of liabilities to something in the range of 120 to 130 per cent. A change of this magnitude would require the system to have an additional reserve in the order of \$1.85 billion. This money must be found from either higher premiums on employers or reduced benefits to injured workers. The committee will investigate this matter further in its next review.

### Scheme efficiency

- 2.31** Scheme efficiency is determined by the proportion of each dollar paid in premiums returned directly to injured workers as benefits, such as weekly payments and medical costs. The higher the proportion of premiums paid as claim benefits (rather than as service delivery costs or insurer profits), the greater the efficiency of the scheme.
- 2.32** SIRA provided the committee with the following table outlining the percentage of premium income which is returned to injured workers via weekly benefits and other compensation since the 2012-13 financial year.

**Table 1 Return of premium income to injured workers via entitlements**

Financial Year	Total compensation NSW system	Total NSW system Premium	% Benefit to Premium
2012-13	\$2,956,056,694	\$3,505,805,481	84 per cent
2013-14	\$2,737,589,584	\$3,236,936,339	85 per cent
2014-15	\$2,619,374,280	\$3,000,420,192	87 per cent
2015-16	\$2,641,609,990	\$3,044,864,815	87 per cent

*Source: Answers to questions on notice, SIRA, p 10.*

- 2.33** As shown in the table, around 87 per cent of the premium dollar was returned in benefits to injured workers in 2015-16.<sup>100</sup> Mr Bhatia informed the committee that the total scheme agent

---

<sup>100</sup> Evidence, Ms Carmel Donnelly, Executive Director, Workers and Home Building Compensation Regulation, SIRA, 7 November 2016, p 42.

remuneration represented 20 per cent of premiums collected, being \$396 million. This represents 13 per cent of the total costs of the workers compensation scheme.<sup>101</sup>

- 2.34** To assist with greater levels of efficiency, icare gave evidence that it will centrally manage policies and billing from early 2017. Employers, or their brokers, will be able to purchase and renew insurance policies via icare's new customer support centre or its online portal. These platforms will also facilitate the payment of premiums. icare also intends to implement a unified technology platform, noting that better data will result in more transparent and streamlined processes for identifying needs and areas for improvement.<sup>102</sup>
- 2.35** The committee heard that under the current system, premium notices are not always sent out in a timely manner. Mr Greg Pattison, Consultant, NSW Business Chamber, told the committee that 'lots of employers got premium renewal notices quite late. Some of them got them well into the premium year.'<sup>103</sup>

#### ***Committee comment***

- 2.36** The committee acknowledges that the scheme is operating in an efficient manner, with 87 per cent of premiums collected returned directly to injured workers as benefits. The committee looks forward to reviewing the implementation of icare's new centrally managed policy and billing system in its next review.

#### **Insurer profitability**

- 2.37** The *Market Practice Premiums Guidelines* implemented by SIRA outline the relationship between the breakeven premium rate charged by insurers and the target premium rate as agreed between icare and SIRA. These guidelines require workers compensation insurers to demonstrate compliance with five premium principles and to provide supporting justification if the two rate amounts are different.<sup>104</sup>
- 2.38** Unlike the compulsory third party insurance scheme, there is no legislative requirement requiring the five workers compensation scheme agents to account for their actual profit margins.
- 2.39** The following table indicates icare's annual expenditure to scheme agents in 2015-16, including payments for medical expenses, investigation expenses, and scheme agent fees.

---

<sup>101</sup> See, Evidence, Mr Bhatia, 7 November 2016, pp 29-30; Answers to questions on notice, icare, p 9.

<sup>102</sup> Answers to pre-hearing questions on notice, icare, p 6.

<sup>103</sup> Mr Pattison, 4 November 2016, p 58.

<sup>104</sup> SIRA, *State Insurance Regulatory Authority Market Practice Premiums Guidelines* 2016, p 19.

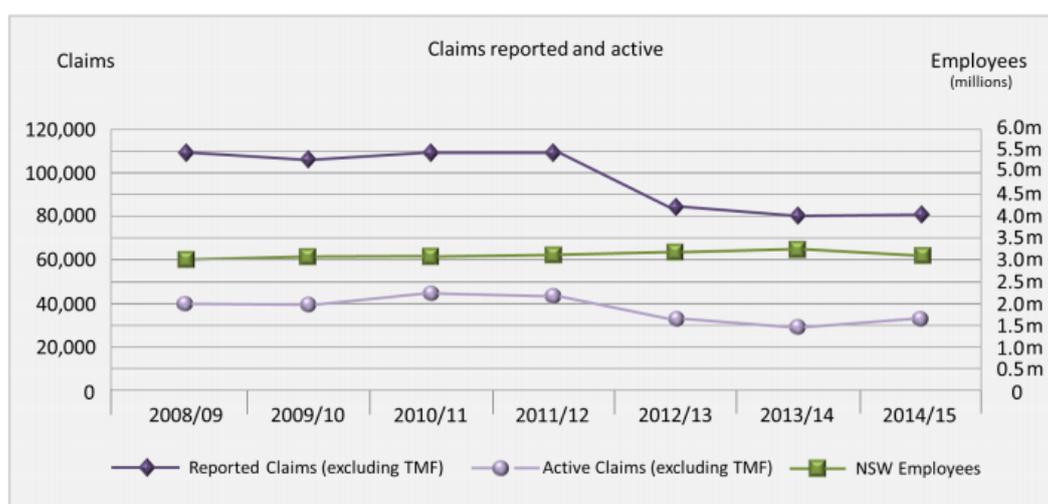
**Table 2** icare's annual expenditure to scheme agents

Type	Cost	Percentage of total costs
Medical	\$427 million	14 per cent
Investigation	\$71 million	2 per cent
Scheme agent fees	\$396 million	13 per cent

Source: Answers to question on notice, icare, p 9.

### Claims experience

- 2.40** Claims experience reflects the usage of the workers compensation scheme, including the number of claims and notifications.
- 2.41** The icare annual report notes that 60,174 new workers compensation claims were received in 2015-16,<sup>105</sup> and that \$1.7 billion was spent on these claims.
- 2.42** Mr Bhatia advised that icare is focusing on ensuring that scheme agents provide consistent quality services to improve health care outcomes for injured worker.<sup>106</sup> icare highlighted that it was transitioning to 'the model of the future' in order to achieve these objectives, noting that 'what we do know is that the current model or the model of the past is probably not the model of the future'.<sup>107</sup> As part of this new model, icare established the Workers Care program, which is discussed in Chapter 1. icare's operating model for scheme agents and injured workers' claims experience is discussed in detail in Chapter 8.
- 2.43** SIRA's workers compensation system performance report includes as a metric all reported and active claims. The most recent report provides the following table outlining this metric.

**Table 3** SIRA: Number of claims reported and active

Source: SIRA, Workers compensation inaugural system performance report 2014-2015, 2016 p 15.

<sup>105</sup> icare, *Insurance and Care NSW Annual Report 2015-16* 2016, p 107.

<sup>106</sup> Evidence, Mr Bhatia, 7 November 2016, p 23.

<sup>107</sup> Evidence, Mr Bhatia, 7 November 2016, p 23.

- 2.44** SIRA noted that the reduction in the number of claims reported and active coincided with the 2012 workers compensation reforms. The reduction in claim numbers is significant, falling from approximately 110,000 in 2011-12 to just over 60,000 in 2015-16. Specifically, SIRA attributes the reduction to a number of possible factors, including reduced numbers of work-related injuries, reduced propensity to make a claim following an injury and the exclusion of journey related claims where there was not a real and substantial connection to work.<sup>108</sup>

## **Return to work**

- 2.45** One key aim of the workers compensation system is to provide support to workers to maintain contact with the workforce through recovery at work and successful return to work.<sup>109</sup> During the course of this review, the committee heard evidence about how return to work rates are tracking and the measures that have been introduced to improve these rates. However, the committee also heard concerns expressed in relation to return to work. These issues are examined below.

### **Return to work rates**

- 2.46** SIRA advised the committee that the latest independent report published by Safe Work Australia indicates that return to work rates in New South Wales have improved and are now the second highest in Australia. New South Wales' return to work rate is 90 per cent, which compares with a national rate of 87 per cent.<sup>110</sup> It also reported that more than 90 per cent of injured workers return to work within six months.<sup>111</sup>

- 2.47** However, Ms Browne commented that:

If you have been able to get your employee back to work within 13 weeks you will get a 15 per cent discount on those claims costs. If you have been able to get them back to work within 26 weeks you will get a 10 per cent discount, and within 52 weeks you will get a five per cent discount. What is not clear is whether or not the person has to be at work not receiving any weekly compensation, or whether they only have to be back at work. My reading of the legislation is that they have to be back at work. The feedback we have had from icare is that they have to be not receiving any weekly compensation.<sup>112</sup>

- 2.48** As outlined earlier in this chapter, the new premium model incentivises return to work through the provision of discounts on the claims costs. These incentives are based on a worker returning to work either during the first 13 weeks, 26 weeks or 52 weeks, on a sliding scale.<sup>113</sup> Return to work statistics in relation to those metrics are outlined in the figure below, with 87.64 per cent of all workers returning to work within 13 weeks, 93.01 per cent within

---

<sup>108</sup> SIRA, *NSW workers compensation inaugural system performance report 2014-2015*, 2016, p 15.

<sup>109</sup> Answers to pre-hearing questions on notice, SIRA, p 12.

<sup>110</sup> Answers to pre-hearing questions on notice, SIRA, p 9.

<sup>111</sup> Answers to pre-hearing questions on notice, SIRA, p 12.

<sup>112</sup> Evidence, Ms Browne, 4 November 2016, p 64

<sup>113</sup> Evidence, Ms Browne, 4 November 2016, p 64.

26 weeks, 95.84 per cent within 52 weeks. The numbers are lower for workers in receipt of weekly benefits.

**Table 4 Proportion of injured workers returned to work**

Number of weeks	Claims with weekly benefits	All claims
13	76.54 per cent	87.64 per cent
26	86.85 per cent	93.01 per cent
52	92.26 per cent	95.84 per cent
104	96.19 per cent	97.95 per cent

*Source: icare, Insurance and Care NSW Annual Report 2015-2016, 2016, p 104.*

**2.49** Similarly, at the hearing icare advised that about 80,000 claims were received each year from a total of around 3.5 million insured workers, and that of those 80,000 claims, around 80 per cent were back at work on a sustainable basis within the first 12 weeks, with 92 per cent of workers back after 52 weeks.<sup>114</sup>

**2.50** The committee did not hear evidence providing a breakdown of which workers had returned to work on a full time or part time basis, and which workers were working only at partial capacity (light duties) as opposed to full capacity. However, Ms Browne observed that workers returning to work after a workplace injury often do so on a part-time basis.<sup>115</sup>

### Measures to improve return to work rates

**2.51** Both icare and SIRA gave evidence to the committee as to what they are doing to improve return to work rates.

**2.52** The committee heard that while icare's core focus is on ensuring workers have access to suitable work with their pre-injury employer,<sup>116</sup> it has also introduced vocational assistance programs to assist those workers who are unable to do so. These programs include:

- the JobCover Placement program, which offers a wage subsidy of up to \$27,400 for employers who hire an injured worker with a workers compensation claim. This is designed to reduce the risk an employer may perceive in employing a person with a prior injury<sup>117</sup>
- the WorkTrial program, which allows injured workers to trial a period of work with a new employer while continuing to receive weekly benefits. This program is designed to allow an employer and a worker to establish whether the new role is the 'right fit'.<sup>118</sup>

<sup>114</sup> See, Evidence, Mr Bhatia 7 November 2016, p 17; Mr John Nagle, Executive General Manager, Workers Insurance, icare, 7 November 2016, p 17.

<sup>115</sup> Evidence, Ms Browne, 4 November 2016, p 64.

<sup>116</sup> Answers to pre-hearing questions on notice, icare, p 10.

<sup>117</sup> Answers to pre-hearing questions, on notice, icare, p 10.

<sup>118</sup> Answers to pre-hearing questions on notice, icare, p 11.

**2.53** SIRA noted that as part of the 2015 reforms, it has been working on implementing a number of measures to encourage sustainable return to work. Following a public consultation process, SIRA introduced two new return to work assistance benefits effective from 29 April 2016 to help eligible workers with some of the costs that can be associated with returning to work.<sup>119</sup> These benefits are:

- new employment assistance, where a worker who is unable to return to work with their pre-injury employer can claim up to \$1,000 for expenses involved in returning to work with a new employer
- education or training assistance, where a worker who is required to learn additional skills to improve their readiness for work with the same employer or a new employer can claim up to \$8,000 in education and training expenses.<sup>120</sup>

**2.54** SIRA also indicated to the committee that it ‘actively encourages all insurers, employers and workers to contribute to and fully explore opportunities for suitable employment’,<sup>121</sup> and to that end is currently:

- working in partnership with SafeWork NSW to educate employers on their obligations and undertake appropriate compliance activities when required
- developing the guidelines for claiming workers compensation to promote the proactive and effective management of claims to support return to work
- reviewing the guidelines for workplace return to work programs, with a view to educating and supporting employers on how to fulfil their legislated return to work obligations
- publishing a range of guidance material for employers, workers and medical practitioners, including the workers compensation guide for medical practitioners, workers compensation guide for employers and an injured at work guide for workers
- administering a range of vocational rehabilitation programs to support employers and workers to achieve positive return to work outcomes.<sup>122</sup>

**2.55** In relation to rehabilitation and its role in injury management more generally, the committee heard that:

- there had been an observable shift since the 2012 reforms in scheme agent behaviour, towards scheme agents engaging with workers more actively toward recovery<sup>123</sup>
- rehabilitation specialists were not engaged until, on average, 25.77 weeks after the injury<sup>124</sup>

<sup>119</sup> Answers to pre-hearing questions on notice, icare, p 7.

<sup>120</sup> SIRA, *Return to work assistance payments*, <http://www.sira.nsw.gov.au/workers-compensation/workers-and-claims/payments-and-expenses/return-to-work-assistance>.

<sup>121</sup> Answers to pre-hearing questions on notice, SIRA, p 16.

<sup>122</sup> Answers to pre-hearing questions on notice, SIRA, p 16.

<sup>123</sup> *In camera* evidence, Witness B, 7 November 2016, p 3, published by resolution of the committee.

<sup>124</sup> *In camera* evidence, Witness B, 7 November 2016, p 3, published by resolution of the committee.

- deferring rehabilitation leads to compounding injury, with the compounded injury more expensive to address<sup>125</sup>
- every dollar spent on rehabilitation leads to a savings on actual claims cost<sup>126</sup>
- in some instances rehabilitation has been targeted only to assist in a work capacity decision, rather than more broadly to fully rehabilitate the person (discussed in detail in Chapter 4)<sup>127</sup>
- less than 10 per cent of injured workers receive formal rehabilitation services.<sup>128</sup>

### Concerns regarding return to work

**2.56** During this review, stakeholders expressed a number of concerns regarding return to work.

**2.57** First, the committee heard evidence that return to work is not necessarily a useful measure in assessing scheme performance. Specifically, Mr Paul Macken, Member, Injury Compensation Committee, Law Society of New South Wales, outlined that if an individual is returning to work because they are no longer being paid under the workers compensation scheme, ‘that is not necessarily consistent with the objectives scheme. If you stop paying everyone you will get more people going back to work. That is not what [the scheme] is about.’<sup>129</sup> For example, Ms Roshana May, New South Wales Branch President, Australian Lawyers Alliance, told the committee:

Have you returned to work at any time since you have claimed compensation? That is the only question that is now asked in respect of that national survey. That is the survey that the State regulator relies on to report on return to work outcomes.

...

Return to work is not about getting back to work for one day because our experience is—and we have all had close on 30 years experience in the scheme—most workers return to work for at least one day after having had an injury.<sup>130</sup>

**2.58** The Injured Workers Support Network called for the workers compensation scheme to be re-oriented to a focus on return to health rather than return to work.<sup>131</sup> The network told the committee that whilst there was a perception that the scheme was about return to health, it appeared that there was instead a ‘termination culture’ where necessary health and financial

<sup>125</sup> *In camera* evidence, Witness B, 7 November 2016, p 3, published by resolution of the committee.

<sup>126</sup> *In camera* evidence, Witness B, 7 November 2016, p 4, published by resolution of the committee.

<sup>127</sup> *In camera* evidence, Witness A, 7 November 2016, p 5 and p 7, published by resolution of the committee.

<sup>128</sup> *In camera* evidence, Witness A, 7 November 2016, p 6, published by resolution of the committee.

<sup>129</sup> Evidence, Mr Paul Macken, Member, Injury Compensation Committee, Law Society of New South Wales, 4 November 2016, p 4.

<sup>130</sup> Evidence, Ms Roshana May, New South Wales Branch President, Australian Lawyers Alliance, 4 November 2016, p 4.

<sup>131</sup> Evidence, Mr Rowan Kernebone, Coordinator, Injured Workers Support Network, 7 November 2016, p 4.

support is either denied or delayed and the priority is on closing the file as quickly as possible.<sup>132</sup> The network emphasised that return to work was just one important step towards a return to health.<sup>133</sup>

- 2.59** In this regard, Mr Bhatia told the committee that he ‘would go so far as saying the return to work should be classified as a return to wellbeing.’<sup>134</sup>
- 2.60** Stakeholders also highlighted difficulties in measuring return to work rates accurately. Mr Macken observed that there are various definitions of return to work, with some definitions being ‘based on a person ceasing to be entitled to weekly compensation and the assumption therefore that they have returned to work when in fact that has not been the case’.<sup>135</sup>
- 2.61** Similarly, Mr Tim Concannon, Member, Injury Compensation Committee, Law Society of New South Wales, gave evidence that return to work rates had been conflated with ‘off weekly benefits’ in a SIRA report. Mr Concannon stated that assuming someone has gone back to work because they are no longer receiving benefits was ‘absurd’.<sup>136</sup> He also made the observation that a one day return to work, perhaps prematurely and resulting in the worker not continuing to work after that one day, is not really a return to work at all.<sup>137</sup>
- 2.62** These comments were reflected in an observation by an allied health professional that ‘there is probably no one consistent measure of return to work in the scheme’.<sup>138</sup>
- 2.63** Finally, the committee also heard about the difficulties being experienced by some employers and workers in returning to work. For example, Mr Mark Goodsell, Head NSW and Manufacturing, Australian Industry Group, said that employers are being frustrated in their genuine attempts to assist workers to manage their injuries and return to work.<sup>139</sup>
- 2.64** Similarly, Ms Jill Allen, Manager of Research and Policy, Australian Federation of Employers and Industries, stated that in some instances the claims management process frustrates attempts by employers to achieve return to work outcomes.<sup>140</sup> The federation also gave evidence that employers sometimes lack the necessary knowledge to initiate satisfactory return to work plans in part because of a lack of communication by insurers.<sup>141</sup>
- 2.65** From the perspective of workers, the Police Association of New South Wales highlighted what they felt was a ‘clear lack of drive’ to encourage return to work outcomes from

---

<sup>132</sup> Evidence, Mr Kernebone, 7 November 2016, p 4.

<sup>133</sup> Evidence, Mr Kernebone, 7 November 2016, p 4.

<sup>134</sup> Evidence, Mr Bhatia, 7 November 2016, p 17.

<sup>135</sup> Evidence, Mr Macken, 4 November 2016, p 3.

<sup>136</sup> Evidence, Mr Concannon, 4 November 2016, p 4.

<sup>137</sup> Evidence, Mr Concannon, 4 November 2016, p 3.

<sup>138</sup> *In camera* evidence, Witness B, 7 November 2016, p 2, published by resolution of the committee.

<sup>139</sup> Evidence, Mr Mark Goodsell, Head NSW and Manufacturing, Australian Industry Group, 4 November 2016, p 56.

<sup>140</sup> Evidence, Ms Jill Allen, Manager, Research and Policy, Australian Federation of Employers and Industries, 4 November 2016, p 65.

<sup>141</sup> Evidence, Ms Allen, 4 November 2016, p 65.

employers and insurers. The association supported encouraging insurers to have greater input in the determination of suitable duties for injured workers.<sup>142</sup>

**2.66** The committee also heard evidence from workers who argued that employers were not meeting their obligations under the 1998 Act to provide injured workers with suitable work.<sup>143</sup> To address this, Mr Mark Morey, Secretary, Unions NSW, said that the function of the scheme needed to shift to being about ‘returning injured workers to work as quickly as possible’.<sup>144</sup>

**2.67** The NSW Nurses and Midwives Association agreed with this assessment, noting that:

We believe there is a way that the Government can dramatically improve return-to-work outcomes in the workers compensation scheme and simultaneously save the scheme a considerable amount of money. That is by putting in place robust mechanisms to encourage, and if necessary, force employers to provide suitable work for their injured employees. A great deal of our association’s time and resources are spent representing injured workers against employers who refuse to provide them with suitable work. Too often this is in circumstances where there is clearly work available for those workers to perform.<sup>145</sup>

**2.68** Mr Brett Holmes, General Secretary, NSW Nurses and Midwives Association, noted that best practice employer behaviour was not sufficiently incentivised in relation to return to work. In particular, he noted that by refusing to provide suitable work, ‘employers are able to shift the cost and responsibility of injured workers to the general workers compensation scheme.’<sup>146</sup>

**2.69** Mr Leigh Shears, an injured worker who has returned to work with a new employer, told of feeling isolated from the workplace due to the stigma of having a workplace injury.<sup>147</sup> On a positive note, he said that the income supplement provides injured employers with an incentive to employ injured workers.<sup>148</sup>

#### **Case study: Mr Ross Stirling<sup>149</sup>**

Mr Ross Stirling has been with his current employer for 25 years. Following an injury in 2014, Mr Stirling’s claim for workers compensation was denied, even though the specialist considered the injuries to the tendons in his shoulder were the result of his work. Mr Stirling was required to visit the specialist again. As his claim continued to be denied, Mr Stirling went to the Workers Compensation Commission where his claim was successful.

<sup>142</sup> Submission 8, Police Association of New South Wales, p 3.

<sup>143</sup> Evidence, Ms Belinda Scott, Injured worker, 4 November 2016, p 37.

<sup>144</sup> Evidence, Mr Mark Morey, Secretary, Unions NSW, 4 November 2016, p 38.

<sup>145</sup> Evidence, Mr Brett Holmes, General Secretary, NSW Nurses and Midwives’ Association, p 45.

<sup>146</sup> Evidence, Mr Holmes, p 45.

<sup>147</sup> Evidence, Mr Leigh Shears, Injured worker, Australian Manufacturing Workers’ Union, 4 November 2016, p 47.

<sup>148</sup> Evidence, Mr Shears, 4 November 2016, p 47.

<sup>149</sup> Evidence, Mr Ross Stirling, Local network member, Injured Workers Support Network Parramatta, 7 November 2016, p 3.

Despite now being back at work, Mr Stirling told the committee that the insurance company makes it difficult for him to keep his job. He said that the insurer requires case conferences every month, even though he is now working 38 hours a week. He said they also want monthly consultations with the doctor.

Of the two days a week that Mr Stirling does not work, one of those days is dedicated to completing what he considers to be ‘unnecessary paperwork’. He describes the effect of the ongoing nature of this paperwork as feeling like bullying.

The insurer managing Mr Stirling’s claim has included rehabilitation in his return to work plan. Although Mr Stirling has heard that he can request his own rehabilitation consultant, he has been advised to accept the one chosen by the insurer. As opting for your own can lead to hassles with the insurer. Mr Stirling is not happy with the approach taken by the rehabilitation consultant. Mr Stirling feels the rehabilitation provider focuses on issues designed to encourage his employer to terminate his employment, rather than on improving his current work performance.

The rehabilitation consultant also does not appear to be familiar with Mr Stirling’s case, telling him ‘We are looking for you to go back to your pre-injury work duties in the first month of 2017’ even though the reports from the specialists say that Mr Stirling will never return to his pre-injury duties. He feels as though the insurer just wants to get him off the system.

### *Committee comment*

- 2.70** The committee sees return to work as an essential metric in the workers compensation scheme. SIRA outlined the social and economic interest in ensuring that injured workers return to work safely and as soon as possible following a workplace injury, and is currently reviewing the guidelines for workplace return to work programs to support employers in this important area. The committee acknowledges and supports recent initiatives by icare and SIRA to continue to drive improved return to work rates and to support workers, such as vocational assistance programs and return to work assistance benefits.
- 2.71** As for measuring return to work rates, the committee believes this metric should be refined so that it does not capture workers who have returned to work for an hour, or who are classified as having returned to work because they no longer received workers compensation payments. Instead, a worker should be considered as ‘returned to work’ in circumstances where the injured worker and their employer are both satisfied with the new working conditions.
- 2.72** The committee is also of the view that there is insufficient data being collected to distinguish how many workers have returned to work in full or time employment, as well as at full or partial capacity. We recommend that SIRA and icare collect clearer data regarding the circumstances in which an injured worker returns to work and maintain statistics in relation to that worker for at least 12 months following their return to work, and that the return to work data specifically identify workers who have returned to work for insignificant periods or have had their benefits terminated for a reason other than return to work.

**Recommendation 2**

That SIRA and icare collect clearer data regarding the circumstances in which an injured worker returns to work and maintain statistics in relation to that worker for at least 12 months following their return to work, and that the return to work data specifically identify workers who have returned to work for insignificant periods or have had their benefits terminated for a reason other than return to work.

---

- 2.73** The committee also believes that the appropriate use of rehabilitation services could further improve return to work practices in New South Wales. We recommend that SIRA develop a guideline for use by scheme agents which outlines how rehabilitation services should be utilised during the case management process.
- 

**Recommendation 3**

That SIRA develop a guideline for use by scheme agents which outlines how rehabilitation services should be utilised during the case management process.

---



## Chapter 3 Recommendations from the previous scheme review

This chapter examines the response to each of the recommendations made by the committee's previous review into the workers compensation scheme, when it was under the jurisdiction of the former WorkCover Authority.

### Recommendations from the 2014 review of the exercise of the functions of the WorkCover Authority

- 3.1** This section examines the response by the NSW Government<sup>150</sup> to each of the recommendations made in the committee's 2014 review of the exercise of the functions of the WorkCover Authority, and considers further actions since that response was tabled.<sup>151</sup>
- 3.2** This chapter groups and examines the 2014 report's 26 recommendations under ten key themes: abolishing the WorkCover Authority and establishing discrete organisations to assume its responsibilities; the WIRO (then known as the WorkCover Independent Review Office); medical treatment; work capacity decisions and access to paid legal representation; return to work provisions; stakeholder engagement and access to information; phoenix companies; self insurers; Comcare; and the disability sector.

#### Abolishing the WorkCover Authority of NSW and establishing discrete organisations to assume its responsibilities

**2014 review of the exercise of the function of the WorkCover Authority recommendation 1:** That the Minister for Finance and Services, in consultation with the WorkCover Independent Review Office and other stakeholders, consider establishing a separate agency or other administrative arrangements to clearly separate the roles of regulator and nominal insurer in the workers compensation scheme, and implement that model as soon as practicable.

**2014 review of the exercise of the function of the WorkCover Authority recommendation 2:** That the WorkCover Authority of NSW consult with stakeholders, including worker and employer representatives, during its review of the segregation of functions and delegations around its role in work capacity decisions, and that it publish the review's findings.

<sup>150</sup> Correspondence, from the Hon Dominic Perrottet, MP, Minister for Finance, Services and Property to the Clerk of the Parliaments 6 May 2015.

<sup>151</sup> Standing Committee on Law and Justice, New South Wales Legislative Council, *Review of the exercise of the functions of the WorkCover Authority*, (2014).

**2014 review of the exercise of the function of the WorkCover Authority recommendation 3:** That the WorkCover Authority of NSW, in consultation with stakeholders, review the procedures currently utilised to distinguish between the work health and safety regulatory and advisory roles of WorkCover, and implement protocols to minimise potential conflicts of interest.

**3.3** Recommendation 1 was implemented with the government's introduction of the *State Insurance and Care Governance Act 2015*, which abolished WorkCover and provided for the establishment of three separate agencies from 1 September 2015:

- SIRA
- icare
- SafeWork NSW.

**3.4** The establishment of these three bodies separated the roles of regulator and nominal insurer in the workers compensation scheme, with the function of icare being to act as the nominal insurer and the function of SIRA being to act as independent insurance regulator. The third body, SafeWork NSW, was established as an independent work health and safety regulator.<sup>152</sup>

**3.5** In his evidence to this review, Mr Vivek Bhatia, Chief Executive Officer, icare noted that his organisation was still in the early stages of bringing about the long-term cultural and organisational change that is needed. He commented that icare is currently working to 'kick off a multi year change journey for a system that needs a lot of change', identifying the need for significant changes in service delivery and culture.<sup>153</sup>

**3.6** The focus of recommendation 2, being the segregation of the WorkCover's functions and delegations relating to work capacity decisions, was also achieved by the 2015 structural reforms. The committee has not been informed of whether any stakeholder consultation took place prior to the changes, nor were the findings of any review into this issue published.

**3.7** In relation to recommendation 3, the implementation of the 2015 reforms separated the regulatory functions for workplace health and safety from the other regulatory functions of the workers compensation system. SafeWork NSW now undertakes the workplace health and safety regulatory functions, with the remainder of the regulatory functions belonging to SIRA.

#### ***Committee comment***

**3.8** We commend the government for implementing the structural separation of the regulator and nominal insurer in the workers compensation scheme. Much work has been done to implement this reform in a comparatively short amount of time, and we are pleased that the potential conflicts of interest inherent in WorkCover's dual functions will now no longer arise.

**3.9** While significant structural reform can and has been achieved through the passage of legislation, cultural and organisational change takes longer. We look forward to monitoring the progress of these changes within SIRA and icare in our next review.

---

<sup>152</sup> Answers to pre-hearing questions on notice, SIRA, 27 October 2016, p 1.

## Workers Compensation Independent Review Office

**2014 review of the exercise of the function of the WorkCover Authority recommendation 4:** That the NSW Government amend Part 3 of Schedule 1 of the *Government Sector Employment Act 2013* to designate the WorkCover Independent Review Office as a separate public sector agency.

**2014 review of the exercise of the function of the WorkCover Authority recommendation 5:** That the NSW Government expand the operational parameters of the WorkCover Independent Review Office to include work health and safety, and review the resources of the Office to ensure it has the extra capacity to undertake this additional responsibility.

- 3.10** With respect to recommendation 4, in its submission to this review the WIRO noted that during November 2014, the provision of shared services previously undertaken by Safety Return to Work was transferred to the then Office of Finance and Services, which was subsequently incorporated into the Department of Finance, Services and Innovation. WIRO noted that this occurred without notification, and that there had been no further discussion about this recommendation.<sup>154</sup>
- 3.11** WIRO also confirmed that recommendation 5 concerning the expansion of WIRO's role to cover work health and safety had not been implemented, nor had any consultation on this issue occurred.<sup>155</sup> The committee notes that its recommendation to expand WIRO's role to include oversight of work health and safety arose out of concerns expressed during the 2014 review that there was not an appropriate oversight mechanism in the then WorkCover scheme for work health and safety activities.
- 3.12** In this review, the committee received evidence in relation to the progress of WIRO's Parkes Review project. WIRO established the Parkes Review into the workers compensation legislation with a view to providing the Minister with proposed amendments to the legislation that would lead to the improved operation of the workers compensation scheme. The Parkes Review was tasked with collating from stakeholders a list of proposed reforms to the workers compensation scheme, with a particular focus on issues of practical concern. In evidence, the Mr Mark Goodsell, Head, NSW and Manufacturing, Australian Industry Group, highlighted that the Parkes Review canvassed many of the calls for reform outlined in the submissions to this committee's review.<sup>156</sup> WIRO advised that the funding for this project had ended, meaning the project has not been able to be finalised.<sup>157</sup>

<sup>154</sup> Submission 54, WIRO, p 14.

<sup>155</sup> Submission 54, WIRO, p 14.

<sup>156</sup> Evidence, Mr Mark Goodsell, Head, NSW and Manufacturing, Australian Industry Group, 4 November 2016, p 55.

<sup>157</sup> Evidence, Mr Kim Garling, Workers Compensation Independent Review Officer, WIRO, 7 November 2016, p 11.

***Committee comment***

- 3.13** During the 2014 review, the committee heard evidence about the need for an independent Inspector or Ombudsman oversighting the workers compensations scheme. These concerns stemmed at least in part from larger concerns about the inherent conflicts of interest that existed in the scheme that was then operated by WorkCover. The committee sought to address the perceived need for independent oversight by designating the then WorkCover Independent Review Office as a separate public agency.
- 3.14** The committee understands that WIRO has not finalised the Parkes Review. While we note that some of the work of the Parkes Review has been overtaken by the 2015 reforms, we consider that the project may have the potential to offer stakeholder-driven insights and direction in relation to the operation of the workers compensation scheme, particularly under the new structure. The committee recommends that the NSW Government consider the need for the Workers Compensation Independent Review Office to complete the Parkes Review.
- 3.15** The absence of financial independence has clearly hampered the work of WIRO. For many stakeholders and injured workers WIRO is seen as a genuinely helpful, independent part of the scheme. Ensuring that the office is able to continue to exercise its functions is clearly in the interests of all scheme participants.

---

**Recommendation 4**

That the NSW Government consider the need for the Workers Compensation Independent Review Office to complete the Parkes Review.

---

- 3.16** In relation to the oversight of work health and safety, given that the post 2015 structural reforms are still in their early stages, the committee is yet to establish whether additional oversight of the work health and safety aspects of the scheme is necessary, given responsibility for this now rests with a separate agency, SafeWork NSW. The committee will keep a watching brief in relation to this issue.

**Medical treatment**

**2014 review of the exercise of the function of the WorkCover Authority recommendation 6:** That the NSW Government restore lifetime medical benefits for hearing aids, prostheses, home and vehicle modifications for all injured workers, noting the actuarial evidence as to the relatively minimal cost of restoring such benefits to the workers' compensation scheme, and that it promptly review the viability of restoring all lost medical benefits for injured workers under the scheme.

**2014 review of the exercise of the function of the WorkCover Authority recommendation 7:** That the NSW Government consider amendments to the WorkCover scheme to allow for the payment of medical expenses where, through no fault of the injured worker, it was not reasonable or practical for the worker to obtain pre-approval of medical expenses before undertaking the treatment.

**2014 review of the exercise of the function of the WorkCover Authority**

**recommendation 8:** That the WorkCover Authority of NSW and WorkCover Independent Review Office collaborate to develop a process whereby disagreements over assessments of permanent impairment can be resolved through negotiation between an insurer and injured worker.

**2014 review of the exercise of the function of the WorkCover Authority**

**recommendation 9:** That the WorkCover Authority of NSW develop, through consultation with all stakeholders and their representatives, binding operational directives for the workers compensation nominal insurers' scheme agents or licenced insurers that ensure all parties are aware of their rights and responsibilities.

***Restoring medical benefits***

- 3.17** In relation to recommendation 6, the government made the *Workers Compensation Amendment (Existing Claims) Regulation 2014* on 3 September 2014. This regulation applied to those injured workers who had first made a claim **before** 1 October 2012. It exempted these workers from the compensation period restriction in s 59A of the *Workers Compensation Act 1987* (the 1987 Act) in relation to compensation payable for:
- the provision of crutches, artificial limbs, eyes or teeth and other artificial aids or spectacles (including hearing aids and hearing aid batteries)
  - modification of a worker's home or vehicle.<sup>158</sup>
- 3.18** Workers injured after 1 October 2012 are able to obtain similar benefits through the application of the savings and transitional provisions of the 1987 Act.<sup>159</sup>
- 3.19** SIRA advised the committee that the recent introduction of the *Workers Compensation Amendment Act 2015* extended the enhancements that came into effect on 3 September 2014 to claims made **on or after** 1 October 2012, including lifetime compensation for artificial aids, and home and vehicle modifications.<sup>160</sup>

***Absence of pre-approval for medical expenses***

- 3.20** In respect of recommendation 7, s 60(2A) of the 1987 Act provides that a worker's employer is not liable to pay the cost of medical treatment or services without the prior approval of the insurer. In accordance with s 60(2A)(a), SIRA's *Guidelines for Claiming Workers Compensation* provide for some exemptions to this provision.
- 3.21** The committee heard that new *Guidelines for Claiming Workers Compensation* came into effect on 1 August 2016.<sup>161</sup> Replacing the old WorkCover Guidelines, SIRA outlined that the 2016 guidelines removed the requirement for pre-approval for a number of medical interventions in

<sup>158</sup> Submission 54, WIRO, p 14.

<sup>159</sup> Submission 54, WIRO, p 14.

<sup>160</sup> Answers to pre-hearing questions on notice, SIRA, p 2.

<sup>161</sup> Answers to pre-hearing questions on notice, SIRA, p 2.

the acute stages of an injury.<sup>162</sup> In addition to previously existing exemptions, the new guidelines also provide access, without pre-approval, to:

- services provided in a public hospital
- consultation with medical specialists
- diagnostic investigations, including x-rays, MRI, CT scan and ultrasound
- pharmaceutical items.<sup>163</sup>

**3.22** During the course of the review, the committee heard evidence of concerns with the operation of the pre-approval requirements and exemptions under the 1987 Act under the old WorkCover guidelines. For example, the committee heard of a worker who had pre-approval from an insurer and proceeded with the surgery only to discover later that it was the wrong insurer, with the correct insurer refusing to meet the cost of the surgery as it had not been the subject of a request for pre-approval.<sup>164</sup> The committee also heard of a case where an insurer approved surgery, then later decided that the surgery did not arise from the work injury and cancelled the approval and sought to recover the expense.<sup>165</sup>

**3.23** In addition, Ms Roshana May, New South Wales Branch President, Australian Lawyers Alliance, advised the committee of two decisions of the Workers Compensation Commission in late 2016 relevant to this issue.<sup>166</sup> In particular, in the decision of *Deans v Roderic Neil Mitchell t/as RN Mitchell & Workers Compensation Nominal Insurer*,<sup>167</sup> the arbitrator found that because liability had been accepted, and notwithstanding agreement between the parties that the emergency medical treatment sought was reasonably necessary, the pre-approval exemptions available in the guidelines did not apply.

### ***Permanent impairment***

**3.24** The committee heard that recommendation 8 has not yet been implemented. WIRO gave evidence that it has made regular attempts to pursue this recommendation due to its concern about injured workers who have to undergo further medical examinations to determine the correct degree of impairment. WIRO also noted that the emotional distress for workers is exacerbated by the delay in implementation of this recommendation.<sup>168</sup>

**3.25** SIRA gave evidence to the committee that it had commenced preliminary discussions with key stakeholders regarding the negotiation of permanent impairment between a worker and insurer. Further, it outlined that a policy position would be established which addresses ‘the fairness and equity of outcomes for stakeholders, as well as the system wide impact’, with

<sup>162</sup> Answers to pre-hearing questions on notice, SIRA, p 2.

<sup>163</sup> Answers to pre-hearing questions on notice, SIRA, p 2.

<sup>164</sup> Submission 54, WIRO, p 15.

<sup>165</sup> Submission 54, WIRO, p 15.

<sup>166</sup> Correspondence, from Ms Roshana May, New South Wales Branch President, Australian Lawyers Alliance to Chair, 9 December 2016.

<sup>167</sup> *Deans v Roderic Neil Mitchell t/as RN Mitchell & Workers Compensation Nominal Insurer* [2016] NSWCC 279

<sup>168</sup> Submission 54, WIRO, p 15.

implementation expected in early 2017.<sup>169</sup> In addition, Workers Compensation Amendment (Transitional Arrangements for Weekly Payments) Regulation 2016, made on 16 December 2016, now allows for permanent impairment to be agreed between a worker and an insurer, without the need for a Medical Assessment Certificate, for workers transitioning off weekly payments. This is discussed further in Chapter 6.

***Binding operational directives outlining rights and responsibilities***

- 3.26** The committee heard evidence that recommendation 9 has not been the subject of any discussion with WIRO, and has not been implemented.<sup>170</sup> The rights and responsibilities are addressed in the deed between icare and scheme agents.<sup>171</sup>
- 3.27** The conduct of scheme agents and the scheme agent deed is discussed further in Chapter 8.

***Committee comment***

- 3.28** The committee notes the government's decision to restore lifetime medical benefits for workers in respect of hearing aids, prostheses, home and vehicle modifications. These changes have provided comfort, especially for older workers with occupational hearing loss, who faced the distressing prospect of losing the benefit of their hearing aids with consequential social withdrawal. Reinstating the lifelong guarantee of access to hearing aids and prostheses was particularly welcomed by many stakeholders.
- 3.29** The committee notes recent decisions of the Workers Compensation Commission concerning the operation of exemptions to pre-approval under the old WorkCover guidelines. We are keen to avoid similar uncertainty arising from the operation of the new SIRA guidelines and s 60(2A). As such, the committee recommends that SIRA issue a guidance note explaining how the new *Guidelines for claiming workers compensation* to operate with respect to s 60(2A) of the *Workers Compensation Act 1987*.
- 3.30** It was too early in this review to determine if SIRA's changes will have a meaningful impact on the problems that are repeatedly identified with pre-approval requirements for medical expenses. The committee will investigate this matter further in its next review.

---

**Recommendation 5**

That SIRA issue a guidance note explaining how the new *Guidelines for claiming workers compensation* operate with respect to s 60(2A) of the *Workers Compensation Act 1987*.

---

- 3.31** The committee acknowledges the steps taken by SIRA in relation to permanent impairment disagreements. The committee will watch carefully to see what process is developed to resolve disagreements over assessments of permanent impairment through negotiation, and encourages SIRA to finalise this activity as matter of priority.

---

<sup>169</sup> Answers to pre-hearing questions on notice, SIRA, p 3.

<sup>170</sup> Submission 54, WIRO, p 15.

<sup>171</sup> Answers to questions on notice, icare, 2 December 2016, Tab E, 2015 Scheme Agent Deed.

### Work capacity decisions and access to paid legal representation

**2014 review of the exercise of the function of the WorkCover Authority recommendation 10:** That the NSW Government consider amending section 44(6) of the *Workers Compensation Act 1987* to allow legal practitioners acting for a worker to be paid or recover fair and reasonable fees for the work undertaken in connection with a review of a work capacity decision of an insurer, subject to an analysis of its financial impact.

- 3.32** The 2015 workers compensation reforms included a provision allowing for the limited payment of legal costs in connection with work capacity decision reviews, to be prescribed by regulation.
- 3.33** However, at the time this review commenced, no such regulation had been made, with stakeholders expressing concern that injured workers continued to be unable to access legal representation when challenging a work capacity decision. For example, Ms Emma Maiden, Assistant Secretary, Unions NSW, said: ‘It is a real problem that there is not that legal support on a very complex decision. A work capacity decision is a very complicated process.’<sup>172</sup>
- 3.34** Similarly, the NSW Teachers Federation said that not allowing workers access to legal assistance means that the stated objectives of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) cannot be met:
- A stated objective of the WIMCA [*Workplace Injury Management and Workers Compensation Act 1998*] Act is: (d) to be fair, affordable, and financially viable. There is no application of fairness in a system where an injured workers who has their claim declined and payments cease under one section of the act is afforded access to legal assistance and an injured worker who has payments cease under a different system has no such right to legal assistance.<sup>173</sup>
- 3.35** In October 2016, SIRA gave evidence to the committee as follows:
- on 29 October 2015 it had published a discussion paper on how the new provision and regulation should operate
  - on 26 November 2015 public consultation closed
  - on 18 December 2015 a summary of submissions was published.<sup>174</sup>
- 3.36** On 16 December 2016, the NSW Government made the *Workers Compensation Amendment (Legal Costs) Regulation 2016*, which inserted new clauses into the *Workers Compensation Regulation 2016*. The regulation fixes the maximum costs that a legal practitioner is entitled to be paid by an insurer for providing legal services to a worker in connection with an application for merit review of certain work capacity decisions.
- 3.37** However, legal costs are not payable if the worker seeks legal advice more than 30 days after receiving notification of an internal review decision.

<sup>172</sup> Evidence, Ms Emma Maiden, Assistant Secretary, Unions NSW, 4 November 2016, p 40.

<sup>173</sup> Submission 67, NSW Teachers Federation, p 8.

<sup>174</sup> Answers to pre-hearing questions on notice, SIRA, p 3.

- 3.38 SIRA indicated that it would continue to consult and engage with stakeholders through the implementation phase, and will be providing guidance material to support reform implementation in the first quarter of 2017.<sup>175</sup>

*Committee comment*

- 3.39 The committee notes that following the passage of the Workers Compensation Regulation 2016, injured workers may, in certain circumstances, engage legal professionals paid by the insurer to challenge a work capacity decision at the merit review stage. We also note that it took the government a significant period of time to implement this recommendation.

**Return to work**

**2014 review of the exercise of the function of the WorkCover Authority recommendation 11:** That the WorkCover Authority of NSW review the mechanisms used to ensure compliance with the return to work provisions contained in the *Workplace Injury Management and Workers Compensation Act 1998*, and consider introducing incentives to encourage compliance and penalties for non-compliance.

**2014 review of the exercise of the function of the WorkCover Authority recommendation 12:** That the WorkCover Authority of NSW undertake an education campaign to inform employees and employers of their rights and obligations in regard to returning to work following an injury.

- 3.40 With respect to recommendation 11, SIRA gave evidence that, as the regulator of workers compensation, it has reviewed return to work compliance mechanisms. It advised the committee that:
- incentives have been built into workers compensation insurance premiums issued by the icare to encourage employers to meet set return to work criteria, as discussed in Chapter 2
  - SafeWork NSW's return to work inspectorate can provide assistance to employers in understanding their obligations and can issue improvement notices for non-compliance.<sup>176</sup>
- 3.41 In relation to recommendation 12, SIRA gave evidence that the following measures have been adopted to assist in delivering the recover at work message to stakeholders:
- new guidelines have been developed to educate employers and medical practitioners on their return to work obligations, available on the SIRA website
  - SIRA released a short video exploring the importance of, and opportunities for, communication between an employer and a nominated treating doctor, during the recover at work / injury management process

<sup>175</sup> Answers to pre-hearing questions on notice, SIRA, p 3.

<sup>176</sup> Answers to pre-hearing questions on notice, SIRA, p 3.

- the Injured at Work: a recovery at work Guide for Workers is available.<sup>177</sup>

**3.42** SIRA also gave evidence that the SafeWork NSW Inspectorate assists with informing employers and workers of their rights and obligations regarding recovery at work, with SIRA continuing to support SafeWork NSW in this area.<sup>178</sup> SafeWork's initiatives have included:

- SafeWork NSW Awards, with finalists and winners showcased through social media
- forum awareness campaigns held in regional areas during 2015
- a pilot project to target workplaces at higher risk of poor return to work outcomes, resulting in engagement with 240 workplaces and improvements at 91 per cent of those workplaces<sup>179</sup>

### *Committee comment*

**3.43** The committee welcomes the initiatives introduced by SIRA and SafeWork NSW in promoting awareness amongst employers and employees about their return to work rights and obligations.

**3.44** However, apart from a brief reference to SafeWork NSW's power to issue improvement notices, the committee was not provided with information with regard to any available penalties for non-compliance. We will keep a watching brief on this issue and look forward to being provided with more complete information in our next review.

### **Stakeholder engagement and access to information and guidelines**

**2014 review of the exercise of the function of the WorkCover Authority recommendation 13:** That the WorkCover Authority of NSW develop an engagement plan in consultation with all stakeholders and their representatives, and publish it as soon as practicable.

**2014 review of the exercise of the function of the WorkCover Authority recommendation 14:** That the Minister for Finance and Services establish a WorkCover Authority of NSW Advisory Committee under section 10 of the *Safety, Return to Work and Support Board Act 2012* and Schedule 2 of the *Work Health and Safety Act 2011*. The advisory committee should be comprised of representatives of workers and employers, together with other relevant stakeholders.

**2014 review of the exercise of the function of the WorkCover Authority recommendation 16:** That the WorkCover Authority of NSW include more detailed information in its annual reports, including information on claims processes, injury management, fraud, premium auditing and return to work rates.

<sup>177</sup> Answers to pre-hearing questions on notice, SIRA, p 3.

<sup>178</sup> Answers to pre-hearing questions on notice, SIRA, p 3.

<sup>179</sup> Answers to pre-hearing questions on notice, SIRA, p 4.

**2014 review of the exercise of the function of the WorkCover Authority recommendation 17:** That the WorkCover Authority of NSW recommence publishing its statistical bulletins, and publish bulletins containing information from 2010 to September 2014, as a matter of urgency.

**2014 review of the exercise of the function of the WorkCover Authority recommendation 18:** That the WorkCover Authority of NSW update its website as soon as possible following the conclusion of its current review of publically available information.

**2014 review of the exercise of the function of the WorkCover Authority recommendation 19:** That the WorkCover Authority of NSW immediately update its 'Contact us' webpage, as well as any automated phone messages used by the customer service centre, to include information about the WorkCover Independent Review Office.

**2014 review of the exercise of the function of the WorkCover Authority recommendation 20:** That the WorkCover Authority of NSW undertake a review of all guidelines that apply to the workers compensation scheme, in consultation with stakeholders, to simplify and consolidate the guidelines.

**2014 review of the exercise of the function of the WorkCover Authority recommendation 21:** That the WorkCover Authority of NSW publish the external auditor's final report on the decision making process for prosecutions, and invite feedback on the report's recommendations from stakeholders.

- 3.45** The committee's 2014 recommendation for an engagement plan arose out of the disappointment and frustration that stakeholders had expressed in relation to the 2012 reforms. SIRA advised the committee that following stakeholder consultation in 2015, a Better Regulation Stakeholder Engagement Strategy had been released.<sup>180</sup> This strategy covers both SIRA and SafeWork NSW under the banner of the Better Regulation Division – a new division of the NSW Department of Finance, Services and Innovation. It outlines what subgroups are considered stakeholders for different issues, what engagement principles will inform consultation and the methods of future engagement. The success of the strategy will be measured by SIRA and SafeWork NSW through feedback, surveys and complaints.<sup>181</sup>
- 3.46** With respect to recommendation 14 and the establishment of an advisory committee, this arose out of concerns around the lack of any formal industry mechanism for providing feedback on workplace issues. The power to appoint an advisory committee existed under the *Safety, Return to Work and Support Board Act 2012* which was repealed as part of the 2015 reforms. There is no similar power to appoint advisory committees under the current legislative scheme.
- 3.47** Recommendation 16 sought to ensure of the inclusion of more detailed information in the annual reporting process with respect to claims processes, injury management, fraud, premium

<sup>180</sup> Answers to pre-hearing questions on notice, SIRA, p 4.

<sup>181</sup> NSW Government, Better Regulation Division, *Better regulation stakeholder engagement strategy* (June 2016).

auditing and return to work rates. SIRA noted that WorkCover's final annual report, covering 2014-15, contained information with respect to each of these issues.<sup>182</sup>

- 3.48** SIRA also noted that its first annual report, reporting on financial year 2015-16, was tabled in Parliament on 15 November 2016. While the report contains some mention of claims processes, injury management, premium auditing and return to work rates in the report, there was an absence of statistical reporting on these issues. The exception is fraud, where the annual report indicated that there were 153 fraud referrals and one prosecution during 2015-16.<sup>183</sup>
- 3.49** Instead, SIRA has included some statistical information in its *NSW workers compensation system inaugural performance report 2014-2015*.<sup>184</sup> This report outlines six workers compensation scheme performance measures and notes that each of these measures has been, or will be, allocated metrics for the purpose of measurement and reporting. This report also provides statistical data in relation to both premium ratios<sup>185</sup> and the return to work rate.<sup>186</sup>
- 3.50** In this review, stakeholders continued to emphasise that information sharing was necessary so that they could jointly monitor the scheme.<sup>187</sup> It was argued that when stakeholders have access to all of the data arising from the operation of the workers compensation scheme, they were in a better position to identify problems that require addressing.<sup>188</sup>
- 3.51** With respect to recommendation 17, the committee was informed that statistical bulletins for the years 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14 are currently available on both the SIRA website, with the most recent bulletin published in May 2016.<sup>189</sup>
- 3.52** The government response to the 2014 review outlined that recommendation 19, to update the 'contact us' webpages and automated phone messages, had been implemented.<sup>190</sup> The committee heard that this recommendation was also implemented across the new icare and SIRA websites.<sup>191</sup> However, during the hearing, the committee heard that a number of forms on SIRA's website, including the workers compensation claim form, were still branded 'WorkCover'. Mr Anthony Lean, Chief Executive, SIRA, indicated that reviewing the old WorkCover documents, guidelines and forms was an 'extraordinarily large job' which was complicated where forms were prescribed by the legislation.<sup>192</sup> SIRA subsequently confirmed that the claim form was issued under s 65 of the 1998 Act as an 'approved form'. SIRA confirmed that it had recently redesigned the claims form for ease of use, relevancy of

<sup>182</sup> Answers to pre-hearing questions on notice, SIRA, p 4.

<sup>183</sup> SIRA, *Annual Report 2015-16*, 2016, pp 20-21.

<sup>184</sup> SIRA, *NSW workers compensation system inaugural performance report 2014/2015*, 2016.

<sup>185</sup> SIRA, *NSW workers compensation system inaugural performance report 2014/2015*, 2016, pp 20-21.

<sup>186</sup> SIRA, *NSW workers compensation system inaugural performance report 2014/2015*, 2016, pp 11-14.

<sup>187</sup> Evidence, Mr Goodsell, 4 November 2016, p 60.

<sup>188</sup> Evidence, Mr Garry Brack, Chief Executive, Australian Federation of Employers and Industries, 4 November 2016, p 60.

<sup>189</sup> Answers to pre-hearing questions on notice, SIRA, p 4.

<sup>190</sup> Correspondence, from the Minister for Finance, Services and Property, to the Clerk of the Parliaments, 6 May 2015.

<sup>191</sup> Answers to pre-hearing questions on notice, SIRA, p 4.

<sup>192</sup> Evidence, Mr Anthony Lean, Chief Executive, SIRA, 7 November 2016, p 47.

information collection and branding requirements. The rebranded claims form is now available online.<sup>193</sup>

**3.53** In relation to the review of workers compensation scheme guidelines, the committee heard that since the 2014 review, SIRA:

- had reviewed four guidelines relating to claiming compensation benefits, provision of domestic assistance, work capacity, and internal and merits review, and consolidated these into one new document, *Guidelines for claiming workers compensation*, commencing on 1 August 2016<sup>194</sup>
- had published new *Workers compensation market practice and premiums guidelines*, commencing 6 May 2016 and new *Workers compensation licensed insurer business plan guidelines*, commencing 30 June 2016<sup>195</sup>
- had updated:
  - *NSW Workers compensation guidelines for the evaluation of permanent impairment (4<sup>th</sup> edition)*, commencing on 1 April 2016
  - *Guidelines for the approval of treating allied health practitioners*, commencing on 1 August 2016.<sup>196</sup>
- is currently reviewing the *Guidelines for workplace return to work programs*, with draft guidelines circulated between October and November 2016.<sup>197</sup>

**3.54** A review of the guidelines on independent medical examinations and reports was due to commence in late 2016.<sup>198</sup> SIRA noted that it was prioritising its work on the guidelines based on the feedback it received from stakeholders.<sup>199</sup>

**3.55** With respect to recommendation 21, the committee was informed that the external auditor's report relating to the decision-making process for prosecutions was published on the WorkCover website, with stakeholder feedback invited. In response to the recommendations in the report and based on the stakeholder consultation, an action plan was developed and a number of changes to the decision-making process were implemented, commencing in September 2016.<sup>200</sup>

### ***Committee comment***

**3.56** The committee notes the development of a new engagement strategy covering both SIRA and SafeWork NSW.

<sup>193</sup> SIRA, *State Insurance Regulatory Authority Worker's injury claim form*, [http://www.sira.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0020/68600/Injury\\_claim\\_form.pdf](http://www.sira.nsw.gov.au/__data/assets/pdf_file/0020/68600/Injury_claim_form.pdf)

<sup>194</sup> Answers to pre-hearing questions on notice, SIRA, p 5.

<sup>195</sup> Answers to pre-hearing questions on notice, SIRA, p 5.

<sup>196</sup> Answers to pre-hearing questions on notice, SIRA p 5.

<sup>197</sup> Answers to pre-hearing questions on notice, SIRA, p 5.

<sup>198</sup> Answers to pre-hearing questions on notice, SIRA, p 5.

<sup>199</sup> Evidence, Ms Carmel Donnelly, Executive Director, Workers and Home Building Compensation Regulation, SIRA, 7 November 2016, p 47.

<sup>200</sup> Answers to pre-hearing questions on notice, SIRA, pp 5-6.

- 3.57** The committee has reviewed SIRA's 2016 performance report, and notes that some of the metrics by which the performance of the scheme can be measured are still in development. The committee looks forward to seeing more information included in the next performance and annual reports, with particular reference to claims processes, injury management, fraud, premium auditing and return to work rates. This will assist all stakeholders in the scheme to acquit their ongoing informal supervisory role, as well as assist this committee in its formal supervisory function.
- 3.58** The lack of transparency and poor access to credible data from SIRA is a repeated theme in the submissions to this committee's current review. While we accept that a change in culture takes time in any organisation, we would have expected significantly more advances in this regard than have been evidenced to date. The committee notes that SIRA had updated the workers compensation claims form, and acknowledges the extensive work being undertaken to review, update and consolidate the guidelines that operate within the scheme. The committee also notes SIRA's prioritisation program in relation to the guidelines and will keep a watching brief in relation to the development of further guidelines within the scheme.
- 3.59** In terms of the decision-making process for prosecutions, we note that 2015-16 saw only one prosecution from a total of 153 fraud referrals. The committee will keep a watching brief on the issues that inform decisions by SafeWork to investigate and subsequently prosecute matters.

### Phoenix companies and the chain of responsibility

**2014 review of the exercise of the function of the WorkCover Authority recommendation 22:** That the NSW Government require that insurers offering workers compensation cover have applicants declare whether any proprietor, director, senior executive or public officer associated with the applying entity has:

- any outstanding workers compensation premiums, and/or
- been associated with a registered corporation, sole trader or partnership that either has outstanding premiums as a going concern, or been placed in administration or receivership in the past five years.

**2014 review of the exercise of the function of the WorkCover Authority recommendation 23:** That the WorkCover Authority of NSW convene a roundtable of insurers, relevant employer organisations and unions to address phoenix companies and their impact on the economy. The roundtable should:

- outline the extent of the problem, the impact on work health and safety and the impact on the efficiency and cost of workers compensation
- outline the means of addressing phoenix operators including identifying offenders, reporting to the ACCC and ASIC, insurer vigilance, industry responsibility and regulatory responses, and
- report the outcomes of the roundtable to the Standing Committee on Law and Justice and the Minister for Finance and Services.

- 3.60** SIRA gave evidence that it is currently developing a model to identify companies with risk factors that indicate possible phoenix activity.<sup>201</sup> SIRA also noted that, since the 2014 review:
- the federal government had convened an interagency phoenix taskforce, on which New South Wales is represented by the Office of State Revenue
  - progress and activities of the interagency phoenix taskforce are reported at SafeWork Australia meetings that are attended by SIRA.<sup>202</sup>
- 3.61** In addition, SIRA informed the committee of a related compliance focus, namely sham contracting and the avoidance of premiums. Where a risk of phoenix-type activity is uncovered, SIRA works with the Office of State Revenue to provide data to assist with its operations.<sup>203</sup>
- 3.62** SIRA explained that rather than duplicate existing roundtables, it would continue to liaise with key stakeholders working to address phoenix activity.<sup>204</sup> The committee received no evidence in relation to the implementation of recommendation 22.

*Committee comment*

- 3.63** The committee notes that SIRA is in process of addressing the substance of recommendation 23. The committee will keep a watching brief on this matter to ensure that the issue of phoenix companies seeking to gain unfair advantage within the workers compensation scheme is appropriately managed. The committee looks forward to SIRA's advice on its new model that will identify companies likely to be seeking to operate in this manner.

**Self insurers**

**2014 review of the exercise of the function of the WorkCover Authority recommendation 24:** That the NSW Government review the regulatory requirements that apply to self insurers in New South Wales to ensure they do not require unnecessary documentation or expense

- 3.64** The committee heard evidence that SIRA is currently reviewing its self-insurance licensing framework.<sup>205</sup> Following the first round of consultation which commenced in the latter half of 2015, PricewaterhouseCoopers (PwC) was engaged to assist with the review. PwC subsequently made recommendations that form the basis of a proposed new licensing framework. SIRA then undertook public consultation on the proposed licensing framework, concluding in November 2016.<sup>206</sup>

<sup>201</sup> Answers to pre-hearing questions on notice, SIRA, p 6.

<sup>202</sup> Answers to pre-hearing questions on notice, SIRA, p 6.

<sup>203</sup> Answers to pre-hearing questions on notice, SIRA, p 6.

<sup>204</sup> Answers to pre-hearing questions on notice, SIRA, p 6.

<sup>205</sup> Answers to pre-hearing questions on notice, SIRA, p 6.

<sup>206</sup> Answers to pre-hearing questions on notice, SIRA, p 6.

**3.65** The recommendations outlined in the report prepared by PwC included:

- a three tiered oversight model based on performance, with high performers requiring less oversight
- an increase in the licencing term to a maximum of eight years for higher performing self-insurers
- that the views of industry, employees and injured worker representatives be considered when assessing performance
- that a risk-based approach be adopted to claims management oversight, with top tier self-insurers subject to fewer audit requirements.<sup>207</sup>

***Committee comment***

**3.66** The committee was pleased to see that the proposed new licensing framework will seek to incentivise self-insurers to improve their performance through the re-design of the licence requirements and conditions, whilst providing them with a level of autonomy and a reduced regulatory burden where they have a demonstrated history of high level of performance. The committee was particularly pleased that the new framework would enable continuous oversight of self-insurer performance, so that SIRA could more effectively acquit its role as regulator.

**3.67** The committee will continue to watch this space with interest and looks forward to receiving the new framework in its next review.

**Comcare**

**2014 review of the exercise of the function of the WorkCover Authority recommendation 25:** That the NSW Government develop an actuarial and legal impact statement of an expanded Comcare scheme.

**3.68** SIRA advised the committee that in 2014, the Australian Government introduced proposed legislation to change self-insurer license and benefits arrangements under the Comcare scheme. SIRA noted that the proposed changes would have had some impacts on New South Wales, with the impacts assessed as manageable.<sup>208</sup>

**3.69** SIRA further advised that the proposed legislation lapsed with the prorogation of the 44<sup>th</sup> Commonwealth Parliament in April 2016, and that it was not known whether the new government would seek to introduce the same or similar legislation.<sup>209</sup> SIRA confirmed that it would continue to monitor any new legislation introduced.<sup>210</sup>

<sup>207</sup> PwC, *Review of the NSW self-insurance licensing framework final report State Insurance Regulatory Authority*, pp iv-v.

<sup>208</sup> Answers to pre-hearing questions on notice, SIRA, p 6.

<sup>209</sup> Answers to pre-hearing questions on notice, SIRA, p 6.

<sup>210</sup> Answers to pre-hearing questions on notice, SIRA, p 6.

*Committee comment*

- 3.70** The committee acknowledges the update from SIRA in relation to the previously proposed expanded Comcare scheme, and is keen to hear if new legislation is introduced and its impact on New South Wales.

**Disability sector****2014 review of the exercise of the function of the WorkCover Authority**

**recommendation 15:** That the WorkCover Authority of NSW establish a disability industry reference group as soon as practicable.

**2014 review of the exercise of the function of the WorkCover Authority**

**recommendation 26:** That the WorkCover Authority of NSW, in consultation with stakeholders, develop risk assessment practice guidelines for the disability sector, guidance material on workplace health and safety for disability service providers, and disability sector-specific training material for WorkCover inspectors.

- 3.71** This committee's 2014 review highlighted the tension between disability legislation and work health and safety legislation, with many of the rights afforded in disability legislation ameliorated by the responsibilities of employers under work health and safety legislation.<sup>211</sup>
- 3.72** In relation to recommendation 15, the committee heard that SIRA had initiated a disability industry stakeholder engagement project and hosted a 'Disability Industry Think Tank' in late 2015, at which participants discussed options for engaging disability industry stakeholders and people with disability. Following this, an action plan was prepared which outlined a range of engagement methods to be utilised alongside partnerships with carer and family stakeholders. The think tank participants received a copy of the action plan for comment.<sup>212</sup> The committee was also told that SIRA would continue to work closely with the disability industry including the Disability Council of NSW.<sup>213</sup>

*Committee comment*

- 3.73** The committee recognises that a number of participants in the workers compensation scheme have acquired disabilities as a result of workplace injuries. The committee also recognises the importance of ensuring that there is a best practice response to such injuries, both during the recovery phase and when injured workers return to work. We acknowledge the work undertaken by SIRA to engage with the disability sector, and will keep a watching brief on the need for a formal disability industry reference group in its new review.
- 3.74** A risk assessment practice guideline for the disability sector would be a useful tool for stakeholders in the workers compensation scheme, especially when seeking to negotiate the legislative tensions between disability legislation and work health and safety legislation.

<sup>211</sup> Standing Committee on Law and Justice, *Review of the exercise of the functions of the WorkCover Authority* (2014), pp 135-139.

<sup>212</sup> Answers to pre-hearing questions on notice, SIRA, p 4.

<sup>213</sup> Answers to pre-hearing questions on notice, SIRA, p 4.

- 3.75** While the committee did not receive any evidence in relation to an ongoing need for a disability industry reference group and other guidance material, we will also keep a watching brief on this.

## Chapter 4 Work capacity decisions

This chapter examines work capacity decisions which were the subject of extensive evidence during this review and indeed, the committee's 2014 report. The chapter considers a number of concerns arising from the operation of work capacity decisions, including how work capacity assessments are used; issues with nominated treating doctors; the format of notices; the definition of suitable employment in s 32A of the *Workers Compensation Act 1987* (the 1987 Act); the calculation of pre-injury average weekly earnings; and the suspension of work capacity decisions under s 44BC of the 1987 Act.

### Overview

- 4.1 'Work capacity' refers to an injured worker's capacity to work in any employment.<sup>214</sup> The concept was introduced into the New South Wales workers compensation scheme as part of the 2012 reforms.
- 4.2 In accordance with s 43 of the 1987 Act a work capacity decision includes a decision about:
- a worker's current work capacity
  - what constitutes suitable employment for a worker
  - the amount an injured worker is able to earn in suitable employment
  - the amount of an injured worker's pre-injury average weekly earnings or current weekly earnings
  - whether a worker is, as a result of injury, unable without substantial risk of further injury to engage in employment of a certain kind because of the nature of that employment
  - any other decision of an insurer that affects a worker's entitlement to weekly payments of compensation.<sup>215</sup>
- 4.3 Importantly, work capacity decisions are made by insurers and are final and binding.<sup>216</sup> A decision may be subject to an administrative review under s 44BB of the 1987 Act or judicial review by the Supreme Court of NSW. The dispute resolution process for work capacity decisions is discussed in Chapter 5.
- 4.4 Work capacity decisions are the result of work capacity assessments. If, from a work capacity assessment, it is determined that a worker cannot return to their pre-injury employment, then the insurer must assess if the worker can instead work in other suitable employment,<sup>217</sup> either with the pre-injury employer or another employer. Suitable employment is discussed in detail later in the chapter.

<sup>214</sup> SIRA, *Work capacity disputes*, <http://www.sira.nsw.gov.au/disputes/workers-compensation-disputes/work-capacity-disputes>.

<sup>215</sup> *Workers Compensation Act 1987*, s 43.

<sup>216</sup> *Workers Compensation Act 1987*, s 43(1).

<sup>217</sup> SIRA, *Guidelines for claiming workers compensation*, 2016, p 21.

4.5 SIRA advised that 10,636 work capacity decisions were issued by insurers in 2015-2016.<sup>218</sup>

4.6 The committee examined work capacity decisions in its 2014 review of the WorkCover Authority. Evidence presented during this review suggests that some issues have not been resolved.

## Work capacity assessments

4.7 A work capacity assessment is an assessment by an insurer of an injured worker's current work capacity, conducted in accordance with the *Guidelines for claiming workers compensation*.<sup>219</sup> In addition to the guidelines, work capacity assessments are governed by s 44A of the 1987 Act.

4.8 SIRA advised that work capacity assessments consider two questions:

1. Does the worker have a present ability to return to their pre-injury employment?
2. Does the worker have a present ability to return to suitable employment?<sup>220</sup>

4.9 Work capacity assessments consider the injured worker's medical, functional and vocational status. In order to determine this status, a worker may be instructed to participate in any assessment that is reasonably necessary, including an examination by a medical practitioner or other health care professional.<sup>221</sup>

4.10 In addition, where a worker is injured and is unable to perform their usual role for more than seven consecutive days, they must choose a nominated treating doctor. The role of the nominated treating doctor is to:

- provide the worker with a complete certificate of capacity
- act as the primary communicator for treatment and the injury management plan
- where authorised by the worker, provide relevant information to the employer, insurer and other parties involved in the management of the worker's injury.<sup>222</sup>

4.11 The certificate of capacity is used by an injured worker's insurer as part of the work capacity assessment. It also facilitates the development of an injury management plan which may include treatment, rehabilitation and retraining options to support an injured worker's return to work.<sup>223</sup>

---

<sup>218</sup> SIRA, *NSW workers compensation system inaugural performance report 2014/2015*, 2016, p 27. This is the number of contested work capacity decisions.

<sup>219</sup> *Workers Compensation Act 1987*, s 44A(2).

<sup>220</sup> SIRA, *Guidelines for claiming workers compensation*, 2016, p 21.

<sup>221</sup> *Workers Compensation Act 1987*, s 44A(5).

<sup>222</sup> SIRA, *Nominating treating doctors*, <http://www.sira.nsw.gov.au/workers-compensation/health-practitioners-workers-compensation/medical-practitioners-for-injured-workers/general-practitioners>.

<sup>223</sup> SIRA, *Certificate of Capacity*, <http://www.sira.nsw.gov.au/workers-compensation/workers-and-claims/making-a-claim/certificate-of-capacity>.

### The conduct and purpose of assessments

**4.12** Numerous stakeholders raised concerns in this review about:

- the way that underlying medical and other health assessments are being conducted
- the purpose for which work capacity assessments are being used.

**4.13** For example, the Construction, Forestry, Mining and Energy Union (CFMEU) contended that some case managers are using medical and other assessments selectively in order to support an assessment that an injured worker has capacity to work:

... if an injured worker's certificate of capacity is inconsistent with the insurer's opinion or that expressed in a functional assessment, the insurer may place greater emphasis on the findings of the rehabilitation report, thereby ignoring the sound medical advice of the nominated treating doctor. Life altering decisions are being made by unqualified case managers with no legal training and who have a vested interest in finding that an individual worker has capacity to work.<sup>224</sup>

**4.14** A group of allied health professionals made similar representations to the committee. Witness A observed that insurers are using rehabilitation and other treatments only to determine work capacity, rather than to support an injured worker's return to work more broadly:

... the use of rehabilitation and return-to-work has been limited by the agents and is selectively used to help support work-capacity decisions, rather than to build the capacity in a worker to help that person return to work.<sup>225</sup>

**4.15** The witness continued:

... [the use of rehabilitation services] seems to be more about theoretically measuring work capacity rather than trying to build that capacity. Rehabilitation services could be far better used to achieve better health, wellbeing and social outcomes for workers, but they have been too narrowly targeted towards work capacity decisions.<sup>226</sup>

**4.16** Witness B suggested that the focus on work capacity decision-making in the workers compensation scheme compromises the objectives of the scheme,<sup>227</sup> and is exacerbated by the conflict between the commercial and health interests inherent in the system.<sup>228</sup>

**4.17** It was proposed that this situation could be rectified by amending the legislation or guidelines to ensure that a work capacity decision cannot contradict a return to work pathway that is underway.<sup>229</sup>

**4.18** In line with the allied health professionals, Slater and Gordon Lawyers acknowledged that work capacity assessments should be used to assist workers:

<sup>224</sup> Submission 61, CFMEU, p 31.

<sup>225</sup> *In camera* evidence, Witness A, 7 November 2016, p 2, published by resolution of the committee.

<sup>226</sup> *In camera* evidence, Witness A, 7 November 2016, p 6, published by resolution of the committee.

<sup>227</sup> *In camera* evidence, Witness B, 7 November 2016, p 5, published by resolution of the committee.

<sup>228</sup> *In camera* evidence, Witness A and B, 7 November 2016, p 5, published by resolution of the committee.

<sup>229</sup> *In camera* evidence, Witness B, 7 November 2016, p 5, published by resolution of the committee.

... properly used capacity assessments could be an effective tool to periodically review a worker's capacity to fulfil work duties and progress in returning to work and thereby assist a claims manager in determining a return to work plan in conjunction with the worker's doctors and treatment providers.<sup>230</sup>

- 4.19** However, Slater and Gordon Lawyers continued that work capacity assessments could only be effective if '... used passively rather than as a tool to cut worker's benefits, remove the worker from the scheme as quickly as possible and thereby reduce liability of the insurer.'<sup>231</sup> Mr Ross Stirling, an injured worker, told the committee about some of the difficulties he had encountered with his rehabilitation provider:

That rehabilitator even come into my workplace—the one that was provided by them—and I have had a sit-down meeting with him before and I said, 'I think this is just basically you going in and speaking to my employer, you are giving him the options to actually sit back and think, 'Can I dismiss this worker?' I said, 'I don't want you to go and ask: 'Has he got any long-term prospects?' Go into my employer and ask how I am doing.' So he goes in, and my union rep is there, what is one of the first questions? 'Do you think Mr Stirling's long-term prospects are good here?'<sup>232</sup>

- 4.20** Along similar lines, the CFMEU argued that the work capacity system, and work capacity assessment process in particular, are being used to discourage workers from making and pursuing workers compensation claims:

... work capacity assessments and work capacity decisions are used as a mechanism for pushing people off the workers compensation system or pressuring injured workers to remove themselves from the system voluntarily rather than being constantly subject to the whim of the work capacity process.<sup>233</sup>

### **Nominated treating doctors**

- 4.21** During this review, the committee also heard concern expressed around the role of nominated treating doctors in the work capacity assessment process, and the pressure placed on them by employers, scheme agents and others. For example, Mr Leigh Shears, an injured worker, said it can be difficult to find a doctor willing to take on a workers compensation patient because some scheme agents pressure medical practitioners to classify workers as being fit for work:

... it is not easy to find a doctor that will take on a workers' comp patient. They do not want to do it. I would suggest that it is because of the pressure that gets put on them. I have assisted people in the workplace prior to me being injured and that is their experience as well. You have work health and safety officers in companies who are told to get on the phone to the doctor and change the medical certificate so that they can be suitable for duties, open up their hours and get back to work.<sup>234</sup>

---

<sup>230</sup> Submission 53, Slater and Gordon Lawyers, p 4.

<sup>231</sup> Submission 53, Slater and Gordon Lawyers, p 4.

<sup>232</sup> Evidence, Mr Ross Stirling, Local Network Member, Injured Workers Support Network, 7 November 2016, p 5.

<sup>233</sup> Submission 61, CFMEU, p 29.

<sup>234</sup> Evidence, Mr Leigh Shears, Injured worker, Australian Manufacturing Workers' Union, 4 November 2016, p 51.

**4.22** Likewise, Ms Rita Mallia, State President, CFMEU, said that for some injured workers employed with larger employers, ‘the insurance companies lob up to doctor’s appointments with workers and monster doctors to change medical certificates.’<sup>235</sup>

**4.23** In addition, the New South Wales Teachers Federation said that certain nominated treating doctors are being pressured by rehabilitation providers, who are funded by scheme agents, to alter certificates of capacity:

... there is a continuing issue with Rehabilitation Providers, as funded by the insurer, inviting themselves to the injured worker’s appointments with their nominated treating doctor (NTD). This creates an opportunity for the Rehabilitation Provider to apply an undue influence over the injured worker and their NTD in certificates on work capacity restrictions.<sup>236</sup>

**4.24** The federation explained: ‘For workers with physical injuries this can be counterproductive, lead to longer periods of recovery and lead to either full or partial incapacity to work.’<sup>237</sup> To overcome this issue, the New South Wales Teachers Federation advocated for greater differentiation between the appointments an injured worker has with their nominated treating doctor on the one hand, and case management conferences (or return to work meetings) with doctors, insurers and employers on the other:

A clear differentiation needs to be made between the appointment an injured worker makes with their NTD to discuss their current medical needs and the case conference or Return to Work meeting where the medical restrictions as stated on the Work Capacity Certificate are already decided and are then used as fact from which to discuss the possibility of suitable duties and how the injured worker can work towards a sustainable return to work.<sup>238</sup>

**4.25** It was also suggested that workers and their nominated treating doctors should be provided with more guidance around what information should inform the injury management plan, and that the appropriate provisions of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) be amended accordingly:

More specific guidance should be provided to workers and their nominated treating doctors that the information to be provided to the insurer or employer under Sub-section 45(5) of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW), including medical information, should inform the injury management plan.<sup>239</sup>

**4.26** Employers and industry groups drew the committee’s attention to a different concern, suggesting that certain nominated treating doctors do not adequately support an injured worker’s return to work. Indeed, the Australian Federation of Employers and Industries commented that some nominated treating doctors underestimate the work capacity of injured workers:

<sup>235</sup> Evidence, Ms Rita Mallia, State President, CFMEU, 4 November 2016, p 51.

<sup>236</sup> Submission 67, New South Wales Teachers Federation, p 7.

<sup>237</sup> Submission 67, New South Wales Teachers Federation, p 7.

<sup>238</sup> Submission 67, New South Wales Teachers Federation, p 7.

<sup>239</sup> Submission 67, New South Wales Teachers Federation, p 8.

Medical practitioners are the gatekeepers of the scheme and who, some observers believe, aid and abet fraud on the scheme by certifying workers as having no work capacity when quite plainly there is relevant capacity.<sup>240</sup>

**4.27** The federation proposed that SIRA and icare should take action to overcome this problem by enforcing existing penalty provisions:

SIRA and ICNSW [icare] must be more assertive with medical practitioners and implement the provisions ... which states that a person must not make a statement knowing that it is false or misleading in a material particular:

- a) in a claim made by the person, or
- b) in a medical certificate or other document that relates to a claim, or
- c) when furnishing information to any person concerning a claim or likely claim (whether the information is furnished by the person who makes or is entitled to make the claim or not).<sup>241</sup>

**4.28** The Australian Industry Group similarly contented that certain nominated treating doctors are not focused on return to work. The Australian Industry Group stated that there must be a continuing focus on engaging with treating practitioners to assist them to contribute to recovery and return to work.<sup>242</sup>

#### *Committee comment*

**4.29** We note that some stakeholders with experience of the process believe that work capacity assessments are being used primarily to limit injured workers' access to entitlements rather than supporting a return to work. We encourage scheme agents to consider how work capacity assessments can be more effectively used to promote return to health for injured workers, which is ultimately in the interests of all participants in the workers compensation system.

**4.30** We are concerned by reports that some nominated treating doctors are not fulfilling their obligation to support return to work. Stakeholders offered differing perspectives as to why this may be happening, with some suggesting that doctors may be being pressured by insurers and employers to prematurely support an injured worker's return to work, and others suggesting that doctors may be deliberately underestimating the work capacity of injured workers.

**4.31** The committee emphasises that it is inappropriate for any party, including an insurer or an employer, to unduly pressure a nominated treating doctor. We therefore recommend that icare, in the new scheme agent deed, consider including penalties for scheme agents who exert undue pressure on nominated treating doctors. The scheme agent deed is discussed in detail in Chapter 8.

---

<sup>240</sup> Submission 80, Australian Federation of Employers and Industries, p 14.

<sup>241</sup> Submission 80, Australian Federation of Employers and Industries, p 14.

<sup>242</sup> Submission 28, Australian Industry Group, p 11.

- 4.32 Additionally, the committee recommends that icare collaborate with scheme agents to provide guidance to nominated treating doctors about their legal obligations in workers compensation matters.

---

### Recommendation 6

That icare, in the new scheme agent deed, consider including penalties for scheme agents who exert undue pressure on nominated treating doctors.

---

### Recommendation 7

That icare collaborate with scheme agents to provide guidance to nominated treating doctors about their legal obligations in workers compensation matters.

---

## Work capacity notices

- 4.33 Once an insurer makes a work capacity decision, this decision is communicated to the worker in the form of a work capacity notice. In accordance with the *Guidelines for claiming workers compensation*, a work capacity notice must explain:
- the concept of a work capacity assessment and the decision itself
  - the legislative basis for the decision including what the legislation states
  - the evidence considered and how the evidence was assessed to make the decision
  - the impact of the decision for the worker's benefits, including weekly benefits and medical and related treatment, and
  - the worker's review rights and other options for assistance.<sup>243</sup>
- 4.34 These guidelines are intended to promote procedural fairness.<sup>244</sup> SIRA informed the committee that following the release of the guidelines in August 2016, education sessions were conducted with insurers to ensure that the guidelines are implemented consistently and that work capacity decisions provide appropriate information to the worker.<sup>245</sup> SIRA also hosts regular meetings between the Merit Review Service and icare to identify issues and trends concerning work capacity decisions to identify and share best practice procedures.<sup>246</sup>
- 4.35 However, the committee received extensive evidence about the excessive length and complexity of work capacity notices and the associated attachments such as medico-legal

---

<sup>243</sup> See, SIRA, *Guidelines for claiming workers compensation*, 2016, p 25; Correspondence, from Mr Andrew Borden, General Manager, Workers Compensation, QBE Australia and New Zealand, to Chair, 6 December 2016, p 4.

<sup>244</sup> Answers to questions on notice, SIRA, 2 December 2016, p 4.

<sup>245</sup> Answers to questions on notice, SIRA, p 4.

<sup>246</sup> Answers to questions on notice, SIRA, p 4.

reports. SIRA advised that the length of each decision is largely determined by the nature of the dispute and the complexity of the issues considered in each application:

Some applications may only raise one discrete issue for determination, while other applications may raise a large volume of issues, relating to a number of work capacity decisions, to be dealt with in the merit review.<sup>247</sup>

**4.36** As for the actual length of work capacity decisions, SIRA advised that in relation to the 50 applications for merit review open as at November 2016, the average length a work capacity decision was eight pages and included 73 pages of attachments and the largest application(s) included a 13-page decision and 187 pages of attachments.<sup>248</sup>

**4.37** Review participants expressed concern that the length and complexity of these notices place a significant burden on the insurer, employer and worker.<sup>249</sup> For example, Mr Stephen Keyte, Chairperson, NSW Self Insurers Association, told the committee that he issued a work capacity decision to a worker who was confused by the detailed nature of the notice:

... [the notice was] seven to eight pages long, with a lot of references to legislation and timeframes, to amounts and thresholds which he did not understand at all.<sup>250</sup>

**4.38** Mr Keyte noted the problem was compounded by the fact that, at the time, he could not direct the worker to engage a lawyer to provide advice on the work capacity decision.<sup>251</sup>

**4.39** The Law Society of New South Wales similarly remarked that notifications are ‘almost always unintelligible to the average injured worker.’<sup>252</sup> Mr Paul Macken, Member, Injury Compensation Committee, Law Society of New South Wales, stated that it is unfair to require a worker to decipher a work capacity notice without legal assistance (as was the case at the time of his evidence).<sup>253</sup> Mr Macken concluded that the work capacity notice, and the work capacity process, needed to be simplified.<sup>254</sup>

**4.40** Following on, Ms Roshana May, New South Wales Branch President, Australian Lawyers Alliance, was concerned that work capacity notices are highly prescriptive and almost incomprehensible to most people:

There is a whole lot of prescribed content. You have to tell them this, you have tell them that, you have to give them notice, you have to give them a call. When you see these things ... they come to pages long of gobbledegook reciting opinions of doctors

<sup>247</sup> Answers to questions on notice, SIRA, p 4.

<sup>248</sup> Answers to questions on notice, SIRA, p 3.

<sup>249</sup> See, Evidence, Mr Mick Franco, Honorary Solicitor, NSW Self Insurers Association, 4 November 2016, p 68.

<sup>250</sup> Evidence, Mr Stephen Keyte, Chairperson, NSW Self Insurers Association, 4 November 2016, p 68.

<sup>251</sup> Evidence, Mr Keyte, 4 November 2016, p 68.

<sup>252</sup> Submission 65, Law Society of New South Wales, p 4.

<sup>253</sup> Evidence, Mr Paul Macken, Member, Injury Compensation Committee, Law Society of New South Wales, 4 November 2016, p 4.

<sup>254</sup> Evidence, Mr Macken, 4 November 2016, pp 4-5.

all over the place, which are written by people who are inexpert at writing and inexpert at communicating, and so people give up.<sup>255</sup>

**4.41** Ms May suggested that when faced with challenging the notice, workers invariably ‘give up’ and choose not to proceed with an administrative review.<sup>256</sup>

**4.42** In this regard, Mr Anthony Lean, Chief Executive, SIRA, agreed that work capacity decisions of excessive lengths, such as those reaching 180 pages, would be a ‘concern’.<sup>257</sup>

**4.43** In their evidence to the committee, scheme agents agreed that the length of a notice is determined by the legislative requirements and is dependent on the amount of evidence reviewed for each case.<sup>258</sup> For example, GIO said notices are ‘... unavoidably lengthy and detailed to cover every element of the work capacity decision and the corresponding review process for each element stated in Section 43 of the Act.’<sup>259</sup>

**4.44** The committee heard that scheme agents are taking steps to address concerns about the complexity of the documents. For example, QBE uses plain English as much as possible to communicate with workers in work capacity decisions:

QBE recognises that the worker is the intended recipient of a work capacity decision, and that many are unfamiliar with legislative references and associated formal language. Within the legislative framework, QBE makes every attempt to communicate decisions in plain English and provide a clear explanation of, and the reasons for, our decisions.<sup>260</sup>

**4.45** QBE also stated that it discusses decisions with workers prior to sending out a notice:

We take care to provide procedural fairness, and ensure that workers understand the process and the implications of any work capacity decision for their entitlements. Decision notices are not sent without prior discussion with the worker.<sup>261</sup>

**4.46** The committee heard that EML has simplified notices to ensure that the reasons for decisions are clear and concise while continuing to comply with the guidelines.<sup>262</sup>

**4.47** Similar issues with liability notices<sup>263</sup> are discussed in more detail in Chapter 5.

<sup>255</sup> Evidence, Ms Roshana May, New South Wales Branch President, Australian Lawyers Alliance, 4 November 2016, p 7.

<sup>256</sup> Evidence, Ms May, 4 November 2016, p 7.

<sup>257</sup> Evidence, Mr Anthony Lean, Chief Executive, SIRA, 7 November 2016, p 36.

<sup>258</sup> Correspondence, from Mr Borden, to Chair, 6 December 2016, p 4 and Correspondence, from Mr David Hutton, Executive Manager – General Accident & Lifestyle Claims NSW, GIO, to Chair, 1 December 2016, p 8.

<sup>259</sup> Correspondence, from Mr Hutton, to Chair, 1 December 2016, p 9.

<sup>260</sup> Correspondence, from Mr Borden, to Chair, 6 December 2016, p 4.

<sup>261</sup> See, Correspondence, from Mr Borden, to Chair, 6 December 2016, p 4; Correspondence, from Mr Hutton, to Chair, 1 December 2016, pp 9-10.

<sup>262</sup> Correspondence, from Mr Mark Coyne, Chief Executive Officer, EML, to Chair, 1 December 2016, p 5.

<sup>263</sup> See for example, Submission 84, NSW Self Insurers Association, p 2; Submission 65, Law Society of New South Wales, p 3.

***Committee comment***

- 4.48** The committee appreciates that to provide procedural fairness, work capacity notices need to include detailed information concerning a worker's compensation claim including references to legislative timeframes and other details of the administrative review process. However, given the length and complexity of these documents, it is not surprising that injured workers – who until recently have had to consider work capacity notices without the benefit of legal advice – may find such a document overwhelming and potentially forgo opportunities to have their matter reviewed. We believe that this situation is undesirable and recommend that icare work with scheme agents to ensure that notices are written in plain English, and consider options to shorten the format of these documents.
- 

**Recommendation 8**

That icare work with scheme agents to:

- ensure that notices are written in plain English
  - consider options to shorten the format of notices.
- 

- 4.49** This recommendation should be considered in conjunction with the discussion in Chapter 5 concerning the development of a single notice for all workers compensation decisions.

- 4.50** The committee understands that it is necessary to provide workers with supporting documentation relevant to a work capacity decision such as medico-legal reports. However, we can see no reason why such documentation could not be provided to workers at an earlier stage so that they can be read and understood prior to the issuing of the work capacity notice. In light of the evidence suggesting that injured workers can be overwhelmed by the volume and complexity of these attachments, we recommend that SIRA amend the *Guidelines for claiming workers compensation* so that injured workers are provided with any supporting documents relevant to a work capacity decision in real time or at pre-determined stages throughout the life of a claim, rather than only as attachments to a work capacity notice.
- 

**Recommendation 9**

That SIRA amend the *Guidelines for claiming workers compensation* so that injured workers are provided with any supporting documents relevant to a work capacity decision in real time or at pre-determined stages throughout the life of a claim, rather than only as attachments to a work capacity notice.

---

- 4.51** The legislation governing a work capacity decision is complex and that complexity is increased with sometimes multiple guidelines also being relevant to the decision. While we acknowledge there have been some steps to reintroduce legal assistance for some challenges to work capacity decisions, there is no logical reason to treat work capacity decisions as separate to liability decisions in the scheme. That distinction is both complex and artificial.
-

## Suitable employment

- 4.52** The concept of ‘suitable employment’ is critical to the determination of an injured worker’s ‘current work capacity’,<sup>264</sup> which in turn determines their entitlement to weekly compensation payments in accordance with ss 36-38 of the 1987 Act. Put simply, a worker will only be entitled to compensation if they are both unable to return to their pre-injury employment **and** unable to return to work in other suitable employment.
- 4.53** ‘Suitable employment’ is defined in s 32A of the 1987 Act and takes into account factors such as a worker’s work capacity, age, education, skills and work experience, as well as details of their return to work and injury management plans and rehabilitation support.<sup>265</sup> The second limb of the definition lists factors that are **not** considered in the definition, including:
- whether the work or the employment is available
  - whether the work or the employment is of a type or nature that is generally available in the employment market
  - the nature of the worker’s pre-injury employment
  - where the worker resides.<sup>266</sup>
- 4.54** Numerous stakeholders were concerned about the operation of this provision. This section considers the second limb of the definition and the use of vocational assessments in determining suitable employment. Employers’ engagement in return to work is discussed in Chapter 3.

### Second limb of definition

- 4.55** Many stakeholders took issue with the definition of suitable employment, and in particular, the factors that are excluded from consideration under the second limb of the definition.
- 4.56** The Australian Workers Union NSW Branch argued that excluding consideration of the availability of work, the nature of the worker’s pre-injury employment and where the worker lives ‘... allows insurers to reach manifestly unfair and absurd outcomes that severely limit or deny continued compensation payments when, in reality, there is no suitable employment.’<sup>267</sup>
- 4.57** Similarly, the NSW Bar Association called the provision ‘unrealistic and grossly unfair,’<sup>268</sup> stating:

The direction to disregard those matters [in the second limb] makes the determination of suitable employment almost entirely hypothetical and provides a ready avenue for

<sup>264</sup> Section 32A of the 1987 Act defines ‘current work capacity’ as a worker’s ‘... inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment.’

<sup>265</sup> *Workers Compensation Act 1987*, s 32A(a).

<sup>266</sup> *Workers Compensation Act 1987*, s 32A(b).

<sup>267</sup> See, Submission 7, Australian Workers Union NSW Branch, p 2; Submission 67, New South Wales Teachers Federation, p 9.

<sup>268</sup> Submission 6, NSW Bar Association, p 12.

determination of the right to weekly benefits. It is the cause of significant injustice within the workers compensation scheme.<sup>269</sup>

- 4.58** The Law Society of New South Wales argued that allowing scheme agents to interpret and apply the definition of suitable employment exacerbates the inherent unfairness of the matters excluded under the second limb of the definition:

Any system that puts the determination of suitable employment solely in the hands of an insurer and entitles an insurer to disregard factors such as the state of the employment market or the claimant's place of residence is inherently unfair.<sup>270</sup>

- 4.59** The Law Society argued further that the definition '... encourages insurers to adopt unrealistic approaches to return to work and to use the work capacity decision process as a means by which to terminate a worker's benefits rather than to achieve a sustainable and realistic return to work objective.'<sup>271</sup>

- 4.60** The Australian Lawyers Alliance echoed these sentiments, also expressing concern about the subjective nature of the decisions made by insurers applying the definition of suitable employment:

The insurer makes the decision as to the whether the worker can work, whether the worker is undertaking sufficient work to the satisfaction of the insurer, what work the worker could undertake (regardless of whether that work actually exists), what the worker could earn in that notional employment and how much in weekly payments the worker will receive. The arbitrariness, subjectivity, inherent inequity and unfairness of these decisions does not need further amplification.<sup>272</sup>

- 4.61** The CFMEU was similarly inclined: 'There is no logical basis for including the second limb in the definition beyond making it easier for insurer to remove injured workers from the system through the work capacity regime.'<sup>273</sup>

- 4.62** The New South Wales Teachers Federation noted that this provision is particularly impractical for workers living in rural communities:

Work Capacity Decisions can be based on the deemed ability of an injured worker to perform work which may simply not exist in their community and can result in negative PIAWE [pre-injury average weekly earnings] payments related to jobs that don't actually exist. Many rural communities experience high levels of unemployment while much of the available work is within small and family owned businesses. It is unrealistic to expect an injured teacher to find clerical or retail employment in these circumstances.<sup>274</sup>

- 4.63** Key legal organisations proposed abolishing or significantly amending the definition of suitable employment. For example, the Law Society of New South Wales proposed removing

---

<sup>269</sup> Submission 6, NSW Bar Association, p 12.

<sup>270</sup> Submission 65, Law Society of New South Wales, p 2.

<sup>271</sup> Submission 65, Law Society of New South Wales, p 2.

<sup>272</sup> Submission 74, Australian Lawyers Alliance, p 14.

<sup>273</sup> Submission 61, CFMEU, p 28.

<sup>274</sup> Submission 67, New South Wales Teachers Federation, p 10.

the second limb of the current definition of suitable employment and reinstating the pre-2012 definition of suitable employment.<sup>275</sup>

- 4.64** The Australian Lawyers Alliance also called for the abolition of the second limb of the definition and advocated a test of actual, and not theoretical, employment as contained in the draft recommendations to the Parkes Project.<sup>276</sup> Likewise, the NSW Bar Association proposed that the definition of suitable employment be amended to require consideration of the realistic prospect of a worker obtaining suitable employment in their particular circumstances.<sup>277</sup>
- 4.65** This call was echoed by the CFMEU and the New South Wales Teachers Federation.<sup>278</sup> Further, it was suggested by the New South Wales Teachers Federation that ‘the actual test for work must be linked to work that not only actually exists but is actually providing employment for the specific injured worker.’<sup>279</sup>

### **Vocational assessments**

- 4.66** Various review participants expressed concern about vocational assessments, which are undertaken by private providers and are used to determine what work may be suitable for an injured worker.
- 4.67** The Law Society of New South Wales stated that such vocational assessments often fail to take into account whether the job is realistically available or suitable to the workers:

It is our members’ experience that they [organisations performing vocational capacity assessments] focus almost exclusively on the hypothetical availability of a job in the open labour market for which the claimant may (and often may not) be physically and psychologically suited. However, these organisations often avoid consideration of whether the type of job is realistically available to the claimant in the current labour market or whether it is realistically suitable to the claimant having regard to his or her education, training and work history and/or residence.<sup>280</sup>

- 4.68** The committee also heard concerns expressed by individuals who have attended vocational assessments. For example, one injured former police officer told the committee they felt pressured by the assessors to return to work and was not aware that attendance at the appointments was not mandatory:

I was sent to see vocational assessors who also put me under pressure to return to work. The assessors came up with jobs that I could not do but put pressure on me to do them. Going to the vocational assessments was making me regress due to the pressure I felt to return to work I later learnt that I did not have to go to these appointments if I was not ready. I did not know this at the start as the case workers made out that I had no choice but to go.<sup>281</sup>

<sup>275</sup> Submission 65, Law Society of New South Wales, p 3.

<sup>276</sup> See, Submission 74, Australian Lawyers Alliance, p 14; Submission 54, WIRO, Appendix D, p 3.

<sup>277</sup> Submission 6, NSW Bar Association, p 1.

<sup>278</sup> Submission 61, CFMEU, pp 28-29; Submission 67, New South Wales Teachers Federation, p 10.

<sup>279</sup> Submission 67, New South Wales Teachers Federation, p 10.

<sup>280</sup> Submission 65, Law Society of New South Wales, p 2.

<sup>281</sup> Submission 39, Name suppressed, p 2.

4.69 Another injured worker, Mr John Schofield, said that the vocational assessment he attended did not consider his injuries or take into account the recommendations of his occupational therapist when determining suitable employment.<sup>282</sup>

4.70 The Workers Health Centre proposed using vocational assessments to better support return to work:

The vocational assessment not be utilised for the purpose of making a work capacity assessment and decision. The definition of the vocational assessment be amended to assist the injured worker and make recommendations to effect a workers return to work.<sup>283</sup>

### *Committee comment*

4.71 The committee notes stakeholders' concerns about the second limb of the definition of suitable employment, as set out in s 32A(b) of the 1987 Act. While the definition is designed to incentivise return to work, and the vast majority of injured workers do so as quickly as possible, we also acknowledge stakeholders' concerns that the definition can pose challenges for some workers, particularly those living in rural areas. At the same time, it is important to recognise that there is an obligation on all injured workers to seek suitable re-employment. The committee intends to keep a watching brief on this issue.

4.72 Additionally, the committee expects that vocational assessment organisations better promote meaningful employment for injured workers in the future.

## **Calculation of pre-injury average weekly earnings**

4.73 If an injured worker is unable to perform his or her pre-injury job or suitable alternative duties as a result of a work-related injury or illness they are entitled to receive weekly compensation payments. The amount of weekly compensation payable is calculated by reference to the worker's pre-injury average weekly earnings (PIAWE). As noted above, a decision by an insurer about the amount of an injured worker's PIAWE or that affects a worker's entitlement to weekly payments of compensation is a work capacity decision.

4.74 The methodology for calculating PIAWE was altered as part of the 2012 reforms to the workers compensation system and is now contained in ss 44C – 44I together with Schedule 3 of the 1987 Act.

4.75 According to icare, the methodology applicable in most calculations of PIAWE is as follows:

PIAWE is the average of a worker's weekly earnings while employed by the same employer over the 52 weeks before the injury occurred. The calculation may include overtime, shift allowances, bonus payments, commission, work related employee benefits and paid leave.

PIAWE does not include periods of unpaid leave or when the worker was not actually working.

---

<sup>282</sup> Submission 46, Mr John Schofield and Mrs Petronella Schofield, p 2.

<sup>283</sup> Submission 68, Workers Health Centre, p 4.

...

Weekly compensation payments are calculated based on a percentage of average weekly earnings (a maximum amount is set). After 52 weeks of weekly payments, the worker's PIAWE will be re-calculated to remove any overtime and shift allowances.<sup>284</sup>

**4.76** In addition, how PIAWE is calculated will be different depending on factors such as:

- how long the worker has worked for their current employer
- whether the worker was working part time but seeking full time employment at the time their injury occurred
- whether the worker was employed by two or more employers at the time the injury occurred.<sup>285</sup>

**4.77** Following the 2012 reforms weekly compensation payments are 'stepped down' over three key periods: at 13 weeks; at 14-130 weeks; and at 260 weeks (five years). During the first entitlement period, the injured worker receives 95 per cent of their average weekly earnings, whereas in the second and third entitlement periods this is reduced to 80 per cent subject to a maximum cap.<sup>286</sup> Weekly payments cease for most workers, apart from those assessed as having a whole person impairment of more than 20 per cent, after 260 weeks.<sup>287</sup> Entitlements are discussed further in Chapter 6.

#### Concerns about PIAWE calculation

**4.78** Many review participants contended that the calculation of PIAWE was overly complicated and disadvantaged workers. For example, the CFMEU called the PIAWE system 'complex, inaccessible, poorly understood and costly.'<sup>288</sup> The CFMEU explained some of the considerations that are interpreted as part of PIAWE:

The insurer must interpret the legislative provisions, the relevant industrial instrument and payslips to determine what is actually included in the scope of PIAWE prior to commencing the actual calculation.<sup>289</sup>

**4.79** The CFMEU concluded that scheme agent representatives and merit reviews officers are 'ill-equipped' to determining PIAWE as many do not have legal or industrial experience.<sup>290</sup>

**4.80** The NSW Bar Association referred to PIAWE as complex and argued that this causes confusion and delay in the processing of claims.<sup>291</sup>

<sup>284</sup> icare, *pre-injury average weekly earnings*, <https://www.workersinsurance.icare.nsw.gov.au/workers-insurance-claims/payments-and-expenses/weekly-payments/archive/calculating-pre-injury-average-weekly-earnings>.

<sup>285</sup> *Workers Compensation Act 1987*, schedule 3.

<sup>286</sup> *Workers Compensation Act 1987*, ss 36-38.

<sup>287</sup> *Workers Compensation Act 1987*, s 39.

<sup>288</sup> Submission 61, CFMEU, p 38.

<sup>289</sup> Submission 61, CFMEU, p 39.

<sup>290</sup> Submission 61, CFMEU, p 39.

**4.81** The committee also heard that the PIAWE caused particular frustration for workers who are injured for a short period. The Public Service Association of NSW explained the predicament:

A worker injured and unable to work will receive a compensation payment for the following seven-day period of an amount that is either 95 per cent of their PIAWE or the maximum weekly compensation amount, whichever is the lesser. The problem arises when the worker is away from work for less than a week, as the legislation effectively creates a cap on the amount that can be earned in that seven-day period so that it cannot be greater than the compensation amount.<sup>292</sup>

**4.82** Mr Stewart Little, General Secretary, Public Service Association of NSW, explained that shift workers entitled to penalty rates who are injured for a short time and then return to work such as prison officers, are the most disadvantaged.<sup>293</sup>

**4.83** Mr Little also raised concern that injured workers would be unwilling to report injuries once they are aware that they could potentially lose earnings based on the calculation of PIAWE.<sup>294</sup> Mr Little further argued that the provisions may distort the true number of workers compensation claims – which appear to be declining – as workers choose to take sick leave instead of claiming workers compensation:

Often, prison officers, for example, have a huge rate of injury and that is reflected in their sick leave because they do not claim workers compensation, particularly for short periods, because if they do, and the way that they work out the average weekly earnings, they are penalised. It is then reflected in the higher rates of absenteeism. It just gets shifted.<sup>295</sup>

**4.84** Several stakeholders, including the Law Society and Australian Lawyers Alliance, supported the following principles adopted by the Parkes Project in relation to PIAWE:

1. The calculation of Pre Injury Average Weekly earnings should be a simple and fair process
2. The calculation method of PIAWE should provide a fair outcome regardless of the class of worker (for example, to ensure workers are not penalised for working more than one job, part time hours, or are aged)
3. 'PIAWE' should reflect the current value of 'pre-injury average weekly earnings' (Indexation) as should the Maximum cap on weekly payments.<sup>296</sup>

---

<sup>291</sup> Submission 6, NSW Bar Association, p 17.

<sup>292</sup> Correspondence, from Mr Stewart Little, General Secretary, Public Service Association of NSW, to Chair, 30 November 2016, p 1.

<sup>293</sup> Correspondence, from Mr Little, to Chair, 30 November 2016, p 1.

<sup>294</sup> Evidence, Mr Stewart Little, General Secretary, Public Service Association of NSW, 4 November 2016, p 31.

<sup>295</sup> Evidence, Mr Little, 4 November 2016, p 26.

<sup>296</sup> Submission 54, WIRO, Appendix D, p 3; Submission 65, Law Society of New South Wales, p 9 and Submission 74, Australian Lawyers Alliance, p 6.

### Options for reform

**4.85** Proposals to enhance the calculation of PIAWE put forward in this review included:

- removing the 52 week step down in the calculation of PIAWE<sup>297</sup>
- enhancing the first entitlement period (13 weeks) to 100 per cent of PIAWE<sup>298</sup>
- replacing the current provisions in the 1987 Act concerning the calculation of PIAWE with the pre-2012 provisions<sup>299</sup>
- replacing the current provisions with a single definition, namely that PIAWE is ‘the average of an employee’s pre-injury earnings during the 52 week period prior to injury or where an employee has not been employed for 52 weeks, the period of continuous service prior to injury’<sup>300</sup>
- paying an injured worker on daily rather than weekly basis.<sup>301</sup>

**4.86** However, other review participants supported the current provisions. For example, the Australian Industry Group argued the current PIAWE calculation methodology better meets the needs of injured workers than the previous calculation, as the calculation now includes shift penalties and overtime (averaged over the previous 12 months) which were not part of the pre-2012 calculations.<sup>302</sup>

**4.87** Indeed, the Australian Industry Group argued against amending the current provision:

It is Ai Group’s views that the current approach to weekly compensation is a reasonable balance between providing fair compensation to injured workers, with a particular focus on those that have the highest needs ... and providing an incentive to return to work for injured workers who have a work capacity.<sup>303</sup>

**4.88** SIRA agreed that the current PIAWE calculation methodology better takes in account the complexity of the modern working environment:

... PIAWE more adequately reflects an individual’s circumstances, as it more accurately reflects complex pay and conditions inherent in modern industrial arrangements. Since PIAWE was introduced, a worker’s average weekly payments have increased as the rate takes into account the workers total average earnings, rather than the base award rate for their occupation.<sup>304</sup>

<sup>297</sup> See, Submission 65, Law Society of New South Wales, p 9; Submission 74, Australian Lawyers Alliance, p 18.

<sup>298</sup> See, Submission 65, Law Society of New South Wales, p 9; Submission 74, Australian Lawyers Alliance, p 18.

<sup>299</sup> Submission 6, NSW Bar Association, p 17.

<sup>300</sup> Submission 61, CFMEU, p 41.

<sup>301</sup> Evidence, Mr Little, 4 November 2016, p 32.

<sup>302</sup> Submission 28, Australian Industry Group, p 11.

<sup>303</sup> Submission 28, Australian Industry Group, p 12.

<sup>304</sup> Answers to pre-hearing questions on notice, SIRA, 27 October 2016, p 14.

- 4.89** In addition, SIRA advised that that the *Workers Compensation Amendment Act 2015* introduced a provision to allow regulations to be made that change the way that PIAWE is calculated:

The 2015 legislative amendments introduced a provision to allow Regulations to vary the method by which pre-injury average weekly earnings are to be calculated in respect of a worker or class of workers; prescribe a benefit or class of benefit as a non-pecuniary benefit; and prescribe a payment, allowance, commission or other amount, or class of amount, as a base rate of pay exclusion.<sup>305</sup>

- 4.90** SIRA advised that is consulting with stakeholders about how this regulation should operate:

SIRA invited stakeholders to provide written submissions as to how this Regulation should operate. While stakeholders are generally supportive of providing a simplified methodology for calculating PIAWE, a wide range of views have been put forward as to how this is best achieved. SIRA is continuing to consult stakeholders in developing advice to Government about the proposed Regulation.<sup>306</sup>

- 4.91** SIRA also informed the committee that changes to PIAWE will be designed to ‘provide fair equitable and appropriate access to weekly payments’, and that it had engaged an independent legal adviser to lead further stakeholder consultation.<sup>307</sup>

- 4.92** In this regard, the Law Society of New South Wales and the Australian Lawyers Alliance submitted that, as the calculation of PIAWE is vital for a quick and efficient determination of a worker’s entitlement to weekly payments, it should be urgently reformed by legislative amendment rather than by regulatory change.<sup>308</sup>

#### *Committee comment*

- 4.93** The committee appreciates that the calculation of PIAWE under the current provisions of the 1987Act is complex, and that this has the potential to cause delays in the processing of claims.

- 4.94** We support review participants’ calls for a fairer, more transparent PIAWE calculation method and note that SIRA is currently consulting with stakeholders to develop a proposed regulation for the NSW Government. We are hopeful that this regulation will address some of the concerns expressed in this review and believe that that SIRA expedite its stakeholder consultation process regarding the calculation of pre-injury average weekly earnings and develop a regulation on this issue as a matter of priority.

---

<sup>305</sup> Answers to pre-hearing questions on notice, SIRA, p 14.

<sup>306</sup> See, Answers to pre-hearing questions on notice, SIRA, p 14; Correspondence, Ms Carmel Donnelly, Executive Director, Workers and Home Building Compensation Regulation, SIRA, to Chair, 29 November 2016, pp 1-2.

<sup>307</sup> Answers to pre-hearing questions on notice, SIRA, p 14.

<sup>308</sup> See, Submission 65, Law Society of New South Wales, p 9; Submission 74, Australian Lawyers Alliance, p 15.

---

### Recommendation 10

That SIRA expedite its stakeholder consultation process regarding the calculation of pre-injury average weekly earnings and develop a regulation on this issue as a matter of priority.

---

### Stay provision

- 4.95** Where a worker applies for a review of a work capacity decision, s 44BC of the 1987 Act provides for a stay, or suspension of that decision, to apply for the duration of the review process. The provision was introduced as part of 2015 reforms of the workers compensation system.
- 4.96** Under s 44BC, the stay operates by reference to the date on which the worker was notified (or required under s 44BB to be notified) of the relevant decision, namely:
- the work capacity decision to be reviewed (in the case of an application for internal review)
  - the decision on the internal review (in the case of an application for review by the Authority), or
  - the findings of the merit review (in the case of an application for review by WIRO).
- 4.97** The provision effectively prevents the insurer from taking any action based on the decision while the decision is stayed. However, review participants expressed concern about the practical implications of the provision and the ability of insurers to misinterpret its meaning.
- 4.98** The CFMEU noted that where a scheme agent does not make a decision within the legislated timeframe, usually 30 days, the worker is still bound by this timeframe in order to take advantage of the stay provisions:
- The injured worker applies for an internal review. Section 44BB requires the insurer to make an internal review decision within 30 days. The insurer fails to make the decision within that 30 day period and in fact takes 40 days. The period by which the next application [for review] must be made in order to claim the protection of s 44BC is then 20 days instead of 30 days because the provision operates based on the date on which the injured worker was required to be notified. The injured worker loses 10 days grace due to the actions of the insurer.<sup>309</sup>
- 4.99** The CFMEU noted that an injured worker can make an application for merit review from the date that they were required to be notified, but most injured workers wait for the internal review decision before deciding whether to take the next step in the process.<sup>310</sup>
- 4.100** WIRO identified a separate concern about the operation of s 44BC, namely that insurers can unfairly interpret s 44BC to the detriment of the worker:

---

<sup>309</sup> Submission 61, CFMEU, pp 32-33.

<sup>310</sup> Submission 61, CFMEU, p 33.

Some scheme agents take the view that if payments have been stopped after (for instance) Merit Review but before the commencement of the Procedural Review then they cannot be resumed, because no “action” may be taken by an Insurer while the decision is stayed.

This is with respect a complete misreading of section 44BC(1), which only prohibits the taking of any action “based on the decision.” The resumption of weekly payments is hardly going to be action based on a decision to cease the same payments.<sup>311</sup>

- 4.101** WIRO proposed that the government clarify with amending legislation, if necessary, that weekly payments should continue until a final decision is made through the review process.<sup>312</sup>

***Committee comment***

- 4.102** We acknowledge that s 44BC of the 1987 Act was introduced as part of the 2015 reforms and support the NSW Government’s initiative for promoting greater fairness in the work capacity process.
- 4.103** However, the committee was disappointed to learn that some insurers are undermining the effectiveness of s 44BC of the 1987 Act. The committee expects insurers to interpret s 44BC of the 1987 Act in the spirit in which it was intended; a stay of a work capacity decision should be in place during the review process, and a worker’s ability to access a stay should not be limited through the actions of an insurer. Similarly, it appears unjust that a stay provision designed to benefit workers should be used to their detriment by denying the resumption of weekly payments. We recommend that SIRA issue a guidance note explaining the appropriate operation of s 44BC of the *Workers Compensation Act 1987*.

---

**Recommendation 11**

That SIRA issue a guidance note explaining the appropriate operation of s 44BC of the *Workers Compensation Act 1987*.

---

---

<sup>311</sup> Submission 54, WIRO, p 17.

<sup>312</sup> Submission 54, WIRO, p 18.

## Chapter 5      Dispute resolution

This chapter examines the dispute resolution processes available in the New South Wales workers compensation system. The chapter commences by discussing stakeholders' specific concerns with the two separate processes available for resolving disputes over work capacity decisions and liability matters. It then considers complications arising from having a bifurcated dispute resolution system in place. The chapter also considers options for reform, including a proposal to develop a single forum to resolve all disputes in workers compensation matters.

### Dispute resolution process for work capacity decisions

- 5.1** As mentioned in Chapter 4, a work capacity decision may be subject to an administrative review under s 44BB of the *Workers Compensation Act 1987* (the 1987 Act) and a judicial review by the Supreme Court of NSW.
- 5.2** SIRA's *Guidelines for claiming workers compensation* outlines the administrative review process:
- A work capacity decision can only be reviewed if the worker makes an application for the decision to be reviewed. There are three types of administrative review:
1. an internal review, where the insurer undertakes the review and informs the worker of the review decision
  2. a merit review, where SIRA undertakes the review and informs the worker and insurer of its findings and recommendations
  3. a procedural review, where the Workers Compensation Independent Review Officer (WIRO) undertakes the review and informs the worker, insurer and SIRA of its findings.<sup>313</sup>
- 5.3** Judicial review is initially available in the Supreme Court of NSW, followed by the NSW Court of Appeal.
- 5.4** As discussed in Chapter 3, the Workers Compensation Regulation 2016 allows workers to access legal representation to challenge a work capacity decision in certain circumstances. However, before this regulation was introduced in December 2016, WIRO noted that lawyers provided advice on a pro bono basis for only a very small number of decisions.<sup>314</sup>
- 5.5** This review saw many stakeholders express concern about the administrative review process in place for work capacity decisions. Particular concerns relating to the operation of the internal review and merit review services are detailed below. Mr Kim Garling, Workers Compensation Independent Review Officer, WIRO, also noted that the whole concept has not worked and it is acknowledged by most participants that it is 'not a successful method of determining disputes involving injured workers.'<sup>315</sup>

<sup>313</sup> SIRA, *Guidelines for claiming workers compensation*, 2016, p 26.

<sup>314</sup> Submission 54, WIRO, p 7.

<sup>315</sup> Evidence, Mr Kim Garling, Workers Compensation Independent Review Officer, WIRO, 7 November 2016, p 12.

- 5.6** Complexity was a key criticism identified by review participants, with Mr Garling observing that the procedural and legal rules surrounding administrative reviews had grown:

We now have, effectively, practice rules around merit, we have guidelines on proceeding to a merit review and internal reviews. It has become as complex as the Workers Compensation Commission process.<sup>316</sup>

- 5.7** The Australian Services Union/United Services Union said that workers, especially those with limited resources or capacity, find the regulatory system underpinning the administrative review process overwhelming:

All of these review processes are undertaken against the background of a complex regulatory framework in which the insurer has access to resources beyond the scope of a worker. This imbalance extends to commissioning evidence and is exacerbated by unrealistic time periods to respond to evidence. The injured worker has limited resources or capacity to comprehend such wide ranging issues and limited capacity to identify what alternative evidentiary material could have been submitted.<sup>317</sup>

- 5.8** Likewise, the NSW Bar Association observed it was ‘absurd’ and ‘impracticable’ for a worker to navigate the administrative review process:

The fact that a work capacity decision has the potential to pass through five levels of decision making is absurd. Of course the reality is that it is utterly impracticable and probably impossible for an injured worker to prosecute their rights through those five stages.<sup>318</sup>

- 5.9** The NSW Bar Association argued that the administrative review process is ‘failing’ as most workers who unsuccessfully challenge their decisions ‘simply give up because the system is too difficult to negotiate’.<sup>319</sup>

- 5.10** Review participants were particularly concerned that workers from non-English speaking backgrounds are at an additional disadvantage when accessing the administrative review process.<sup>320</sup> Ms Rita Mallia, State President, Construction, Forestry, Mining and Energy Union (CFMEU), stated that many of the union’s non-English speaking members found the administrative review process extremely challenging:

Many of our members do not come from English speaking backgrounds. They are not articulate. They do not fill out forms. They find dealing with bureaucracy one of the most stressful experiences of their lives. And many do not even have access to proper legal representation ...<sup>321</sup>

---

<sup>316</sup> Evidence, Mr Garling, 7 November 2016, p 13.

<sup>317</sup> Submission 5, Australian Services Union/United Services Union, p 4.

<sup>318</sup> Submission 6, NSW Bar Association, p 12.

<sup>319</sup> Submission 6, NSW Bar Association, p 12.

<sup>320</sup> See, Evidence, Mr Garling, 7 November 2016, p 12.

<sup>321</sup> Evidence, Ms Rita Mallia, State President, CFMEU, 4 November 2016, p 45.

- 5.11** This sentiment was echoed by Ms Emma Maiden, Assistant Secretary, Unions NSW, who told the committee that workers from non-English speaking backgrounds have ‘no chance’ of trying to navigate the system.<sup>322</sup>
- 5.12** The committee heard that workers from non-English speaking backgrounds do receive some assistance from scheme agents.<sup>323</sup> For example, Allianz uses interpreters in certain circumstances:
- Allianz uses interpreters at all verbal communication touch points when a worker nominates that their spoken language is not English, including during fair notice and on the delivery of a work capacity decision. This ensures that communication of the decision is fair and transparent and outlines the dispute mechanism process and third party support services available.<sup>324</sup>
- 5.13** However, Allianz acknowledged that it is not general practice to provide translations of written communications, and said it would be beneficial if scheme agents could access a service to translate notices into the worker’s spoken language.<sup>325</sup>
- 5.14** EML, QBE, GIO and CGU all stated that they use interpreters and/or provide translations of key documents such as work capacity decisions and internal review decisions, where possible.<sup>326</sup> However, EML remarked that ‘... there may be a need for a more consistently effective approach. In particular, this would be beneficial during the work capacity assessment process, and when communicating the decisions in writing.’<sup>327</sup> Similarly, CGU welcomed the opportunity to identify and implement ways that non-English speaking workers could be further supported to navigate the scheme.<sup>328</sup>

### *Committee comment*

- 5.15** We acknowledge concerns about the complexity of the administrative review process for work capacity decisions. The committee concurs with the need for a simplified, more accessible dispute resolution process. We expect that some of these concerns will be alleviated now that workers can access legal representation to challenge a work capacity decision. Additionally, it is anticipated that the recommendations made in Chapter 4 regarding the format of notices and the provision of any supporting documents in real time or at pre-determined stages

<sup>322</sup> Evidence, Ms Emma Maiden, Assistant Secretary, Unions NSW, 4 November 2016, p 40.

<sup>323</sup> See Evidence, Mr Rowan Kernebone, Coordinator, Injured Workers Support Network, 7 November 2016, p 4.

<sup>324</sup> Correspondence, from Mr Mike Siomiak, General Manager, NSW Workers Compensation, Allianz Australia Workers Compensation (NSW) Ltd, to Chair, 1 December 2016, p 10.

<sup>325</sup> Correspondence, from Mr Siomiak, to Chair, 1 December 2016, p 11.

<sup>326</sup> See, Correspondence, from Mr Mark Coyne, Chief Executive Officer, EML, to Chair, 5 December 2016, p 6; Correspondence, from Mr Andrew Borden, General Manager, Workers Compensation, QBE Australia and New Zealand, 6 December 2016, pp 4-5; Correspondence, from Mr David Hutton, Executive Manager – General Accident & Lifestyle Claims, GIO, to Chair, 1 December 2016, p 10; Correspondence, from Mr Dustin Bartley, State Manager, Workers Compensation, CGU, to Chair, 1 December 2016, p 5.

<sup>327</sup> Correspondence, from Mr Coyne, to Chair, 5 December 2016, p 6.

<sup>328</sup> Correspondence, from Mr Bartley, to Chair, 1 December 2016, p 5.

throughout the life of a claim will assist injured workers navigate the system. The recommendations we make later in this chapter are also pertinent.

- 5.16** The committee recognises that injured workers from non-English speaking backgrounds face enormous challenges when navigating the workers compensation system. While we acknowledge that scheme agents are providing some level of service, there is a need for greater consistency. To support the needs of these workers we recommend that icare develop a mandatory standard for the use of interpreters and translation services by scheme agents during the life of a workers compensation claim.
- 

### **Recommendation 12**

That icare develop a mandatory standard for the use of interpreters and translation services by scheme agents during the life of a workers compensation claim.

---

- 5.17** The distinction between work capacity decisions and liability decisions produces unnecessary legal complexity and additional costs in the scheme. The committee therefore recommends that the NSW Government investigate removing the distinction between work capacity decisions and liability decisions in the workers compensation scheme. This issue is also addressed further in the committee's consideration of the dispute resolution process.
- 

### **Recommendation 13**

That the NSW Government investigate removing the distinction between work capacity decisions and liability decisions in the workers compensation scheme.

---

### **Internal review**

- 5.18** Where a worker is dissatisfied with a work capacity decision, the first step is to request that their insurer conduct an internal review of the decision. The insurer has 30 days from the request to either affirm the original decision or issue a new decision.<sup>329</sup>
- 5.19** SIRA advised that approximately 23 per cent of work capacity decisions are challenged via an internal review and that 40 per cent of these matters result in better outcomes for workers.<sup>330</sup>
- 5.20** Mr Paul Macken, Member, Injury Compensation Committee, Law Society of New South Wales, described the practicalities of how an internal review operates:

The insurer will pass the volume of material onto somebody else within the insurer and they will review it without recourse to the original decision and they will come up with their own independent decision.<sup>331</sup>

---

<sup>329</sup> Submission 54, WIRO, p 7.

<sup>330</sup> SIRA, *NSW workers compensation system inaugural performance report 2014/2015*, 2016, p 27.

<sup>331</sup> Evidence, Mr Paul Macken, Member, Injury Compensation Committee, Law Society of New South Wales, 4 November 2016, p 11.

---

- 5.21** Mr Macken highlighted a potential conflict of interest in the internal review process: ‘Where an insurance company is making a decision about how much money an insurance company pays out, that is, in my view, always going to create a bit of a problem.’<sup>332</sup> He further noted that the approach taken to internal review varies across the five scheme agents.<sup>333</sup>
- 5.22** There was also some concern that workers are not adequately informed of their rights and responsibilities in regards to internal reviews.<sup>334</sup> In response to these concerns, SIRA noted that at the first instance a worker is provided with information and support from their case manager.<sup>335</sup> Additionally, SIRA remarked that the *Guidelines for claiming compensation benefits* ‘support, inform and guide’ all participants in the workers compensation scheme, including scheme agents, in relation to the internal review process.<sup>336</sup>
- 5.23** SIRA also informed the committee that it monitors the performance of scheme agents, including their the internal review processes and where appropriate, can take action under the insurer supervision model.<sup>337</sup>

### **Merit Review Service**

- 5.24** Following an internal review, a worker can seek a review by SIRA’s Merit Review Service, providing that request is made within 30 days of the receipt of the reviewed decision or after expiry of 30 days from the date of the request for internal review.<sup>338</sup>
- 5.25** SIRA advised that a merit review is a new decision as opposed to an appeal of the insurer’s work capacity decision:

A merit review is a fresh decision made by an independent Merit Reviewer, based on the merits of the issues raised in a work capacity decision. It is not an appeal looking at the validity or correctness of the preceding insurer’s internal review or the original insurer work capacity decision.<sup>339</sup>

- 5.26** SIRA also explained that there are various reasons a merit reviewer may make different findings than a scheme agent:

That difference may be due to the Merit Reviewer making different findings of facts or a different application of the law to the facts of the case, or it may be due to other factors including that there may be more relevant information now available, or that there may have been a change in the workers condition and capacity since the earlier decisions.<sup>340</sup>

<sup>332</sup> Evidence, Mr Macken, 4 November 2016, p 5.

<sup>333</sup> Evidence, Mr Macken, 4 November 2016, p 9.

<sup>334</sup> See, Mr Tim Concannon, Member, Injury Compensation Committee, Law Society of New South Wales, 4 November 2016, p 5; Evidence, Ms Gail Lay, 4 November 2016, p 39.

<sup>335</sup> Answers to pre-hearing questions on notice, SIRA, 27 October 2016, p 13.

<sup>336</sup> Answers to pre-hearing questions on notice, SIRA, p 12.

<sup>337</sup> Answers to pre-hearing questions on notice, SIRA, p 13.

<sup>338</sup> Submission 54, WIRO, p 7.

<sup>339</sup> Answers to questions on notice, SIRA, 2 December 2016, p 16.

<sup>340</sup> Answers to questions on notice, SIRA, p 16.

- 5.27** SIRA informed the committee that ‘Of the 681 merit review applications finalised in 2015/16, there were 22 applications (three per cent) where the outcome was less beneficial to a worker than the work capacity decision of the insurer.’<sup>341</sup> A new *Merit Review User Guide* was published by SIRA in August 2016.

***Provision of evidence in a merit review***

- 5.28** Section 44BB(3)(d) of the 1987 Act states that the worker and the insurer must provide such information as the Merit Reviewer may reasonably require for the purposes of the review.<sup>342</sup> SIRA advised of the reasoning behind this provision:

This ensures that the Merit Reviewer can determine the issues between the parties on the basis of all of the available relevant information, beyond the information that the parties may choose to provide in support of their position.<sup>343</sup>

- 5.29** However, review participants argued that workers are not in a position to collate the necessary evidence from their own service providers, especially without legal advice, within the 30-day time limit.<sup>344</sup> Ms Roshana May, New South Wales Branch President, Australian Lawyers Alliance, explained that workers are many times faced with refuting an extensive amount of evidence that the insurer has collated which the individual has not previously seen.<sup>345</sup>

- 5.30** Similarly, Mr Macken suggested that the evidence-gathering process is not working as intended:

Part of the problem is that what informs the process to get you to the Merit Review service is a decision made by an insurer, informed by information and documentation generated by the insurer and put together by the insurer, and the insurer comes to a decision about how much money it will or will not pay. That is what goes to the Merit Review Service, without the benefit of legal advice, without the worker being able to say, ‘I do not agree with that doctor or that rehabilitation service provider. I would like to get my own evidence about that.’ That is not what is happening.<sup>346</sup>

- 5.31** The Law Society of New South Wales, together with the Australian Lawyers Alliance, noted that it was particularly challenging for workers to obtain vocational assessment reports to challenge those provided by the insurer within the time limit,<sup>347</sup> making their prospects of successfully challenging the review much slimmer.<sup>348</sup>

<sup>341</sup> Answers to questions on notice, SIRA, p 16.

<sup>342</sup> *Workers Compensation Act 1987*, s 44BB(3)(d).

<sup>343</sup> Answers to questions on notice, SIRA, p 5.

<sup>344</sup> See, Evidence, Ms Roshana May, New South Wales Branch President, Australian Lawyers Alliance, 4 November 2016, p 9; Evidence, Mr Macken, 4 November 2016, p 10.

<sup>345</sup> Evidence, Ms May, 4 November 2016, p 9.

<sup>346</sup> Evidence, Mr Macken, 4 November 2016, p 6.

<sup>347</sup> Evidence, Mr Concannon, 4 November 2016, p 9; Evidence, Ms May, 4 November 2016, p 10.

<sup>348</sup> Evidence, Mr Concannon, 4 November 2016, p 10.

- 5.32 In this regard, SIRA advised that of the 50 applications for merit review open as at November 2016, 80 per cent of cases saw workers submit additional documentation with their application.<sup>349</sup>

### *Independence of the Merit Review Service*

- 5.33 The Law Society of New South Wales and the NSW Bar Association were also concerned about the independence of the Merit Review Service. Both organisations suggested that embedding the Merit Review Service within SIRA was problematic given that the regulator is responsible for managing the appropriate balance of funds in the scheme and for determining if a worker should receive weekly entitlements out of those funds.<sup>350</sup> The CFMEU made similar representations.<sup>351</sup>

- 5.34 In response to concerns about a perceived conflict of interest, SIRA advised that:

SIRA as the regulator of workers compensation in NSW is not responsible for the management of statutory funds created by workers compensation premiums. As such, there is no conflict of interest with regard to the Merit Review Service. The creation of SIRA, Safe Work NSW and icare NSW through the *State Insurance and Care Governance Act 2015* removed any perceived conflict between insurance regulator and delivery functions.<sup>352</sup>

### *Consistency of decision making*

- 5.35 Another concern raised during the review related to the consistency of the Merit Review Service's decisions. WIRO reported anecdotal evidence of where identical decisions have been made by scheme agents, but have subsequently received widely differing outcomes following merit review.<sup>353</sup> WIRO said that this has caused concern for scheme agents:

Some insurers have said that they prefer the certainty of the Commission to the uncertainty of Merit Review. While insurers might understandably have a negative view of their decisions being overturned, it is a consistent complaint to WIRO that merit review is capable of producing almost totally unpredictable outcomes.<sup>354</sup>

### *Publishing merit review decisions*

- 5.36 The committee heard that following the publication of the new *Merit Review User Guide* in August 2016, SIRA has published eleven 'notable' merit review decisions on its website.<sup>355</sup> SIRA advised the committee of the purpose of publishing such decisions:

The publication of merit reviews is to enhance transparency, accountability and education and to provide guidance to workers, insurers, representatives and all scheme

<sup>349</sup> Answers to questions on notice, SIRA, p 5.

<sup>350</sup> See, Evidence, Mr Concannon, 4 November 2016, p 11; Submission 6, NSW Bar Association, p 12.

<sup>351</sup> Submission 61, CFMEU, p 34.

<sup>352</sup> Answers to pre-hearing questions on notice, SIRA, p 10.

<sup>353</sup> Submission 54, WIRO, p 18.

<sup>354</sup> Submission 54, WIRO, pp 18-19.

<sup>355</sup> See, Answers to questions on notice, SIRA, p 6; Evidence, Mr Anthony Lean, Chief Executive, SIRA, 7 November 2016, p 39.

stakeholders. Publication is intended to assist in improving claims management practices, work capacity decision making and minimise disputation in the workers compensation scheme.<sup>356</sup>

- 5.37 The guide specifies that published decisions are de-identified and anonymised.<sup>357</sup>
- 5.38 SIRA explained that the criteria and process for publishing ‘notable’ decisions involved seeking stakeholder feedback when new issue arise in the system, and replacing older decisions with more recent ones covering a broader range of issues.<sup>358</sup>
- 5.39 Ms Sherri Hayward, Industrial/Legal Officer, CFMEU, raised concerns with SIRA’s approach to publishing notable decisions, observing that in at least one case the regulator did not adequately de-identify a decision and failed to indicate that the decision was subject to a judicial review.<sup>359</sup> The decision was subsequently removed from the website following Ms Hayward’s intervention.<sup>360</sup>

### ***Committee comment***

- 5.40 The committee acknowledges that despite being established to provide a quick and simple dispute resolution process, workers are finding aspects of the Merit Review Service challenging, particularly in gathering evidence to challenge their insurer’s decision. We reiterate our earlier recommendations regarding simplified, more accessible work capacity notices and the provision of supporting documents to workers in real time or at pre-determined stages throughout the life of a claim. We are hopeful that these changes will assist injured workers when they come to challenge an internal review.
- 5.41 The committee was concerned to receive anecdotal evidence that Merit Review Service decisions can result in widely differing outcomes in respect of comparable internal review decisions. We expect that SIRA work with its Merit Review Officers to overcome this issue.
- 5.42 The committee agrees that publishing merit review decisions encourages greater transparency and consistency in decision-making. The Merit Review Service should continue to publish notable decisions, taking care that the information published is accurate and adequately de-identified.
- 5.43 No participant in this review supported the complexity in the dispute resolution process. There are compelling reasons for it to be simplified.

### **Procedural review**

- 5.44 A procedural review by WIRO is the final step in the administrative review process. This review must commence within 30 days of receipt of the recommendation by the Merit

<sup>356</sup> Answers to questions on notice, SIRA, p 6 quoting clause 8.21 of the SIRA, *Merit Review User Guide*.

<sup>357</sup> See, Answers to questions on notice, SIRA, p 6; Evidence, Mr Lean, 7 November 2016, p 38.

<sup>358</sup> See, Answers to questions on notice, SIRA, p 7; Evidence, Mr Lean, 7 November 2016, p 39.

<sup>359</sup> Evidence, Ms Sherri Hayward, Industrial/Legal Officer, CFMEU, 4 November 2016, p 49.

<sup>360</sup> Evidence, Ms Hayward, 4 November 2016, p 49.

Review Service.<sup>361</sup> WIRO can only consider, and make recommendations, on procedural issues arising from the insurer's original work capacity decision. Mr Garling explained the practical implications of this system:

... we are only reviewing the original work capacity decision, not the subsequent decisions and, even if our office comes to a conclusion about work capacity and the validity of the decision, an insurer can simply make a new work capacity decision the following day.<sup>362</sup>

- 5.45** Put another way, there could be procedural inconsistencies in internal review and the merit review but the WIRO cannot examine such matters.<sup>363</sup>
- 5.46** WIRO reported that 162 work capacity procedural reviews were completed from July 2015 to June 2016.<sup>364</sup> Of these reviews, the work capacity decision was upheld in 63 cases, dismissed in 96 cases and withdrawn in three cases.<sup>365</sup>
- 5.47** Mr Garling described procedural reviews as 'a little bit pointless' noting that '... initially every worker was successful, and that was for a particular reason, but as we have moved on the insurers are better at the procedures.'<sup>366</sup> Mr Garling also suggested that the procedural review should be conducted before the merit review.<sup>367</sup>
- 5.48** WIRO is serviced by the Independent Legal Assistance and Review Service (ILARS). ILARS provides access to free, independent legal advice to workers, through the provision of a grant, where there is a disagreement with scheme agents regarding entitlements.<sup>368</sup> Approximately 1,000 lawyers have been approved by WIRO to provide legal services to injured workers.<sup>369</sup>

### *Committee comment*

- 5.49** The committee notes concerns about the relevance of the procedural review process. The restrictions on the disputes WIRO can consider and scheme agents' increasing awareness of the procedures surrounding work capacity decisions has limited the effectiveness of this service. We are hopeful that a 'one stop shop' for dispute resolution will result in a more cohesive process overall.

<sup>361</sup> Submission 54, WIRO, p 7.

<sup>362</sup> Evidence, Mr Garling, 7 November 2016, p 12.

<sup>363</sup> Evidence, Mr Garling, 7 November 2016, p 12.

<sup>364</sup> Submission 54, WIRO, Appendix A, p 20.

<sup>365</sup> Submission 54, WIRO, Appendix A, p 20.

<sup>366</sup> Evidence, Mr Garling, 7 November 2016, p 12.

<sup>367</sup> Evidence, Mr Garling, 7 November 2016, p 12.

<sup>368</sup> WIRO, *Legal help*, <http://wiro.nsw.gov.au/help-injured-workers/legal-help>.

<sup>369</sup> Submission 54, WIRO, p 11.

## Dispute resolution process for liability decisions

**5.50** The Workers Compensation Commission is responsible for determining disputes in relation to:

- an insurer’s liability for weekly payments of compensation if the weekly compensation claim falls within the first 130 weeks.
- medical assessments conducted by Approved Medical Specialists (AMS), who are appointed by the Workers Compensation Commission to assess disputes about medical issues concerning workers compensation claims.<sup>370</sup>

**5.51** The Workers Compensation Commission does not have jurisdiction to determine any dispute about a work capacity decision of an insurer, and may not make a decision in respect of a dispute before the Commission that is inconsistent with a work capacity decision of an insurer.<sup>371</sup>

**5.52** The NSW Bar Association summarised the different dispute resolution avenues within the Workers Compensation Commission for disputes about liability versus those concerning an AMS assessment:

- Liability dispute:
  - Initial decision – Arbitrator
  - Intermediate appellate level – Presidential Member
  - Final appellate level (limited to questions of law) – NSW Court of Appeal
- Approved Medical Specialists
  - Initial decision maker – AMS
  - Initial appellate level – Medical Appeal Panel
  - Initial administrative law appellate level – Supreme Court of NSW
  - Final administrative law appellate level – NSW Court of Appeal.<sup>372</sup>

**5.53** The NSW Bar Association argued that the NSW Government has failed to address the problem of inconsistencies arising between the work capacity decisions of insurers and the decisions of AMS.<sup>373</sup> The Bar Association explained how an AMS and an insurer may come to widely different conclusions about an individual’s work capacity:

(a) In assessing the WPI resulting from a psychological injury, an AMS is required by Table 11.6 of *The WorkCover Guides for the Evaluation of Permanent Impairment*, to consider a worker’s employability. The relevant psychiatrist can conclude that the individual falls within class 5 in that he or she “cannot work at all”. This categorisation then forms part of the overall assessment of what the degree of WPI [whole person impairment] is;

(b) The certificate from the AMS is then conclusive evidence with respect to the degree of impairment that results from the injury;

<sup>370</sup> Submission 84 NSW Self Insurers Association, p 2.

<sup>371</sup> *Workers Compensation Act 1987*, ss 43 (2) and 43 (3).

<sup>372</sup> Submission 6, NSW Bar Association, p 9.

<sup>373</sup> Submission 6, NSW Bar Association, p 10.

(c) The same worker can be assessed by a scheme agent/insurer as having no incapacity for work as part of a “work capacity decision”; and

(d) As such the worker is assessed by one NSW jurisdiction as being unable to work at all and by another NSW jurisdiction as having no restrictions on their ability to work.<sup>374</sup>

**5.54** The Bar Association concluded: ‘Rational systems of dispute resolution should not be able to produce inconsistent decisions and they should certainly not be able to produce absurd ones.’<sup>375</sup>

*Committee comment*

**5.55** The committee notes the jurisdiction of the Workers Compensation Commission is currently limited to determining disputes over liability for weekly payments of compensation and medical disputes conducted by an approved medical specialist. Stakeholders’ concerns about overlaps and inconsistencies within the current dispute resolution processes, and the committee’s recommendations to overcome these obstacles, are discussed in the following section.

## **Bifurcation of the dispute resolution process**

**5.56** This review saw numerous review participants identify difficulties arising from the current bifurcation of dispute resolution within the workers compensation system.

**5.57** Mr Ross Stanton, Member, Common Law Committee, NSW Bar Association, described having multiple jurisdictions for workers compensation as ‘inefficient and productive of delay, complexity and added costs.’<sup>376</sup> The association identified the key problems as being:

- the fact that decision makers in the separate bodies can come to separate and inconsistent decisions<sup>377</sup>
- the fact that, although the 2012 reforms attempted to avoid overlap between the two jurisdictions by preventing the Workers Compensation Commission from making any decision that is inconsistent with a work capacity decision of an insurer, in practice some overlap has occurred.<sup>378</sup>

**5.58** Similarly, the NSW Self Insurers Association described the current dispute resolution system ‘dysfunctional’,<sup>379</sup> highlighting the multiple processes and forums for the determination or resolution of different claim types:

<sup>374</sup> Submission 6, NSW Bar Association, p 10.

<sup>375</sup> Submission 6, NSW Bar Association, p 11.

<sup>376</sup> Evidence, Mr Ross Stanton, Member, Common Law Committee, NSW Bar Association, 4 November 2016, p 5.

<sup>377</sup> Submission 6, NSW Bar Association, p 9.

<sup>378</sup> Submission 6, NSW Bar Association, p 10.

<sup>379</sup> Submission 84, NSW Self Insurers Association, p 3.

i. Liability disputes as to injury, causation and weekly payments if there is no work capacity decision are dealt with by the Commission, but only if the weekly compensation claim falls within the first 130 weeks.

ii. Medical cost disputes are dealt with by the Commission.

iii. Permanent impairment liability disputes are dealt with by the Commission.

iv. Permanent impairment assessment is dealt with by the Commission's AMS and Medical Appeal Panel processes, with potential for judicial review proceedings in the Supreme Court of NSW, if a party is aggrieved by the final outcome.

v. Work capacity disagreements are dealt with firstly by internal review of the insurer and then by further review by the Merit Review Agency (MRA) and procedural review by WIRO; and these agencies adopt different approaches on certain issues; with potential for judicial review proceedings following the three-step review process.

vi. Work injury damages claims are dealt with by the mediation process in the Commission and substantive proceedings in the District Court, if claims do not resolve at mediation.

vii. Interim payment, expedited assessment and injury management disputes are dealt with by dispute resolution officers of the Commission in a truncated non-arbitral process where conferences and hearings are conducted entirely by telephone, with no opportunity to ask questions of or cross examine witnesses.<sup>380</sup>

**5.59** Mr Mick Franco, Honorary Solicitor, NSW Self Insurers Association, reiterated this concern in his evidence to the committee:

The problem, in short, is there are too many pathways for different claims or different components and it is too complex for both injured workers and employers who are self insured to negotiate and to get to a clear outcome.<sup>381</sup>

**5.60** Likewise, the Australian Lawyers Alliance stated that the dispute resolution 'borders on dysfunctional', calling the bifurcated system 'confusing, difficult to navigate and contradictory'.<sup>382</sup>

**5.61** Another issue noted by stakeholders was that workers can have different components of the same dispute heard in various forums simultaneously. The NSW Self Insurers Association explained how this can occur:

... there may be a dispute about liability for the injury which is dealt with by the Workers Compensation Commission. However, if there is a work capacity decision in respect of the claim for weekly payments, the Commission may not be able to deal with the determination of the weekly payments entitlement.<sup>383</sup>

---

<sup>380</sup> Submission 84, NSW Self Insurers Association, pp 2-3.

<sup>381</sup> Evidence, Mr Mick Franco, Honorary Solicitor, NSW Self Insurers Association, 4 November 2016, p 68.

<sup>382</sup> Submission 74, Australian Lawyers Alliance, p 6.

<sup>383</sup> See, Submission 84, NSW Self Insurers Association, p 2; Evidence, Mr Stanton, 4 November 2016, p 5; Evidence, Mr Franco, 4 November 2016, p 71.

- 5.62** SIRA acknowledged the current dispute resolution system is complex and said it is aware that stakeholders believe the process does not deliver efficient outcomes.<sup>384</sup> However, Mr Anthony Lean, Chief Executive, SIRA, informed the committee that bifurcation was intended to provide a quick, cost-effective means of dispute resolution:

My understanding from the 2012 reforms is that a separate process was put in place for work capacity review decisions to provide a quick, fair and just process that enabled those work capacity review matters to be resolved more quickly.<sup>385</sup>

- 5.63** Mr Garling agreed that the initial reasoning for bifurcation was ‘meritorious’,<sup>386</sup> but it has become complicated by the method that was adopted:

... what was originally intended was you would have a certificate of capacity from a doctor that said yes you can go back to work or no you could not; you could challenge that and say that is not quite correct. A quick look by the insurer would say yes that is right, the merit review would have a quick look at it, and it would all be over and done within 30 days and everyone would be content. It did not work that way.<sup>387</sup>

### ***Sabanayagam v St George Bank Ltd* [2016] NSWCA 145**

- 5.64** Numerous stakeholders drew the committee’s attention to the decision of *Sabanayagam v St George Bank Ltd* [2016] NSWCA 145, which they said highlighted the problems arising from the bifurcated nature of the dispute resolution system as well as the difficulty of distinguishing work capacity from liability decisions.

- 5.65** The Law Society of New South Wales provided an overview of the facts of the case:

The case involved a claim for weekly compensation benefits, where the insurer had initially accepted liability and paid compensation benefits, but then subsequently declined liability essentially on the basis that the claimant had recovered from the effects of her workplace injury. Notification of the decision declining liability was issued [on 20 March 2015] in accordance with section 74 of the *Workplace Injury Management and Workers Compensation Act 1998*.<sup>388</sup>

- 5.66** In the Workers Compensation Commission, the claimant disputed the decision declining liability and sought reinstatement of weekly payments. Arbitrator McDonald determined that the commission had no jurisdiction to deal with the matter as it was after the end of the

<sup>384</sup> Evidence, Mr Lean, 7 November 2016, p 38.

<sup>385</sup> Evidence, Mr Lean, 7 November 2016, p 38.

<sup>386</sup> Evidence, Mr Garling, 7 November 2016, p 13.

<sup>387</sup> Evidence, Mr Garling, 7 November 2016, p 13.

<sup>388</sup> Correspondence, from Mr John Eades, President, Law Society of New South Wales, to Minister for Innovation and Better Regulation, 22 February 2016, p 1, <https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/1093960.pdf>.

second entitlement period (130 weeks). In turn, it was considered unnecessary to determine whether the notice dated 20 March 2015 was a work capacity decision.<sup>389</sup>

**5.67** The matter was heard on appeal by Deputy President O’Grady, who reaffirmed that the commission does not have jurisdiction after the end of the second entitlement period. The Deputy President further determined that it could be inferred from the nature of the liability notice issued that a work capacity decision had been made.<sup>390</sup>

**5.68** The Law Society explained the implications of this determination:

In these circumstances the Commission was of the view that the claim for weekly compensation had to be the subject of the review process so far as it related to the work capacity decision, and this was not something for which the Workers Compensation Commission had jurisdiction.<sup>391</sup>

**5.69** Following the decision of the Deputy President, the matter was appealed to the Court of Appeal. In the result, the court rejected the proposition that the notice provided on 20 March 2015 was a work capacity decision, or that it was possible to infer the scheme agent had made a work capacity decision prior to formulating the notice.<sup>392</sup> It found that notice of a decision that denies ongoing liability for weekly payments in accordance with s 33 of the 1987 Act is not a work capacity decision. Consequently, the commission did have jurisdiction to determine a dispute about the denial of liability to pay weekly benefits where a scheme agent maintains there is no incapacity as a result of an injury.

**5.70** While the decision provided clarity around some matters, the Law Society of New South Wales noted that ‘... the decision has not resolved the difficulties and confusion identified in any final sense.’<sup>393</sup>

## Options for reform

**5.71** Various review participants advocated dismantling the current dispute resolution process altogether, arguing that a ‘one stop shop’ was more efficient – a single jurisdiction that could determine all disputes in relation to work capacity decisions and liability decisions.<sup>394</sup>

**5.72** The Law Society unequivocally supported a properly constituted single forum for workers compensation disputes, arguing that it is imperative such matters be dealt with by an

<sup>389</sup> WIRO, *WIRO Wire, Sabanayagam v St George Bank Ltd* [2016] NSWCCPD 3, <http://e.wiro.nsw.gov.au/pub/pubType/EL/pubID/z573bc52e50f8d621/nc/z5874765ee8e73692/interface.html>, 1 July 2016.

<sup>390</sup> Correspondence, from Mr Eades, to Minister for Innovation and Better Regulation, 22 February 2016, pp 1-2.

<sup>391</sup> Correspondence, from Mr Eades, to Minister for Innovation and Better Regulation, 22 February 2016, p 2.

<sup>392</sup> See, Submission 74, Australian Lawyers Alliance, p 6.

<sup>393</sup> Submission 65, Law Society of New South Wales, p 5.

<sup>394</sup> See, Evidence, Mr Mark Morey, Secretary, Unions NSW, 4 November 2016, p 40; Submission 53, Slater and Gordon Lawyers, p 6.

independent tribunal with properly trained and experienced judicial officers.<sup>395</sup> Mr Macken reiterated this argument in his evidence to the committee, adding that judicial officers in the court should have tenure:

The position of the Law Society for a long time has been it should be an independent court with properly qualified judicial officers who have tenure, for want of a better expression—they are not subject to reappointment every three years and therefore may be influenced in their decision-making by reason of the term of their tenure. The Law Society’s position is that it should go to a properly constituted court.<sup>396</sup>

**5.73** The Australian Lawyers Alliance similarly supported a ‘one stop shop’ for dispute resolution in workers compensation matters:

The ALA [Australian Lawyers Alliance] maintains and repeats its call for a single forum for dispute resolution of workers compensation matters. That forum should have the features of independence, appointed judicial officers, full time legally qualified workers compensation (personal injury) expert decision makers, the right of all parties to maintain legal representation, the power to make costs orders and an avenue of appeal to a superior court.<sup>397</sup>

**5.74** The NSW Bar Association agreed that it would be ‘sensible ... to bring the various decision making functions within the one general jurisdiction.’<sup>398</sup>

**5.75** The Self Insurers Association also supported a single dispute resolution court or tribunal with appointed judicial officers dealing with resolution and determination of all issues, disagreements and disputes arising under the workers compensation legislation.<sup>399</sup>

**5.76** The Law Society argued that while the form of the ‘one stop shop’ is not of primary importance, desirable features of the forum would include:

- enabling and encouraging early conciliation or mediation
- quickly and efficiently identifying issues which are legitimately in dispute and allowing for the prompt and efficient exchange of the information and documentation relevant to those matters
- being flexible enough to accommodate an expedited resolution of small claims or claims involving single or limited issues, while also providing a proper process by which disputes involving complex claims and multiple issues are heard and determined in a manner which affords justice and procedural fairness to the parties in dispute
- allowing disputes to be triaged at the gateway by appropriately trained personnel who can then determine the appropriate dispute resolution path for that specific case

<sup>395</sup> Submission 65, Law Society of New South Wales, p 5.

<sup>396</sup> Evidence, Mr Macken, 4 November 2016, p 18.

<sup>397</sup> Submission 74, Australian Lawyers Alliance, p 7.

<sup>398</sup> Submission 6, NSW Bar Association, p 11.

<sup>399</sup> See, Submission 84, Self Insurers Association of NSW, p 3; Evidence, Mr Franco, 4 November 2016, p 69.

- making use of available technology to provide an effective and efficient process such as providing online dispute resolution for small claims or claims involving single or limited issues.<sup>400</sup>

**5.77** Stakeholders suggested that potential forums for the proposed one stop shop included re-enlivening the jurisdiction of the Workers Compensation Commission in all matters or establishing a personal injury division in the New South Wales Civil and Administrative Tribunal.

**5.78** Significantly, stakeholders also advocated that injured workers should have access to legal representation within the proposed new model.<sup>401</sup>

**5.79** Another suggestion made to the committee was the idea of a single forum for all personal injury claims, covering both workers compensation and compulsory third party claims. For example, Mr Tim Concannon, Member, Injury Compensation Committee, Law Society of New South Wales, stated that ‘... it would be ideal for all personal injury decisions to be made in the one tribunal, not just workers compensation decisions.’<sup>402</sup> Following on, Ms May said it was appropriate to consider this proposition given the NSW Government is considering adapting features from the workers compensation scheme in the compulsory third party [CTP] reforms:

... one of the principles of those proposed reforms is that the CTP scheme borrows the merit review service or the merit review processes, internal reviews, from workers compensation. If the Government is going to have similar processes in two different schemes, then it makes sense to have them dealt with in the same place.<sup>403</sup>

**5.80** In line with a single forum for adjudication, stakeholders supported the use of a single notice for all workers compensation claims/decisions. The Law Society of New South Wales said that such a notice should be ‘simple, concise and understandable’ and identify whether an injured worker is entitled to statutory compensation benefits and if so, the nature and extent of those entitlements.<sup>404</sup>

**5.81** The NSW Self Insurers Association also supported a simple notice in plain English that makes it easy for workers to understand the grounds for the decision and how the decision can be challenged.<sup>405</sup> Mr Franco said: ‘The association considers that the time has well and truly come for a single and simple form of notification to the worker of what are their entitlements in a concise and understandable way across all different claims types.’<sup>406</sup>

<sup>400</sup> Submission 65, Law Society of New South Wales, pp 5-6.

<sup>401</sup> See, Evidence, Mr Concannon, 4 November 2016, p 12; Evidence, Ms May, 4 November 2016, p 12; Evidence, Mr Garling, 7 November 2016, p 13; Submission 84, Self Insurers Association of NSW, p 3.

<sup>402</sup> Evidence, Mr Concannon, 4 November 2016, p 19.

<sup>403</sup> Evidence, Ms May, 4 November 2016, p 19.

<sup>404</sup> Submission 65, Law Society of New South Wales, p 5.

<sup>405</sup> Evidence, Mr Stephen Keyte, Chairperson, NSW Self Insurers Association, 4 November 2016, p 68.

<sup>406</sup> Evidence, Mr Franco, 4 November 2016, p 69.

*Committee comment*

- 5.82** The committee acknowledges that stakeholders have raised an array of concerns about the bifurcation of the dispute resolution process. The sheer number of different pathways available for challenging workers compensation decisions is staggering and it is easy to see why workers find the system impenetrable. While having a separate administrative review system for work capacity decisions was intended to provide a quick, simple, cost effective dispute resolution mechanism, the complexities of the rules and procedures underpinning this system has raised real concerns about the accessibility of the process.
- 5.83** Further, it would be remiss not to acknowledge stakeholders' frustration that injured workers were unable to engage legal professionals to support their challenges to work capacity decisions until December 2016.
- 5.84** We note that the NSW Government has used statutory measures in an attempt to address concerns about the overlap between matters that can be heard in the two jurisdictions. However, as *Sabanayagam v St George Bank Ltd* demonstrated, these provisions have not managed to overcome the inherent difficulty of distinguishing between a work capacity and a liability decision in the first place.
- 5.85** We believe that all parties in the workers compensation system deserve a simpler, more accessible dispute resolution process. Further, we concur with stakeholders that this is best achieved through access to a single, properly constituted forum for dispute resolution that promotes the core values of a successful tribunal.
- 5.86** We note that review participants' varying views about the most appropriate way to proceed with a 'one stop shop' model. Accordingly, the committee will refrain from making specific recommendations about how the proposed model should operate. Instead, we have put forward general principles that we believe the government should consider when implementing the proposed single dispute resolution forum.
- 5.87** The committee recommends that the NSW Government implement a single, 'one stop shop' dispute resolution forum for all workers compensation disputes, which allows disputes to be triaged by appropriately trained personnel, allows claimants to access legal advice as currently regulated, encourages early conciliation or mediation, uses properly qualified judicial officers where appropriate, facilitate the prompt exchange of relevant information and documentation, makes use of technology to support the settlement of small claims, and promotes procedural fairness.

---

**Recommendation 14**

That the NSW Government establish a ‘one stop shop’ forum for resolution of all workers compensation disputes, which:

- allows disputes to be triaged by appropriately trained personnel
  - allows claimants to access legal advice as currently regulated
  - encourages early conciliation or mediation
  - uses properly qualified judicial officers where appropriate
  - facilitates the prompt exchange of relevant information and documentation
  - makes use of technology to support the settlement of small claims
  - promotes procedural fairness.
- 

- 5.88** Following on, the committee recommends that the NSW Government introduce a single notice for both work capacity decisions and liability decisions made by insurers. The notices are to take account of the committee’s earlier recommendations about the format of these documents and giving workers access to any relevant supporting documents in real time or at pre-determined stages throughout the life of a claim.
- 

**Recommendation 15**

That the NSW Government introduce a single notice for both work capacity decisions and liability decisions made by insurers.

---

- 5.89** While the matter was addressed by only a minority of stakeholders, some participants did express the view that a more unified approach to personal injury dispute resolution, especially in regards statutory schemes, would be beneficial. Clearly there are significant differences in the liability issues and benefits payable in schemes such as the compulsory third party system for motorists and the workers compensation scheme. These distinctions are both fair and appropriate. However there are many common issues faced by claimants and insurers alike when determining matters such as the extent of an injury or the effect of an injury on a person’s capacity to work in these schemes.

- 5.90** While not a single stakeholder proposed extending the unwieldy dispute resolution system for workers compensation to Compulsory Third Party disputes, there is some merit in producing a specialised and well regarded personal injury jurisdiction in New South Wales. We therefore recommend that the NSW Government consider the benefits of developing such a jurisdiction.
- 

**Recommendation 16**

That the NSW Government consider the benefits of developing a more comprehensive specialised personal injury jurisdiction in New South Wales.

---

## Chapter 6 Entitlements

This chapter considers the entitlements available to injured workers under the New South Wales workers compensation scheme. The chapter initially outlines the recent reforms to entitlements. It then examines injured workers' access to medical benefits, permanent impairment compensation and weekly payments. The chapter also considers provisions for commutation in the scheme.

### Recent entitlement reforms

- 6.1** An injured worker may be entitled to a range of compensation benefits depending on their claim and the type, nature and severity of their work-related injury, including:
- medical, hospital and rehabilitation expenses
  - permanent impairment compensation
  - weekly payments.<sup>407</sup>
- 6.2** As discussed in Chapter 1, the workers compensation scheme has been subject to numerous reforms in recent years. The NSW Government implemented the initial reforms in stages from June 2012, including:
- capping medical and related payments at 12 months for most workers after a claim is made or, where weekly payments of compensation are made, for 12 months after the worker ceases to be entitled to those weekly payments
  - limited lump sum payments for permanent impairment
  - changing weekly benefits for seriously injured workers
  - capping weekly benefit entitlements to 260 weeks.<sup>408</sup>
- 6.3** In 2014, the NSW Government announced the reinstatement of some benefits existing prior to the 2012 reforms. These changes, applicable to those workers who received an injury and made a formal claim on or before 1 October 2012, included: extending medical benefits for workers with whole person impairment of between 21 per cent to 30 per cent; ensuring workers remain eligible for weekly benefits until a work capacity dispute has been resolved; and clarifying the entitlement to a 'second surgery' period for workers where the initial surgery requires a second surgery falling outside 12-month medical cap.<sup>409</sup>

<sup>407</sup> SIRA, *Workers Compensation Benefits Guide*, 2016, p 3.

<sup>408</sup> Standing Committee on Law and Justice, NSW Legislative Council, *Review of the exercise of the functions of the WorkCover Authority* (2014), p 9 quoting Answers to questions on notice, Ms Carmel Donnelly, General Manager, Strategy and Performance Safety, Return to Work and Support, 28 April 2014, pp 1-2 and *Workers Compensation Act 1987*, Pt 3, Subdivision 2.

<sup>409</sup> Standing Committee on Law and Justice, *Review of the exercise of the functions of the WorkCover Authority*, pp 10-11 quoting Media Release, Hon Dominic Perrottet MP, Minister for Finance and Services, 'Workers Benefit From NSW Government's Sound Financial Management', 26 June 2014.

6.4 In 2015, the NSW Government implemented a \$1 billion package that expanded access to medical and other benefits, and reduced premiums. The changes included:

- extending medical entitlements for all workers
- providing lifetime medical expenses for injured workers with a whole person impairment of more than 20 per cent
- increasing the maximum lump sum compensation for permanent impairment
- providing minimum weekly compensation payments for injured workers with highest needs
- allowing secondary surgery for all eligible workers
- reducing premiums.<sup>410</sup>

6.5 Despite the recent reforms, certain stakeholders remain concerned about the ability of the scheme to meet the objectives of the workers compensation legislation, specifically s 3 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) which states that the system should:

... provide prompt treatment of injuries, effective and proactive management of injuries and necessary medical and vocational rehabilitation following injuries in order to assist injured workers and to promote their return to work as soon as possible.<sup>411</sup>

6.6 The Australian Lawyers Alliance argued the current system fails to support an injured worker's recovery and return to work:

The system, as it has become, does not provide an integrated experience for a worker whereby a worker is supported by weekly income replacement, a sympathetic employer, a treatment and care program that sees them supported in the workplace as they recover from injury.<sup>412</sup>

6.7 Indeed, Ms Roshana May, New South Wales Branch President, Australian Lawyers Alliance, remarked that the scheme was in 'crisis' as injured workers have insufficient access to the entitlements available under the Act.<sup>413</sup> This was reflected in the evidence of some injured workers who participated in this review.<sup>414</sup>

#### ***Committee comment***

6.8 The committee acknowledges that following the 2012 reforms to the workers compensation system the financial viability of the scheme improved by limiting workers' entitlements.

---

<sup>410</sup> Answers to pre-hearing questions on notice, SIRA, 27 October 2016, p 2.

<sup>411</sup> *Workplace Injury Management and Workers Compensation Act 1998*, s 3.

<sup>412</sup> Submission 74, Australian Lawyers Alliance, pp 16-17.

<sup>413</sup> Evidence, Ms Roshana May, New South Wales Branch President, Australian Lawyers Alliance, 4 November 2016, p 2.

<sup>414</sup> See, Submission 29, Name suppressed, p 1; Submission 13, Name suppressed, p 2.

## Entitlement to payment of medical expenses

- 6.9** All workers are entitled to be compensated for reasonably necessary medical expenses for a defined entitlement period from the date of their workers compensation claim or from when their entitlement to weekly compensation ceased. Under s 59A of the *Workers Compensation Act 1987* (the 1987 Act), the length of this period varies according to an injured worker's level of whole person impairment (WPI).<sup>415</sup> As noted above, the 2015 reforms amended s 59A to extend the duration of medical and treatment expenses according to an injured worker's level of WPI.
- 6.10** SIRA advised that workers with a WPI of more than 20 per cent now receive reasonably necessary medical and related treatment for life. Workers with a WPI of 20 per cent or less receive medical and related treatment for between two and five years after weekly benefits cease, meaning that workers with a WPI of 10 per cent or less receive up to seven years of treatment, and those with a WPI of between 11-20 per cent receive up to ten years of treatment.<sup>416</sup>
- 6.11** There are currently two versions of s 59A of the 1987 Act operating in the workers compensation scheme. Mr Mick Franco, Honorary Solicitor, NSW Self Insurers Association, explained in what circumstances the new provision – which provides for greater access to medical benefits – applies:
- The transitional provision says that if you were in receipt of weekly payments in September 2012, or if your first claim for weekly compensation for the injury was made between October 2012 and December 2015 the new version applies. If you do not fall within those parameters the old version applies, subject to the reform that came in in 2014.<sup>417</sup>
- 6.12** Mr Franco stated this is a significant issue as there are potentially thousands of old claims in the system.<sup>418</sup> He added: 'The short point is that we have got potentially two systems that operate in relation to medical expenses that will confuse the participants, the injured worker and the employer, and it will be a recipe for more disputation.'<sup>419</sup>
- 6.13** Mr Kim Garling, Workers Compensation Independent Review Officer, WIRO, concurred that the transitional provision creates confusion but noted that this was a problem throughout the scheme, not just for s 59A of the 1987 Act.<sup>420</sup>

---

<sup>415</sup> SIRA, *Workers Compensation Benefits Guide*, 2016, p 13.

<sup>416</sup> See, Answers to pre-hearing questions on notice, SIRA, 27 October 2016, p 11; Submission 5, Australian Services Union/United Services Union, p 3.

<sup>417</sup> Evidence, Mr Mick Franco, Honorary Solicitor, NSW Self Insurers Association, 4 November 2016, p 69.

<sup>418</sup> Evidence, Mr Franco, 4 November 2016, p 69.

<sup>419</sup> Evidence, Mr Franco, 4 November 2016, p 69.

<sup>420</sup> Evidence, Mr Kim Garling, Workers Compensation Independent Review Officer, WIRO, 7 November 2016, p 12.

### **Linking access to medical benefits to whole person impairment**

- 6.14** A number of review participants questioned whether the level of WPI should be used to determine access to medical benefits.
- 6.15** For example, the Law Society of New South Wales stated that WPI is an inappropriate threshold test for the receipt of medical treatment expenses and argued that such a provision causes additional friction points for scheme participants resulting in increased disputation, delay and costs and inefficiencies.<sup>421</sup>
- 6.16** Likewise, Ms May said WPI is an inaccurate, imperfect and improper tool for determining whether a person receives treatment.<sup>422</sup> Additionally, Ms May noted that the American Medical Association, which is considered the preeminent authority in such matters, warns against using impairment in such a way.<sup>423</sup>
- 6.17** Mr Garling remarked it is ‘unfortunate’ that s 59A of the 1987 Act ties entitlements to medical expenses to level of impairment.<sup>424</sup>
- 6.18** Similarly, the Australian Services Union/United Services Union described the use of the WPI to determine the extent of entitlement to medical treatment as ‘contrived and necessarily unfair.’<sup>425</sup> Slater and Gordon Lawyers argued that access to medical treatment should be a matter of ongoing assessment by health care professionals rather than being based on an ‘artificial legal concept’.<sup>426</sup>

### **Time limits on medical benefits**

- 6.19** Inquiry participants also expressed concern that the time limits on access to medical expenses under s 59A of the 1987 Act may cause poor outcomes for the treatment of a workplace injury. Indeed, the Public Service Association of NSW pointed to a report by the Centre for International Economics noting that time limits tend to encourage doctors to bring forward treatments:

The Centre for International Economics noted in its review of the 2012 amendments that the presence of a time limit creates an incentive for treating doctors to bring forward treatment to ensure that it is performed whilst compensated under the scheme, even though the timing of the procedure might not align with the optimum treatment of the injured worker.<sup>427</sup>

- 6.20** The Australian Lawyers Alliance and the Law Society of New South Wales were similarly concerned that s 59A of the 1987 may encourage doctors to pursue treatments within the

---

<sup>421</sup> Submission 65, Law Society of New South Wales, p 10.

<sup>422</sup> See, Submission 74, Australian Lawyers Alliance, p 11; Evidence, Ms May, 4 November 2016, p 13.

<sup>423</sup> See, Evidence, Ms May, 4 November 2016, pp 13-14; Submission 74, Australian Lawyers Alliance, p 11.

<sup>424</sup> Evidence, Mr Garling, 7 November 2016, p 11.

<sup>425</sup> Submission 5, Australian Services Union/United Services Union, p 5.

<sup>426</sup> Submission 53, Slater and Gordon Lawyers, p 4.

<sup>427</sup> Submission 62, Public Service Association of NSW, pp 2-3.

legislated time frame.<sup>428</sup> Mr Paul Macken, Member, Injury Compensation Committee, Law Society of New South Wales, stated that the provisions are influencing the health outcomes of injured workers as decisions about treatment are being determined by financial considerations.<sup>429</sup>

**6.21** Likewise, the Australian Services Union/United Services Union said that the time limits force workers to make an ‘unenviable’ decision: either make a claim to meet their medical expenses in the short term, or delay their claim and mitigate the risk of the injury worsening to avoid being locked out of the compensatory scheme.<sup>430</sup>

**6.22** In addition, Ms May explained that the time limits caused frustration when medical treatment was delayed due to a dispute that is not resolved within the legislated period:

The provision of medical treatment is further constrained by the fact that the treatment has to be given or provided within those two years. So that at the 18 months point, for example, someone is referred for surgery, and there is a dispute about whether that surgery should take place, that dispute is unlikely to be resolved in the remaining six months, and that particular worker, if the dispute is resolved in their favour, will not be entitled to the surgery because the two years has expired.<sup>431</sup>

**6.23** The committee was informed that Victoria, South Australia and Tasmania have time limits on entitlements.<sup>432</sup> However, it was observed that, unlike New South Wales, some of these jurisdictions have exceptions to the time limits.<sup>433</sup> Queensland, the ACT, Northern Territory and Comcare do not have similar restrictions.<sup>434</sup>

### **Proposal to remove limits on medical benefits**

**6.24** Many stakeholders, including the Australian Lawyers Alliance, the NSW Bar Association and the Law Society, called for restrictions on medical expenses to be lifted urgently.<sup>435</sup> The Law Society argued that restoring medical benefits is vital given the scheme is in significant surplus:

... the scheme has moved from a large projected deficit—somewhere in the order of \$3 billion in 2012—to a large projected surplus now in a relatively short period of time of, I think, approximately \$3 billion ... Bearing in mind the scheme’s objectives, it seems to us that potentially one of the most useful things you can do to help the

<sup>428</sup> See, Evidence, Ms May, 4 November 2016, p 17; Evidence, Mr Tim Concannon, Member of the Injury Compensation Committee, Law Society of New South Wales, 4 November 2016, p 18; Evidence, Mr Paul Macken, Member Injury Compensation Committee, Law Society of New South Wales, 4 November 2016, p 17.

<sup>429</sup> Evidence, Mr Macken, 4 November 2016, p 18.

<sup>430</sup> Submission 5, Australian Services Union/United Services Union, p 3.

<sup>431</sup> See, Evidence, Ms May, 4 November 2016, p 13; Submission 52, Australian Manufacturing Workers’ Union, pp 4-5.

<sup>432</sup> See, Evidence, Mr Macken, 4 November 2016, p 14; Evidence, Ms May, 4 November 2016, p 14.

<sup>433</sup> See, Evidence, Mr Macken, 4 November 2016, p 14; Evidence, Ms May, 4 November 2016, p 14.

<sup>434</sup> Evidence, Mr Macken, 4 November 2016, p 14.

<sup>435</sup> See, Evidence, Ms May, 4 November 2016, p 18; Submission 6, NSW Bar Association, p 7; Submission 65, Law Society of New South Wales, pp 10-11; Evidence, Mr Concannon, 4 November 2016, p 13.

scheme attain its objectives is to return to the situation which existed between 1929 and 2012—simply paying medical expenses which are reasonably required to treat an injured worker’s state.<sup>436</sup>

**6.25** A number of unions also advocated removing limits on the payment of ongoing medical expenses. For example:

- The Public Service Association of NSW noted that based on the actuarial figures contained in the committee’s 2014 review, ‘... the complete removal of the medical expenses cap, even at the estimated upper limit, would be affordable given the scheme’s current and projected surpluses.’<sup>437</sup>
- The Australian Services Union/United Services Union said that it ‘strongly’ supports reinstating workers’ to reasonably necessary medical treatment to those provisions that were in place immediately prior to the 2012 amendments.<sup>438</sup>
- The Australian Manufacturing Workers Union (AMWU) proposed removing medical caps ‘... to restore justice to injured workers in an effort to stop the cost shifting onto workers, their families and the broader community and allow injured workers to meet their maximum ability to return to or stay at work.’<sup>439</sup>
- The Construction, Forestry, Mining and Energy Union (CFMEU) similarly supported restoring reasonably necessary medical benefits for all workers,<sup>440</sup> and said that, where appropriate, a doctor should determine access to treatment thus entitlements.<sup>441</sup>

**6.26** Mr Rowan Kernebone, Coordinator, Injured Workers Support Network, also supported restoring medical benefits for all workers:

I would like automatic approvals for all medicals related to that injury, and not just for the first 13 weeks but for life. We need to go to a situation where maintenance of an injury is just as relevant as the emergency section of it.<sup>442</sup>

**6.27** Mr Garling observed that removing the reference to WPI would assist the operation of s 59A of the 1987 Act. However, he also acknowledged that any such action would require legislative change and costings.<sup>443</sup>

**6.28** icare advised that it has not explicitly modelled the possibility of removing limits to medical benefit caps. However, icare noted that the potential impact of entirely removing these caps would be expected to run into the billions of dollars.<sup>444</sup>

<sup>436</sup> Evidence, Mr Concannon, 4 November 2016, p 2.

<sup>437</sup> Submission 62, Public Service Association of NSW, pp 2-3.

<sup>438</sup> Submission 5, Australian Services Union/United Services Union, pp 4-5.

<sup>439</sup> See, Submission 52, AMWU, pp 4-5; Submission 6, NSW Bar Association, p 7.

<sup>440</sup> Evidence, Ms Rita Mallia, State President, CFMEU, 4 November 2016, p 52.

<sup>441</sup> Evidence, Ms Mallia, 4 November 2016, p 45.

<sup>442</sup> Evidence, Mr Rowan Kernebone, Coordinator, Injured Workers Support Network, 7 November 2016, p 7.

<sup>443</sup> Evidence, Mr Garling, 7 November 2016, p 12.

<sup>444</sup> Answers to questions on notice, icare, 2 December 2016, p 10.

*Committee comment*

- 6.29** The committee notes that following the 2015 reforms, access to medical benefits were extended for all injured workers. This has been possible because of the improvement in the financial viability of the scheme brought about by the 2012 reforms. While the committee acknowledges the views expressed by some stakeholders urging the removal of limits on medical benefits, the committee believes that, in order to maintain long term financial viability, it is appropriate to continue with the current provisions set out in s of 59A of the 1987 Act at this time.
- 6.30** It should be noted that we did not receive any specific costings regarding the removal of limits on access to medical benefits. If the scheme continues to remain in significant surplus or increases its surplus, the committee encourages the NSW Government to consider options to amend the current limits to make them more generous for workers. The committee will investigate the impact on the scheme of extending lifetime medical benefits to cover all or some classes of injured workers in its next review.

**Entitlement to permanent impairment compensation**

- 6.31** Workers who suffer a permanent impairment of greater than 10 per cent as a result of a workplace injury may be entitled to receive compensation in the form of a lump sum payment. This is in addition to medical expenses and weekly payments which may also be available.<sup>445</sup>
- 6.32** Review participants suggested that access to this form of compensation is unfairly limited by the operation of s 66(1A) of the 1987 Act, which allows a single claim for permanent impairment, and s 322A of the *Workplace Injury Management and Workers Compensation Act 1998 Act* (1998 Act), which allows only one assessment of the degree of permanent impairment of an injured worker. Concern was also expressed about the impact of these provisions on workers' access to medical treatment. These issues are discussed in the following sections.

**Single claim for permanent impairment**

- 6.33** Section 66(1A) of the 1987 Act provides that 'Only one claim can be made under this Act for permanent impairment compensation in respect of the permanent impairment that results from an injury.'
- 6.34** The Australian Lawyers Alliance expressed concern that by allowing only one claim, injured workers who have a deteriorating condition may not be adequately compensated:

The single, once and only permanent impairment lump sum compensation payment prohibits workers who suffer a significant deterioration of their condition as a consequence of perhaps the effluxion of time or surgery to be properly compensated for their impairment.<sup>446</sup>

- 6.35** The Australian Lawyers Alliance proposed that, in line with the draft recommendations from the Parkes Project, workers be allowed to seek additional permanent impairment lump sum

<sup>445</sup> *Workers Compensation Act 1987*, s 66.

<sup>446</sup> Submission 74, Australian Lawyers Alliance, p 10.

compensation if they can demonstrate significant deterioration of their condition.<sup>447</sup> Specifically, the proposal would permit workers to bring second and subsequent claims for permanent impairment compensation where there is a deterioration in their condition leading to an increase in the degree of impairment by at least 5 per cent.<sup>448</sup>

**6.36** The Law Society of New South Wales similarly submitted that s 66(1A) should be reviewed and, at the very least, amended to allow an exception to the ‘one lump sum only’ rule where there is a significant deterioration in the worker’s condition or where the first lump sum claim does not result in receipt of any financial compensation.<sup>449</sup>

**6.37** The Australian Services Union/United Services Union also supported amending s 66(1A).<sup>450</sup>

### Single assessment of permanent impairment

**6.38** Section 322A of the 1998 Act allows only one assessment of the degree of permanent impairment of an injured worker. The NSW Bar Association noted that s 322A was introduced as part of the 2012 reforms to ‘supplement and fortify’ the one claim provision set out in s 66(1A) of the 1987 Act.<sup>451</sup>

**6.39** In most instances, an Approved Medical Specialist (AMS) conducts an assessment of an injured worker’s level of permanent impairment.<sup>452</sup> During the assessment, the *NSW workers compensation guidelines for the evaluation of permanent impairment* are used to evaluate an injured worker’s level of permanent impairment. In most cases, the guidelines adopt the fifth edition of the *American Medical Association’s Guides to the Evaluation of Permanent Impairment*.<sup>453</sup> At the conclusion of the assessment, the AMS issues a medical assessment certificate which, in appropriate cases, includes an impairment evaluation.<sup>454</sup>

**6.40** Inquiry participants suggested that the idea of allowing a single assessment of permanent impairment is unfair and against the objectives of the 1998 Act.<sup>455</sup> In fact, the NSW Bar Association called s 322A ‘absurd’<sup>456</sup> and the Australian Lawyers Alliance described the provision as ‘superfluous’.<sup>457</sup>

<sup>447</sup> Submission 74, Australian Lawyers Alliance, p 10.

<sup>448</sup> Submission 74, Australian Lawyers Alliance, p 18.

<sup>449</sup> Submission 65, Law Society of New South Wales, p 11.

<sup>450</sup> Submission 5, Australian Services Union/United Services Union, p 5.

<sup>451</sup> Submission 74, Australian Lawyers Alliance, p 10.

<sup>452</sup> Submission 74, Australian Lawyers Alliance, p 10. Section 65 of the 1987 Act relates to the determination of degree of permanent impairment to states that the degree of permanent impairment that results from an injury is to be assessed as provided by this section and Part 7 (Medical assessment) of Chapter 7 of the 1998 Act.

<sup>453</sup> SIRA, *NSW workers compensation guidelines for the evaluation of permanent impairment*, fourth edition, 2016, p 3.

<sup>454</sup> *Workplace Injury Management and Workers Compensation Act 1998*, s 325(2a-d).

<sup>455</sup> Submission 6, NSW Bar Association, pp 15-16.

<sup>456</sup> See, Submission 6, NSW Bar Association, pp 15-16; Evidence, Ms May, 4 November 2016, p 15.

<sup>457</sup> Submission 74, Australian Lawyers Alliance, p 10.

**6.41** However, stakeholders also expressed concern about the impact of s 322A of the 1998 Act on workers' access not only to permanent impairment compensation but other benefits. As the Australian Lawyers Alliance explained, the level of impairment determined during the assessment is critical to deciding a worker's entitlements:

... [L]evel of impairment determines not only permanent impairment lump sum compensation but the duration of weekly payments compensation, whether a worker is a worker with high needs or highest needs, the duration of medical and treatment expenses, access to artificial aids and domestic and vehicle modifications for life, and is the gateway threshold to work injury damages.<sup>458</sup>

**6.42** For example, inquiry participants were concerned about how s 322A of the 1998 Act interacts with s 59A of the 1987 Act, which as noted above, limits the period during which workers are entitled to be compensated for medical expenses based on the level of impairment. The committee heard that the issue particularly affects workers with deteriorating conditions, such as those with injuries to the knees, backs, necks and shoulders, who may defer treatment until absolutely necessary, or those with conditions in which the accepted professional protocol is to defer treatment or surgery until much later in life.<sup>459</sup> It was suggested that that these workers cannot access adequate medical expenses, to which they may be legitimately entitled, if they can only have a single medical assessment which is conducted closer to the time of injury.<sup>460</sup>

**6.43** The Australian Services Union/United Services Union summarised the dilemma faced by workers:

The nature of injuries is often of a gradual deterioration and a rigid and artificial restriction on access to permanent impairment compensation and a WPI assessment deprives injured workers of any prospect of recognition and coverage for injuries.

This problem is most obviously demonstrated in a 'catch 22' situation where an injured worker requires surgery at a later date. Their WPI will (usually) be greater after a surgery, however if they do not proceed with an impairment claim now their coverage for medical expenses will expire 2 years after their date of injury or when they last received weekly payments.

Alternatively, if they do proceed with an impairment claim now, they deprive themselves of any subsequent WPI assessment (and potentially enhanced access to medical coverage) if this condition worsens.<sup>461</sup>

**6.44** The NSW Bar Association used a frequently cited example of a worker with a spinal injury to illustrate this predicament:

... [A] worker with a lumbar spine disc protrusion might have been assessed at 12 per cent. Some years later the disc may completely collapse and produce the need for a lumbar spinal fusion to be performed – which typically increases the WPI resulting from the injury to 24 per cent.

<sup>458</sup> Submission 74, Australian Lawyers Alliance, p 10.

<sup>459</sup> Submission 74, Australian Lawyers Alliance, p 11.

<sup>460</sup> See, Submission 74, Australian Lawyers Alliance, p 11; Evidence, Mr Garling, 7 November 2016, pp 11-12.

<sup>461</sup> Submission 5, Australian Services Union/United Services Union, p 5.

The inability of the worker to have a second assessment made by an AMS means that the earlier certificate continues to conclusively determine the degree of impairment. As such, even if everyone agrees the impairment was now 24 per cent - the legislation continues to provide that it is only 12 per cent.<sup>462</sup>

- 6.45** The NSW Bar Association continued: ‘Under the current regime the above outcome would prevent the worker from having any entitlement to medical expenses two years after he or she ceased to be entitled to weekly compensation.’<sup>463</sup>
- 6.46** In 2015, the NSW Government introduced s 59A(7) of the 1987 Act, allowing secondary surgery in certain circumstances, to address concerns about the interaction of s 322A of the 1998 Act and s 59A of the 1987 Act. However, the Australian Lawyers Alliance contended this provision does not go far enough.<sup>464</sup>
- 6.47** Ultimately, the NSW Bar Association and the Australian Lawyers Alliance supported repealing s 322A of the 1998 Act.<sup>465</sup> The Law Society of New South Wales similarly supported repealing the provision or, at the very least, amending the provision to allow for additional assessments where a worker’s injury deteriorates.<sup>466</sup> WIRO similarly supported repealing s 322A of the 1998 Act,<sup>467</sup> as did the Australian Services Union/United Services Union.<sup>468</sup>
- 6.48** The case study below describes the experience of Mr Leigh Shears. Mr Shears has a lower back injury following a workplace injury but is no longer entitled to medical treatment.

#### **Case study: Mr Leigh Shears**<sup>469</sup>

Mr Shears worked as boilermaker until he sustained an injury to his lower back in a workplace accident in 2011. He tried returning to boilermaking soon after the incident but was reinjured.

Six months after his injury Mr Shears was dismissed from his job. The unfair dismissal and the injury led to significant concerns for his wellbeing and for a number of years he struggled with depression.

Following his injury Mr Shears was assessed as having eight per cent whole person impairment. However, he feels that this assessment does not accurately reflect his current impairment status. For example, in early 2016 he was unable to walk and consequently spent time in hospital for approximately three days. Additionally, during this time he was unable to work and earn money.

Until early 2016 Mr Shears received physiotherapy to help manage his pain. The treatment allowed him to engage in everyday tasks including work. However, Mr Shears’ insurer stopped paying for his physiotherapy. This was distressing as Mr Shears has visited numerous specialists who have determined he has no chance of recovery but instead have said to him “You’ve just got a life of managing that

<sup>462</sup> See, Submission 6, NSW Bar Association, pp 15-16; Evidence, Ms May, 4 November 2016, p 15.

<sup>463</sup> Submission 6, NSW Bar Association, pp 15-16.

<sup>464</sup> Submission 74, Australian Lawyers Alliance, p 11.

<sup>465</sup> See, Submission 6, NSW Bar Association, pp 15-16; Submission 74, Australian Lawyers Alliance, p 10; Evidence, Ms May, 4 November 2016, p 15.

<sup>466</sup> Submission 65, Law Society of New South Wales, p 11.

<sup>467</sup> Submission 54, WIRO, p 29.

<sup>468</sup> Submission 5, Australian Services Union/United Services Union, p 5.

<sup>469</sup> Evidence, Mr Leigh Shears, Injured worker, AMWU, 4 November 2016, pp 46-47. This case study is based on the content of the evidence.

injury. At some stage in the future you may need an operation but at this stage you're not quite there yet".

Due to the limits placed on access to medical treatment under s 59A of the 1987 Act, towards the end of 2016 Mr Shears was no longer entitled receive medical support. This is despite Mr Shears continuing to experience a significant amount of pain from his injury. For instance, two weeks after his entitlement to medical treatment expired, Mr Shears was playing with children when his back 'went out'. He was sore the day of the incident and spent the following two days in bed. He also had to take three days off work.

### *Committee comment*

- 6.49** The committee notes stakeholders concerns that s 66(1(A)) of the 1987 Act, which allows only one claim for permanent impairment, and s 322A of the 1998 Act, which allows only one assessment of permanent impairment, do not adequately meet the needs of injured workers.
- 6.50** Further, we appreciate that the perceived challenges of these provisions may be amplified by the interaction of s 59A of the 1987 Act, which places time limits on access to medical benefits, with s 322A of the 1998 Act. As these provisions clearly have a particularly problematic effect on workers with deteriorating conditions, we recommend that the NSW Government investigate the possibility of amending s 322A of the 1998 Act to allow up to two assessments of permanent impairment for certain clearly defined injuries that are prone to deteriorate over time, such as spinal injuries.

### **Recommendation 17**

That the NSW Government investigate the possibility of amending s 322A of the *Workplace Injury Management and Workers Compensation Act 1998* to allow up to two assessments of permanent impairment for certain clearly defined injuries that are prone to deteriorate over time, such as spinal injuries.

## **Entitlement to weekly payments**

- 6.51** Sections 33-42 of the 1987 Act detail injured workers' entitlement to weekly compensation. As previously mentioned, following the 2012 reforms weekly compensation payments are 'stepped down' over three key periods: the first entitlement period is 1-13 weeks; the second period is 14-130 weeks; and the third period concludes for most workers at 260 weeks (five years).<sup>470</sup> During the first entitlement period, the injured worker receives 95 per cent of their average weekly earnings, whereas in the second and third entitlement periods this is reduced to 80 per cent subject to a maximum cap.<sup>471</sup> Weekly payments cease for most workers, apart from those assessed as having a WPI of more than 20 per cent, after 260 weeks.<sup>472</sup>

<sup>470</sup> *Workers Compensation Act 1987*, Pt 3, Subdivision 2.

<sup>471</sup> *Workers Compensation Act 1987*, ss 36, 37 and 38.

<sup>472</sup> *Workers Compensation Act 1987*, s 39.

- 6.52** As with the other reforms introduced in 2012, the caps on weekly entitlements sought to incentivise return to work.<sup>473</sup> However, a number of stakeholders suggested that rather than incentivising return to work, the ‘step down’ approach either forces people back to work before they are ready or onto social security payments.<sup>474</sup>
- 6.53** For example, the CFMEU said the ‘step down’ approach pushes injured workers and their families further towards poverty as it fails to adequately consider reasons why an injured worker has not returned to work.<sup>475</sup> Likewise, the Shop, Distributive Allied Employees Association Northern and Newcastle Branch (SDA) asserted that cuts to weekly payments are a ‘gross injustice’ and go against the intent of the workers compensation scheme, which should support rather than penalise workers.<sup>476</sup> The SDA said that workers and their families are suffering due to the cuts to payments.<sup>477</sup>
- 6.54** Following on, the NSW Bar Association called on the NSW Government to consider improving the weekly benefits payable to injured workers to keep injured workers from becoming ‘impoverished’.<sup>478</sup>
- 6.55** As discussed in Chapter 4, if a worker is found to have work capacity, their access to weekly payments can be terminated. Discussion about the calculation of weekly benefits is also included in Chapter 4. Dispute resolution processes concerning work capacity decisions are discussed in Chapter 5.
- 6.56** The following sections detail specific concerns about injured workers’ access to weekly payments.

### **Access to weekly payments after the second entitlement period**

- 6.57** Section 38 of the 1987 Act details special requirements for the continuation of weekly payments to certain workers after the second entitlement period (130 weeks). SIRA advised that to receive entitlements after 130 weeks, a worker must be:
- working 15 hours or more a week and earning at least \$183 a week (indexed annually) and have been **assessed by the insurer** as being, and as likely to continue indefinitely to be, incapable of doing additional employment or work that would increase their earnings, or
  - a worker with high needs or highest needs.<sup>479</sup>

---

<sup>473</sup> *Hansard*, NSW Legislative Assembly, 19 June 2012, p 13,015 (Mike Baird).

<sup>474</sup> Submission 72, Australian Lawyers Alliance, p 16.

<sup>475</sup> Submission 61, CFMEU, p 24.

<sup>476</sup> Submission 4, SDA Newcastle and Northern Branch, p 47.

<sup>477</sup> Submission 4, SDA Newcastle and Northern Branch, p 47.

<sup>478</sup> Submission 6, NSW Bar Association, p 1.

<sup>479</sup> See, SIRA, *Payments when working*, <http://www.sira.nsw.gov.au/workers-compensation/workers-and-claims/payments-and-expenses/weekly-payments/payments-when-working>; Submission 6, NSW Bar Association, p 17, quoting *Workers Compensation Act 1987*, s 38(2).

- 6.58** The NSW Bar Association stated that the drafting of this provision leaves this entitlement ‘... completely contingent on the insurer making an assessment or assessments which are favourable to the worker.’<sup>480</sup>
- 6.59** WIRO similarly advised that s 38 of the 1987 Act does not refer to objective criteria or to the possibility that any other body, including a body conducting a review, might draw the same or a different conclusion about the worker.<sup>481</sup>
- 6.60** The NSW Bar Association and the Australian Lawyers Alliance advocated amending s 38 of the 1987 Act to remove the subjective insurer determinations required for the continued payment of weekly benefits.<sup>482</sup>

### **Minimum weekly payment for workers with highest needs**

- 6.61** Section 38A of the 1987 Act was introduced as part of the 2015 reforms and provides for a minimum safety net of weekly payments for workers with highest needs (workers with a WPI greater than 30 per cent). The Australian Lawyers Alliance commended the government for this reform but noted that the Workers Compensation Commission has interpreted the transitional provisions as excluding existing recipients from receiving this entitlement:

... the transitional regulations have been interpreted by the Workers Compensation Commission in a way that the safety net does not apply to those seriously injured workers (now workers with highest needs) who were “existing recipients”. This would comprise about 950 of the most seriously injured people in the scheme. The ALA sees no policy reason as to why some workers with highest needs should be excluded from the benefit purely based upon whether they were receiving weekly benefit on 1 October 2012 or not.<sup>483</sup>

- 6.62** The Australian Lawyers Alliance argued that this distinction is ‘arbitrary and unfair’ and submitted that the extension of the safety net should cover all workers with highest needs.<sup>484</sup>

### ***Committee comment***

- 6.63** The committee notes that weekly payments are an essential source of income for injury workers. We accept that the lack of an objective test in s 38 of the 1987 Act leaves workers dependent on subjective assessments made by individual insurers in order to continue to access weekly benefits after 130 weeks. The committee recommends that SIRA amend the *Guidelines for claiming workers compensation* concerning s 38 of the 1987 Act to set out an objective test for insurers to adhere to when determining the requirements for continuation of weekly payments after the second entitlement.

<sup>480</sup> Submission 6, NSW Bar Association, p 17, quoting *Workers Compensation Act 1987*, s 38(3b).

<sup>481</sup> Submission 54, WIRO, p 20.

<sup>482</sup> See, Submission 6, NSW Bar Association, p 18; Submission 74, Australian Lawyers Alliance, p 14.

<sup>483</sup> Submission 74, Australian Lawyers Alliance, p 14.

<sup>484</sup> Submission 74, Australian Lawyers Alliance, p 14.

---

### Recommendation 18

That SIRA amend the *Guidelines for claiming workers compensation* concerning s 38 of the *Workers Compensation Act 1987* to set out an objective test for insurers to adhere to when determining the requirements for continuation of weekly payments after the second entitlement.

---

- 6.64** The committee notes the government introduced a minimum weekly compensation payment for injured workers with highest needs. However, the committee heard that the transitional provisions may exclude existing recipients of weekly payments from being eligible for the minimum safety net. We are not aware of whether this was intentional. The committee recommends that the government clarify the intended scope of s 38A and if necessary, extend the minimum weekly compensation payments for injured workers with highest needs to existing recipients of weekly payments, subject to an analysis of its financial impact.
- 

### Recommendation 19

That the NSW Government clarify the intended scope of s 38A of the *Workers Compensation Act 1987* and if necessary, extend the minimum weekly compensation payments for injured workers with highest needs to existing recipients of weekly payments, subject to an analysis of its financial impact.

---

### Cessation of weekly benefits after five years

- 6.65** Section 39 of the 1987 Act provides for the termination of weekly benefits after 260 weeks (five years). This section was introduced as part of the 2012 reforms.
- 6.66** SIRA advised that to receive weekly payments **after** 260 weeks a worker must have a WPI greater than 20 per cent.<sup>485</sup> Workers with high needs (those assessed as having a WPI of 21-30 per cent) require a work capacity assessment at least once every two years to receive this entitlement. However, workers with the highest needs (those with a WPI of more than 30 per cent) continue to be entitled to weekly payments without requiring a work capacity assessment.<sup>486</sup> SIRA further noted that a worker's entitlement to weekly payments after 260 weeks is also subject to s 38 of the 1987 Act, which is discussed above.<sup>487</sup>
- 6.67** The NSW Bar Association observed that s 39 of the 1987 Act means that 'virtually all' injured workers, except those few assessed as having a WPI of 21 per cent or more, cannot receive any weekly compensation after 260 weeks.<sup>488</sup>
- 

<sup>485</sup> SIRA, *Guidelines for claiming workers compensation*, 2016, p 19. Section 38 of the *Workers Compensation Act 1987* refers to special requirements for continuation of weekly payments after second entitlement period (after week 130).

<sup>486</sup> SIRA, *Guidelines for claiming workers compensation*, 2016, p 19.

<sup>487</sup> See, WIRO, WIRO Wire, *260 week limit on weekly payment* (3 November 2016), <http://e.wiro.nsw.gov.au/link/id/zxxx581acaa837bb0905Pzzzz557641390af2a844/page.html>; SIRA, *Guidelines for claiming workers compensation*, 2016, p 19.

<sup>488</sup> See, Submission 6, NSW Bar Association, p 14; Evidence, Mr Garling, 7 November 2016, p 15.

---

**6.68** As previously discussed, the American Medical Association specifically cautions against using WPI to determine entitlement to benefits.<sup>489</sup> The NSW Bar Association expressed alarm that ‘This warning is being ignored by the current legislative provisions, which use the percentage estimates as a basis for deciding whether a worker can obtain more than 260 weeks of weekly compensation.’<sup>490</sup>

***Workers transitioning off entitlements under s 39***

**6.69** As s 39 of the 1987 Act was introduced as part of the 2012 reforms, SIRA advised that the first cohort of approximately 6,661 workers will be transitioning off weekly payments between September 2017 and June 2018.<sup>491</sup> SIRA provided a breakdown of potentially affected workers by insurer type:

- Nominal Insurer (icare): up to 5,569 workers which equates to approximately 84 per cent of the workers who are impacted by section 39
- Treasury Managed Fund: up to 740 workers which equates to approximately 11 per cent
- Self and Specialised insurers: up to 352 workers which equates to approximately five per cent.<sup>492</sup>

**6.70** Mr John Nagle, Executive General Manager, Workers Insurance, icare, said that there would be a ‘bottleneck’ of workers who will stop receiving weekly benefits from October 2017 to February 2018.<sup>493</sup> Following on, SIRA informed the committee that most of the affected workers will cease receiving entitlements during December 2017 and January 2018.<sup>494</sup> SIRA noted current projections indicate that post January 2018, the ongoing number of workers ceasing entitlement to weekly payments under s 39 will be up to 80 per month.<sup>495</sup>

**6.71** SIRA has established reporting requirements for this transition period for all insurers: icare (acting for the nominal insurer and the Treasury Managed Fund) will provide monthly updates, and self and specialised insurers will report to SIRA on a bi-monthly basis, commencing January 2017.<sup>496</sup> Ms Carmel Donnelly, Executive Director, Workers and Home Building Compensation Regulation, SIRA, anticipated that the information provided by icare in these reports will assist in providing further guidance about the transition process:

... we have asked them [icare] to start to identify and work through processes and test the approach, ahead of us giving more guidance to the rest of the insurers in the system. We expect that that will assist us to refine the estimates, particularly as there

<sup>489</sup> Submission 6, NSW Bar Association, p 14.

<sup>490</sup> Submission 6, NSW Bar Association, p 14.

<sup>491</sup> See, Answers to questions on notice, SIRA, 2 December 2016, p 2. SIRA noted that the estimation was current as at 24 November 2016; Evidence, Mr Vivek Bhatia, Chief Executive Officer, icare, 7 November 2016, p 20.

<sup>492</sup> See, Answers to questions on notice, SIRA, p 2; Evidence, Ms Carmel Donnelly, Executive Director, Workers and Home Building Compensation Regulation, SIRA, 7 November 2016, p 34.

<sup>493</sup> Evidence, Mr John Nagle, Executive General Manager, Workers Insurance, icare, 7 November 2016, p 20.

<sup>494</sup> Answers to questions on notice, SIRA, p 2.

<sup>495</sup> Answers to questions on notice, SIRA, p 2.

<sup>496</sup> Answers to questions on notice, SIRA, p 2.

may be some workers who have not had a whole person permanent impairment assessment yet.<sup>497</sup>

**6.72** SIRA noted that scheme agents are reviewing approximately 4,261 nominal insurer scheme claims relevant to permanent impairment and provided key results concerning these reviews:

- 70 per cent of the reviews have been completed
- 36 per cent of reviewed workers require an assessment to determine their degree of permanent impairment
- 72 per cent of workers with a determined permanent impairment are expected to have s 39 apply
- 28 per cent of workers with a determined permanent impairment are not expected to have s 39 apply.<sup>498</sup>

**6.73** Stakeholders expressed concern about the impending transition of workers off weekly entitlements under s 39. Ms Abbey Wilkinson, an injured worker, said she has no work capacity but anticipated being affected by the provision:

In the last 4 years I have been found to have no work capacity, I have in fact not worked for 13 years. I have no ability to work and function as a mother and a wife due to the constant intense pain I am in. My pain level sits at a 7-8 out of 10 every single day. I can experience pain episodes anywhere up to a 12-13 out of 10. Yet, because of these laws, as of this time next year I will be axed from the system if I am found to be under the 21 per cent WPI level ...<sup>499</sup>

**6.74** Ms Rita Mallia, State President, CFMEU, stated that thousands of workers who failed to recover from their injury within the five-year timeframe would soon be without assistance:

... next year, the fifth anniversary of the scheme, there are going to be thousands of injured workers who will be relegated to the scrapheap when their weekly benefits are cut off because they have reached the magical five-year limit ... Everyone who transitioned in 2012, the long-term injured workers, will no longer receive benefits. The permanently injured but not those with 20 per cent whole person impairment [WPI]: no more weekly benefits just because you did not get better in that miraculous period of five years.<sup>500</sup>

**6.75** Ms Mallia said she expects this transition period will come at a 'horrendous human cost.'<sup>501</sup>

**6.76** Mr Brett Holmes, General Secretary, NSW Nurses and Midwives Association, said that more than 50 of the union's members will be affected by the impending deadline:

... in October 2017 more than 50 of our members will strike the five-year cut-off period and they will be in limbo. They do not meet the seriously injured category.

<sup>497</sup> Evidence, Ms Donnelly, 7 November 2016, p 34.

<sup>498</sup> Answers to questions on notice, SIRA, p 2.

<sup>499</sup> Submission 17, Ms Abbey Wilkinson, p 3.

<sup>500</sup> Evidence, Ms Mallia, 4 November 2016, p 44.

<sup>501</sup> Evidence, Ms Mallia, 4 November 2016, p 44.

They have been able to do some work as required but are unable to return to full-time hours and they will not qualify for disability benefits from Centrelink.

Many of those nurses will be in severe financial distress as a result of workplace injury but have nowhere left to go. I fear for their safety—their mental, physical and wellbeing safety.<sup>502</sup>

- 6.77** Ms Sherri Hayward, Industrial/Legal Officer, CFMEU, noted that s 322A of the 1998 Act, which allows only one assessment of impairment, is significant when considering the effect of s 39 of the 1987 Act:

... the interplay of section 322A of the 1998 Act is really of significance when it comes to the five-year mark. In order for a person to be eligible for benefits beyond five years they must get a MAC [Medical Assessment Certificate]; they must have their assessment determined. That may not be in their best interests in terms of seeking a lump sum under the other provisions of the Act, and because section 322A says you only get one assessment, you lose your chance at other benefits just so you can see whether you are eligible for weekly benefits.<sup>503</sup>

- 6.78** Ms Hayward continued: ‘That is inherently unfair. Other sections of the Act allow the injured worker and the insurer to have a look and see whether or not you are close to the 20 per cent, not the five-year limit.’<sup>504</sup>

- 6.79** icare advised that it has previously instructed PricewaterhouseCoopers Actuarial Pty Ltd (PwC) to estimate the potential impact of making changes to the weekly compensation benefit cap under s 39 of the 1987 Act.<sup>505</sup> The report concluded that if s 39 was repealed, there would be a liability increase on the nominal insurer of \$6.3 billion and workers compensation premiums would be required to increase approximately 35 per cent:

Were the section 39 cap to be repealed in its entirety, PwC have estimated that the liability impact on the Nominal Insurer would be an increase of \$6.3bn. This estimate includes an allowance for the potential behavioural changes that may arise. In addition to the liability impact, the change has been estimated to lead to an increase in the required workers compensation premium of approximately 35 per cent.<sup>506</sup>

- 6.80** icare further stated that any changes to medical benefit caps in conjunction with changes to s 39 will undermine the financial position of the scheme:

If changes in the medical benefit caps were combined with changes to section 39, the impact on the Nominal Insurer’s financial position would be material enough to put the Nominal Insurer in an unsustainable financial position giving rise to a significantly undefined liability.<sup>507</sup>

<sup>502</sup> Evidence, Mr Brett Holmes, General Secretary, NSW Nurses and Midwives Association, 4 November 2016, p 45.

<sup>503</sup> Evidence, Ms Sherri Hayward, Industrial/Legal Officer, , 4 November 2016, p 53.

<sup>504</sup> Evidence, Ms Hayward, 4 November 2016, p 53.

<sup>505</sup> Answers to questions on notice, icare, p 10.

<sup>506</sup> Answers to questions on notice, icare, p 10.

<sup>507</sup> Answers to questions on notice, icare, p 10.

***Communication with workers regarding s 39 of the 1987 Act***

- 6.81** The committee was advised that during 2016, icare communicated with workers potentially affected by s 39 of the 1987 Act about their possible upcoming transition off weekly entitlements.<sup>508</sup>
- 6.82** WIRO summarised icare's advice to workers: 'In order to facilitate the determination of which workers will be affected insurers have commenced writing to a worker likely to reach the 260 week limit and inviting them to attend for an independent medical examination paid for by the insurer.'<sup>509</sup>
- 6.83** WIRO expressed concern that the information incorrectly suggested that the insurer's assessment was final:

The inference in the correspondence has been that this examination and report will determine the eligibility of the worker for weekly payments without indicating that the worker is entitled to challenge the medical assessment at the Workers Compensation Commission in the usual way.<sup>510</sup>

- 6.84** Mr Garling stated that icare should have encouraged workers to seek legal advice about the cut-off date.<sup>511</sup> WIRO acknowledged that he has a different interpretation to icare about whether the only path to deal with s 39 is through the Workers Compensation Commission:

There is a view that section 39 of the *Workers Compensation Act 1987* would require a medical assessment certificate issued by an approved medical specialist in order for a worker to qualify for continued weekly payments. This approach by WIRO has been developed having regard to different views expressed about whether the only path to deal with section 39 is through the Commission.<sup>512</sup>

- 6.85** icare responded to WIRO's concerns during the review. Mr Nagle advised of the intent guiding icare's brochure:

We do not believe that you need to go through the commission in the first instance. The process we have instituted is if you already have a whole person assessment, we are not asking you to do a new one. What we are doing is advising of the current position and advising you of the timelines and offering assistance through transition back to the community, back to work.<sup>513</sup>

<sup>508</sup> Evidence, Mr Garling, pp 15-16.

<sup>509</sup> See, WIRO, *Notice of Termination of Weekly Benefits to Workers*, 24 November 2016, <http://wiro.nsw.gov.au/news/notice-termination-weekly-benefits-workers>; Evidence, Mr Garling, 7 November 2016, pp 15-16.

<sup>510</sup> See, WIRO, *Notice of Termination of Weekly Benefits to Workers*, 24 November 2016, <http://wiro.nsw.gov.au/news/notice-termination-weekly-benefits-workers>; Evidence, Mr Garling, 7 November 2016, pp 15-16.

<sup>511</sup> Evidence, Mr Garling, 7 November 2016, pp 15-16.

<sup>512</sup> See, WIRO, *Notice of Termination of Weekly Benefits to Workers*, 24 November 2016, <http://wiro.nsw.gov.au/news/notice-termination-weekly-benefits-workers7>.

<sup>513</sup> Evidence, Mr Nagle, 7 November 2016, p 21.

- 6.86** Mr Nagle noted that the brochure has been re-released following WIRO's concerns and now directed workers to seek legal advice:

Following WIRO concerns we have re-established our brochure to make sure it is more prominent; that people should seek advice or approach WIRO, SIRA, or the commission for assistance. We have said that from day one. The reason we have instituted the process we had is we did not want an adversarial process from day one. So what we have tried to do is actually ensure people understand the process, understand the supports available and understand their rights all the way through.<sup>514</sup>

***Workers Compensation Amendment (Transitional Arrangements for Weekly Payments) Regulation 2016***

- 6.87** Mr Garling observed that in respect to s 39 of the 1987 Act there may be certain circumstances where it is preferable for an insurer to accept that a worker has a WPI of more than 20 per cent instead of having them having them assessed by an AMS:

A lot of those [injured workers affected by s 39] will already have a medical assessment certificate, so they will not participate. I should say that we have made some recommendations as to how that can be overcome, particularly in allowing insurers to make the decision to accept workers being over 20 per cent instead of them having to go through the system.

Under another section relating to high needs and highest needs workers there is a provision for an insurer to say, "Yes, we accept you are over 20 per cent". If you have fallen off the building and you are still in hospital six months later they can say, "We accept you are over 20 per cent for all practical purposes without having to have a formal assessment". That does not arise in section 39. The oddity is that some workers will already be assessed as high needs and accepted as high needs without a formal assessment but still have to go through the gate?<sup>515</sup>

- 6.88** In response to this suggestion, on 16 December 2016, the NSW Government published the *Workers Compensation Amendment (Transitional Arrangements for Weekly Payments) Regulation 2016*. The regulation provides that in respect to s 39 of the 1987 Act:

(a) the 260-week limit on entitlement to weekly payments of compensation does not apply to certain injured workers whose degree of permanent impairment has not been assessed or has been determined by an insurer to be more than 20 per cent, and

(b) an injured worker whose degree of permanent impairment has been assessed may have one further assessment of permanent impairment for the purposes of determining the worker's entitlement to benefits under the *Workers Compensation Act 1987*.<sup>516</sup>

- 6.89** The regulation is retrospective and only applies to workers who were in receipt of weekly payments prior to 1 October 2012.

<sup>514</sup> Evidence, Mr Nagle, 7 November 2016, p 21.

<sup>515</sup> Evidence, Mr Garling, 7 November 2016, p 16.

<sup>516</sup> *Workers Compensation Amendment (Transitional Arrangements for Weekly Payments) Regulation 2016*, Explanatory note.

- 6.90** WIRO advised that the regulation means that an insurer may accept that a worker has a WPI of more than 20 per cent without the necessity of obtaining a binding Medical Assessment Certificate (MAC) from an AMS:

One significant benefit from the 2016 Amendment was that an insurer is entitled to accept that a worker has a permanent impairment being more than 20 per cent without the necessity of obtaining a binding MAC to that effect. That will be a relief to those workers who had already been accepted as being workers of high needs.<sup>517</sup>

- 6.91** WIRO further stated: 'It is important to observe that this is entirely up to an insurer and there is no obligation to accept an assessment of permanent impairment that is not the subject of a MAC.'<sup>518</sup>

***Committee comment***

- 6.92** The committee understands that the impending transition of the final cohort of injured workers off weekly payments will cause them upheaval. It is of utmost importance that SIRA and icare appropriately oversee this transition and assist those injured workers who are affected. It is therefore unfortunate to receive evidence that icare did not provide unequivocally clear information about the transition process to eligible workers.
- 6.93** The committee notes that SIRA is collating information from icare and self and specialised insurers about the first cohort affected by the operation of s 39 of *Workers Compensation Act 1987*. We recommend that SIRA use this data to identify workers in need of intensive case management and work placement, and to provide these opportunities to eligible workers before the expiration of weekly benefits.

---

**Recommendation 20**

That SIRA use the data collected from icare and self and specialised insurers concerning the first cohort of workers affected by the operation of s 39 of the *Workers Compensation Act 1987* to identify workers in need of intensive case management and work placement, and provide these opportunities to eligible workers before the expiration of weekly benefits.

---

- 6.94** More generally, the committee notes that repealing s 39 of the 1987 Act would adversely impact the financial viability of the scheme and substantially increase premiums.
- 6.95** We note the introduction of the Workers Compensation Amendment (Transitional Arrangements for Weekly Payments) Regulation 2016. This regulation is intended to assist with the impending transition process.

---

<sup>517</sup> WIRO, WIRO Wire, *Issues arising from s 39 of the Workers' Compensation Act 1987 and the effect of the Workers Compensation Amendment (Transitional arrangements for weekly payments) Regulation 2016*, (12 January 2017), <http://e.wiro.nsw.gov.au/link/id/zzzz587718d25609e376Pzzzz5851c17036b12761/page.html>.

<sup>518</sup> WIRO, WIRO Wire, *Issues arising from s 39 of the Workers' Compensation Act 1987 and the effect of the Workers Compensation Amendment (Transitional arrangements for weekly payments) Regulation 2016*, (12 January 2017), <http://e.wiro.nsw.gov.au/link/id/zzzz587718d25609e376Pzzzz5851c17036b12761/page.html>.

## Entitlement to commutation

- 6.96** Prior to the 2012 reforms, lump sum payments to compensate for an injured worker's loss of income were available under s 40 of the 1987 Act.<sup>519</sup> The 2012 reforms introduced limited lump sum payments for permanent impairment via a commutation. A commutation is an agreement between an injured worker, their employer and the scheme agent to pay the injured worker's entitlements as a lump sum. A worker who has accepted a commutation is no longer entitled to future weekly payments, or to claim medical, hospital, rehabilitation expenses for that injury.<sup>520</sup>
- 6.97** Section 87EA of the 1987 Act details the preconditions for commutation, including that the worker:
- has a permanent impairment of at least a 15 per cent as a result of their injury
  - has been paid compensation for their permanent impairment
  - first received weekly payments for the injury more than two years ago
  - has fully exhausted all opportunities for injury management and return to work
  - has received weekly payments (regularly and periodically) throughout the previous six months
  - is entitled to ongoing weekly payments
  - has not had their weekly payments stopped or reduced as a result of not complying with their return to work obligations.<sup>521</sup>
- 6.98** Stakeholders contended that the commutation provisions are insufficient and do not allow injured workers to pursue the resolution of disputes.<sup>522</sup> For example, the Australian Lawyers Alliance said that the prerequisites in s 87EA of the 1987 Act are 'overly onerous and inaccessible to most workers'.<sup>523</sup> The Australian Lawyers Alliance proposed repealing the provision to better facilitate the resolution of disputes and claims on terms agreeable to both parties on a full and final basis. Moreover, the Australian Lawyers Alliance said that injured workers should have access to legal advice when considering a commutation.<sup>524</sup>
- 6.99** Likewise, the Law Society of New South Wales supported removing restrictions on commutations:

... the restrictions presently placed on the party's ability to commute liability for the payment of statutory compensation benefits as set out in s 87EA of the 1987 Act

<sup>519</sup> Evidence, Ms Mallia, 4 November 2016, p 52.

<sup>520</sup> SIRA, *Commutations*, <http://www.sira.nsw.gov.au/workers-compensation/workers-and-claims/payments-and-expenses/commutations>.

<sup>521</sup> SIRA, *Commutations*, <http://www.sira.nsw.gov.au/workers-compensation/workers-and-claims/payments-and-expenses/commutations>.

<sup>522</sup> See, Submission 74, Australian Lawyers Alliance, pp 6-7; Submission 65, Law Society of New South Wales, p 6.

<sup>523</sup> Submission 74, Australian Lawyers Alliance, pp 6-7.

<sup>524</sup> Submission 74, Australian Lawyers Alliance, pp 6-7.

should be removed altogether so that all parties have the ability to agree to a settlement, however described, on a final basis, of statutory compensation entitlements.<sup>525</sup>

- 6.100** The Australian Lawyers Alliance and the Law Society of New South Wales further suggested that allowing commutations would encourage workers to return to work:

A worker who is able to settle on a final basis an entitlement to statutory compensation in exchange for a lump sum is then far more likely to be able to return to work in suitable employment with an alternate employer. A worker with a finalized claim is no longer “in the system” and as a result is more employable. Our experience has demonstrated the positive impact a lump sum settlement can have upon an injured worker’s sense of autonomy and psychological state, which is often an impediment to a sustainable return to work.<sup>526</sup>

- 6.101** Mr Franco from the NSW Self Insurers Association supported commutations, saying that these agreements allow an injured worker to finalise their claims and entitlements and ‘put it all behind him or her and move on with their life.’<sup>527</sup>

- 6.102** Ms Mallia encouraged the committee to consider reinstating lump sum payments to workers to compensate for loss of income as per the pre-2012 s 40 of the 1987 Act.<sup>528</sup> Ms Mallia suggested the circumstances where a lump sum compensation may be appropriate:

There should be a capacity for people to receive some sort of lump sum ... Where people are seriously injured and it is very clear that they are not going to return to their pre-injury employment, options of retraining have been exhausted, why should they not get a lump sum to pay off that mortgage, to come to grips with life with a disability and have some compensation for future medicals ...

- 6.103** Ms Mallia noted that this would allow workers to exit the system which would be beneficial, as she explained that ‘... many do not want to be beholden to an insurance company until they are 65 years of age – that, in itself, is a stress and an anxiety that they do not want.’<sup>529</sup>

*Committee comment*

- 6.104** The committee notes concerns that the current provisions for commutations are overly onerous.

---

<sup>525</sup> Submission 65, Law Society of New South Wales, p 6.

<sup>526</sup> Answers to questions on notice, Mr Gary Ulman, President, Law Society of New South Wales and Ms Roshana May, New South Wales Branch President, 1 December 2016, p 2.

<sup>527</sup> Evidence, Mr Franco, 4 November 2016, p 71.

<sup>528</sup> Evidence, Ms Mallia, 4 November 2016, p 52.

<sup>529</sup> Evidence, Ms Mallia, 4 November 2016, p 52.

## Chapter 7 First responders

During the review stakeholders raised a number of issues specific to first responders, particularly police and firefighters, under the workers compensation scheme. This chapter considers the exemption of these workers from the 2012 reforms, their claims experience since that time, and the impact of psychological injuries, including the proposal that such injuries should be presumptively treated as work-related. The chapter then examines the use of surveillance on injured first responders.

### Exemption from reforms

- 7.1 Certain first responders including police, paramedics and fire fighters were exempt from the 2012 reforms and have continued with this exemption by agreement with the NSW Government.<sup>530</sup> The Specialist PTSD & Injury Lawyers explained that as a result, these workers are more generously compensated than other workers in the scheme.<sup>531</sup>
- 7.2 The Police Association of NSW maintained that the exemption should remain in place.<sup>532</sup> Ms Kirsty Membreno, Manager Industrial, Police Association of New South Wales, said that the exemption is vital especially as policing is becoming increasingly dangerous.<sup>533</sup>
- 7.3 However, Mr Stewart Little, General Secretary, Public Service Association of NSW, noted that the 2012 reforms did not exempt all emergency workers:

The current workers compensation scheme has established a two-class system for emergency workers. Prison officers, Juvenile Justice workers, rural firefighters in the National Parks and Wildlife Service and State forests, and government employees involved in dangerous occupations in disability services and child protection [are not exempt from the 2012 reforms].<sup>534</sup>

- 7.4 Mr Little argued that the NSW Government should recognise and acknowledge the dangers and risks faced by the union's members in providing essential frontline public services, and extend to them the same exemptions granted to other emergency services employees.<sup>535</sup>

### Claims experience for first responders

- 7.5 This section examines the claims experience of police and firefighters following the 2012 reforms.

<sup>530</sup> See, Submission 8, Police Association of New South Wales, p 1; Evidence, Ms Kirsty Membreno, Manager Industrial, Police Association of New South Wales, 4 November 2016, p 22.

<sup>531</sup> Submission 47, Specialist PTSD & Injury Lawyers, pp 2-3.

<sup>532</sup> Submission 8, Police Association of New South Wales, p 2.

<sup>533</sup> Evidence, Ms Membreno, 4 November 2016, p 22.

<sup>534</sup> Evidence, Mr Stewart Little, General Secretary, Public Service Association of NSW, 4 November 2016, p 23.

<sup>535</sup> Evidence, Mr Little, 4 November 2016, p 23.

## Police

- 7.6** The committee heard that since 2012, the NSW Police Force has improved its workers compensation claims history. Indeed, Ms Membreno advised that since 2013-14, the police force's annual workers compensation cost had decreased from \$443 million to \$333 million:

It should be noted that the exemption has not resulted in an increase in workers compensation costs but rather, as evidenced in the recent Audit Office report, since 2013-2014 the total annual cost has reduced from \$443 million to \$333 million. The 2016-2017 costs are expected to be further reduced when hindsight adjustments are made.<sup>536</sup>

- 7.7** Ms Membreno also noted that since 2012, new workers compensation claims have decreased by 1.7 per cent despite increases to police numbers and increases in pay rises.<sup>537</sup>

- 7.8** The Police Association of New South Wales attributed this trend to numerous factors, including a change in culture within the force to recognise the importance of supporting injured workers, and a cooperative arrangement between the association and the police in preventing workplace injuries.<sup>538</sup> However, the NSW Police Force's Workforce Improvement Program was considered the greatest contributor to these improvements. The committee heard that the program includes initiatives to prevent injuries and provide treatment and injury management to encourage recovery and return to work:

These [programs] were designed to prevent injuries and provide treatment and injury management to officers which were focused on expedited recovery and earlier return to work outcomes. Combined with a programme of providing injured officers, who had reached maximum medical improvement, with meaningful and ongoing employment, we have experienced an overwhelming reduction in medical discharges and workers compensation costs.<sup>539</sup>

- 7.9** Ms Membreno explained that under the program, spending is concentrated on preventive programs and early treatment options:

These programs are frontloading the system; basically where they are spending the money upfront, being proactive in terms of resolving issues before they actually become a claim for workers compensation. It is in the preventative space, aimed at assisting officers before they get injured.<sup>540</sup>

- 7.10** The committee also received evidence about the Physical Training Instructor's Reconditioning Initiative, which allows injured officers to receive physiotherapy and conditioning services based on the 'return to play' model used in high performance sport. The initiative treats physical injuries immediately rather than waiting for approval by an insurer and has resulted in

---

<sup>536</sup> Evidence, Ms Membreno, 4 November 2016, p 22.

<sup>537</sup> Evidence, Ms Membreno, 4 November 2016, p 22.

<sup>538</sup> Evidence, Mr Peter Remfrey, Secretary, Police Association of New South Wales, 4 November 2016, p 24 and p 32.

<sup>539</sup> See, Submission 8, Police Association of New South Wales, p 2; Evidence, Ms Membreno, 4 November 2016, p 22.

<sup>540</sup> See, Evidence, Ms Membreno, 4 November 2016, p 22; Evidence, Mr Remfrey, 4 November 2016, p 24.

lower treatment costs and improved return to work outcomes.<sup>541</sup> Mr Peter Remfrey, Secretary, Police Association of New South Wales, said that the initiative is also having an effect on the incidence of secondary psychological injuries:

It also has a massive effect on secondary psychological injuries, so the quicker we can get people fixed up physically, the less chance there is of having problems from a secondary psychological injury perspective, which is a major problem in policing, as you can appreciate. That is working extremely well.<sup>542</sup>

**7.11** The Police Association of New South Wales supported the continuation of the NSW Police Force's Workforce Improvement Program.<sup>543</sup> Indeed, the Public Service Association noted the success of the programs offered by the police and encouraged the NSW Government to take a similarly coordinated approach.<sup>544</sup>

**7.12** The Police Association of New South Wales also stressed the importance of tailoring return to work opportunities to an individual worker's needs and providing meaningful employment opportunities:

The Association is passionate about modifying positions for officers with permanent injuries or illnesses to motivate officers to return to work early, knowing they are undertaking a meaningful job and that, should their injury become permanent then there are suitable jobs available and they still have worth within the organisation, despite not being 100 per cent fit.<sup>545</sup>

**7.13** Ms Membreno used the example of an injured detective sergeant to illustrate the need to provide meaningful suitable employment:

With a detective sergeant, do not make him just sit there and answer phones. He could work on briefs. There are a number of things that a detective sergeant with a physical injury, for example, could do. The only thing that they probably cannot do is go out and lock up the crook or go to a warrant search, but there are a number of other functions and core duties that that person could do.<sup>546</sup>

**7.14** However, despite these improvements, the committee received evidence that injured police officers still face challenges when returning to work. For example, an injured police officer submitted:

There is so much money spent in the NSWPF [NSW Police Force] on injury management and the amount of time spent trying to get officers back into the workplace, the majority of which may never be quite right. If they do make it back into the workplace in some capacity they have to be managed and that in itself is very taxing to those required to supervise and assist them in their endeavours to return to

---

<sup>541</sup> Submission 8, Police Association of New South Wales, p 1; Evidence, Mr Remfrey, 4 November 2016, p 24.

<sup>542</sup> Evidence, Mr Remfrey, 4 November 2016, p 24.

<sup>543</sup> Evidence, Ms Membreno, 4 November 2016, p 22.

<sup>544</sup> Evidence, Mr Little, 4 November 2016, p 26.

<sup>545</sup> See, Submission 8, Police Association of New South Wales, p 4; Ms Membreno, 4 November 2016, p 22 and p 32.

<sup>546</sup> Evidence, Ms Membreno, Manager Industrial, 4 November 2016, p 32.

full duties. Where officers are genuinely seeking a return to work and are able to, that is fantastic. Where it is just a process of going through the motions because they are broken and probably never be fixed, and will continually break down, how does that really help the individual or those they work with and under?<sup>547</sup>

- 7.15** An additional concern for the Police Association of New South Wales is the number of officers unable to secure suitable duties and forced to medically retire:

The Association is unfortunately still witnessing officers who are on suitable duties being unable to secure permanent suitable employment within NSWPF and are being forced to medically discharge against their will. The insurer does not have any input or ability to influence this decision and process, which seems ludicrous when there is a direct impact on worker's compensation benefits payable and the ongoing premium.

- 7.16** The Police Association of New South Wales suggested to addressing this situation by encouraging priority transfers for injured officers to other public sector agencies.<sup>548</sup>

- 7.17** SIRA advised that it is keen to work with the NSW Police Force, the Police Association of New South Wales, other government agencies and the Treasury Managed Fund to improve access to suitable employment for injured police officers. SIRA stated that it has also a range of initiatives to support return to work.<sup>549</sup> Return to work is discussed in detail in Chapter 3.

### Firefighters

- 7.18** The committee heard that the NSW Fire Brigade has also seen a decline in the number of workers compensation claims since the 2012 reforms. Mr Darin Sullivan, Secretary, Fire Brigade Employees Union of New South Wales, believed that there were various factors contributing to this decrease:

Whilst the workers' comp changes were occurring across the workforces across the State, at the same time Fire and Rescue were also implementing other changes within the job, which included starting to sack firefighters who were medically unfit, which had a fairly large culture change within the industry and put a lot of pressure on people to start to change how they report and what they report with respect to injuries ... Another [change] is that there is a commitment on both sides—the union and the fire brigade—at the moment to negotiate a health and fitness assessment process as well.<sup>550</sup>

- 7.19** Ms Claire Pullen, Senior Industrial Officer, Fire Brigade Employees Union of New South Wales, said that policy changes at the workplace level have been a significant force behind the declining number of claims. For example, Ms Pullen explained that employers are making individual adjustments to assist return to work:

In my experience with assisting these members, the employer is doing a better job of making individual adjustments for firefighters. That is particularly difficult for us ... a

<sup>547</sup> Submission 20, Name suppressed, p 2.

<sup>548</sup> Submission 8, Police Association of New South Wales, p 3.

<sup>549</sup> Answers to pre-hearing questions on notice, SIRA, 27 October 2016, p 16.

<sup>550</sup> Evidence, Mr Darin Sullivan, Secretary, Fire Brigade Employees Union of New South Wales, 4 November 2016, p 25.

clerk can go to work with a cold, but a firefighter cannot put on a breathing apparatus if they have a cold. What we have been able to do, working closely with the employer, is make adjustments around that kind of injury and return to work. It is happening at a lower level than legislative or benefit; it is policy or procedure, if you will. We are negotiating through that.<sup>551</sup>

- 7.20** Ms Pullen further highlighted the importance of the employer tailoring return to work to an individual firefighter's need, including 'work adjustments, role adjustments, individual station and zone work with the employer'.<sup>552</sup>

*Committee comment*

- 7.21** The evidence presented during this review highlights that policing is a difficult occupation in which workplace injury is sadly not uncommon. The committee acknowledges the dedication of the NSW Police Force and the Police Association of New South Wales in working together to reduce and better manage workers compensation claims.
- 7.22** The Workforce Improvement Program offers a positive example of how workplaces can support injured workers through early intervention, leading to greater recovery and return to work rates. The committee supports the need for meaningful employment opportunities for injured police officers and encourages the police association to continue pursuing this matter with the NSW Police Force and its insurer.
- 7.23** The committee also acknowledges the work of the Fire Brigade Union of New South Wales to manage workers compensation claims and to implement policies and procedures that assist firefighters to return to work. Their initiatives demonstrate how changes at the workplace level can benefit both workers and employers.

## Psychological injuries for first responders

- 7.24** The committee received numerous submissions from injured police officers discussing the psychological injuries, including post-traumatic stress disorder, they have suffered due to their employment.<sup>553</sup> For example, an injured police officer submitted:

I was involved in a significant critical incident on the 6th December 2003 which led to a diagnosis of major depression and PTSD. On the 2nd June 2007 I suffered physical injury at Cessnock Police Station. On 8th March 2009 I attended a fatal motor vehicle accident in Mulbring. I was diagnosed with a reoccurrence of major depression and PTSD [post traumatic stress disorder].<sup>554</sup>

<sup>551</sup> Evidence, Ms Claire Pullen, Senior Industrial Officer, Fire Brigade Employees Union, 4 November 2016, p 25.

<sup>552</sup> Evidence, Ms Pullen, 4 November 2016, p 33.

<sup>553</sup> See, Submission 39, Name suppressed, p 1; Submission 56, Name Suppressed, p 2; Submission 76, Unions NSW, Attachment 1, p 62; Evidence, Mr Brendan Bullock, 7 November 2016, pp 56-57.

<sup>554</sup> Submission 34, Name suppressed, p 2.

**7.25** Likewise, Mr Andrew Collins, an injured former police officer, stated:

I was diagnosed with Chronic Post Traumatic Stress Disorder and Major Depression following 15 years of policing and medically discharged from the NSW Police in 2000.<sup>555</sup>

**7.26** In fact, the Police Association noted that ‘... over 20 per cent of workers compensation claims submitted by police officers are psychological injuries, due to the ongoing exposure and impact policing has on their mental health and wellbeing.’<sup>556</sup>

**7.27** Review participants expressed concern that the emotional and psychological toll of re-telling an injured worker’s employment history to case managers and medical professionals can exacerbate an injury and, at times, cause secondary psychological injuries. Ms Pullen told the committee that members often call the union when their workers compensation claim is contested to discuss the challenges of re-living their traumatic workplace experiences:

What our members are asked to do, essentially, when a claim is contested or when the insurer rejects the claim initially, is relay every single one of those events over and over and over. What happens then is they ring me up ... in very distressed circumstances, saying, “I’ve just been to see an insurance company doctor for seven hours and they grilled me ... about the burnt babies and the traumatic amputations and the heads that were separate from the body at the car accident, and then they came out and said I was fine”.<sup>557</sup>

**7.28** Ms Pullen explained that injured workers find re-telling their work history traumatic particularly when a case manager questions their psychological state:

Not only are they experiencing the trauma, they are having to relive it for their own doctors, on the condition that their own doctors are up to standard in terms of dealing with that, but they are actually having their own psychological state questioned again by the insurer saying “I fundamentally do not believe that you are unwell.” It is an appalling position to put someone in, and the delays in having that dealt with mean that they ruminate on this.<sup>558</sup>

**7.29** Ms Pullen added that it can take 12 to 14 months for union members to resolve their claims and that in some cases this delay is ‘absolutely fatal’ to their return to work.<sup>559</sup>

**7.30** Ms Membreno observed that, at times, psychological injuries can play out as performance management issues, further complicating matters:

People who are probably not performing or are very much going into their shell and not being themselves and behaving very differently to what they ordinarily would in the workplace can sometimes be the 25 years of exposure that they have had, and the fact that they are trying to hide their injury and their suffering inside, that it comes out in a different way.<sup>560</sup>

---

<sup>555</sup> Submission 35, Mr Andrew Collins, p 1.

<sup>556</sup> Submission 8, Police Association of New South Wales, p 3.

<sup>557</sup> Evidence, Ms Pullen, 4 November 2016, p 27.

<sup>558</sup> Evidence, Ms Pullen, 4 November 2016, p 27.

<sup>559</sup> Evidence, Ms Pullen, 4 November 2016, p 27.

<sup>560</sup> Evidence, Ms Membreno, 4 November 2016, p 28.

**7.31** icare acknowledged concerns about the potential for any worker, not just first responders, to develop a secondary psychological injury arising from a workers compensation claim:

icare acknowledges that secondary psychological injuries sometimes develop following an injury, particularly if recovery from injury is prolonged or the relationship with the employer, insurer or other stakeholders breaks down. The impact of secondary psychological injury can be far reaching for the injured worker, impacting on their recovery from injury, return to work and life outside of work.<sup>561</sup>

**7.32** icare assured the committee that it is examining ways to prevent and actively manage secondary psychological injuries including the trial of a new screening tool, the Work Injury Screening and Intervention protocol, to identify injured workers who may be at risk of secondary psychological injury or delayed return to work.<sup>562</sup> icare provided details of the trial and support offered to at-risk workers:

The trial involved 580 NSW Health workers from 17 hospitals with a focus on the early identification of soft tissue injury claims that had the potential to escalate to a secondary psychological injury if not managed appropriately. Once identified, injured workers were provided with specialised support to ensure risks and barriers were being addressed to prevent secondary psychological injuries from developing.<sup>563</sup>

**7.33** icare advised: "The preliminary results of the trial indicated significantly improved and sustained return to work rates, with claimants averaging 29 days off work versus the usual average of 53 days."<sup>564</sup>

**7.34** icare informed the committee that it is also considering ways to restructure the way claims are managed to incorporate bio-psycho-social thinking to prevent injuries, as well as treat them.<sup>565</sup>

**7.35** SIRA advised that it is interested to work with the NSW Police Force, the Police Association of New South Wales and the Treasury Managed Fund to improve the outcomes for police and emergency service workers affected by psychological injury.<sup>566</sup> SIRA noted that it has taken steps to assist emergency service personnel with psychological injuries:

On 1 August 2016, SIRA gazetted Fees Orders which specifically allow emergency services workers access to extended treatment sessions and increased coverage and cost for the treatment of Post Traumatic Stress Disorder (PTSD).

SIRA has removed the cap on fees for specialised psychological services available to emergency services workers who have been diagnosed with PTSD to ensure they have access to appropriate support.<sup>567</sup>

**7.36** Additionally, SIRA is establishing a new team to lead injury prevention and rehabilitation which will have an increased focus on psychological injury.<sup>568</sup>

<sup>561</sup> Answers to pre-hearing questions on notice, icare, 27 October 2016, p 11.

<sup>562</sup> Answers to pre-hearing questions on notice, icare, p 11.

<sup>563</sup> Answers to pre-hearing questions on notice, icare, p 12.

<sup>564</sup> Answers to pre-hearing questions on notice, icare, p 12.

<sup>565</sup> Answers to pre-hearing questions on notice, icare, p 12.

<sup>566</sup> Answers to pre-hearing questions on notice, SIRA, p 18.

<sup>567</sup> Answers to pre-hearing questions on notice, SIRA, p 18.

**Proposal regarding presumptive psychological injuries**

- 7.37** Due to the significant proportion of psychological claims experienced by first responders, the Police Association of New South Wales proposed that legislation be adopted that provides a presumption that psychological injuries are work-related for these classes of workers:

It is the Association's position that workers compensation laws should adopt a presumption that psychological injuries are work related for all emergency service/first responder workers to avoid the additional stress that is placed upon our members having to relive and retell their stories at the point of submitting a workers compensation claim.<sup>569</sup>

- 7.38** Ms Membreno explained that the proposed approach would presume, with or without evidence, that an emergency worker has a psychological injury and requires immediate access to treatment and assistance. Additionally, it was expected that the traditional interview-type arrangements with an insurer would be replaced by a more nuanced approach to evidence gathering:

... if there was a presumption that most emergency service workers would be suffering some type of psychological injury, the first call should really be "Here is the immediate treatment and assistance we can provide you because we know that you are distressed, you are at home", not necessarily an interview-type arrangement questioning them about what has occurred but more just trying to say, "We understand what has occurred", or "We have some level of understanding and appreciation, but let's try and make you better. Let's get you early intervention and immediate treatment and assistance".<sup>570</sup>

- 7.39** Mr Remfrey stressed that such early intervention was essential for return to work and, more importantly, return to health for injured workers.<sup>571</sup>

- 7.40** It was also noted that certain Canadian provinces, including Alberta and Ontario, have similar presumptive provisions for police, as does the Australian Armed Services.<sup>572</sup>

- 7.41** In addition to advocating such a provision, the Police Association of New South Wales also supported additional workplace support for officers with psychological or psychiatric injuries:

... effective workplace support systems should be in place to support these officers with early intervention to get them professional psychological/psychiatric treatment without delay and to assist them with a return to their workplace (when medically appropriate) on graded duties that are meaningful and have a purpose.<sup>573</sup>

- 7.42** Mr Berrick Boland, Administrator, The Forgotten 000, supported the Police Association's proposal.<sup>574</sup>

---

<sup>568</sup> Answers to pre-hearing questions on notice, SIRA, p 17.

<sup>569</sup> Submission 8, Police Association of New South Wales, p 3.

<sup>570</sup> Evidence, Ms Membreno, 4 November 2016, p 27.

<sup>571</sup> Evidence, Mr Remfrey, 4 November 2016, p 24.

<sup>572</sup> Submission 8, Police Association of New South Wales, p 3 and p 4.

<sup>573</sup> Submission 8, Police Association of New South Wales, p 4.

<sup>574</sup> Evidence, Mr Berrick Boland, Administrator, The Forgotten 000, 7 November 2016, p 60.

*Committee comment*

- 7.43** The committee acknowledges that first responders bear a greater risk of suffering a psychological injury due to the nature of their work. It is distressing to receive evidence that the behaviour of some insurers' case workers can lead to the exacerbation of a psychological injury or cause a secondary psychological injury.
- 7.44** Having said this, the committee does not support the proposal for presumptive psychological injuries for first responders' workers compensation claims. We do, however, consider it vitally important that all parties work together to minimise any potential to aggravate a psychological injury. icare's trial of the Work Injury Screening and Intervention protocol appears to have shown some early success and we recommend that icare monitor the outcomes from this trial, and subject to results, roll out the protocol to all scheme participants.

**Recommendation 21**

That icare monitor the outcomes of the Work Injury Screening and Intervention protocol trial, and subject to results, roll out the protocol to all scheme participants.

**Surveillance**

- 7.45** The use of surveillance on injured workers in workers compensation matters, particularly first responders, was subject to a great deal of evidence during the review.
- 7.46** Insurers may use covert surveillance and desktop investigations, where appropriate, to investigate a workers compensation claim. Covert surveillance refers to physical surveillance of an individual. Desktop investigations involve the monitoring of social media accounts and other online platforms.
- 7.47** icare advised that surveillance may be used for many reasons, including where a third party advises that an injured worker is involved in undisclosed employment and/or other activities that are contrary to their entitlement or undermine the validity or severity of their injury.<sup>575</sup> icare and the scheme agents stressed the need to minimise fraud in the workers compensation scheme.<sup>576</sup>
- 7.48** The following sections the outline regulation and use of surveillance in workers compensation matters, stakeholders' experience of surveillance, the value of surveillance on a person with a psychological injury and desktop investigations.

<sup>575</sup> See, Answers to questions on notice, icare, 2 December 2016, p 8; Evidence, Mr Steve Hunt, Executive General Manager, Self Insurance, icare, 7 November 2016, p 28.

<sup>576</sup> See, Answers to questions on notice, icare, p 8; Correspondence, from Mr Dustin Bartley, State Manager, Workers Compensation, CGU, to Chair, 1 December 2016, p 2; Correspondence, from Mr Andrew Borden, General Manager, Workers Compensation, QBE, to Chair, 6 December 2016, p 1; Correspondence, from Mr David Hutton, Executive Manager - General Accident & Lifestyle Claims NSW, GIO, to Chair, 1 December 2016, p 2.

## Regulation of covert surveillance

**7.49** icare advised that surveillance investigations must comply with the relevant legislation and guidelines as set out in the scheme agent deed:

Scheme agents and claim managers are required to manage each and every compensation claim, including any investigations, as per the applicable legislation. This includes the operational guidelines on Covert Optical Surveillance outlined in the Nominal Insurer Deed. This includes senior delegated authorisation to engage surveillance, type and method of information to be collected and the conduct required by operatives.

Investigators must be engaged and act in accordance with the *Commercial Agents and Private Inquiry Agents Act 2004* and the *Surveillance Devices Act 2007*. Any agent found to be in substantial breach of the laws may trigger a termination of their contract should it not be capable of remedy.<sup>577</sup>

**7.50** The current *Covert Optical Surveillance Guideline* was released by WorkCover in July 2015 and is of an advisory nature only.<sup>578</sup> SIRA is currently reviewing its authority to issue guidance on surveillance, and the need for such guidance.<sup>579</sup>

**7.51** Similarly, icare is currently in discussions with scheme agents about developing a guideline concerning the use of surveillance.<sup>580</sup> It is expected that the guideline will be in place by the end of the 2016-17 financial year.<sup>581</sup>

**7.52** The scheme agents informed the committee that they adhere to the relevant guidelines and their own internal procedures to facilitate a consistent approach to the use of surveillance.<sup>582</sup> For example, EML, which is the scheme agent for police and emergency services, said it has strict internal protocols governing surveillance:

EML has strict protocols in place for the authorisation and approval of surveillance activity. For case managers, authorisation for surveillance is subject to EML's internal Surveillance Guidelines. The EML Claims Authorisation Framework ... states that approval for any type of surveillance for any case may only be provided with justification.<sup>583</sup>

**7.53** EML noted its surveillance providers are also subject to the 'highest standards of practice', including conforming to EML's *Privacy and Information Security Essentials* protocol, which requires providers to safeguard the privacy and security of information collected.<sup>584</sup> However,

<sup>577</sup> Answers to questions on notice, icare, p 8.

<sup>578</sup> Answers to pre-hearing questions on notice, SIRA, p 17.

<sup>579</sup> Answers to pre-hearing questions on notice, SIRA, p 17.

<sup>580</sup> Evidence, Mr Vivek Bhatia, Chief Executive Officer, icare, 7 November 2016, p 29.

<sup>581</sup> Evidence, Mr Bhatia, 7 November 2016, p 29.

<sup>582</sup> Correspondence, from Mr Mike Siomiak, General Manager, NSW Workers Compensation, Allianz Australia Workers Compensation (NSW) Ltd, to Chair, 1 December 2016, p 3; Correspondence, from Mr Hutton, to Chair, 1 December 2016, p 3; Correspondence, from Mr Borden, to Chair, 6 December 2016, p 1.

<sup>583</sup> Correspondence, from Mr Mark Coyne, Chief Executive, EML, to Chair, 30 November 2016, p 2.

<sup>584</sup> Correspondence, from Mr Coyne, to Chair, 30 November 2016, p 2.

this was disputed by numerous witnesses who appeared before the committee who were the subject of surveillance.

- 7.54** Stakeholders advocated for greater regulation around the use of surveillance in workers compensation claims. Mr Josh Mennen, Principal Lawyer, Maurice Blackburn, stated that surveillance practices across the insurance industry are ‘crying out’ for regulation to provide certainty and protection to consumers.<sup>585</sup> Similarly, Slater and Gordon Lawyers proposed that in-depth review of this issue was required and should possibly result in the development of enforceable guidelines around the use of surveillance.<sup>586</sup>

### **Use of covert surveillance**

- 7.55** icare advised the committee that surveillance is used in a small number of workers compensation cases:

The number of claims where surveillance of an injured worker is deemed appropriate is quite small. Over the 12 months ending 31 August 2016, over 60,300 workers compensation claims were notified. Of this total, surveillance was undertaken on 2.7 per cent. Of the 60,300 claims, 0.7 per cent were declined following surveillance.<sup>587</sup>

- 7.56** Evidence from the scheme agents similarly suggested that covert surveillance was used infrequently for workers compensation claims:

- EML used covert surveillance on approximately 3.5 per cent of the more than 11,000 claims it manages within the Treasury Managed Fund portfolio<sup>588</sup>
- Allianz used covert surveillance on less than 1 per cent of claims managed in 2016<sup>589</sup>
- CGU used covert surveillance in 2 per cent of its New South Wales workers compensation claims from July 2015 – June 2016.<sup>590</sup>

### **Stakeholders’ experience of surveillance**

- 7.57** Review participants agreed that surveillance was appropriate to use in certain circumstances. Mr Mennen said that there can be a legitimate need to test a claim:

There is no doubt that it is necessary for insurers to test a claim—for example, with somebody with an orthopaedic injury who is found in a rugby scrum, there are absolutely legitimate bases for that to occur. If the insurer has a reasonable suspicion that that individual is participating in some physical activity which is inconsistent with his claimed condition, then of course it should be able to conduct surveillance.<sup>591</sup>

<sup>585</sup> Evidence, Mr Josh Mennen, Principal Lawyer, Maurice Blackburn, 7 November 2016, p 49.

<sup>586</sup> Submission 53, Slater and Gordon Lawyers, p 1.

<sup>587</sup> Answers to questions on notice, icare, p 8.

<sup>588</sup> Correspondence, from Mr Coyne, to Chair, 30 November 2016, p 2.

<sup>589</sup> Correspondence, from Mr Siomiak, to Chair, 1 December 2016, p 3.

<sup>590</sup> Correspondence, from Mr Bartley, to Chair, 1 December 2016, p 2.

<sup>591</sup> Evidence, Mr Mennen, 7 November 2016, p 53.

**7.58** Mr John Cox, Principal Lawyer, Specialist PTSD & Injury Lawyers, agreed that surveillance should be used if there are reasonable grounds to doubt either the veracity or the bona fides of a claim.<sup>592</sup> Similar comments were made by Ms Pullen of the Fire Brigade Employees Union of New South Wales<sup>593</sup> and Ms Membreno of the Police Association of New South Wales.<sup>594</sup>

**7.59** However, review participants suggested that surveillance is often inappropriately used, without the existence of such reasonable grounds. Mr Mennen stated:

There is a culture among insurers ... of initiating surveillance as a routine claims assessment process and not in circumstances where they have some reasonable basis to believe that the claimant is exaggerating or feigning their condition. It is being used, rather, as a fishing expedition.<sup>595</sup>

**7.60** Mr Cox concurred, stating that insurers are ‘routinely’ using surveillance in a manner that is inappropriate.<sup>596</sup> Specialist PTSD & Injury Lawyers said that it has experience of private investigators acting outside of the law:

I have experiences of private investigators, in breach of the law, doing the following: attending schools; entering school grounds without consent; taking video footage of sporting events involving large groups of children; without consent entering the private properties of my clients in order to take video footage; and entering hospital grounds without consent for the same purpose.<sup>597</sup>

**7.61** Mr Cox stated that he believed approximately 80 to 90 per cent of his cases, which predominately involve police officers, involve surveillance.<sup>598</sup> Mr Mennen estimated that about 50 per cent of the litigated matters involving mental health claimants undertaken by his firm involve surveillance.<sup>599</sup>

**7.62** The committee heard from a former police officer who said he had been subject to aggressive covert surveillance tactics:

I have experienced a level of aggressive intrusion and surveillance that I would expect to encounter if I were a sex offender or a domestic terrorist. I have lost friends and family because of the tactics of EML. My family has been harassed to the point of great stress. Vehicles parked intermittently, for days at a time. I myself have had not less than 3 incidents of direct contact with intrusive surveillance. These confrontations have at time been aggressive and hostile.<sup>600</sup>

---

<sup>592</sup> Evidence, Mr John Cox, Principal Lawyer, Specialist PTSD & Injury Lawyers, 7 November 2016, p 52.

<sup>593</sup> Evidence, Ms Pullen, 4 November 2016, pp 28-29.

<sup>594</sup> Evidence, Ms Membreno, 4 November 2016, p 29.

<sup>595</sup> Evidence, Mr Mennen, 7 November 2016, p 49.

<sup>596</sup> Evidence, Mr Cox, 7 November 2016, p 51.

<sup>597</sup> See, Submission 47, Specialist PTSD & Injury Lawyers, p 4; Submission 53, Slater and Gordon Lawyers, pp 1-2.

<sup>598</sup> Evidence, Mr Cox, 7 November 2016, p 53.

<sup>599</sup> See, Evidence, Mr Mennen, 7 November 2016, p 54; Correspondence, from Mr Josh Mennen, Principal Lawyer, Maurice Blackburn, to Chair, 11 November 2016, p 1.

<sup>600</sup> Submission 34, Name suppressed, p 3.

- 7.63** The Fire Brigade Employees Union of New South Wales, the Police Association of New South Wales and the Public Service Association all confirmed that covert surveillance had been used on some members of their organisations who had made workers compensation claim.<sup>601</sup>
- 7.64** The following case study details former police officer Mr Brendan Bullock's experience of being subject to covert surveillance.

**Case study: Mr Brendan Bullock<sup>602</sup>**

Mr Bullock is a former NSW Police Force detective senior constable. In 2012, he was medically discharged from the force having been diagnosed with chronic PTSD. Mr Bullock's psychiatric injury is attributed to exposure to traumatic incidents spanning his 15 year career.

In light of his injury, Mr Bullock applied to EML for workers compensation in 2012.

Mr Bullock experience with EML was distressing from the outset. He felt relentless pressure from case managers to participate in an interview with a private investigator about the cause and nature of his psychiatric injury. Indeed, he felt that the case managers assumed his claim was fraudulent before even considering potential evidence.

Mr Bullock was subjected to intrusive and relentless covert surveillance by private investigators contracted by EML, and to desktop surveillance. Mr Bullock found this situation particularly difficult as he had been trained in physical surveillance by the NSW Police Force and is hyper vigilant. Also, he had a number of death threats made against his life during his employment and considered those to be imminent and real.

Mr Bullock found it easy to identify surveillance activities; however, he was unaware of whether the person watching him was a surveillance operative from an insurance company or a criminal who was about to severely injure or maybe kill him.

Mr Bullock was examined by psychiatrists appointed by EML as part of an independent process in relation to his whole person impairment. He believes the psychiatrists were commissioned by EML to provide favourable medico-legal reports. Further, EML also challenged the opinion of Mr Bullock's own, well-recognised, psychiatrist with expertise in PTSD, about his diagnosis of chronic PTSD.

The workers compensation process has exacerbated Mr Bullock's psychiatric injury causing: ten admissions to psychiatric hospitals; drug and alcohol addiction; onset of a major depressive disorder; a serious suicide attempt; cognitive brain impairment; trauma and psychological distress for his family members; and, finally, the destruction of his marriage.

It was all the more upsetting as Mr Bullock felt that he has always complied with workers compensation legislation.

In 2015, Mr Bullock made a complaint to the chief executive officer of EML about the appalling treatment he had received by the insurer.

Mr Bullock's claim was eventually settled following proceedings in the Workers Compensation Commission.

<sup>601</sup> Evidence, Ms Pullen, 4 November 2016, pp 28-29, Evidence, Ms Membreno, 4 November 2016, p 29; Evidence, Mr Little, 4 November 2016, p 29.

<sup>602</sup> Evidence, Mr Bullock, 7 November 2016, pp 56-57, p 60. This case study is based on the content of the evidence.

- 7.65** Other injured workers also told of being subject to covert surveillance. For example, a stakeholder submitted:

The private investigators sit out the front of your home or up the road watching you videotaping EVERY movement. Following you everywhere even the people you reside with and their children they watch. This is a TOTAL invasion of one's privacy just to try catch an injured worker on anything or collect anything little bit to try discredit the injured worker or try say the injured worker is lying.<sup>603</sup>

### **Value of surveillance on a person with a psychological injury**

- 7.66** As highlighted in Mr Bullock's case study, review participants expressed concern about the impact of surveillance on a worker with a psychological injury. For example, Slater and Gordon Lawyers told the committee that '... surveillance has the potential to aggravate and exacerbate psychiatric injuries.'<sup>604</sup>

- 7.67** The issue was especially pertinent for police officers. The Specialist PTSD & Injury Lawyers said that due to the nature of police work, covert surveillance of ex-police claimants with psychological illnesses often have a devastating effect:

One of the most common symptoms of PTSD is that sufferers experience hypervigilance and paranoia. Most often the police clients I represent have worked in high-level criminal investigations which involved covert surveillance. I cannot overstate the trauma occasioned by these claimants suddenly finding themselves (without any reasonable cause) being extensively surveilled over long periods of time, all in the course of simply pursuing compensation benefits to which they are entitled. In addition to this, many of these claimants have been the subject of previous threats by criminals during their career.<sup>605</sup>

- 7.68** These concerns were reflected in the experiences described by an injured police officer who was subject to covert surveillance:

EML have conducted surveillance upon me over the years which has had a very detrimental effect upon my mental health. Due to being very paranoid as a result of the PTSD and my policing experience, I could detect surveillance easily.

I have had panic attacks and gone into fits of rage at the surveillance operatives. This has caused me to approach them and be very aggressive towards them. Once I was triggered by the surveillance, it would take days and some times weeks to settle down. The surveillance has had a very detrimental effect on my condition and thus my recovery.<sup>606</sup>

---

<sup>603</sup> Submission 21, Name suppressed, p 1.

<sup>604</sup> Submission 53, Slater and Gordon Lawyers, p 1.

<sup>605</sup> Submission 47, Specialist PTSD & Injury Lawyers, p 4.

<sup>606</sup> See, Submission 39, Name suppressed, p 3; Submission 35, Mr Andrew Collins, pp 3-4.

**7.69** Mr Remfrey noted that the current threat environment should also be considered when conducting surveillance on a police officer:

Police officers are the target. It is the intelligence that we have. So you can imagine someone who is already suffering psychological injury. We have had this in the past where someone was involved in that sort of work in police work dealing with very serious criminals. The paranoia that would emerge on seeing someone following them in the current threat environment is taken to a whole new level.<sup>607</sup>

**7.70** Review participants also questioned the probative value of conducting surveillance on a person with a psychiatric condition.<sup>608</sup> This concern was best illustrated in the observations of Justice Robb in the case of *Wheeler v FSS Trustee Corporation (as trustee for the first state superannuation scheme)* [2016] NSWSC 534.<sup>609</sup> In that decision, Justice Robb observed that the nature of psychological disorders means that surveillance is of minimal value when conducted on persons' with these conditions:

... [T]he medical evidence suggests that both PTSD and major depressive disorder are insidious mental injuries, which can be extremely detrimental to the sufferer's ability to hold down regular employment, whether full-time or part-time; but the symptoms of the disorders are not permanently and consistently manifested ... The sufferer may, at various times and periods, appear reasonably normal, and capable of engaging in many forms of employment. The presence of the psychological disorders is not necessarily inconsistent with periods of happiness and sociability. Indeed, treating psychiatrists and psychologists are most likely to advise sufferers to do their best to get out into the real world and try to live a normal life, as a remedial exercise. In short, the ordinary person cannot safely look at evidence of the occasional day to day activities of a person suffering from PTSD and major depressive disorder, and conclude that the person is not suffering from disabilities that may make the person practically unemployable, because the person is able from time to time to engage in the sort of activities of which healthy people are capable of doing.<sup>610</sup>

**7.71** As one former fire fighter with a psychological injury who was subject to covert surveillance put it, 'I suffer from a mental health condition and YOU DON'T KNOW WHAT IM THINKING by looking at a video or a photo'.<sup>611</sup>

### Desktop investigations

**7.72** Review participants also expressed concern about the use of desktop investigations, involving the monitoring of social media accounts. Specialist PTSD & Injury Lawyers explained that desktop investigations:

- are unlawful

<sup>607</sup> Evidence, Mr Remfrey, 4 November 2016, p 30.

<sup>608</sup> See, Evidence, Mr Remfrey, 4 November 2016, p 29; Evidence, Mr Mennen, 7 November 2016, pp 50-51 and 53; Evidence, Mr Cox, 7 November 2016, p 50; Submission 47, Specialist PTSD & Injury Lawyers, p 3.

<sup>609</sup> Evidence, Mr Mennen, 7 November 2016, pp 50-51.

<sup>610</sup> Evidence, Mr Mennen, 7 November 2016, p 51.

<sup>611</sup> Submission 13, Name suppressed, p 1 [emphasis as per original].

- significantly breach a claimant's privacy
- significantly increase and exacerbate the trauma and often the psychological illness of the claimants.
- are so excessive, heavy handed and intrusive, that neither EML nor the NSW Police Force should be engaged in such activities.<sup>612</sup>

**7.73** The committee heard examples of the impact desktop investigations has had on injured workers. For example, a former fire fighter said that following a workplace injury his insurer attempted to use a desktop investigation to discredit his claim.<sup>613</sup>

**7.74** Mr Mennen also informed the committee of a matter where a desktop investigation was conducted on a police officer with a psychological injury:

One particularly unseemly example was of a female police officer with a making a claim for a disability benefit. Her treating psychologist recommended that she adopt a hobby to keep her engaged in some way in the community, so she learned how to make nice cakes. She took some photos of those cakes and put them on her Facebook account, and the insurer then relied upon those, among other things, to deny her claim and assert that that was positive evidence of a capacity to run a cake-making business.<sup>614</sup>

**7.75** Mr Mennen explained that due to the nature of psychological injuries, sometimes social media and online communities is the only place workers can engage with others:

There is a number of online support groups which injured workers can access, and there is no doubt that they gain some sort of comfort in communicating with other individuals in similar circumstances without having to physically go out into a public space where they might not feel comfortable.<sup>615</sup>

**7.76** Likewise, Mr Cox stated that the online community could provide crucial support to injured workers particularly police officers.<sup>616</sup>

### **Code of practice**

**7.77** The committee heard that there is currently no surveillance code of practice for scheme agents, and that while there is a general insurance code of practice it does not include any specific provisions around the use of surveillance.<sup>617</sup> However, Ms Vicki Mullen, General Manager Consumer Relations and Market Development, Insurance Council of Australia,

---

<sup>612</sup> See, Submission 47, Specialist PTSD & Injury Lawyers, p 5; Evidence, John Cox, 7 November 2016, p 49.

<sup>613</sup> Submission 13, Name suppressed, p 1.

<sup>614</sup> Evidence, Mr Mennen, 7 November 2016, p 52.

<sup>615</sup> Evidence, Mr Mennen, 7 November 2016, p 52.

<sup>616</sup> See, Evidence, Mr Cox, 7 November 2016, p 52; Submission 47, Specialist PTSD & Injury Lawyers, p 5.

<sup>617</sup> Evidence, Ms Vicki Mullen, General Manager Consumer Relations and Market Development, Insurance Council of Australia, 7 November 2016, p 63.

stated that the Code Governance Committee, an independent body responsible for monitoring and enforcing the standards under the general insurance code of practice, is currently undertaking an inquiry into the use of service suppliers including investigators:

The Code Governance Committee is in the process of doing an own motion inquiry into service suppliers under the code. The definition of “service suppliers” includes investigators. What I can say is that we anticipate a report from the Code Governance Committee within the coming months. That should give the industry guidance around the use by insurers of investigators.<sup>618</sup>

**7.78** The Police Association of New South Wales submitted that there should be ‘... a clear commitment and statement from Government in relation to a code of conduct and policy position in respect to workers compensation surveillance for all insurers.’<sup>619</sup>

**7.79** Mr Mennen remarked that developing a code of practice would give workers confidence that their privacy and other rights will be respected through a robust and accountable process.<sup>620</sup> In respect to the details of a proposed code of practice, Mr Mennen suggested that there be an objective test used before surveillance is undertaken:

I believe that the test should be that the insurer must have a reasonable basis on an objective standard that there is an inconsistency in the claimant’s asserted level of incapacity and their behaviour in some way to justify a rather extraordinary set of claims assessment measures.<sup>621</sup>

**7.80** Mr Cox added that the second limb of the test should be that the surveillance itself will be useful.<sup>622</sup>

**7.81** The Financial Services Council, the peak body for life insurers within Australia, recently published a code of practice containing provisions about the use of surveillance, including a requirement that there be a reasonable basis to believe there is an inconsistency before surveillance commences.<sup>623</sup> Mr Mennen noted that the code needed enhancement and commented: ‘It is yet to be seen whether the measures in play in this code will cure the problem or improve circumstances for claimants.’<sup>624</sup>

### *Committee comment*

**7.82** The committee appreciates that injured workers who are subjected to covert surveillance and desktop investigations find the experience confronting and, in many cases, disturbing. Due to the invasive nature of surveillance it is vital to ensure that surveillance operatives, acting on behalf of scheme agents behave in accordance with the law. A degree of sensitivity is particularly vital when subjecting first responders to surveillance practices.

<sup>618</sup> Evidence, Ms Mullen, 7 November 2016, p 64.

<sup>619</sup> Submission 8, Police Association of New South Wales, p 3.

<sup>620</sup> Evidence, Mr Mennen, 7 November 2016, p 55.

<sup>621</sup> Evidence, Mr Mennen, 7 November 2016, p 53.

<sup>622</sup> Evidence, Mr Cox, 7 November 2016, p 55.

<sup>623</sup> Evidence, Mr Mennen, 7 November 2016, p 54.

<sup>624</sup> Evidence, Mr Mennen, 7 November 2016, p 54.

- 7.83** We acknowledge that scheme agents have provided information about their surveillance procedures. It is vital that these procedures are outlined to case managers, and other staff as appropriate, on a regular basis to reinforce the significant implications of subjecting an individual to surveillance.
- 7.84** The committee notes that there is no standard guideline or code of practice in place for scheme agents in respect to surveillance. We understand that icare is currently developing such a guideline. We recommend that both icare and SIRA expedite work on a mandatory surveillance guideline for scheme agents which sets objective standards for when surveillance should be used.
- 7.85** It is anticipated that developing and implementing such a guideline will ensure a uniform model of ethical behaviour across the industry, encourage insurers and their service providers to be accountable for their actions and bolster community understanding on the use of surveillance.

---

**Recommendation 22**

That icare and SIRA expedite work on a mandatory surveillance guideline for scheme agents which sets objective standards for when surveillance should be used.

---

## Chapter 8 Scheme agents

This chapter examines the role of scheme agents in the workers compensation scheme. It then outlines stakeholders' concerns about their conduct, including the behaviour of case managers and the use of Independent Medical Examiners. The chapter also considers the deed between icare, as the nominal insurer, and the five scheme agents.

### Role of scheme agents

- 8.1** The *Workers Compensation Act 1987* (the 1987 Act) provides for icare, as the nominal insurer, to enter into arrangements with insurance companies to act as scheme agents. The scheme agents can exercise any functions of the nominal insurer, subject to the direction and control of the nominal insurer under any agency arrangement, including the deeds establishing the relationship, and any relevant legislation.<sup>625</sup>
- 8.2** As noted in Chapter 1, there are five scheme agents operating within the New South Wales workers compensation scheme Allianz, EML, CGU, GIO and QBE,
- 8.3** Scheme agents play a central role in delivering services to key stakeholders in the workers compensation system. Services provided to workers include:
- assisting to identify what benefits a worker may be entitled to
  - supporting the worker in their recovery and return to work
  - reviewing workplace injury notifications
  - assigning a case manager who is responsible for the worker's compensation claim services
  - managing third-party service providers (for example rehabilitation providers) and ensuring payment of appropriate benefits
  - conducting work capacity assessments.<sup>626</sup>
- 8.4** Insurers also provide certain services to employers, including:
- issuing policies and Certificates of Currency
  - calculating premiums
  - assessing compliance
  - collecting premiums and premium related debts
  - providing employers with strategies to reduce their premiums.<sup>627</sup>

<sup>625</sup> *Workers Compensation Act 1987*, ss 154B and 154G.

<sup>626</sup> See, icare, *insurance agent services*, <http://workersinsurance.icare.nsw.gov.au/premiums-and-policies/insurance-agents/scheme-agent-services>; Evidence, Ms Vicki Mullen, General Manager Consumer Relations and Market Development, Insurance Council of Australia, 7 November 2016, p 63.

## Scheme agent deed

- 8.5** The five scheme agents have been contracted to provide services on behalf of icare until 1 January 2018.<sup>628</sup> The deed dictates the obligations of scheme agents, including that the organisations have the ‘... skills, qualifications and experience necessary to perform and manage the services in an efficient, cost effective and controlled manner, with a high degree of quality and responsiveness.’<sup>629</sup>
- 8.6** icare advised that under the deed, an incentive model is used to remunerate scheme agents. Mr Vivek Bhatia, Chief Executive Officer, icare, explained: ‘Every year we have calculations of incentive models. There is a base remuneration model and then there are performance-based remuneration structures.’<sup>630</sup>
- 8.7** icare also informed the committee that the current deed allows scheme agents to be remunerated across six measures of relative performance relating to return to work, financial outcomes and premium collection, and seven service standards.<sup>631</sup> Mr Bhatia noted that the contracts allow icare to impose sanctions on insurers for breach of the performance standards.<sup>632</sup>
- 8.8** In relation to performance against these measures, icare advised that:
- In the most recent performance review, all of the scheme agents were within the expected range of performance in the financial outcome and premium collection measures. However, only four out of five agents were above the expected level of performance in the return to work measure and none of the insurers had passed all of the service standards.<sup>633</sup>
  - While performance during the 2016 contract year is still in the very early stages of assessment, most agents are passing most measures where results are available.<sup>634</sup>
- 8.9** The committee also heard that the service standards are regularly updated, and that icare anticipates that the standards for 2017 will focus on improving agents’ services and responses to those most at need.<sup>635</sup>

---

<sup>627</sup> icare, *insurance agent services*, <http://workersinsurance.icare.nsw.gov.au/premiums-and-policies/insurance-agents/scheme-agent-services>.

<sup>628</sup> Australian Federation of Employers and Industry, *NSW Workers Compensation Scheme – Changes to Insurance Companies*, <http://www.afei.org.au/node/108708>.

<sup>629</sup> Answers to questions on notice, icare, 2 December 2016, TAB E, 2015 Scheme Agent Deed, p 15.

<sup>630</sup> See, Evidence, Mr Vivek Bhatia, Chief Executive Officer, icare, 7 November 2016, p 26; Evidence, Mr John Nagle, Executive General Manager, Workers Insurance, icare, 7 November 2016, p 26.

<sup>631</sup> Answers to questions on notice, icare, 2 December 2016, p 6.

<sup>632</sup> Evidence, Mr Bhatia, 7 November 2016, p 26.

<sup>633</sup> Answers to questions on notice, icare, p 6.

<sup>634</sup> Answers to questions on notice, icare, p 7.

<sup>635</sup> Answers to questions on notice, icare, p 9.

### Scheme agent remuneration

**8.10** Certain review participants took issue with icare using an incentive model to remunerate scheme agents.<sup>636</sup> Indeed, Unions NSW described the practice as ‘perverse’.<sup>637</sup> Mr David Henry, Work Health and Safety Officer, Australian Manufacturing Workers Union (AMWU), was similarly concerned: ‘We do not necessarily believe that there is a group of people who are sitting around plotting and planning, necessarily, to harm injured workers but we do believe that there are perverse incentives sewn into contracts that are leading to this behaviour.’<sup>638</sup>

**8.11** The Fire Brigade Union of New South Wales and the Police Association of New South Wales were similarly concerned. Ms Claire Pullen, Senior Industrial Officer, Fire Brigade Union of New South Wales, said that she had received anecdotal evidence that insurers primarily considered commercial imperatives when assessing a workers compensation claim:

... certainly members have communicated to me a view that insurers reject claims or parts of claims on a commercial basis, taking a punt, essentially, that the worker will give up and go away.<sup>639</sup>

**8.12** One review participant did see a benefit to using an incentive based deed. An allied health professional said that scheme agents have been incentivised to assist workers’ recovery:

Without being privy to the detail of the contracts, I think there has been more incentive for agents to engage workers on their journey of recovery. Those contracts are confidential but there is certainly a move—and I think the way that agent behaviour has shifted a little bit, there is a definite move—towards trying to engage workers more actively.<sup>640</sup>

### Remuneration provisions

**8.13** Certain remuneration provisions within the deeds are kept confidential on the basis that they are commercial in confidence.<sup>641</sup> Review participants expressed an interest in making these provisions public, arguing that knowledge of the incentive and penalty provisions would assist in understanding the behaviours of scheme agents and would better inform stakeholders’ decision making.

**8.14** For example, the Australian Federation of Employers and Industries supported greater transparency, outlining that access to the remuneration provisions would allow stakeholders to evaluate the effectiveness of the agent management structure.<sup>642</sup> The federation stated:

<sup>636</sup> See, Evidence, Mr Berrick Boland, Administrator, The Forgotten 000, 7 November 2016, p 56.

<sup>637</sup> See, Evidence, Ms Emma Maiden, Assistant Secretary, Unions NSW, 4 November 2016, p 41; Evidence, Mr Shay Deguara, Industrial Officer, Unions NSW, 4 November 2016, p 41.

<sup>638</sup> Evidence, Mr David Henry, Work Health and Safety Officer, AMWU, 4 November 2016, p 46.

<sup>639</sup> Evidence, Ms Claire Pullen, Senior Industrial Officer, Fire Brigade Employees Union of New South Wales, 4 November 2016, p 25.

<sup>640</sup> *In camera* evidence, Witness B, 7 November 2016, p 3, published by resolution of the committee.

<sup>641</sup> See, Answers to questions on notice, icare, p 9; Evidence, Mr John Nagle, Executive General Manager, Workers Insurance, icare, 7 November 2016, p 28.

<sup>642</sup> Evidence, Mr Garry Brack, Chief Executive, Australian Federation of Employers and Industries, 4 November 2016, p 65.

Employers should know quite specifically what the agents are being asked to do and importantly how they are being remunerated. What are the price points to which they must respond and what are those price points are expected to achieve?<sup>643</sup>

- 8.15** Mr Shay Deguara, Industrial Officer, Unions NSW, agreed that there should ‘absolutely’ be transparency around the deeds as the documents operate within a government scheme.<sup>644</sup>
- 8.16** icare advised that there will be greater transparency in future deeds.<sup>645</sup>

### **Deed renewal**

- 8.17** As previously mentioned, the deeds between icare and the scheme agents expire at the end of 2017.<sup>646</sup> The committee heard that consultation with key stakeholder groups will take place over the next six to eight months to develop a blueprint of the proposed model for the new deed.<sup>647</sup>
- 8.18** Mr Bhatia acknowledged that the nominal insurer had, over the past decade and half, provided a low level of oversight of scheme agents.<sup>648</sup> However, he told the committee that going forward, icare will take a new approach to contractual arrangements with scheme agents that focuses on consistency and quality delivery of services:

From our perspective, the focus for us is very clearly on ensuring that there is a consistency and quality of delivery through the scheme agents and a number of things are being done at the moment ... but predominantly geared towards consistency and quality of service delivery and, more importantly, quality of health care.<sup>649</sup>

- 8.19** Mr Bhatia added that icare is ‘... coming up with a much more tailored service delivery model, as opposed to a one-size-fits-all approach that has been rampant in the past.’<sup>650</sup>

### ***Committee comment***

- 8.20** The committee notes the use of incentive-based remuneration provisions in the deed between icare and the scheme agents. The committee shares stakeholders’ frustration at the lack of public access to these provisions. The community expects greater transparency in the dealings between public agencies and organisations operating on their behalf. We are pleased to hear that icare intends for greater transparency in future deeds. We therefore recommended that icare release the remuneration provisions in the new scheme agent deed, including incentive-based remuneration provisions.

<sup>643</sup> Submission 80, Australian Federation of Employers and Industries, p 14.

<sup>644</sup> Evidence, Mr Deguara, 4 November 2016, p 42.

<sup>645</sup> Evidence, Mr Bhatia, 7 November 2016, p 28.

<sup>646</sup> Evidence, Mr Bhatia, 7 November 2016, p 23.

<sup>647</sup> See, Evidence, Mr Bhatia, 7 November 2016, pp 23-24; Evidence, Mr Nagle, 7 November 2016, p 23.

<sup>648</sup> See, Evidence, Mr Bhatia, 7 November 2016, p 23 and p 29.

<sup>649</sup> Evidence, Mr Bhatia, 7 November 2016, p 23.

<sup>650</sup> Evidence, Mr Bhatia, 7 November 2016, pp 23-24.

---

### Recommendation 23

That icare release the remuneration provisions in the new scheme agent deed, including incentive-based remuneration provisions.

---

- 8.21** More broadly, we consider that the upcoming deed negotiations provide an excellent opportunity for icare to consider the concerns raised by review participants during this review, such as qualifications and training requirements for case managers, and to place appropriate performance measures in the new contracts. We discuss these issues further below.

### Concerns about scheme agents

- 8.22** Stakeholders raised numerous concerns about the conduct of scheme agents in this review. Indeed, the Construction, Forestry, Mining and Energy Union (CFMEU) said the WIRO 2015 annual report established a ‘pattern of misbehaviour and complacency’<sup>651</sup> by scheme agents:

The case studies [in WIRO’s annual report] include examples of insurers overlooking claims for months; punishing workers for circumstances beyond their control even after providing supporting documentation; failure to pay benefits for a period of 4 months due to administrative oversight; and, failure to understand EBA [Enterprise Bargaining Agreement] entitlements. The evidence shows that despite case managers not being industrial experts, insurers are taking it upon themselves to make industrial decisions.<sup>652</sup>

- 8.23** In contrast, an allied health professional said that there has been a marked improvement in scheme agent engagement with workers since the 2012 reforms:

... the shift in agent behaviour has been marked since the 2012 reforms. We are certainly in a better place in terms of the way agents are engaging with workers. I think, if you reflected back perhaps prior to 2012 and looked at the scheme at that time, you would see similar issues, without doubt, presenting themselves as they are today.<sup>653</sup>

- 8.24** Similarly, while acknowledging the seriousness of stakeholders’ concerns,<sup>654</sup> Mr Kim Garling, Workers Compensation Independent Review Officer, WIRO, stated that it is vital to recognise that insurers operate in a very challenging environment and, for the most part, are successful in managing claims:

It is my experience, and the WIRO experience, that despite the complexity of the rules which govern the scheme, which are acknowledged by everyone as being confusing, ambiguous and difficult to manage, the conduct of claims by insurers is generally of a very high standard.<sup>655</sup>

---

<sup>651</sup> Submission 61, CFMEU, p 18.

<sup>652</sup> Submission 61, CFMEU, pp 18-19.

<sup>653</sup> *In camera* evidence, Witness B, 7 November 2016, p 3, published by resolution of the committee.

<sup>654</sup> Evidence, Mr Kim Garling, Workers Compensation Independent Review Office, 7 November 2016, p 9.

<sup>655</sup> Evidence, Mr Garling, 7 November 2016, p 9.

8.25 Mr Mark Goodsell, Head, NSW and Manufacturing, Australian Industry Group, similarly stated: ‘If you look at the scheme as a whole, most claims are resolved very quickly and cheaply.’<sup>656</sup>

8.26 The following sections outline the key complaints this committee heard in relation to scheme agents.

### **Adversarial environment**

8.27 The committee received competing evidence as to whether scheme agents are subject to the NSW Government’s *Model Litigant Policy for Civil Litigation*.<sup>657</sup> The model litigant policy provides best practice guidelines for government agencies in civil litigation matters. It is founded upon the concepts of behaving ethically, fairly and honestly to model best practice in litigation.<sup>658</sup>

8.28 Whatever the case, the committee heard that scheme agents often treat injured workers as adversaries, leading Mr Garling to remark that insurers ‘... take such steps as they think are proper to fight the adversary, being the worker.’<sup>659</sup>

8.29 Mr Garling advised that, in his view, the policy is not followed by all scheme agents.<sup>660</sup> However, he acknowledged that it is difficult to determine why this is so, as stakeholders are not aware of the instructions provided by employers to insurers about the claim.<sup>661</sup>

### **Exerting undue pressure and intimidation**

8.30 Various review participants told the committee about their sub-standard experience with scheme agents. For example, one injured worker said his insurer ‘... tried every trick in the book using loopholes and legislation (which only favours them) to bully, intimidate and harass me in anyway shape or form.’<sup>662</sup>

8.31 Typical comments from review participants included:

- ‘I received poor guidance and the insurance company did everything they could to delay the process. They would request a certain set of documents at a meeting and then never even look at them once they were provided.’<sup>663</sup>

---

<sup>656</sup> Evidence, Mr Mark Goodsell, Head, NSW and Manufacturing, Australian Industry Group, 4 November 2016, p 55.

<sup>657</sup> See, Submission 47, Specialist PTSD & Injury Lawyers, p 9; Evidence, Ms Mullen, 7 November 2016, p 64.

<sup>658</sup> NSW Government, Department of Justice, *Model Litigant Policy for Civil Litigation*.

<sup>659</sup> Evidence, Mr Garling, 7 November 2016, p 10.

<sup>660</sup> Evidence, Mr Garling, 7 November 2016, p 10.

<sup>661</sup> Evidence, Mr Garling, 7 November 2016, p 10.

<sup>662</sup> Submission 21, Name suppressed, p 1.

<sup>663</sup> Submission 23, Name suppressed, p 1.

- ‘Injured workers are under a large amount of pressure due to the fact they have had their whole world turned upside down from the injury and then coming to terms with the fact that they may not return to their chosen vocation, then to have a heartless insurer applying pressure for them to jump hoops just to get paid their fair compensation or to have medical treatments approved.’<sup>664</sup>
- ‘My experience [with the workers compensation system] ... has been the most degrading and humiliating experience of my life. I expected to be exited with dignity. I deserved to be treated with respect and compassion. I have not ... I cannot convey what it has done to me. It has taken a part of my life, dignity, and soul that I do not believe I am ever meant to reconcile.’<sup>665</sup>

### **Lack of consistent decision making**

- 8.32** Another key concern expressed to the committee related to the lack of consistency and certainty in scheme agent decision-making. For example, one injured police officer submitted that, in their experience, scheme agent behaviour was erratic and driven by economic imperatives:

The back capture of correspondence between all parties would reveal a staggering amount of inconsistency and questionable actions. There is no uniformity to the adjudication of claims. ... The economic rationale of EML dictates and rewards unscrupulous such behaviour.<sup>666</sup>

- 8.33** Likewise, Ms Rita Mallia, State President, CFMEU, said that workers were often subject to unreasonable decision-making by insurers:

... there is irrational decision-making and conduct across the system. None of it is supporting an injured worker to be supported because they need the time to heal or get back to work if they are ready to come back to work. There is resistance to provide training and support. It is bizarre.<sup>667</sup>

- 8.34** It was also noted that these inconstancies increase the potential for conflict in the system. An allied health professional stated: ‘The application of the work capacity decision is inconsistent amongst agents and it is too frequently poorly considered, which creates adversarial fallout from workers, employers and it is not good thing for the scheme.’<sup>668</sup>

### **Delaying treatment and payment**

- 8.35** Numerous stakeholders relayed concerns about insurers delaying treatments and payments.<sup>669</sup> For example, an injured worker submitted:

<sup>664</sup> Submission 30, Name suppressed, p 2.

<sup>665</sup> Submission 34, Name suppressed, p 3.

<sup>666</sup> Submission 34, Name suppressed, p 5.

<sup>667</sup> Evidence, Ms Rita Mallia, State President, CFMEU, 4 November 2016, p 51.

<sup>668</sup> *In camera* evidence, Witness B, 7 November 2016, p 5, published by resolution of the committee.

<sup>669</sup> See, WIRO, *Annual report 2015*, 2015, p 7; Submission 61, CFMEU, p 18; Submission 68, Workers Health Centre, p 5.

I was obstructed in my rehabilitation by the insurance company by continually delaying payment to therapist, IME [Independent Medical Examiners] doctors reports, and ambulance return to work coordinator, rehab coordinator and insurance case managers lying. I was subsequently medical[ly] retired but received minimal compensation under workers comp.<sup>670</sup>

- 8.36** Another injured worker said that their recovery from a workplace injury was impeded because their insurer delayed treatment:

The case workers would try to delay making a decision about treatment. They were very evasive in not saying one way or another whether they would agree to treatment. In the end I had to get a solicitor involved before they agreed to more treatment. The lapses of treatment meant my overall recovery both psychologically and physically had been setback.<sup>671</sup>

- 8.37** A team of allied health professionals said that by delaying an injured worker's referral to rehabilitation, scheme agents are significantly inflating scheme costs.<sup>672</sup> As noted in Chapter 2, the average time to refer a worker to a rehabilitation provider is 25.77 weeks.<sup>673</sup> Significantly, one study found that every dollar spent on rehabilitation saves between \$27 and \$34 in actual claims cost.<sup>674</sup>
- 8.38** Witness B said that scheme agents' reluctance to engage rehabilitation providers stemmed from an unwillingness to spend money, instead targeting use of rehabilitation only for work capacity decisions.<sup>675</sup> This issue is discussed in detail in Chapter 4.
- 8.39** More generally, the Fire Brigade Union of New South Wales stated that the delay in processing claims caused significant distress to workers, and noted that it was during this period that secondary psychological injuries often arise.<sup>676</sup>

### **Psychological impact of protracted interactions with scheme agents**

- 8.40** Stakeholders were also concerned about the psychological impact on injured workers of having protracted interactions with insurers. Ms Pullen commented that workers with psychological injuries, such as post-traumatic stress disorder, find dealing with insurers 'traumatic' and expressed concern that scheme agents do not understand or have compassion for workers with these types of injuries.<sup>677</sup>

<sup>670</sup> Submission 26, Name suppressed, p 1.

<sup>671</sup> Submission 39, Name suppressed, p 3.

<sup>672</sup> *In camera* evidence, Witness A and Witness B, 7 November 2016, p 3, published by resolution of the committee.

<sup>673</sup> *In camera* evidence, Witness A and Witness B, 7 November 2016, p 3, published by resolution of the committee.

<sup>674</sup> *In camera* evidence, Witness B, 7 November 2016, p 4, published by resolution of the committee.

<sup>675</sup> *In camera* evidence, Witness B, 7 November 2016, p 3, published by resolution of the committee.

<sup>676</sup> Submission 64, Fire Brigade Union of New South Wales, p 3.

<sup>677</sup> Evidence, Ms Pullen, 4 November 2016, p 25.

- 8.41 Likewise, Kirsty Membreno, Manager Industrial, Police Association of New South Wales, argued that a worker with a psychological injury can become increasingly unwell during the dispute resolution process:

Putting people who already have a psychological illness through a disputed process where they have to engage lawyers and seek assistance from the association puts a lot more pressure and a lot more stress on them. They do not have access to the treatment and the services that they need immediately because of the cost associated—there is a limit on what they can get through their GP. So they do become probably more unwell through that period.<sup>678</sup>

- 8.42 Review participants noted that workers can receive a secondary psychological injury from their dealings with insurers.<sup>679</sup> Mr Mark Morey, Secretary, Unions NSW, remarked:

The prolonged amount of energy and time taken to actually fight the system means that many of these workers then have a secondary psychological injury that compounds their initial injury which makes it almost impossible for them to return to work.<sup>680</sup>

- 8.43 Mr Morey described the behaviour of scheme agents as requiring a worker to fight ‘endless circles’ of bureaucracy.<sup>681</sup>

***Committee comment***

- 8.44 The committee notes the considerable amount of evidence from stakeholders, including many injured workers, regarding unacceptable behaviour by some scheme agents. While we acknowledge the vast majority of claims are dealt with promptly and efficiently, it is nevertheless concerning that some injured workers are experiencing poor treatment and service.

- 8.45 The committee notes that there is no clear consensus as to whether scheme agents are subject to the *Model Litigant Policy for Civil Litigation*. As scheme agents are performing a service on behalf of icare, the committee supports requiring insurers to be subject to the policy. We are hopeful that doing so will foster a more supportive, less adversarial environment which will benefit all scheme participants. The committee recommends that icare, in the new scheme agent deed, require scheme agents to comply with the NSW Government’s *Model Litigant Policy for Civil Litigation*.

---

**Recommendation 24**

That icare, in the new scheme agent deed, require scheme agents to comply with the NSW Government’s *Model Litigant Policy for Civil Litigation*.

---

<sup>678</sup> Evidence, Ms Kirsty Membreno, Manager Industrial, Police Association of New South Wales, 4 November 2016, pp 25-26.

<sup>679</sup> Evidence, Ms Pullen, 4 November 2016, p 25.

<sup>680</sup> Evidence, Mr Mark Morey, Secretary, Unions NSW, 4 November 2016, p 35.

<sup>681</sup> Evidence, Mr Morey, 4 November 2016, p 38.

- 8.46** We are disappointed to receive evidence of some insurers intimidating and exerting undue pressure on injured workers. It is unacceptable that injured workers should feel pressured to pursue a certain course of treatment or to return to work before they are ready. This kind of behaviour does nothing to facilitate a return to health or encourage a sustained return to work, thus undermining the objectives of the workers compensation system. The committee believes that the training framework we recommend below will help to improve the way that individual case managers engage with injured workers, and to improve consistency in decision-making.
- 8.47** The committee notes concerns that some scheme agents appear to be delaying access to entitlements, including medical treatment and weekly payments. Again, we are disappointed to receive this evidence, as this behaviour does not support an injured worker's return to work nor does it promote the most efficient use of the scheme's resources. The evidence clearly indicates that early intervention is a cost-effective means of injury treatment. We urge scheme agents to use rehabilitation and other treatment services, where appropriate, during the early stages of injury management to support an injured worker's return to health.
- 8.48** The committee understands that there can be significant consequences for the wellbeing of injured workers who experience prolonged interactions with scheme agents. It is concerning that a system designed to support an injured worker's return to health may in fact exacerbate an existing psychological condition or even cause an additional injury. As detailed in Chapter 7, icare is working with scheme agents to minimise the psychological impact of protracted interactions with scheme agents. The committee encourages icare to continue pursuing these programs.

### **Employer concerns**

- 8.49** The committee heard that employers and industry representatives also have concerns about the conduct of scheme agents. WIRO reported that most employer complaints made to its service centre related to communication failures.<sup>682</sup>
- 8.50** This trend was reflected in the evidence received in this review.<sup>683</sup> The Australian Industry Group advised that the complaints made by its members included: employers not feeling supported by the scheme agent during a difficult claim; employers having to constantly chase the agent for answers; and the regular change of case managers.<sup>684</sup>
- 8.51** Mr Goodsell questioned the ability of insurers to adequately assist employers to transition workers back to work following an injury:

We have had reports of companies saying, "We are happy to have the person back and they are happy to be back but there is some aggro amongst the team about how they fit in when they are not doing their normal job." Companies quite genuinely get quite anguished in how to deal with that kind of situation. I do not know how well equipped the agents are to deal with those kinds of issues ...<sup>685</sup>

---

<sup>682</sup> See, WIRO, *Annual report 2015*, 2015, p 11; Submission 61, CFMEU, p 18.

<sup>683</sup> Evidence, Mr Goodsell, 4 November 2016, p 55.

<sup>684</sup> Submission 28, Australian Industry Group, p 9.

<sup>685</sup> Evidence, Mr Goodsell, 4 November 2016, p 56.

- 8.52** The Australian Federation of Employers and Industries expressed concern around the costs imposed on businesses because the way scheme agents go about assessing claims. Mr Garry Brack, Chief Executive, Australian Federation of Employers and Industries, suggested that some agents simply approve claims to the detriment of employers:

Agents have gone to a position where they approve just about everything and are reticent about talking to the employer about the circumstances of the claim. They get it and they approve it. That is lovely. It cuts down the amount of labour involved. The employer is paying the cost and there is no downside to the agent. That is an inadequate strategy if it is operating in that fashion.<sup>686</sup>

- 8.53** Ms Jill Allen, Manager, Research and Policy, Australian Federation of Employers and Industries, described employers as being reduced to a ‘bit player’ in the claims management process.<sup>687</sup>

- 8.54** Further, Acacia Products, a manufacturing company in Western Sydney, told the committee of experiencing unnecessary delays due to the behaviour of a scheme agent:

Procrastination by the agent in having employees signed off as fit for work and returned to work. One of the two recent cases featured a written prognosis by the rehabilitation provider and hand specialist in Sept 2015 that the employee should be signed off as fit for work. Unfortunately we were made to continue making payments until May 2016 because the Scheme Agent delayed the independent medical review and the GP continued to provide work cover certificates. This more than doubled the size of the claim.<sup>688</sup>

- 8.55** Acacia Products said that scheme agent representatives were ‘overly assertive’ and subjected staff to ‘veiled threats and insinuations’.<sup>689</sup> Acacia Products also noted that the scheme agent was lax in the provision of information about recent workers compensation claims and was dismissive of their concerns.<sup>690</sup>

### *Committee comment*

- 8.56** The committee understands that some employers and industry groups are frustrated with scheme agents, particularly in respect to the management of claims. Good communication is vital, and given that employers play a key role in the workers compensation scheme, they should be kept to up-to-date during the life stages of a claim. Further, we anticipate that engaging employers earlier on will better facilitate an injured worker’s return to work.

<sup>686</sup> Evidence, Mr Brack, 4 November 2016, p 62.

<sup>687</sup> Evidence, Ms Jill Allen, Manager, Research and Policy, Australian Federation of Employers and Industries, 4 November 2016, p 65.

<sup>688</sup> Submission 45, Acacia Products, p 2.

<sup>689</sup> Submission 45, Acacia Products, p 2.

<sup>690</sup> Submission 45, Acacia Products, p 2.

## Case managers

**8.57** A case manager coordinates all aspects of a worker's claim and is the primary contact for the worker and others involved in assisting them to return to and recover at work. A case manager's duties may include:

- contacting the worker, employer and medical practitioners following receipt of a claim to determine the assistance the worker requires
- authorising and arranging payment for 'reasonably necessary' medical and related expenses
- determining a worker's entitlement to weekly compensation payments and commencing payments
- assisting the employer to meet their obligations to support the worker to recover at work
- arranging, where appropriate, assessments or services to help determine a worker's capacity for work or identify suitable employment.<sup>691</sup>

**8.58** Allianz observed that the case manager role is complex, as it involves balancing the needs of workers and other parties involved in a claim while navigating complex workers compensation legislation:

The complexities of the rules which govern the scheme are such that the role of the workers compensation case manager is one of the most challenging in the insurance industry. There is a primary relationship between the case manager and the worker that is based on engagement, empathy and trust. The case manager has to manage the intricacies of the Workers Compensation legislation and work with all stakeholders in addition to the worker, such as the employer, the treating doctor, broker, specialists, medical providers, consultants, and where required, interpreters. This requires appropriate skills and knowledge to provide support, whilst empowering workers on the journey to recovery, return to work and wellbeing.<sup>692</sup>

**8.59** The case studies below highlight concerning behaviour among certain case managers.

### Case study: Ms Gail Lay<sup>693</sup>

Ms Lay was a school teacher for 16 years. She enjoyed teaching until there was an increase in violence among students at her school and a deterioration in relationships between staff. This confluence of factors caused Ms Lay to have a breakdown and access workers compensation.

Following her recovery, Ms Lay returned to work. However, her return to work program was ignored and subsequently her psychological injury was exacerbated.

<sup>691</sup> SIRA, *SIRA workers compensation guide for medical practitioners*, <http://www.sira.nsw.gov.au/resources-library/workers-compensation-resources/publications/health-professionals-for-workers-compensation/workcover-nsw-medical-guide>.

<sup>692</sup> Correspondence, from Mr Mike Siomiak, General Manager, NSW Workers Compensation, Allianz Australia Workers Compensation (NSW) Ltd, to Chair, 1 December 2016, p 2.

<sup>693</sup> Evidence, Ms Gail Lay, Injured worker, 4 November 2016, pp 35-36.

Ms Lay took her workers compensation complaint to the Department of Education, where she felt her concerns were inappropriately handled. This led Ms Lay to have a massive breakdown and she is now unable to return to work.

Ms Lay had a particularly harrowing experience with case managers at her insurer. Ms Lay felt she was subject to unethical and unprofessional behaviours from claims staff management, who she suggested harassed her and failed to follow workers compensation guidelines. After one such incident Ms Lay tried to commit suicide.

In a separate incident, Ms Lay found examples of case managers deriding workers and their complaints on social media.

Ms Lay complained to her insurer about these incidents but following an investigation the case managers were found to have done nothing wrong leading Ms Lay to assert that there is insufficient oversight of case managers.

Ms Lay is frustrated at the complexities of the system, noting that workers need knowledge of a vast array of legislation, and an understanding of the machinations of government and scheme agent behaviour, to navigate the scheme.

#### **Case study: Mr Shane O'Donnell<sup>694</sup>**

Mr O'Donnell left school at 16 years of age to become a bricklayer. He injured his spine at work in 2014, requiring surgery to cut away part of the disc to relieve the pressure. Since being injured Mr O'Donnell has had five case managers.

Mr O'Donnell has faced many problems while engaging with the workers compensation system, including having to wait 97 days for approval for psychiatric treatment following a consultation with his insurer's IME.

Mr O'Donnell's insurer also significantly underpaid him. Following two merit reviews, which he challenged without legal assistance, Mr O'Donnell's insurer was required to repay him \$6,000 in unpaid entitlements.

Mr O'Donnell recognises that following his operation he will never return to bricklaying, but is concerned that his insurer is pushing him back to work. At one time this saw him sweeping on building sites rather than engaging in meaningful employment.

Mr O'Donnell was keen to pursue further training and completed a test and tag course. He now must look for four jobs per week or have his entitlements immediately cut off. However, Mr O'Donnell is unsure how to approach potential employers as he is waiting on approval from his insurance company for another operation on his spine.

#### **Case study: Ms Margaret Cameron<sup>695</sup>**

Ms Cameron works in a nursing home. In early 2016 she was assaulted by a resident with dementia.

Ms Cameron has worked light duties since the incident and feels that during this time she has been treated as though what happened to her was her own fault. Additionally, she feels that her insurer has

<sup>694</sup> Evidence, Mr Shane O'Donnell, Local network member, Injured Workers Support Network, 7 November 2016, p 5 and p 6.

<sup>695</sup> Evidence, Ms Margaret Cameron, Injured worker, 7 November 2016, p 3 and p 4.

not been supportive particularly as she has been denied further treatment from her psychologist.

Ms Cameron feels the lack of communication between her insurer and rehabilitation provider added to her stress, and that she has not been treated with compassion or respect.

Prior to the incident, Ms Cameron was a strong, independent, secure woman, proud of her physical abilities and performing a job she loved. Now, following the treatment of her insurer and rehabilitation provider, she has no confidence and lacks autonomy of her own life.

Ms Cameron has had three case workers in nine months.

**8.60** icare advised that it has been working closely with scheme agents to improve the interactions between case managers and injured workers in an effort to provide a more tailored approach to service delivery.<sup>696</sup> icare noted this has involved:

- delivering new training modules to more than 1,400 case managers
- providing injured workers who are required to undergo an independent medical examination with the choice of three doctors, as opposed to telling them which one they must see
- establishing a specialised Advisory Assistance Service, staffed by mental health professionals, for injured workers who need additional help and those who could benefit from speaking with someone separate from their case manager
- shifting the focus for fatality claims away from a process emphasising liability determination and toward one of empathy and support.<sup>697</sup>

**8.61** However, as Mr Garling noted, this is a challenging process.<sup>698</sup>

**8.62** Additionally, Mr Bhatia advised that the negotiations for the next scheme agent need are an opportunity to bring an allied health approach to case management and to provide more tailored service delivery:

We do believe that there is a huge opportunity for us to bring an allied health mindset into caseworkers. We have looked at various examples, not only locally but globally, where there has been a better outcome with more allied health background caseworkers and then supported by cognitive intelligence technology tools that are available today, which help in triaging at the time of the injury.<sup>699</sup>

**8.63** The following sections detail specific evidence received by the committee around oversights, case manager qualifications and training, staff turnover and triaging of claims.

### **Oversight**

**8.64** One issue raised during this review was whether case managers are adequately oversights in performing this role. Mr Berrick Boland, Administrator, The Forgotten 000, said that in his

<sup>696</sup> Answers to pre-hearing questions on notice, icare, 27 October 2016, p 8.

<sup>697</sup> Answers to pre-hearing questions on notice, icare, p 8.

<sup>698</sup> Evidence, Mr Garling, 7 November 2016, p 11.

<sup>699</sup> Evidence, Mr Bhatia, 7 November 2016, pp 23-24.

experience, case managers often lack appropriate supervision from management, leading to a ‘disgraceful amount of unethical conduct.’<sup>700</sup>

- 8.65** The CFMEU was similarly concerned: ‘The system currently has too few monitoring programs and case managers are getting away with questionable behaviour and aggressive communication tactics.’<sup>701</sup> The union remarked that this lack of oversight exacerbated the adversarial culture of the relationship between insurers and workers, and encouraged the SIRA to conduct education programs for case managers and their supervisors to overcome this issue.<sup>702</sup>

### Qualifications and training

- 8.66** Stakeholders expressed concern about the adequacy of the qualifications and training provided to case managers. As one injured worker commented: ‘You get an insurer case manager that looks after your case with NO medical experience or expertise at all making life changing decisions on an injured worker’s health and well-being.’<sup>703</sup>
- 8.67** Another injured worker told of the frustration they experienced because their case manager had lacked appropriate medical knowledge:

For the first few years on workers compensation the case workers just did not understand why I had severe pain in my shoulders and neck. I was sent for scans and to orthopaedic surgeons in an attempt to find a physical cause. Because of the case workers lack of medical knowledge they did not grasp what was occurring. I found it very difficult to explain my condition and could tell that the case worker either did not believe me or was dumbfounded by it.<sup>704</sup>

- 8.68** Mr Bhatia acknowledged that the qualifications and skill level of case managers are varied, and noted that there is currently no consistent framework across the scheme concerning the skills that case managers should possess.<sup>705</sup>
- 8.69** A similar point was made by Ms Vicki Mullen, General Manager Consumer Relations and Market Development, Insurance Council of Australia, who said that claims managers have a wide range of occupational backgrounds but added, ‘It is fair to say that there is no specific standard as far as people recruited into that space.’<sup>706</sup> However, Mr Bhatia also pointed out that it is for scheme agents, rather than icare, to manage their workforce.<sup>707</sup>

<sup>700</sup> Evidence, Mr Boland, 7 November 2016, p 56.

<sup>701</sup> Submission 61, CFMEU, p 13.

<sup>702</sup> Submission 61, CFMEU, p 13.

<sup>703</sup> Submission 21, Name suppressed, p 2 [emphasis as per original].

<sup>704</sup> Submission 39, Name suppressed, pp 2-3.

<sup>705</sup> Evidence, Mr Bhatia, 7 November 2016, p 30.

<sup>706</sup> Evidence, Ms Mullen, 7 November 2016, p 64.

<sup>707</sup> Evidence, Mr Bhatia, 7 November 2016, p 30.

- 8.70** In response to the concerns raised, scheme agents told the committee that they recruit staff with the required competencies and capabilities.<sup>708</sup> For example, Allianz noted that more than 75 per cent of its case managers have formal qualifications including allied health degrees.<sup>709</sup>
- 8.71** The committee was also informed that scheme agents offer case managers internal and external training opportunities. For example:
- Allianz stated that it provides ‘extensive and substantial’ training and development programs to case managers targeting the skills and knowledge needed to manage claims and injuries.<sup>710</sup>
  - EML said it offers training programs that focus on technical knowledge, focusing on claims management and capability levels, which is complimented by workplace application and coaching.<sup>711</sup>
  - QBE explained that case managers receive ongoing coaching and support from managers and technical experts to ensure they receive constructive feedback and guidance.<sup>712</sup>
- 8.72** In regards to external training opportunities, Ms Mullen said that the insurance industry offers occupational and professional training for case managers through the Australian and New Zealand Institute of Insurance and Finance (ANZIIF) and the Personal Injury Education Foundation.<sup>713</sup> However, Ms Mullen noted that having case managers undertake these education courses is not a compliance requirement for scheme agents.<sup>714</sup>
- 8.73** As noted above, the committee heard that icare has invested heavily throughout 2015-16 to deliver e-learning and face to face training opportunities for scheme agents that aims to provide consistency across the scheme.<sup>715</sup> Furthermore, icare advised that it is currently in discussions with ANZIIF about whether it offers a course that can accredit caseworkers and case managers:

One of the things we have been looking at over the six to nine months is to design a course to get the 1,500 to 2,000 people across the scheme agents through a common frame of reference and a consistent training program. That is one of the core elements we are discussing. We are speaking with the Australian and New Zealand Institute of Insurance and Finance [ANZIIF] as to whether they have a course that we can look at that will accredit caseworkers and case managers.<sup>716</sup>

---

<sup>708</sup> See, Correspondence, from Mr Dustin Bartley, State Manager, Workers Compensation, CGU, to Chair, 1 December 2016, p 4.

<sup>709</sup> Correspondence, from Mr Siomiak, to Chair, 1 December 2016, p 7.

<sup>710</sup> Correspondence, from Mr Siomiak, to Chair, 1 December 2016, p 2.

<sup>711</sup> Correspondence, from Mr Mark Coyne, Chief Executive Officer, EML, to Chair, 5 December 2016, p 7.

<sup>712</sup> Correspondence, from Mr Andrew Borden, General Manager, Workers Compensation, QBE, to Chair, 6 December 2016, p 2.

<sup>713</sup> See, Evidence, Ms Mullen, 7 November 2016, p 64; Correspondence, from Mr Coyne, to Chair, 5 December 2016, p 9.

<sup>714</sup> Evidence, Ms Mullen, 7 November 2016, p 64.

<sup>715</sup> Correspondence, from Mr Siomiak, to Chair, 1 December 2016, p 7.

<sup>716</sup> Evidence, Mr Bhatia, 7 November 2016, p 30.

8.74 Mr Bhatia said of the proposed course: ‘We need to make sure that there is a clear framework for training and development and a clear articulation of expectations made through the employers to individuals.’<sup>717</sup> He also noted that there will be an enforceable requirement in the next scheme agent deed requiring all case managers to undergo a training program.<sup>718</sup>

***Committee comment***

8.75 The committee appreciates that case managers have a complex and challenging role, and are often an injured worker’s first and main point of contact with an insurer. As such, it is vital that these individuals are appropriately qualified to perform this role. It is obviously particularly beneficial for case managers to have an allied health background but in any event, all case managers should have the necessary skills to identify and triage those workers with mental health conditions.

8.76 The committee commends icare for its work in improving the interactions between case managers and injured workers, including the delivery of training modules, and notes that scheme agents are also playing a part. However, the committee remains concerned about the high turnover of staff, which dealt with below.

8.77 We believe that with the impending deed renewal, now is the ideal time for icare to work with scheme agents to develop a single, comprehensive qualifications and training framework for all case managers. We recommend that icare develop such a framework and incorporate within it, specific skills to identify and deal with mental health issues. This framework should be made mandatory under the new deed with scheme agents.

---

**Recommendation 25**

That icare:

- develop a single, comprehensive qualifications and training framework for all case managers, incorporating specific skills to identify and deal with mental health issues
  - make compliance with this framework mandatory under the new scheme agent deed.
- 

**Turnover**

8.78 Injured workers and business representatives expressed frustration at the apparent regular turnover of case managers.<sup>719</sup> Workers said that they are constantly required to detail information about their claims and experience to a new case manager, with one injured police officer commenting:

I have had at least 8 to 10 case workers over the years. They seem to change every 3 to 6 months. Many times I was not given notice and only found out by contacting EML myself.<sup>720</sup>

---

<sup>717</sup> Evidence, Mr Bhatia, 7 November 2016, p 30.

<sup>718</sup> Evidence, Mr Bhatia, 7 November 2016, p 31.

<sup>719</sup> See, Submission 1, Name suppressed, p 1; Evidence, Ms Allen, 4 November 2016, p 65.

<sup>720</sup> Submission 39, Name suppressed, p 4.

**8.79** The officer explained that the constant turnover in case managers had implications for his treatment:

My G.P. and I had to and still have to ask for various treatments to reduce the pain. Due to the case workers changing all the time there was not consistency with the treatments. I went for over 12 months with no treatment at all, despite asking repeatedly for EML to pay for treatment. During this time I had to pay for my own treatment as I was still in severe pain.<sup>721</sup>

**8.80** Similarly, Mr Andrew Collins, an injured former police officer, said he had not received his weekly payments due to miscommunication after his case manager had moved on.<sup>722</sup>

**8.81** Ms Mullen acknowledged that there have been challenges for insurers with recruiting and maintaining good claims management staff. However, Ms Mullen believed this was changing:

... we acknowledge that there are some challenges with the retention of staff. What we would like to see is the adjustment of that occupation, which will obviously take some time, from being a transactional approach to the management of a claim to much more a case management approach that takes the needs of the individual much more into account with hopefully an outcome of getting that person back to good and safe work.<sup>723</sup>

**8.82** The scheme agents recognised the need to retain suitably qualified staff. Allianz described having a 'highly experienced team' with 46 per cent of case managers having employment tenure for more than two years, and 20 per cent of those being employed for over five years.

**8.83** Likewise, EML identified its turnover rate for case managers at below 20 per cent per annum for the past two years,<sup>724</sup> and 69 per cent of claims staff at GIO have over five years of service with the insurer.<sup>725</sup>

**8.84** Scheme agents also acknowledged the importance of consistency in the case manager role and told of having procedures in place for such circumstances.<sup>726</sup>

### *Committee comment*

**8.85** The committee understands that injured workers and employers feel frustrated at the apparent regular turnover of case managers. The committee also acknowledges that the role of case managers can be stressful, and requires a great deal of skill and patience. Despite the high turnover rates disclosed by scheme agents, the agents suggested that these rates are within reasonable limits. The committee notes that some scheme agents have procedures in place for handing over active workers compensation claims. We urge all insurers to implement adequate

<sup>721</sup> Submission 39, Name suppressed, p 3.

<sup>722</sup> Submission 35, Mr Andrew Collins, p 2.

<sup>723</sup> Evidence, Ms Mullen, 7 November 2016, p 69.

<sup>724</sup> Correspondence, from Mr Coyne, to Chair, 5 December 2016, p 11.

<sup>725</sup> Correspondence, from Mr David Hutton, Executive Manager - General Accident & Lifestyle Claims NSW, GIO, to Chair, 1 December 2016, p 4.

<sup>726</sup> See, Correspondence, from Mr Coyne, to Chair, 5 December 2016, p 11; Correspondence, from Mr Borden 6 December 2016, p 2; Correspondence, from Mr Bartley, to Chair, 1 December 2016, p 3; Correspondence, from Mr Hutton, to Chair, to Chair, 1 December 2016, pp 4-5.

handover procedures to ensure that injured workers receive seamless service when a case manager departs. It is a concern to this committee that this does not appear to happen, and both employers and employees have expressed their frustration.

## Independent Medical Examiners

**8.86** An IME is a registered medical practitioner who provides impartial medical assessments of workers in the workers compensation scheme, paid for by the insurer.<sup>727</sup> A worker or an insurer may request an independent medical examination if the available medical information associated with a claim is inadequate, unavailable or inconsistent, and the referrer has been unable to resolve the problem directly with the practitioner involved.<sup>728</sup> The IME's report may include advice on accepting a claim, the insurer's ongoing liability and the worker's level of capacity for employment and ongoing treatment.<sup>729</sup>

**8.87** There was discussion during the review about the role of IMEs. The Insurance Council of Australia stated that it is best practice for medical assessments to be independent and based on medical evidence.<sup>730</sup> However, a number of review participants questioned whether this reflects reality. For example, Mr Peter Lay and Ms Gail Lay expressed serious reservations about the use of IMEs, calling into question the independence of medical professionals who tender their services to insurers.<sup>731</sup>

**8.88** Similarly, Mr Boland was unequivocal in his distaste for the use of IMEs:

The most disturbing and dangerous aspect of the current system is what I call cash-for-comment, or so-called private insurance independent medical examiners, who continue to fraudulently misrepresent reporting of cases of injured workers for their own ongoing financial gain from the insurance companies.<sup>732</sup>

**8.89** Additionally, Mr Boland stated that there is an industry practice of 'delaying and delaying' requested medical treatment based on the opinions of what he described as insurers' 'cash-for-comment doctors'.<sup>733</sup> This was reflected in the evidence of an injured worker, who told the committee: 'Independent Medical Examinations are not what they say. It has been my experience after attending over a dozen of them that many are merely 'cash for comment'.<sup>734</sup>

**8.90** In addition, numerous stakeholders suggested that insurers engage in the practice of 'doctor shopping' – requiring workers to attend appointments with different medical practitioners until a preferred assessment was secured. For example, Ms Marie Hart, an injured former police officer, said that she had been directed to attend 16 IME appointments by her insurer

<sup>727</sup> Answers to questions on notice, SIRA, p 20.

<sup>728</sup> Answers to questions on notice, SIRA, p 20.

<sup>729</sup> Answers to questions on notice, SIRA, p 20.

<sup>730</sup> Evidence, Ms Mullen, 7 November 2016, p 64 and p 70.

<sup>731</sup> Evidence, Mr Peter Lay, Injured worker, 4 November 2016, p 42 and Evidence, Injured worker, Ms Gail Lay, 4 November 2016, p 42.

<sup>732</sup> Evidence, Mr Boland, 7 November 2016, p 56.

<sup>733</sup> Evidence, Mr Boland, 7 November 2016, p 56.

<sup>734</sup> Submission 34, Name suppressed, p 4.

between 2012 and 2015.<sup>735</sup> Likewise, a former fire fighter mentioned attending 14 medical appointments to the detriment of his psychological injury:

I have attended in excess of 14 different Medical Evaluations all who diagnose me with the same injury PTSD, but I am continually expected to relive my past and continue why I am injured.

Despite my efforts to improve my mental health, I am then challenged by the very system that encourages me to seek the right help and I'm accused of feigning my symptoms and my credibility is challenged by Workers Compensation and the Insurer.<sup>736</sup>

**8.91** Mr Collins said he has repeatedly been sent to see IME's despite being found to have no work capacity:

Since being covered by CGU workers compensation I have repeatedly been sent to so called 'independent medical examinations' and rehabilitation providers. This is despite all medical evidence from all specialists stating that I have no capacity for work or retraining. I find these referrals extremely stressful and disturbing and unnecessary.<sup>737</sup>

**8.92** Slater and Gordon Lawyers told the committee that 'It is not uncommon, especially in Police compensation matters for the insurer to arrange for numerous and potentially excessive numbers of appointments with doctors and other experts.'<sup>738</sup> Slater and Gordon Lawyers argued that numerous evaluations not only potentially exacerbate the worker's injury and place the claimant under additional stress, but also significantly add to the costs of the scheme.<sup>739</sup>

**8.93** Similarly, Mr Josh Mennen, Principal Lawyer, Maurice Blackburn, described doctor shopping as a 'substantial concern', stating he 'routinely see[s] claimants being subjected to multiple medical examinations at the behest of the insurer.'<sup>740</sup>

**8.94** SIRA and icare acknowledged these concerns. In response, SIRA advised that:

- the *Guidelines for claiming workers compensation* now limit the number of IME appointments that an insurer can require a worker to attend,<sup>741</sup> with SIRA undertaking extensive education with insurers to ensure they understand that the new guideline restricts the use of 'doctor shopping'.<sup>742</sup>
- it will monitor complaints concerning IMEs through its customer service centre and will incorporate information collated from this service in its review of IMEs, due to commence in early 2017.<sup>743</sup> It is anticipated that the review will consider the framework

---

<sup>735</sup> Submission 2a, Ms Marie Hart, p 1.

<sup>736</sup> Submission 13, Name suppressed, p 1.

<sup>737</sup> Submission 35, Mr Andrew Collins, p 2.

<sup>738</sup> Submission 53, Slater and Gordon Lawyers , p 4.

<sup>739</sup> Submission 53, Slater and Gordon Lawyers, p 4.

<sup>740</sup> Evidence, Mr Josh Mennen, Principal Lawyer, Maurice Blackburn, 7 November 2016, p 50.

<sup>741</sup> Answers to questions on notice, SIRA, p 20.

<sup>742</sup> Answers to questions on notice, SIRA, p 20.

<sup>743</sup> Evidence, Mr Anthony Lean, Chief Executive, SIRA, 7 November 2016, p 47.

for how SIRA regulates IMEs and update the guidelines on independent medical examinations and reports.<sup>744</sup>

- 8.95** icare similarly acknowledged that its IME policy was ‘not working’<sup>745</sup> and stated that it had amended it in October 2015. Mr John Nagle, Executive General Manager, Workers Insurance, icare, advised that, where appropriate, scheme agents are now required to provide workers with a choice of three IMEs situated locally to where they reside, rather than dictating which doctor will conduct the examination.<sup>746</sup>
- 8.96** Mr Nagle noted that for workers living in regional areas, icare has tried to group like appointments and then fly specialists to that area.<sup>747</sup> It was also noted that workers can have a support person attend IME visits.<sup>748</sup> Mr Nagle and Mr Bhatia suggested these changes to the IME policy empowered workers.<sup>749</sup>
- 8.97** The scheme agents noted the change in SIRA’s guidelines and icare’s policy regarding IMEs and provided examples of their own policies. For example:
- Allianz stated it uses IMEs only when information from treating doctors is ‘unavailable or inconsistent, to better understand the progress of an injury.’<sup>750</sup> Additionally, where practical, the insurer provides three IMEs for the worker to select their preferred examiner.<sup>751</sup>
  - EML said that its internal procedures stipulate that ‘IMEs are *only* appropriate when information from the treating medical practitioner(s) is inadequate, unavailable or inconsistent and all attempts to obtain information through direct contact with the practitioner(s) has failed ...’<sup>752</sup> EML added that prior to using an IME, a case manager must provide clear evidence outlining the reason for the referral and demonstrating all attempts to communicate with the treating doctor/specialist.<sup>753</sup>

### *Committee comment*

- 8.98** The committee considers ‘doctor shopping’ to be both undesirable and unnecessary, as it encourages poor outcomes for injured workers and is economically unsound. The committee expects scheme agents to abide by the guidelines produced by icare and SIRA on this matter. Indeed, the committee recommends that icare, in the new scheme agent deed, include

<sup>744</sup> Answers to questions on notice, SIRA, p 20.

<sup>745</sup> Evidence, Mr Bhatia, 7 November 2016, p 24.

<sup>746</sup> See, Evidence, Mr Nagle, 7 November 2016, p 25; Answers to questions on notice, icare, p 3.

<sup>747</sup> Evidence, Mr Nagle, 7 November 2016, p 25.

<sup>748</sup> Correspondence, from Mr Coyne, to Chair, 5 December 2016, pp 13-14.

<sup>749</sup> See, Evidence, Mr Nagle, 7 November 2016, p 21; Evidence, Mr Bhatia, icare, 7 November 2016, p 21.

<sup>750</sup> Correspondence, from Mr Siomiak, to Chair, 1 December 2016, pp 6-7.

<sup>751</sup> Correspondence, from Mr Siomiak, to Chair, 1 December 2016, pp 6-7.

<sup>752</sup> Correspondence, from Mr Coyne, to Chair, 5 December 2016, p 13 [emphasis as per original]

<sup>753</sup> See, Correspondence, from Mr Coyne, to Chair, 5 December 2016, p 13; Correspondence, from Mr Borden, 6 December 2016, to Chair, p 3; Correspondence, Mr Bartley, to Chair, 1 December 2016, p 4.

sanctions for scheme agents who fail to comply with the applicable guidelines on the use Independent Medical Examiners.

- 8.99** We also note that SIRA intends to monitor complaints concerning IMEs through its Customer Service Centre. The committee will keep a watching brief on this issue.

---

**Recommendation 26**

That icare, in the new scheme agent deed, include sanctions for scheme agents who fail to comply with the applicable guidelines on the use Independent Medical Examiners.

---

## Appendix 1 Submissions

No	Author
1	Name suppressed
2	Ms Marie Hart
2a	Ms Marie Hart ( <i>partially confidential</i> )
3	Confidential
4	Shop, Distributive and Allied Employees' Association, Newcastle and Northern Branch
5	Australian Services Union / United Services Union
6	NSW Bar Association
7	The Australian Workers' Union New South Wales Branch
8	Police Association of New South Wales
9	EML
10	NSW Nurses and Midwives' Association
11	NSW Business Chamber
12	Confidential
13	Name suppressed
14	Mr Berrick Boland
15	Confidential
16	Mr Owen Thomas
17	Ms Abbey Wilkinson
17a	Ms Abbey Wilkinson
18	Confidential
18a	Confidential
19	Confidential
20	Name suppressed ( <i>partially confidential</i> )
21	Name suppressed ( <i>partially confidential</i> )
22	Mr Ken Stranger
23	Name suppressed
24	Confidential
25	Confidential
26	Mr Peter Turnbull
27	Name suppressed
28	Australian Industry Group

No	Author
29	Name suppressed
30	Name suppressed
31	Confidential
32	Confidential
33	Confidential
34	Name suppressed ( <i>partially confidential</i> )
35	Mr Andrew Collins
36	Name suppressed
37	Name suppressed ( <i>partially confidential</i> )
38	Group Training Association of NSW & ACT
39	Name suppressed
40	Dr James Athanasou
41	Name suppressed
42	Confidential
43	Confidential
44	Confidential
45	Acacia Products
46	Mr John Schofield and Mrs Petronella Schofield ( <i>partially confidential</i> )
47	Specialist PTSD & Injury Lawyers ( <i>partially confidential</i> )
48	Confidential
49	Name suppressed ( <i>partially confidential</i> )
50	The Royal Australian and New Zealand College of Psychiatrists
51	Australian Road Transport Industrial Organisation NSW Branch
52	Australian Manufacturing Workers' Union
53	Slater and Gordon Lawyers
54	Workers Compensation Independent Review Office (WIRO)
55	Confidential
56	Name suppressed ( <i>partially confidential</i> )
57	Name suppressed ( <i>partially confidential</i> )
58	Name suppressed
59	Australian Council of Trade Unions
60	John Peisley and Associates ( <i>partially confidential</i> )
61	Construction, Forestry, Mining and Energy Union
62	Public Service Association of NSW

No	Author
63	Mr Greg Green ( <i>partially confidential</i> )
63a	Mr Greg Green ( <i>partially confidential</i> )
64	Fire Brigade Employees' Union of New South Wales
65	Law Society of New South Wales
66	Name suppressed
67	New South Wales Teachers Federation
68	Workers Health Centre
69	Confidential
70	Confidential
71	Confidential
72	Confidential
73	Name suppressed ( <i>partially confidential</i> )
74	Australian Lawyers Alliance
75	Injured Workers Support Network
76	Unions NSW
77	Name suppressed ( <i>partially confidential</i> )
78	Insurance Council of Australia
79	Confidential
80	Australian Federation of Employers and Industries
81	Confidential
82	Confidential
83	Name suppressed ( <i>partially confidential</i> )
84	NSW Self Insurers Association

## Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
<b>Friday 4 November 2016</b>		
<b>Macquarie Room, Parliament House, Sydney</b>	Mr Tim Concannon	Member, Injury Compensation Committee, Law Society of New South Wales
	Mr Paul Macken	Member, Injury Compensation Committee, Law Society of New South Wales
	Mr Ross Stanton	NSW Bar Association
	Ms Roshana May	New South Wales Branch President, Australian Lawyers Alliance
	Mr Stewart Little	General Secretary, Public Service Association of NSW
	Ms Mary McGookin	Member, Public Service Association of NSW
	Mr Peter Remfrey	Secretary, Police Association of New South Wales
	Ms Kirsty Membreno	Manager Industrial, Police Association of New South Wales
	Mr Darin Sullivan	President, Fire Brigade Employees Union of New South Wales
	Ms Claire Pullen	Senior Industrial Officer, Fire Brigade Employees Union of New South Wales
	Mr Mark Morey	Secretary, Unions NSW
	Ms Emma Maiden	Assistant Secretary, Unions NSW
	Mr Shay Deguara	Industrial Officer, Unions NSW
	Ms Belinda Scott	Injured worker
	Ms Gail Lay	Injured worker
	Mr Peter Lay	Injured worker
	Ms Rita Mallia	State President, Construction, Forestry, Mining and Energy Union
	Ms Sherri Hayward	Industrial/Legal Officer, Construction, Forestry, Mining and

Date	Name	Position and Organisation
		Energy Union
	Mr David Henry	Work Health and Safety Officer, Australian Manufacturing Workers Union
	Mr Leigh Shears	Injured worker, Australian Manufacturing Workers Union
	Mr Brett Holmes	General Secretary, NSW Nurses and Midwives Association
	Mr Stephen Hurley-Smith	General Secretary, NSW Nurses and Midwives Association
	Mr Luke Aitken	Senior Manager Policy, NSW Business Chamber
	Mr Greg Pattison	Consultant, NSW Business Chamber
	Mr Garry Brack	Chief Executive, Australian Federation of Employers and Industries
	Ms Jill Allen	Manager, Research and Policy, Australia Federation of Employers and Industries
	Ms Tracey Browne	Manager – National Safety & Workers’ Compensation Policy and Membership Services, Australian Industry Group
	Mr Mark Goodsell	Head – NSW & Manufacturing, Australian Industry Group
	Mr Stephen Keyte	Chairperson, NSW Self Insurers Association
	Mr Mick Franco	Honorary Solicitor, NSW Self Insurers Association
<b>Monday 7 November 2016</b> <b>Jubilee Room, Parliament</b> <b>House, Sydney</b>	Mr Rowan Kernebone	Coordinator, Injured Workers Support Network
	Mr Shane O’Donnell	Local network member, Injured Workers Support Network Wollongong
	Mr Ross Stirling	Local network member, Injured Workers Support Network Parramatta

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
	Ms Margaret Cameron	Injured worker
	Ms Rebecca Wieczorek ( <i>via teleconference</i> )	Injured worker, Member, Shop, Distributive Allied Employees Association
	Witness A	Allied health provider
	Witness B	Allied health provider
	Mr Kim Garling	Workers Compensation Independent Review Officer, Workers Compensation Independent Review Office
	Mr Vivek Bhatia	Chief Executive Officer, icare
	Dr Nick Allsop	Chief Actuary, icare
	Mr John Nagle	Executive General Manager, Workers Insurance, icare
	Mr Steve Hunt	Executive General Manager, Self Insurance, icare
	Mr Don Ferguson	Executive General Manager of Workers Care, icare
	Mr Anthony Lean	Chief Executive, SIRA
	Ms Carmel Donnelly	Executive Director, Strategy & Regulatory Services, SIRA
	Mr John Cox	Principal Lawyer, Specialist PTSD & Injury Lawyers
	Mr Josh Mennen	Principal Lawyer, Maurice Blackburn
	Mr Berrick Boland	Administrator, The Forgotten 000
	Mr Brendan Bullock	Injured worker
	Ms Vicki Mullen	General Manager Consumer Relations and Market Development, Insurance Council of Australia
	Ms Fiona Cameron	Senior Manager, Government & Industry Relations, Insurance Council of Australia

## Appendix 3 Minutes

### Minutes no. 14

Friday 12 August 2016

Standing Committee on Law and Justice

Room 814/815, Parliament House, Sydney 9.41 am

#### 1. Members present

Mr Mallard, *Chair*

Ms Voltz, *Deputy Chair*

Mr Clarke

Mr Khan

Mr Mookhey

Mr Shoebridge

#### 2. Previous minutes

Resolved, on the motion of Mr Shoebridge: That draft minutes no. 13 be confirmed.

#### 3. Correspondence

The committee noted the following items of correspondence:

##### *Received*

- 27 July 2016 – Letter from Hon Gabrielle Upton, Attorney General, providing an update to the New South Wales Government's response to the recommendations of the racial vilification law inquiry
- 18 July 2016 – Letter from Minister for Innovation and Better Regulation, Hon Victor Dominello to Chair, dated 3 March 2016, announcing the publication of a report on the Review of Green Slip Premium Setting for Motorcycles by Ernst & Young.

##### *Sent*

- 1 July 2016 – Letter from Chair to Hon Gabrielle Upton, Attorney General, requesting an update to the New South Wales Government's response to the recommendations of the racial vilification law inquiry.

Resolved, on the motion of Ms Voltz: That the committee publish the letter from the Attorney General providing an update to the New South Wales Government's response to the recommendations of the racial vilification law inquiry.

#### 4. \*\*\*

#### 5. First review of the Workers Compensation Scheme

On 29 March 2016 the committee resolved to conduct its first review of the Workers Compensation Scheme between August 2016 to February 2017.

##### 5.1 Call for submissions

Resolved, on the motion of Mr Khan: That the call for submissions be made on Monday 15 August 2016 via twitter, stakeholder letters and a media release distributed to all media outlets in New South Wales, with a closing date of Sunday 25 September 2016.

##### 5.2 Stakeholder list

Resolved, on the motion of Mr Khan: That members have until 5.00 pm Wednesday 17 August 2016 to nominate additional stakeholders to the stakeholder list.

### 5.3 Hearing dates

That the committee set aside three days for hearings (two hearing days and one reserve date) in October and/or November, the dates of which are to be determined by the Chair after consultation with members regarding their availability.

## 6. Adjournment

The committee adjourned at 11.46 am, *sine die*.

Teresa McMichael

**Clerk to the Committee**

### Minutes no. 15

Friday 4 November 2016

Standing Committee on Law and Justice

Macquarie Room, Parliament House, Sydney 8.52 am

#### 1. Members present

Mr Mallard, *Chair*

Ms Voltz, *Deputy Chair*

Mr Clarke

Mr Khan (until 4.02 pm)

Mr Mookhey (from 9.09 am)

Mr Shoebridge

#### 2. Previous minutes

Resolved, on the motion of Mr Khan: That draft minutes no. 14 be confirmed.

#### 3. Correspondence

The committee noted the following items of correspondence:

##### *Received*

- 23 August 2016 – Email from Ms Helen Righton, Assistant Director, Strategic and Compensation Policy, Legal and Strategic Policy Branch, Safe Work Australia to secretariat, declining the invitation to make a submission to the review
- 11 October 2016 – Email from submission author no. 69 concerning details of confidential submission to the review
- 12 October 2016 – Email from Mr Arthur Cooke, Clinical Psychologist, to Chair, requesting to be a witness at a hearing for the review
- 17 October 2016 – Email from Mr Owen Thomas, to Chair, requesting to be a witness at a hearing for the review
- 17 October 2016 – Email from Ms Emma Maiden, Assistant Secretary, Unions NSW, to Chair, requesting that Unions NSW appear individually, rather than as a member of a panel
- 18 October 2016 – Email from Ms Roshanna May, NSW Branch President, Australian Lawyers Alliance, to secretariat, regarding witnesses at hearing
- 19 October 2016 – Email from submission author no. 55, to secretariat, requesting that the submission remain confidential and to appear in camera
- 20 October 2016 – Letter from Hon Dominic Perrottet MP, Minister for Finance, Services and Property, to Chair, advising of Insurance & Care NSW (icare) witnesses
- 21 October 2016 – Letter from Ms Barbara Nebart, Branch Secretary, Shop, Distributive and Allied Employees' Association Newcastle and Northern Branch, to secretariat, requesting that the organisation appear as a witness

- 25 October 2016 – Email from Mr Matthew Vickers, General Manager, Workers Insurance NSW, EML, to secretariat, declining invitation to appear as a witness
- 27 October 2016 – Letter from the Hon Victor Dominello MP, Minister for Innovation and Better Regulation, to Chair, advising of State Insurance Regulatory Authority (SIRA) witnesses
- 28 October 2016 – Letter from Anthony Lean, Chief Executive, SIRA to Chair, providing SIRA's NSW Workers Compensation System Performance Report
- 28 October 2016 – Email from Ms Emma Maiden, Assistant Secretary, Unions NSW to secretariat, requesting that their appearance before the committee be authorised to be filmed for the purposes of a short film regarding the workers compensation scheme.

#### ***Sent***

- 29 September 2016 – Letter from Chair to Hon Victor Dominello MP, Minister for Innovation and Better Regulation, attaching pre-hearing questions on notice for SIRA
- 29 September 2016 – Letter from Chair to Hon Dominic Perrottet MP, Minister for Finance, Services and Property, attaching pre-hearing questions on notice for icare.

Resolved, on the motion of Mr Khan: That the committee:

- keep submission author no 69's email confidential due to concerns about adverse mention
- keep submission author no 55's email confidential as it includes identifying information.

## **4. First review of the workers compensation scheme**

### **4.1 Public submissions**

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: 2, 4-11, 14, 16, 17, 17a, 22, 26, 28, 35, 38, 40, 45, 50-54, 59, 61, 62, 64, 65, 67, 68, 74-76, 78, 80.

### **4.2 Partially confidential submissions**

Resolved, on the motion of Mr Khan: That the committee keep names and/or identifying and sensitive information, and potential adverse mention, confidential, as per the request of the author and/or the recommendation of the secretariat, in submissions nos. 1, 2a, 13, 20, 21, 23, 27, 29, 30, 34, 36, 37, 39, 41, 46, 47, 49, 56, 57, 60, 63, 63a, 66, 69, 73, 77.

### **4.3 Confidential submissions**

Resolved, on the motion of Mr Shoebridge:

- That the committee keep submission nos 3, 12, 15, 19, 31, 32, 42, 43, 44, 48, 55, 70, 71, 72, 79 confidential, as per the request of the author, as they contain names and/or identifying and sensitive information and/or potential adverse mention
- That the committee keep submission nos 18, 18a, 24, 25, 33 confidential, as per the recommendation of the secretariat, as they contain names and/or identifying and sensitive information and/or potential adverse mention.

### **4.4 Answers to pre-hearing questions on notice**

The committee noted that the following answers to pre-hearing questions on notice were published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to questions on notice by SIRA, received from Hon Victor Dominello MP, Minister for Innovation and Better Regulation, 27 October 2016
- answers to questions on notice by icare, received from Hon Dominic Perrottet MP, Minister for Finance, Services and Property, 27 October 2016.

### **4.5 Request to appear *in camera***

Resolved, on the motion of Mr Shoebridge: That the evidence of submission author no. 55 on 7 November 2016 be heard *in camera*.

### **4.6 Filming of Unions NSW appearance at hearing**

Resolved, on the motion of Mr Shoebridge: That A35 Films be authorised to film representatives of Unions NSW giving evidence to the committee at the hearing on 4 November 2016.

#### **4.7 Report deliberative meeting**

Resolved, on the motion of Ms Voltz: That the committee hold its report deliberative in the week commencing Monday 27 February 2017, with the date to be determined by the Chair after consultation with members regarding their availability.

#### **4.8 Public hearing**

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Mr Tim Concannon, Partner, Carroll and O’Dea, Law Society of New South Wales
- Mr Paul Macken, Partner, Leigh Virtue and Associates, Law Society of New South Wales
- Mr Ross Stanton, Barrister, NSW Bar Association
- Ms Roshana May, NSW Branch President, Australian Lawyers Alliance.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Stewart Little, General Secretary, Public Service Association
- Ms Mary McGookin, injured worker
- Mr Peter Remfrey, Secretary, Police Association of NSW
- Ms Kirsty Membreno, Manager Industrial, Police Association of NSW
- Mr Darin Sullivan, President, Fire Brigade Employees Union of NSW
- Ms Claire Pullen, Senior Industrial Officer, Fire Brigade Employees Union of NSW.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Mark Morey, Secretary, Unions NSW
- Ms Emma Maiden, Assistant Secretary, Unions NSW
- Mr Shay Deguara, Industrial Officer, Unions NSW
- Ms Belinda Scott, injured worker
- Ms Gail Lay, injured worker
- Mr Peter Lay, injured worker.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Rita Mallia, State President, Construction, Forestry, Mining and Energy Union
- Ms Sherri Hayward, Industrial/Legal Officer, Construction, Forestry, Mining and Energy Union
- Mr David Henry, Work Health and Safety Officer, Australian Manufacturing Workers Union,
- Mr Leigh Shears, injured worker
- Mr Brett Holmes, General Secretary, NSW Nurses and Midwives Association
- Mr Stephen Hurley-Smith, General Secretary, NSW Nurses and Midwives Association.

Mr Shears tendered the following document:

- Opening statement.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Luke Aitken, Senior Manager Policy, NSW Business Chamber
- Mr Greg Pattison, Consultant, NSW Business Chamber

- Mr Garry Brack, Chief Executive, Australian Federation of Employers and Industries
- Ms Jill Allen, Manager, Research and Policy, Australian Federation of Employers and Industries
- Ms Tracey Browne, Manager – National Safety & Workers’ Compensation Policy and Membership Services, Australian Industry Group
- Mr Mark Goodsell, Head – NSW & Manufacturing, Australian Industry Group.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Stephen Keyte, NSW Self Insurers Association
- Mr Mick Franco, NSW Self Insurers Association.

The evidence concluded and the witnesses withdrew.

The public and media withdrew.

The public hearing concluded at 4.03 pm.

#### **4.9 Tendered documents**

Resolved, on the motion of Mr Mookhey: That the committee accept and publish the following document tendered during the public hearing:

- Opening statement, tendered by Mr Leigh Shears.

#### **4.10 Redaction of sensitive information**

Resolved, on the motion of Ms Voltz: That the committee redact the names of third parties identified in the evidence given by Ms Gail Lay.

### **5. Adjournment**

The committee adjourned at 4.08 pm, until Monday 7 November 2016 (*public hearing, first review of the workers compensation scheme*).

Sharon Ohnesorge  
Clerk to the Committee

#### **Minutes no. 16**

Monday 7 November 2016  
Standing Committee on Law and Justice  
Jubilee Room, Parliament House, Sydney 9.05 am

#### **1. Members present**

Mr Mallard, *Chair*  
Ms Voltz, *Deputy Chair* (until 4.02 pm)  
Mr Clarke  
Mr Khan  
Mr Mookhey (from 9.11 am)  
Mr Shoebridge (from 9.12 am)

#### **2. Correspondence**

The committee noted the following items of correspondence:

##### ***Received***

- 1 November 2016 – Letter from Mr Kim Garling, Workers Compensation Independent Review Officer to Chair, responding to submission 60
- 7 November 2016 – Letter from Mr Kim Garling, Workers Compensation Independent Review Officer, setting out legislation relevant to the workers compensation scheme.

Resolved, on the motion of Mr Khan: That the committee keep the correspondence from Mr Garling dated 1 November 2016 confidential, at his request.

### **3. First review of the workers compensation scheme**

#### **3.1 Confidential submissions**

Resolved, on the motion of Mr Khan: That the committee keep submission no 81 confidential, as per the recommendation of the secretariat, as it contains names and/or identifying and sensitive information and potential adverse mention.

Resolved, on the motion of Ms Voltz: That the committee keep submission no 82 confidential, as per the request of the submission author, as it contains potential adverse mention.

#### **3.2 Appearance of witnesses from SDA Newcastle & Northern Branch**

The committee noted a request from the SDA Newcastle & Northern Branch received on 7 November 2016 that the union's representative and their injured worker both appear at the hearing via teleconference. The hearing schedule provided for a representative of the SDA Newcastle & Northern Branch to appear in person on a panel, together with representatives from the Injured Workers Support Network, with the union's injured worker appearing via teleconference.

Mr Shoebridge moved: That the committee agree to the request by the SDA Newcastle & Northern Branch that the union's representative and their injured worker both appear at the hearing via teleconference, together on a panel with representatives from the Injured Workers Support Network.

Ms Voltz moved: That the motion of Mr Shoebridge be amended by omitting all words after 'That the committee' and inserting instead, 'allow the SDA Newcastle & Northern Branch's injured worker to give a five minute opening statement via teleconference, with no further questions directed to SDA witnesses'.

Amendment of Ms Voltz put.

The committee divided.

Ayes: Mr Clarke, Mr Khan, Mr Mallard, Mr Mookhey, Ms Voltz.

Noes: Mr Shoebridge.

Amendment of Ms Voltz resolved in the affirmative.

Original question of Mr Shoebridge, as amended, put and passed.

#### **3.3 Public hearing**

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Mr Rowan Kernebone, Coordinator, Injured Workers Support Network
- Mr Shane O'Donnell, Local network member, Injured Workers Support Network Wollongong
- Mr Ross Stirling, Local network member, Injured Workers Support Network Parramatta
- Ms Margaret Cameron, injured worker
- Ms Rebecca Wieczorek, injured worker, Member, Shop, Distributive and Allied Employees' Association (via teleconference).

The evidence concluded and the witnesses withdrew.

The public and media withdrew.

#### **3.4 *In camera* hearing**

The committee previously resolved to take *in camera* evidence from representatives of an organisation.

The committee proceeded to take *in camera* evidence.

Persons present other than the committee: Ms Sharon Ohnesorge, Ms Emma Matthews, Ms Shaza Barbar, Ms Kate Mihaljek and Hansard reporters.

The following witnesses were sworn and examined:

- Witness A
- Witness B.

The evidence concluded and the witnesses withdrew.

### **3.5 Public hearing**

The committee proceeded to take evidence in public.

Witnesses, the public and the media were readmitted.

The following witness was sworn and examined:

- Mr Kim Garling, Workers Compensation Independent Review Officer, Workers Compensation Independent Review Office.

Mr Garling tendered the following document:

- Opening statement.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Vivek Bhatia, Chief Executive Officer, icare
- Dr Nick Allsop, Chief Actuary, icare
- Mr John Nagle, Executive General Manager, Workers Insurance, icare
- Mr Steve Hunt, Executive General Manager, Self Insurance, icare
- Mr Don Ferguson, Executive General Manager of Workers Care, icare.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Anthony Lean, Chief Executive, SIRA
- Ms Carmel Donnelly, Executive Director, Strategy & Regulatory Services, SIRA.

Mr Lean tendered the following document:

- Opening statement.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr John Cox, Principal Lawyer, Specialist PTSD and Injury Lawyers
- Mr Josh Mennen, Principal Lawyer, Maurice Blackburn.

Mr Mennen tendered the following document:

- 'Life Insurance: Code of Practice', Financial Services Council.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Berrick Boland, Administrator, The Forgotten 000
- Mr Brendan Bullock, Injured worker.

Mr Bullock tendered the following document:

- 'Police Impact Statement: An insight to police suicide', Mr Brendan Bullock, dated 14 December 2014.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Vicki Mullen, General Manager Consumer Relations and Market Development, Insurance Council of Australia
- Ms Fiona Cameron, Senior Manager, Government & Industry Relations, Insurance Council of Australia.

The evidence concluded and the witnesses withdrew.

The public and media withdrew.

The public hearing concluded at 4.39 pm.

### **3.6 Tendered documents**

Resolved, on the motion of Mr Khan: That the committee accept and publish the following documents tendered during the public hearing:

- Opening statement, tendered by Mr Kim Garling.
- Opening statement, tendered by Mr Anthony Lean.
- 'Life Insurance: Code of Practice', Financial Services Council, tendered by Mr Josh Mennen
- 'Police Impact Statement: An insight to police suicide', Mr Brendan Bullock, dated 14 December 2014, tendered by Mr Brendan Bullock.

### **3.7 Response to evidence by scheme agents**

Resolved, on the motion of Mr Mookhey: That the committee authorise the Chair to write to the five scheme agents, seeking a response to the evidence from the hearings on 4 and 7 November 2016 and the submissions regarding the operation of the scheme and the conduct of scheme agents in particular, and noting that receipt of these responses will assist the committee in deciding whether to hold another public and seek their attendance.

## **4. Adjournment**

The committee adjourned at 4.46 pm *sine die*.

Sharon Ohnesorge

**Clerk to the Committee**

### **Draft minutes no. 17**

Friday 3 March 2017

Standing Committee on Law and Justice

Room 1254, Parliament House, Sydney 9.36 am

## **5. Members present**

Mr Mallard, *Chair*

Ms Voltz, *Deputy Chair*

Mr Clarke

Mr Khan

Mr Mookhey

Mr Shoebridge

## **6. Previous minutes**

Resolved, on the motion of Mr Khan: That draft minutes nos. 15 and 16 be confirmed.

## **7. Correspondence**

The committee noted the following items of correspondence:

### ***Received:***

- 5 September 2016 – Letter from Mr A T Whitfield, Deputy Auditor-General, Audit Office of New South Wales to Chair, advising that the Audit Office will not be making a submission to the review

- 7 November 2016 – Letter from Ms Margaritte Colefax to Chair, regarding her experience with the workers compensation scheme
- 11 November 2016, Mr Josh Mennen, Principal Lawyer, Maurice Blackburn, clarifying his evidence to the committee
- 23 November 2016 – Letter from Ms Roshana May, New South Wales Branch President, Australian Lawyers Alliance, to Chair, clarifying her evidence to the committee
- 28 November 2016 – Email from Mr Michael Bale to Secretariat, regarding his complaint against the Legal Services Commissioner
- 29 November 2016 – Letter from Ms Carmel Donnelly, Executive Director, Workers and Home Building Compensation Regulation, to Chair, clarifying her evidence to the committee
- 30 November 2016 – Letter from Mr Stewart Little, General Secretary, Public Service Association, to Chair, clarifying his evidence to the committee
- 30 November 2016 - Letter from Mr Dustin Bartley, State Manager, Workers Compensation, CGU, to Chair, responding to request for evidence
- 1 December 2016 – Letter from Mr Mike Siomiak, General Manager, NSW Workers Compensation, Allianz Australia Workers Compensation, to Chair, responding to request for evidence
- 1 December 2016 – Letter from Mr David Hutton, Executive Manager - General Accident & Lifestyle Claims NSW, GIO, to Chair, responding to request for evidence
- 1 December 2016 – Letter from Mr Mark Coyne, Chief Executive, EML to Chair responding to request for evidence
- 1 December 2016 – Letter from Ms Tracey Browne, Manager – National Safety & Workers Compensation Policy and Membership Services, to secretariat, clarifying her evidence to the committee
- 2 December 2016 – Mr Anthony Lean, Chief Executive, SIRA, to Chair, clarifying his evidence to the committee
- 2 December 2016 – Letter from Mr Gary Ulman, President, Law Society of New South Wales, to Chair, clarifying Mr Paul Macken, Member, Injury Compensation Committee, Law Society of New South Wales, evidence to the committee
- 6 December 2016 – Letter from Mr Andrew Borden, General Manager, Workers Compensation, QBE Australia and New Zealand, to Chair, responding to request for evidence
- 9 December 2016 – Letter from Ms Roshana May, New South Wales Branch President, Australian Lawyers Alliance, to Chair, highlighting recent cases concerning the operation of section 60(2A) of the *Workers Compensation Act 1987*
- 16 December 2016 – Email from Owen Thomas, to Chair, regarding concerns about *Workplace Injury Management and Workers Compensation Act 1998*
- 19 December 2016 – Email from Mr Owen Thomas, to Chair, regarding further concerns about *Workplace Injury Management and Workers Compensation Act 1998*
- 31 January 2016 – Email from Mr David Whitson, to Chair, regarding concerns about climate change
- 1 February 2016 – Email from Mr Rowan Kernebone, Coordinator, Injured Workers Support Network, to Chair, clarifying evidence provided by icare regarding publication of details of Independent Medical Examiners.

**Sent:**

- 10 November 2016 – Letter from the Chair to Mr David Hutton, Executive Manager, General Accident & Lifestyle Claims NSW, GIO General Limited, requesting a response to evidence concerning the behaviour of scheme agents
- 10 November 2016 – Letter from the Chair to Mr Dustin Bartley, State Manager, CGU Workers Compensation (NSW) Limited, requesting a response to evidence concerning the behaviour of scheme agents
- 10 November 2016 – Letter from the Chair to Mr Michael Siomiak, General Manager NSW Workers Compensation, Allianz Australia Workers' Compensation (NSW) Ltd., requesting a response to evidence concerning the behaviour of scheme agents

- 10 November 2016 – Letter from the Chair to Mr Mark Coyne, Chief Executive Officer, Employers Mutual NSW Limited, requesting a response to evidence concerning the behaviour of scheme agents
- 10 November 2016 – Letter from the Chair to Mr Clement Chao, Business Unit Manager, QBE Workers Compensation (NSW) Limited requesting a response to evidence concerning the behaviour of scheme agents.

## **8. First review of the workers compensation scheme**

### **8.1 Public submissions**

The committee noted that the following submission was published by the committee clerk under the authorisation of the resolution appointing the committee: submission no. 84.

### **8.2 Partially confidential submission**

Resolved, on the motion of Mr Khan: That the committee keep names and/or identifying and sensitive information confidential, as per the request of the author in submission no. 83.

### **8.3 Answers to questions on notice**

The committee noted that answers to questions on notice from the following witnesses were published by the committee clerk under the authorisation of the resolution appointing the committee:

- Ms Sherri Hayward, Legal/Industrial Officer, CFMEU, received 21 November 2016
- Mr Brett Holmes, General Secretary, NSW Nurses and Midwives Association, received 29 November 2016
- Mr Alastair McConnachie, Deputy Executive Director, NSW Bar Association, received 30 November 2016
- Mr Stewart Little, General Secretary, Public Service Association, received 30 November 2016
- Mr Gary Ulman, President, Law Society of New South Wales, and Ms Roshana May, New South Wales Branch President, Australian Lawyers Alliance, received 1 December 2016
- Ms Kirsty Membreno, Manager, Industrial, Police Association of NSW, received 1 December 2016
- Ms Judy Pettman, Manager Administration, Australian Federation of Employers and Industries, received 1 December 2016
- Mr Paul Orton, Director, Policy and Advocacy, NSW Business Chamber, received 1 December 2016
- Mr Anthony Lean, Chief Executive Officer, SIRA, received 2 December 2016
- Ms Clemency Morony, Head of Ministerial and Parliamentary Support, Risk, icare, received 2 December 2016
- Mr Kim Garling, Workers Compensation Independent Review Officer, Workers Compensation Independent Review Office, received 2 and 5 December 2016
- Mr Tom Lunn, Senior Policy Advisor, Consumer, Relations and Market Development Directorate, Insurance Council of Australia, received 8 December 2016.

### **8.4 Confidential answers to questions on notice**

Resolved, on the motion of Mr Shoebridge: That the committee keep the answers to questions on notice from the allied health professionals confidential as per the request of the author, as they contain identifying information.

### **8.5 *In camera* transcript**

Resolved, on the motion of Mr Shoebridge: That the committee authorise the *in camera* transcript dated 7 November 2016 to be published with redactions.

### **8.6 Consideration of Chair's draft report**

The Chair submitted his draft report entitled *First review of the workers compensation scheme*, which, having been previously circulated, was taken as being read.

### **Key issues**

Ms Voltz moved: That paragraph 2 be amended by omitting: 'The NSW Government also invested \$1 billion in expanding access to medical and other benefits for scheme participants.'

Mr Shoebridge moved: That the motion of Ms Voltz be amended by inserting instead ‘The NSW Government implemented a \$1 billion package that expanded access to medical and other benefits and reduced premiums.’

Amendment of Mr Shoebridge put and passed.

Original question of Ms Voltz, as amended, put and passed.

Ms Voltz moved: That paragraph 3 be amended by omitting ‘The committee commends the government for its willingness to enhance the benefits available to injured workers. In saying this’ before ‘evidence presented during this review’.

Mr Shoebridge moved: That the motion of Ms Voltz be amended by inserting instead ‘The committee notes that certain benefits have been returned to workers as a result of the committee’s previous recommendations. In saying this’.

Amendment of Mr Shoebridge put and passed.

Original question of Ms Voltz, as amended, put and passed.

Resolved, on the motion of Ms Voltz: That paragraph 5 be amended by omitting ‘excellent’ before ‘opportunity for the nominal insurer’.

## Chapter 1

Resolved, on the motion of Mr Shoebridge: That paragraph 1.45 be amended by omitting ‘and aimed at making the scheme more sustainable’ after ‘were significant.’

Resolved, on the motion of Mr Shoebridge: That paragraph 1.50 be amended by omitting ‘enhancements’ and inserting instead ‘improvements’ before ‘several’.

Resolved, on the motion of Mr Shoebridge: That paragraph 1.56 be amended by:

- a) omitting ‘as a result of’ and inserting instead ‘after’ before ‘the 2012 reforms’
- b) omitting ‘substantially enhanced’ and inserting instead ‘since increased’ before ‘the entitlements available to injured workers’.

Resolved, on the motion of Mr Khan: That paragraph 1.56 be amended by omitting ‘while also maintaining its commitment to incentivising return to work and maintaining a viable scheme’ after ‘greater access to benefits’.

Resolved, on the motion of Mr Shoebridge: That the following new committee comment be inserted after paragraph 1.56:

### ‘Committee comment

The 2012 reforms have seen significant cuts to the benefits payable to the majority of injured workers. The committee does accept that the two tranches of changes since then have increased benefits to some classes of workers and has improved the fairness in the scheme for many workers. At the same time employers have received significant benefits in the form of premium cuts that are on average 15 per cent of the premiums paid.’

## Chapter 2

Resolved, on the motion of Ms Voltz: That paragraph 2.11 be amended by inserting ‘employer’ before ‘stakeholders’.

Resolved, on the motion of Ms Voltz: That paragraph 2.27 be amended by omitting ‘It is good to see that in 2016, the scheme continues to operate at a reasonable surplus, with a current funding position of around 123 per cent’ after ‘As noted in our 2014 review, it is critically important that the financial viability of the workers compensation scheme be maintained, in order both to provide the best possible support for injured workers and the lowest possible premiums for New South Wales businesses.’

Resolved, on the motion of Mr Shoebridge: That paragraph 2.28 be amended by:

- a) omitting 'a generous' and inserting instead 'an adequate' before 'funding ratio'
- b) omitting 'fulsome' and inserting instead 'complete' before 'picture'.

Resolved, on the motion of Ms Voltz: That paragraph 2.29 be amended by omitting 'In relation to premium calculation, the committee was pleased to see icare using the new premium model as a tool to encourage better work health and safety practices. In particular, we are supportive of the discounts available that incentivise low claims activity and best practice return to work conduct. However,' before 'the committee is concerned'.

Resolved, on the motion of Mr Mookhey: That Recommendation 1 be amended by omitting 'to employers' after 'detailed information'.

Resolved, on the motion of Mr Shoebridge: That the following new committee comment be inserted after Recommendation 1:

**'Committee comment**

It was not clear that a compelling case has been presented at this stage for an increase from the current funding ratio of 110 per cent of liabilities to something in the range of 120 to 130 per cent. A change of this magnitude would require the system to have an additional reserve in the order of \$1.85 billion. This money must be found from either higher premiums on employers or reduced benefits to injured workers.'

Resolved, on the motion of Mr Khan: That the new committee comment inserted after Recommendation 1 be amended by inserting at the end: 'The committee will investigate this matter further in its next review.'

Mr Shoebridge moved: That the following new recommendation be inserted after Recommendation 1:

**'Recommendation X**

That icare and SIRA produce a public discussion paper and accept submissions on that paper, regarding any proposed changes to the scheme's funding ratio, including the prudential concerns, together with its impact on employers and injured workers.'

Question put.

The committee divided.

Ayes: Mr Mookhey, Mr Shoebridge, Ms Voltz.

Noes: Mr Clarke, Mr Khan, Mr Mallard.

There being an equality of votes, question resolved in the negative on the casting vote of the Chair.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.40 be amended by omitting 'icare reported that it received' and inserting instead 'The icare annual report notes that' before '60,174 workers compensation claims'.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.43 be amended by inserting 'The reduction in claim numbers is significant, falling from approximately 110,000 in 2011-12 to just over 60,000 in 2015-16' after 'SIRA noted that the reduction in the number of claims reported and active coincided with the 2012 workers compensation reforms'.

Resolved, on the motion of Ms Voltz: That the following new paragraph be inserted after paragraph 2.45:

'However, Ms Tracey Browne, Manager, National Safety and Workers' Compensation Policy and Membership Services, Australian Industry Group, informed the committee:

If you have been able to get your employee back to work within 13 weeks you will get a 15 per cent discount on those claims costs. If you have been able to get them back to work within 26 weeks you will get a 10 per cent discount, and within 52 weeks you will get a five per cent discount. What is not clear is whether or not the person has to be at work not receiving any weekly compensation, or whether they only have to be back at work. My reading of the

legislation is that they have to be back at work. The feedback we have had from icare is that they have to be not receiving any weekly compensation.’ [FOOTNOTE: Evidence, Ms Tracey Browne, Manager, National Safety and Workers’ Compensation Policy and Membership Services, Australian Industry Group, 4 November 2016, p 64.]

Resolved, on the motion of Ms Voltz: That paragraph 2.55 be amended by inserting at the end: ‘For example, Ms Roshana May, New South Wales Branch President, Australian Lawyers Alliance, told the committee:

Have you returned to work at any time since you have claimed compensation? That is the only question that is now asked in respect of that national survey. That is the survey that the State regulator relies on to report on return to work outcomes.

...

Return to work is not about getting back to work for one day because our experience is—and we have all had close on 30 years experience in the scheme—most workers return to work for at least one day after having had an injury. [FOOTNOTE: Evidence, Ms Roshana May, New South Wales Branch President, Australian Lawyers Alliance, 4 November 2016, p 4.]’

Resolved, on the motion of Mr Shoebridge: That Recommendation 2 be amended by:

- a) inserting ‘SIRA and’ before ‘icare’
- b) omitting ‘through the scheme agents’ before ‘collect clearer data’
- c) inserting at the end ‘and that the return to work data specifically identify workers who have returned to work for insignificant periods or have had their benefits terminated for a reason other than return to work’.

Resolved, on the motion of Mr Shoebridge: That Recommendation 3 be amended by omitting ‘consider developing’ and inserting instead ‘develop’ before ‘a guideline’.

### Chapter 3

Ms Voltz moved: That paragraph 3.8 be omitted.

Question put and negatived.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.14 be omitted: ‘Following the implementation of the 2015 structural reforms, we did not hear the same calls to separate oversight of the workers compensation scheme in this review. Accordingly, the committee does not consider that there is sufficient evidence to restate this recommendation.’

Resolved, on the motion of Mr Shoebridge: That the following new committee comment be inserted after 3.15:

#### ‘Committee comment

The absence of financial independence has clearly hampered the work of WIRO. For many stakeholders and injured workers WIRO is seen as a genuinely helpful, independent part of the scheme. Ensuring that the office is able to continue to exercise its functions is clearly in the interests of all scheme participants.’

Ms Voltz moved: That Recommendation 4 be amended by omitting ‘consider the need for’ and inserting instead ‘reinstates funding to enable’ after ‘That the NSW Government’.

Question put.

The committee divided.

Ayes: Mr Mookhey, Mr Shoebridge, Ms Voltz.

Noes: Mr Clarke, Mr Khan, Mr Mallard.

There being an equality of votes, question resolved in the negative on the casting vote of the Chair.

Ms Voltz moved: That the following new recommendation be inserted after Recommendation 4:

**‘Recommendation X**

That the NSW Government informs this committee of what consultations were undertaken with WIRO before the new structure was implemented on 1 September 2015.’

Question put and negatived.

Resolved, on the motion of Ms Voltz: That paragraph 3.22 be amended by omitting ‘evidence pointing to certain anomalies’ and inserting instead ‘of concerns’ after ‘the committee heard’.

Resolved, on the motion of Ms Voltz: That paragraph 3.24 be omitted: ‘The SIRA guidelines are not framed in the same way as the old WorkCover guidelines, and as they have been in place for only a short time, the committee was not made aware of any matters considered under those new guidelines.’

Resolved, on the motion of Ms Voltz: That paragraph 3.29 be amended by omitting ‘commends the government for its’ and inserting instead ‘notes the government’s’ after ‘The committee’.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.29 be amended by inserting at the end: ‘These changes have provided comfort, especially for older workers with occupational hearing loss, who faced the distressing prospect of losing the benefit of their hearing aids with consequential social withdrawal. Reinstating the lifelong guarantee of access to hearing aids and prostheses was particularly welcomed by many stakeholders’.

Resolved, on the motion of Mr Shoebridge: That the following new committee comment be inserted after paragraph 3.30:

**‘Committee comment**

It was too early in this review to determine if SIRA’s changes will have a meaningful impact on the problems that are repeatedly identified with pre-approval requirements for medical expenses.’

Mr Shoebridge moved:

- a) That the new committee comment inserted after paragraph 3.30 be amended by inserting at the end: ‘The requirement for pre-approval of medical expenses was introduced in the 2012 reforms and continues to be a significant matter of concern for injured workers, their representatives and medical practitioners in the system. There remains a strong case for the government to review this aspect of the system in its entirety to ensure the scheme is providing the most timely possible medical assistance to injured workers.’
- b) That the following new recommendation be inserted after the new committee comment inserted after paragraph 3.30:

**‘Recommendation X**

That the NSW Government review the need for pre-approval of medical expenses in the scheme and consider alternative arrangements that focus on providing the most timely possible medical assistance for injured workers.’

Question put.

The committee divided.

Ayes: Mr Mookhey, Mr Shoebridge, Ms Voltz.

Noes: Mr Clarke, Mr Khan, Mr Mallard.

There being an equality of votes, question resolved in the negative on the casting vote of the Chair.

Resolved, on the motion of Mr Khan: That the new committee comment inserted after paragraph 3.30 be amended by inserting at the end: ‘The committee will investigate this matter further in its next review.’

Resolved, on the motion of Ms Voltz: That paragraph 3.39 be amended by omitting ‘While it has taken the government a significant period of time to implement our recommendation, it is anticipated that the new regulation will alleviate a significant concern for review participants and promote greater fairness in

the scheme' and inserting instead 'We also note that it took the government a significant period of time to implement this recommendation'.

Resolved, on the motion of Ms Voltz: That paragraph 3.43 be amended by omitting 'As noted in Chapter 2, we are also supportive of the discounts available under icare's new premium model that incentivise best practice return to work conduct. These should serve to highlight to employers the myriad advantages of appropriately managing an injured worker's return to work.' after 'obligations'.

Resolved, on the motion of Ms Voltz: That paragraph 3.56 be amended by:

- a) omitting 'welcomes' and inserting instead 'notes' after 'The committee'
- b) omitting 'and looks forward to learning about the success of this strategy at our next review' after 'SafeWork NSW'.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.58 be omitted: 'In the interests of transparency, the committee also urges SIRA to continue to publish statistical bulletins in a timely manner', and the following new committee comment be inserted instead:

'The lack of transparency and poor access to credible data from SIRA is a repeated theme in the submissions to this committee's current review. While we accept that a change in culture takes time in any organisation, we would have expected significantly more advances in this regard than have been evidenced to date.'

Resolved, on the motion of Mr Khan: That paragraph 3.59 be amended by omitting 'was pleased to hear' and inserting instead 'notes' before 'that SIRA has updated the workers compensation claims form'.

Resolved, on the motion of Ms Voltz: That paragraph 3.59 be amended by omitting 'is supportive of' and inserting instead 'also notes' before 'SIRA's prioritisation program'.

#### Chapter 4

Resolved, on the motion of Ms Voltz: That paragraph 4.19 be amended by inserting at the end:

'Mr Ross Stirling, an injured worker, told the committee about some of the difficulties he had encountered with his rehabilitation provider:

That rehabilitator even come into my workplace—the one that was provided by them—and I have had a sit-down meeting with him before and I said, 'I think this is just basically you going in and speaking to my employer, you are giving him the options to actually sit back and think, 'Can I dismiss this worker?' I said, 'I don't want you to go and ask: 'Has he got any long-term prospects?' Go into my employer and ask how I am doing.' So he goes in, and my union rep is there, what is one of the first questions? 'Do you think Mr Stirling's long-term prospects are good here?' [FOOTNOTE: Evidence, Mr Ross Stirling, 7 November 2016, p 5].

Resolved, on the motion of Mr Shoebridge: That paragraph 4.29 be amended by omitting 'The committee supports the use of work capacity assessments as a means of assisting workers return to health and return to work', before 'We note that some stakeholders'.

Resolved, on the motion of Mr Shoebridge: That the following new committee comment be inserted after Recommendation 9:

#### **'Committee comment**

The legislation governing a work capacity decision is complex and that complexity is increased with sometimes multiple guidelines also being relevant to the decision. While we acknowledge there have been some steps to reintroduce legal assistance for some challenges to work capacity decisions, there is no logical reason to treat work capacity decisions as separate to liability decisions in the scheme. That distinction is both complex and artificial.'

Mr Shoebridge moved:

- a) That paragraph 4.70 be amended by omitting 'The committee intends to keep a watching brief on this issue' and inserting instead 'The committee notes that no stakeholders were able to justify why

the second limb of the test operates as it does. Given its unfair operation it should be reformed as a matter of priority to either reinstate, or take it significantly closer to, the form of words prior to the 2012 amendments'

- b) That the following new recommendation be inserted after paragraph 4.70:

**'Recommendation X**

That the second limb of the test for suitable employment be reformed to make the test a fairer assessment of each individual worker's employment prospects.'

Question put.

The committee divided.

Ayes: Mr Mookhey, Mr Shoebridge, Ms Voltz.

Noes: Mr Clarke, Mr Khan, Mr Mallard.

There being an equality of votes, question resolved in the negative on the casting vote of the Chair.

Ms Voltz moved: That paragraph 4.92 be amended by omitting at the end: 'However it is also necessary to acknowledge that this complexity reflects, at least in part, the challenge of attempting to accurately account for the great variety of different circumstances in the modern working environment. We understand the frustration that shift workers, particularly prison officers, experience when their PIAWE does not account for penalty rates over short periods'

Question put.

The committee divided.

Ayes: Mr Clarke, Mr Khan, Mr Mallard, Mr Mookhey, Ms Voltz.

Noes: Mr Shoebridge.

Questioned resolved in the affirmative.

Resolved, on the motion of Ms Voltz: That paragraph 4.98 be amended by:

- a) omitting 'acknowledged' and inserting instead 'noted' after 'The CFMEU'
- b) removing the bold emphasis from 'required'
- c) omitting 'was concerned that in practice' before 'most injured workers'.

**Chapter 5**

Resolved, on the motion of Ms Voltz: That paragraph 5.5 be amended by:

- a) omitting 'However, at a general level' before 'Mr Kim Garling'
- b) inserting the word 'also' after 'Mr Kim Garling, Workers Compensation Independent Review Officer, WIRO,'
- c) omitting 'the process was widely acknowledged by most participants to be' and inserting instead 'the whole concept has not worked and it is acknowledged by most participants that it is'.

Resolved, on the motion of Mr Shoebridge: That the following new committee comment and recommendation be inserted after paragraph 5.16:

**'Committee comment**

The distinction between work capacity decisions and liability decisions produces unnecessary legal complexity and additional costs in the scheme. This issue is also addressed further in the committee's consideration of the dispute resolution process.

**Recommendation X**

That the NSW Government investigate removing the distinction between work capacity decisions and liability decisions in the workers compensation scheme.'

Ms Voltz moved: that paragraph 5.41 be omitted.

Question put and negatived.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 5.41:

‘No participant in this review supported the complexity in the dispute resolution process. There are compelling reasons for it to be simplified.’

Mr Shoebridge moved: That:

- a) paragraph 5.85 be amended by omitting ‘legal advice as currently regulated’ and inserting instead ‘regulated access to legal advice’
- b) recommendation 13 be amended by omitting ‘legal advice as currently regulated’ and inserting instead ‘regulated access to legal advice’.

Question put and negatived.

Ms Voltz moved: That:

- a) paragraph 5.87 be omitted: ‘Further, while the committee did not receive a great deal of evidence on the matter, it may be worthwhile exploring whether there are benefits in bringing together the claims assessment processes for workers compensation and compulsory third party claims. We are particularly interested in potential opportunities to promote synergies between these two fields, particularly with respect to the pooling of professional competencies and a potential role for icare. Accordingly, the committee recommends that the NSW Government explore opportunities for economies of scale in bringing together the claims assessment processes for workers compensation and compulsory third party claims.’
- b) recommendation 15 be omitted: ‘That the NSW Government explore opportunities for economies of scale in bringing together the claims assessment processes for workers compensation and compulsory third party claims.’

Question put and negatived.

Mr Shoebridge moved: That paragraph 5.87 and recommendation 15 be omitted, and that the following new committee comment and recommendation be inserted instead:

**‘Committee comment**

While the matter was addressed by only a minority of stakeholders, some participants did express the view that a more unified approach to personal injury dispute resolution, especially in regards statutory schemes, would be beneficial. Clearly there are significant differences in the liability issues and benefits payable in schemes such as the compulsory third party system for motorists and the workers compensation scheme. These distinctions are both fair and appropriate. However there are many common issues faced by claimants and insurers alike when determining matters such as the extent of an injury or the effect of an injury on a person’s capacity to work in these schemes.

While not a single stakeholder proposed extending the unwieldy dispute resolution system for workers compensation to CTP disputes, there is some merit in producing a specialised and well regarded personal injury jurisdiction in New South Wales. Any such system must meet accepted standards for procedural fairness, access to legal representation and efficiency.

**Recommendation X**

That the NSW Government consider the benefits of developing a more comprehensive specialised personal injury jurisdiction in New South Wales.’

Ms Voltz left the meeting at 11.42 am, noting her opposition to Mr Shoebridge’s amendment.

Mr Khan moved: That the motion of Mr Shoebridge be amended by omitting: ‘Any such system must meet accepted standards for procedural fairness, access to legal representation and efficiency.’

Amendment of Mr Khan put.

The committee divided.

Ayes: Mr Clarke, Mr Khan, Mr Mallard.

Noes: Mr Mookhey, Mr Shoebridge.

Amendment of Mr Khan resolved in the affirmative.

Original question of Mr Shoebridge, as amended, put.

The committee divided.

Ayes: Mr Clarke, Mr Khan, Mr Mallard, Mr Shoebridge.

Noes: Mr Mookhey.

Original question, as amended, resolved in the affirmative.

## **Chapter 6**

Resolved, on the motion of Mr Mookhey: That paragraph 6.3 be amended by omitting 'several enhancements' and inserting instead 'the reinstatement of some benefits existing prior'.

Resolved, on the motion of Mr Mookhey: That paragraph 6.4 be amended by:

- a) omitting 'the NSW Government announced a further \$1 billion reform package for the workers compensation system' and inserting instead 'the NSW Government implemented a \$1 billion package that expanded access to medical and other benefits, and reduced premiums.'
- b) omitting 'The benefits included' and inserting instead 'The changes included'
- c) inserting a final dot point 'reducing premiums'.

Resolved, on the motion of Mr Shoebridge, that paragraph 6.8 be amended by:

- a) inserting 'following' after 'The committee acknowledges that'
- b) omitting 'significantly improved' after 'the workers compensation system'
- c) inserting 'improved' after 'the financial viability of the scheme'

Resolved, on the motion of Mr Mookhey, that paragraph 6.8 be amended by omitting 'In light of this improvement, the NSW Government has made some good progress in enhancing these entitlements. We acknowledge the reality that some stakeholders, including injured workers themselves, would prefer greater access to certain benefits.'

Mr Mookhey moved: That paragraph 6.10 be omitted and the following new paragraph be inserted instead:

'Workers with a WPI of 20 per cent or less receive medical and related treatment for between two and five years after weekly benefits cease, meaning that workers with a WPI of 10 per cent or less may receive up to seven years of treatment, and those with a WPI of between 11-20 per cent may receive up to ten years of treatment.'

Question put and negatived.

Mr Mookey moved: That paragraph 6.29 be omitted and the following new paragraph be inserted instead:

'The committee notes that following the 2015 reforms, some access to medical benefits were extended for injured workers. The committee asks that the government consider removing the limits on the payment of ongoing medical expenses.'

Question put.

The committee divided.

Ayes: Mr Mookhey, Mr Shoebridge.

Noes: Mr Clarke, Mr Khan, Mr Mallard.

Question resolved in the negative.

Mr Mookey moved: That:

- a) paragraph 6.30 be amended by omitting 'If the scheme continues to remain in significant surplus or increases its surplus, the committee encourages the NSW Government to consider options to amend the current limits to make them more generous for workers.' and inserting instead 'Given the scheme is in a significant surplus the government should amend the current limits to make them more generous for workers.' after 'access to medical benefits'
- b) the following new recommendation be inserted after paragraph 6.30:

**'Recommendation X**

That the NSW Government consider removing the limits on the payment of ongoing medical expenses.'

Question put.

The committee divided.

Ayes: Mr Mookhey, Mr Shoebridge.

Noes: Mr Clarke, Mr Khan, Mr Mallard.

Question resolved in the negative.

Mr Shoebridge moved: that the following new committee comment and recommendation be inserted after paragraph 6.30:

**'Committee comment**

If you are injured at work then no worker should have to bear the cost of meeting the reasonable and necessary medical expenses that flow from that injury. However the reinstatement of lifetime medical expenses to all injured workers will clearly have a significant impact on the scheme's finances. With the evidence before us we are unable to deliver a specific recommendation on how this should be addressed but the information should be collated by the NSW government and reform options presented to stakeholders as a matter of priority.

**Recommendation X**

That the NSW Government produce cost estimates and a discussion paper regarding the impact on the scheme of reintroducing lifetime medical expenses for all injured workers and alternatively for those injured workers with WPI greater than 5%, 10% and 15%.

Question put.

The committee divided.

Ayes: Mr Mookhey, Mr Shoebridge.

Noes: Mr Clarke, Mr Khan, Mr Mallard.

Question resolved in the negative.

Resolved, on the motion of Mr Khan: That paragraph 6.30 be amended by inserting at the end: 'The committee will investigate the impact on the scheme of extending lifetime medical benefits to cover all or some classes of injured workers in its next review.'

Resolved, on the motion of Mr Mookhey: That the paragraph 6.64 be amended by omitting 'commends the government for introducing minimum weekly compensation payments' and inserting instead 'notes the government introduced a minimum weekly compensation payment'.

Mr Mookhey moved: That Recommendation 16 be amended by omitting ‘investigate the possibility of amending’ and inserting instead ‘amend’.

Question put.

The committee divided.

Ayes: Mr Mookhey, Mr Shoebridge.

Noes: Mr Clarke, Mr Khan, Mr Mallard.

Question resolved in the negative.

Mr Mookhey moved: That Recommendation 18 be amended by:

- a) omitting ‘if necessary’
- b) omitting ‘subject to an analysis of its financial impact’.

Question put.

The committee divided.

Ayes: Mr Mookhey, Mr Shoebridge

Noes: Mr Clarke, Mr Khan, Mr Mallard.

Question resolved in the negative.

Mr Mookhey moved: That paragraph 6.92 be amended by omitting ‘upheaval’ and inserting instead ‘significant hardship’.

Question put.

The committee divided.

Ayes: Mr Mookhey, Mr Shoebridge.

Noes: Mr Clarke, Mr Khan, Mr Mallard.

Question resolved in the negative.

Mr Shoebridge moved: That paragraph 6.94 be omitted: ‘More generally, the committee notes that repealing s 39 of the 1987 Act would adversely impact the financial viability of the scheme and substantially increase premiums’, and the following committee comment and recommendation be inserted instead:

**‘Committee comment**

There is an inherent unfairness in removing injured workers’ entitlements on the basis of an arbitrary WPI assessment after a period of five years. This unfairness will become more apparent over the balance of this year as thousands of injured workers lose their benefits as a result of s 39 of the Act. The only adequate solution to this is to remove the five year cap from the scheme in its entirety.

**Recommendation X**

That the five year limitation on benefits under s 39 of the Act be abolished.’

Question put.

The committee divided.

Ayes: Mr Mookhey, Mr Shoebridge.

Noes: Mr Clarke, Mr Khan, Mr Mallard.

Question resolved in the negative.

Mr Mookey moved: That paragraph 6.94 be omitted: ‘More generally, the committee notes that repealing s 39 of the 1987 Act would adversely impact the financial viability of the scheme and substantially increase premiums.’

Question put.

The committee divided.

Ayes: Mr Mookhey, Mr Shoebridge

Noes: Mr Clarke, Mr Khan, Mr Mallard.

Question resolved in the negative.

Mr Shoebridge moved: That paragraph 6.94 be amended by omitting ‘and substantially increase premiums’.

Question put.

The committee divided.

Ayes: Mr Mookhey, Mr Shoebridge

Noes: Mr Clarke, Mr Khan, Mr Mallard.

Question resolved in the negative.

Resolved, on the motion of Mr Mookey: That paragraph 6.95 be amended by:

- a) omitting ‘should assist’ and inserting instead ‘is intended to assist’
- b) omitting ‘and reflects the NSW Government’s willingness to address concerns as they arise in the workers compensation system’.

Mr Mookhey moved: That:

- a) paragraph 6.104 be amended by omitting ‘While the committee encourages opportunities for injured workers to finalise their claim, we believe that the recommendations we made in Chapter 5 concerning the dispute resolution processes will assist in these matters more effectively than reducing the preconditions to commutations.’ and inserting instead ‘The committee believes the government should review the current provisions for commutations to allow workers to finalise their claims and entitlements in a timely manner.’
- b) the following new recommendation be inserted after paragraph 6.104:

**‘Recommendation X**

That the government review the current provisions for commutations.’

Question put.

The committee divided.

Ayes: Mr Mookhey, Mr Shoebridge.

Noes: Mr Clarke, Mr Khan, Mr Mallard.

Question resolved in the negative.

Resolved, on the motion of Mr Khan: That paragraph 6.104 be amended by omitting ‘While the committee encourages opportunities for injured workers to finalise their claim, we believe that the recommendations we made in Chapter 5 concerning the dispute resolution processes will assist in these matters more effectively than reducing the preconditions to commutations.’ after ‘are overly onerous’.

## Chapter 7

Mr Mookhey moved: That the following new committee comment be inserted after paragraph 7.4:

**‘Committee comment**

The committee notes the dangerous nature of the work undertaken by first responders and those working within the NSW Prison System and Juvenile Justice. The NSW Government should consider extending the exemption to prison officers working in the NSW Prison system and Juvenile Justice.’

Question put.

The committee divided.

Ayes: Mr Mookhey, Mr Shoebridge.

Noes: Mr Clarke, Mr Khan, Mr Mallard.

Question resolved in the negative.

Mr Mookhey moved: That paragraph 7.44 be amended by:

- a) omitting ‘Having said this, the committee does not support the proposal for presumptive psychological injuries for first responders’ workers compensation claims.’ and inserting instead ‘The committee supports the proposal for presumptive psychological injuries for the first responders’ workers compensation claims.’
- b) omitting ‘We do, however, consider it vitally’ and inserting instead ‘We consider it vitally’ before ‘important’.

Question put.

The committee divided.

Ayes: Mr Mookhey, Mr Shoebridge

Noes: Mr Clarke, Mr Khan, Mr Mallard.

Question resolved in the negative.

Resolved, on the motion of Mr Mookhey: That Recommendation 20 be amended by omitting the words ‘continue to’ before ‘monitor the outcomes of the Work Injury Screening and Intervention protocol trial’.

Resolved, on the motion of Mr Mookhey: That paragraph 7.53 be amended by inserting at the end: ‘However, this was disputed by numerous witnesses who appeared before the committee who were the subject of surveillance.’

Resolved, on the motion of Mr Mookhey: That Recommendation 21 be amended by:

- a) inserting ‘and SIRA’ after ‘That icare’
- b) inserting the word ‘mandatory’ before ‘surveillance guideline for scheme agents’.

**Chapter 8**

Mr Mookhey moved: That paragraph 8.12 be omitted: ‘One review participant did see a benefit to using an incentive based deed. An allied health professional said that scheme agents have been incentivised to assist workers’ recovery: “Without being privy to the detail of the contracts, I think there has been more incentive for agents to engage workers on their journey of recovery. Those contracts are confidential but there is certainly a move—and I think the way that agent behaviour has shifted a little bit, there is a definite move—towards trying to engage workers more actively.”’

Question put.

The committee divided.

Ayes: Mr Mookhey.

Noes: Mr Clarke, Mr Khan, Mr Mallard, Mr Shoebridge.

Question resolved in the negative.

Resolved, on the motion of Mr Mookhey: That paragraph 8.20 be amended by:

- a) omitting ‘understands the reason for, and supports’ and inserting ‘notes’ before ‘The committee’
- b) omitting the word ‘However’ before ‘the committee shares stakeholders’ frustration’.

Resolved, on the motion of Mr Mookhey, that Recommendation 22 be omitted: ‘That icare release more detailed information about how the remuneration provisions in the new scheme deed operate including, incentive-based remuneration.’ and that the following new recommendation be inserted instead:

‘That icare release the remuneration provisions in the new scheme agent deed, including incentive-based remuneration provisions.’

Resolved, on the motion of Mr Mookhey: That paragraph 8.76 be amended by inserting at the end: ‘However, the committee remains concerned about the high turnover of staff, which dealt with below.’

Resolved, on the motion of Mr Mookhey: That paragraph 8.85 be amended by:

- a) omitting ‘However, evidence presented by the scheme agents suggests that retention rates for this role are within reasonable limits’ and inserting instead ‘Despite the high turnover rates disclosed by scheme agents, the agents suggested that these rates are within reasonable limits’ after ‘requires a great deal of skill and patience’
- b) inserting at the end: ‘It is a concern to this committee that this does not appear to happen, and both employers and employees have expressed their frustration.’

Resolved, on the motion of Mr Khan: That:

The draft report, as amended, be the report of the committee and that the committee present the report to the House;

The transcripts of evidence, submissions, tabled documents, answers to questions on notice and correspondence relating to the inquiry be tabled in the House with the report;

Upon tabling, all unpublished attachments to submissions be kept confidential by the committee;

Upon tabling, all unpublished transcripts of evidence, submissions, tabled documents, answers to questions on notice and correspondence relating to the inquiry be published by the committee, except for those documents kept confidential by resolution of the committee;

The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;

The committee secretariat be authorised to update any key issues and committee comments where necessary to reflect changes to recommendations or new recommendations or the key issues resolved by the committee;

Dissenting statements be provided to the secretariat at 12.00 pm on Tuesday 7 March 2017;

That the report be tabled on 9 March 2017.

## **9. First review of the Dust Diseases and Lifetime Care and Support schemes**

### **9.1 Call for submissions and closing date**

Resolved, on the motion of Mr Shoebridge: That the call for submissions be made on 13 March 2017 via twitter, stakeholder letters and a media release distributed to all media outlets in New South Wales, with a closing date of 23 April 2017.

### **9.2 Stakeholder list**

Resolved, on the motion of Mr Shoebridge: That members have until 5.00 pm Friday 10 March 2017 to nominate additional stakeholders to the stakeholder list.

### **9.3 Hearing dates**

Resolved, on the motion of Mr Khan: That the committee set aside one hearing day in late May, with the date to be determined by the Chair after consultation with members regarding their availability.

**9.4 Pre-hearing questions**

Resolved, on the motion of Mr Khan: That proposed pre-hearing questions on notice be circulated to members for comment before being sent to icare and SIRA on 28 April 2017.

**10. Adjournment**

The committee adjourned at 12.35 pm *sine die*.

Sharon Ohnesorge  
**Clerk to the Committee**

## Appendix 4 Dissenting statements

### Mr David Shoebridge MLC, The Greens

This committee is a prime example of that four hundred year old rallying cry of Parliamentary democracy:

*“What do we want?”*

*“Gradual change!”*

*“When do we want it?”*

*“In due course!”*

In that spirit I support all of the Committee’s recommendations. Taken together they will make an appreciable, but modest, difference to the unfairness that is now embedded in the NSW Workers Compensation system. They will reduce jurisdictional complexity, clear the path for a one-stop shop to resolve workers compensation disputes and make modest improvements to some benefits.

Even with these improvements, the scheme’s benefits will continue to be grossly inadequate. As a direct result of the 2012 changes brought in by the Coalition Government, thousands of injured workers with ongoing injuries and pressing medical needs are missing out on essential medical care and financial support.

On 27 December this year up to 6,000 injured workers will be cut off their workers compensation benefits in a single day. These are workers who are recognised to have ongoing incapacity as a result of their injury but have been “deemed” to have received their allotted maximum of five years income support. This new limit is found in s39 and was inserted into the scheme in 2012.

6,000 injured workers losing their benefits in a single day is a social disaster. No parliamentarian should accept the widespread hardship this will mean. Each one of those 6,000 workers has been injured at work, and struggled to get by afterwards. Cutting off benefits will inevitably produce family breakdowns, defaults on mortgages, homelessness and very real personal anguish.

This is why I moved, on behalf of the Greens the following addition to the report:

*There is an inherent unfairness in removing injured worker’s entitlements on the basis of an arbitrary WPI assessment after a period of five years. This unfairness will become more apparent over the balance of this year as thousands of injured workers lose their benefits as a result of s39 of the Act. The only adequate solution to this is to remove the five year cap from the scheme in its entirety.*

#### ***New recommendation***

*That the five year limitation on benefits under s39 of the Act be abolished.*

Government members opposed this addition. I stand by that recommendation.

Paying for an injured worker’s doctor, physiotherapist, medication and medical aids should not be controversial. However since the Coalition’s 2012 attack on workers compensation it has been, with many workers receiving 2 years or less of medical treatment.

Even seriously injured workers are cut off medical benefits after a maximum 7 years of payments. Think of a bricklayer with a nasty back injury that has required lower back surgery, or a nurse with a fused ankle joint. These are terribly disabling injuries that will be assessed at less than 20% whole person impairment and these workers will stop receiving income support after 5 years and medical benefits after 7 years.

To fix this will cost some money, but the scheme is running with a 23% surplus of assets over liabilities. There are literally hundreds of millions of dollars available to greatly improve access to medical benefits. This is why I moved, on behalf of the Greens, the following amendment:

*If you are injured at work then no worker should have to bear the cost of meeting the reasonable and necessary medical expenses that flow from that injury. However, the reinstatement of lifetime medical expenses to all injured workers will clearly have a significant impact on the scheme's finances. With the evidence before us we are unable to deliver a specific recommendation on how this should be addressed but the information should be collated by the NSW government and reform options presented to stakeholders as a matter of priority.*

***New recommendation***

*That the NSW Government produce cost estimates and a discussion paper regarding the impact on the scheme of reintroducing lifetime medical expenses for all injured workers and alternatively for those injured workers with WPI greater than 5%, 10% and 15%.*

The government's decision to oppose this recommendation was another example of politics being put before compassion. Returning lifetime medical benefits for all injured workers must be a priority in scheme reform.

Once again I would like to thank all the injured workers, unions, medical practitioners and other stakeholders who presented to the inquiry. I also thank the committee staff for their patience and skill in pulling together a very complex report. I also thank all other committee members for, where we could, working together to improve the scheme.

If you want a revolution in workers compensation don't come knocking at the doors of the Law and Justice Committee. This is a committee that specialises in gradual change and, for a good many workers, the gradual change recommended in the main report will do good, just nowhere near enough.