

Standing Committee on Law and Justice

**Statutory review of the *State  
Insurance and Care  
Governance Act 2015***

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## Terms of reference

1. That a committee of the Legislative Council be designated by resolution of the Legislative Council to review the *State Insurance and Care Governance Act 2015* (including the amendments made by this Act) to determine whether the policy objectives of the Act or those amendments remain valid and whether the terms of the Act (or of the Acts so amended) remain appropriate for securing those objectives.

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

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

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## Committee details

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### 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	
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## Chair's foreword

The *State Insurance and Care Governance Act 2015* has been in operation for two years now. As this committee has previously noted, the Act brought about significant reforms to the governance and regulatory arrangements for the state's statutory insurance and compensation schemes, with the establishment of icare, SIRA and SafeWork NSW. The purpose of this statutory review, the first of its kind undertaken by a Legislative Council committee, was to examine whether the policy objectives of the Act remain valid, and whether the terms of the Act remain appropriate for securing those objectives.

Overall, the committee is of the view that the policy objectives of the Act, particularly the structural separation of the organisations responsible for operating and regulating the relevant schemes and for regulating workplace safety, remain very much valid. There is much that icare, SIRA and SafeWork NSW have achieved in their first two years of operation. However, the committee has made recommendations aimed at improving that performance into the future, particularly around the theme of transparency and access to information.

On behalf of the committee, I would like to thank the stakeholders who participated in this review for their important contribution. I also wish to extend my thanks to my fellow committee members and to the secretariat staff for their contributions to the review process.



Hon Shayne Mallard MLC  
**Committee Chair**

## Recommendations

- Recommendation 1** 14  
That icare publish minutes and communiques of its board meetings and the statement of business intent prepared in accordance with s 11 of the *State Insurance and Care Governance Act 2015*.
- Recommendation 2** 14  
That SIRA undertake the necessary work to ensure the timely publication of workers compensation statistical bulletins, within six months of the end of the financial year to which they refer.
- Recommendation 3** 14  
That SIRA commence work on developing comprehensive real-time data for workers compensation claims, including visualisation tools such as a dashboard.
- Recommendation 4** 15  
That the NSW Government introduce legislative amendments to give SIRA statutory information collection and sharing powers in the area of workers compensation, modelled on the equivalent provisions in the *Motor Accident Injuries Act 2017* for compulsory third party insurance.
- Recommendation 5** 21  
That the NSW Government note the evidence received in this review concerning the relationship between icare and SIRA, and SIRA and SafeWork NSW's effectiveness in carrying out their enforcement and compliance functions, and keep a watching brief on these issues for consideration as part of the five-year statutory review of the *State Insurance and Care Governance Act 2015*.

## **Conduct of review**

The terms of reference for the review were referred to the committee by the Legislative Council on 19 November 2015.

The committee received 16 submissions and one supplementary submission.

The committee held one public hearing at Parliament House in Sydney.

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

## Chapter 1 Statutory review

This report sets out the committee's statutory review of the *State Insurance and Care Governance Act 2015*, including the background to the review, an overview of the objects and key provisions of the Act, and issues raised by stakeholders regarding how the Act is operating.

### Background to the statutory review

1.1 This section provides background to the statutory review of the *State Insurance and Care Governance Act 2015*, including the role of the committee and the scope of the terms of reference.

#### Role of the committee

1.2 The *State Insurance and Care Governance Act* provides for a statutory review to be undertaken by a Legislative Council committee two years after the commencement of the Act:

#### 12 Review by Parliamentary Committee

- (1) As soon as practicable after the second anniversary of the commencement of this clause, a committee of the Legislative Council is to be designated by resolution of the Legislative Council to review this Act (including the amendments made by this Act) to determine whether the policy objectives of the Act or those amendments remain valid and whether the terms of the Act (or of the Acts so amended) remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the committee is appointed.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament.<sup>2</sup>

1.3 The Standing Committee on Law and Justice was designated as the committee to undertake this role.<sup>3</sup> This review is the first time a Legislative Council committee has conducted a statutory review of an Act of Parliament.

1.4 The *State Insurance and Care Governance Act* also provides for a further statutory review to be conducted by the responsible Minister five years after the Act was assented to.<sup>4</sup>

#### Scope of the terms of reference

1.5 The terms of reference for this statutory review are different to the committee's regular reviews supervising the operation of the insurance and compensation schemes established under the state's workers compensation and motor accidents legislation – namely, the

<sup>2</sup> *State Insurance and Care Governance Act 2015*, Sch 4, cl 12.

<sup>3</sup> *Minutes*, NSW Legislative Council, 19 November 2015, p 623.

<sup>4</sup> *State Insurance and Care Governance Act 2015*, s 32.

compulsory third party (CTP) insurance, workers compensation, dust diseases, and lifetime care and support schemes. Those reviews require the committee to examine the operation of each relevant scheme, including matters such as:

- the scheme's performance, including financial performance and other performance measures
- the outcome of recommendations from the previous review of that scheme
- issues concerning the operation of legislation governing that scheme (for example, in the case of the workers compensation scheme, the *Workers Compensation Act 1987*)
- other issues regarding the way the scheme is operating.

**1.6** By contrast, the focus of this statutory review is on the operation of the *State Insurance and Care Governance Act* itself, examining two specific questions:

1. Do the policy objectives of the Act remain valid?
2. Do the terms of the Act remain appropriate for securing those objectives?

**1.7** Statutory reviews are a mechanism commonly provided for in legislation to enable the operation of that legislation to be reviewed after a set period of time (usually by the responsible minister). Statutory reviews generally involve an assessment of:

- how the legislation operates in practice
- whether the legislation is having the effect intended by its drafters (through processes such as consultation with relevant stakeholders)
- whether any inadequacies can be overcome by amendments.

## **Overview of the *State Insurance and Care Governance Act 2015***

**1.8** This section outlines the policy objectives of the Act and provides an overview of its key provisions.

### **Policy objectives of the Act**

**1.9** The policy objectives of the *State Insurance and Care Governance Act* are not prescribed in the Act itself. However, it is clear from the second reading speech that the primary objective of the Act was to reform the governance and regulatory arrangements for the state's insurance and compensation schemes by creating three structurally separate organisations to operate and regulate the schemes, and to regulate workplace safety.<sup>5</sup>

**1.10** The Act establishes:

- Insurance Care NSW (icare) as a single provider of services for each of the schemes

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<sup>5</sup> Dominic Perrottet, Second reading speech: State Insurance and Care Governance Bill 2015, 5 August 2015.

- the State Insurance Regulatory Authority (SIRA) as the independent regulator of the schemes
- SafeWork NSW as the work health and safety regulator.

**1.11** As acknowledged in the second reading speech, the Act was, at least in part, a response to this committee's 2014 review of the exercise of the functions of the WorkCover Authority, which recommended the structural separation of WorkCover's insurance, regulatory, and work health and safety functions. In its report, the committee identified three potential conflicts of interest arising from these multiple functions being performed by one organisation:

Concerns were raised regarding the potential conflict between WorkCover's roles as both the nominal insurer through its management of the Workers Compensation Insurance Fund, and as the regulator of the workers compensation scheme. As the regulator WorkCover is responsible for ensuring compliance with the relevant workers compensation legislation through education, engagement and enforcement, while as the nominal insurer it is responsible for the commercial roles of managing funds and appointing and overseeing the scheme agents that issue insurance policies and manage claims. ...

The second area of concern regarding potential conflicts of interest relates to WorkCover's role in reviewing work capacity assessments. It was argued that WorkCover's role as both the nominal insurer and the decision maker for merit reviews of work capacity decisions raises questions over the independence and impartiality of the merit review process. ...

The third area of concern involves WorkCover's multiple roles in the work health and safety sphere, with WorkCover acting as both the work health and safety regulator and as an advisor to workplaces. While synergies can be achieved in having a single organisation perform both regulatory and advisory roles in the work health and safety sphere, clear protocols must exist to minimise the possibility of conflicts of interest occurring.<sup>6</sup>

**1.12** As well as avoiding conflicts of interest in the workers compensation scheme and establishing clear statutory and operational separation between the provision and regulation of government insurance services, the Act was also intended to achieve the following policy objectives:

The new structure will be far more transparent and accountable and, most importantly, lead to better outcomes for injured workers. The new organisations will be more customer-centric, streamlined and efficient, building economies of scale and focusing on clear objectives.<sup>7</sup>

**1.13** A number of stakeholders expressed the view that these policy objectives remain valid.<sup>8</sup>

<sup>6</sup> Standing Committee on Law and Justice, NSW Legislative Council, *Review of the exercise of the functions of the WorkCover Authority* (2014), p xii.

<sup>7</sup> Dominic Perrottet, Second reading speech: State Insurance and Care Governance Bill 2015, 5 August 2015, p 2099.

<sup>8</sup> Submission 7, National Insurers Brokers Association of Australia, p 2; Submission 11, NSW Business Chamber, p 2; Submission 13, Australian Lawyers Alliance, p 3; Evidence, Mr Luke Aitken, Senior Manager, Policy, NSW Business Chamber, 7 November 2017, p 11; Evidence, Ms Carmel Donnelly, Acting Chief Executive, State Insurance Regulatory Authority, 7 November 2017, p 49.

## Overview of the Act's key provisions

**1.14** The Act's key provisions relate to the constitution, functions and governance of the three new organisations. These provisions are summarised below, along with an overview of the organisations' key activities in accordance with those statutory functions during their first two years of operation.

### *icare*

**1.15** Under the Act, icare was established as the single insurance service provider providing care, services and administration for the state's insurance and compensation schemes. Its statutory functions are to:

- act for, and provide services to the Workers Compensation Nominal Insurer (Workers Insurance)
- provide services to any scheme administered by the following entities (the Relevant Authorities):
  - the Workers Compensation (Dust Diseases) Authority (Dust Diseases Care)
  - the Lifetime Care and Support Authority (Lifetime Care)
  - the NSW Self Insurance Corporation (Self Insurance) and
  - the Sporting Injuries Compensation Authority (Sporting Injuries Insurance)
  - the Building Insurers' Guarantee Corporation (Home Building Compensation)
- enter into agreements or arrangements on behalf of Workers Insurance or the Relevant Authorities
- monitor the performance of the insurance and compensation schemes to which it provides services
- determine the investment strategies for the investment of any scheme fund belonging to Workers Insurance or the Relevant Authorities, and to report to the Minister every six months on the investment performance of each scheme fund.<sup>9</sup>

**1.16** icare is governed by a board comprising a chief executive, who is responsible for the day to day management of icare's activities, and eight non-executive directors. The board reports to the Treasurer.<sup>10</sup>

**1.17** Under the Act, icare is required to prepare and submit an annual Statement of Business Intent to the Treasurer no later than three months after the start of each financial year. This statement must set out icare's business plan.<sup>11</sup>

**1.18** In terms of the scale of services provided, the committee was informed that icare protects 3.7 million workers, 296,000 businesses, and \$190 billion of the state's assets, and provides in excess of \$2 billion in benefits to injured workers and \$110 million in treatment and care services for people with road injuries.<sup>12</sup>

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<sup>9</sup> *State Insurance and Care Governance Act 2015*, ss 10 and 12.

<sup>10</sup> *State Insurance and Care Governance Act 2015*, ss 5 and 6.

<sup>11</sup> *State Insurance and Care Governance Act 2015*, s 11.

<sup>12</sup> Submission 6, icare, p 2.

**1.19** In its submission to this review, icare emphasised its commitment to improving client experience and provided examples of changes and improvements it has made since commencing operation, consistent with the objectives of the Act identified above. These include:

- bringing together the Dust Diseases Care and Lifetime Care service lines under a single operating model, known as Integrated Care
- transferring the management of services for severely injured workers from workers compensation scheme agents to icare, and supporting newly injured workers who meet the severe injury criteria through a Lifetime Care model of support
- improvements to the way workers insurance claims are managed, including by selecting one scheme agent (Employers Mutual NSW Ltd) to manage new claims from January 2018
- establishing the icare Foundation, which consolidates grants, sponsorships, research and innovation seed funding from across the various icare schemes to better leverage its overall investment of \$100 million over five years.<sup>13</sup>

### ***SIRA***

**1.20** Under the Act, SIRA was established as the new insurance regulator. As such, SIRA approves premium, licensing and policy frameworks for insurers, supervises insurers, and monitors the financial solvency and performance of the three compulsory insurance schemes:

- workers compensation, where SIRA regulates the whole system comprising the following four insurance segments:
  - the nominal insurer – a statutory insurer responsible for the Workers Compensation Insurance Fund (managed by icare)
  - specialised insurers – six insurers licenced to operate within a particular industry
  - self-insurers – 57 large employers licenced to self-insure
  - Treasury Managed Fund – the government’s managed fund scheme, administered by the NSW Self-Insurance Corporation (under icare)
- motor accidents injury compensation, where SIRA licences and regulates the private insurers that underwrite the scheme
- home building compensation, where SIRA supervises icare as the sole provider of this type of insurance.<sup>14</sup>

**1.21** SIRA’s functions also include:

- providing dispute resolution services, namely the:
  - Motor Accidents Medical Assessment Service (MAS)
  - Motor Accidents Claims Assessment and Resolution Service (CARS)
  - Workers Compensation Merit Review Service (MRS)
  - NSW CTP Lifetime Care Dispute Reviews and
  - ACT CTP and Workers Compensation Lifetime Care Dispute Reviews

<sup>13</sup> Submission 6, icare, pp 3-6.

<sup>14</sup> Submission 8, SIRA, pp 3-6.

- collecting and analysing information on prudential matters in relation to insurers under the workers compensation and motor accidents legislation
- encouraging and promoting the carrying out of sound prudential practices by insurers under that legislation
- evaluating the effectiveness and carrying out of those practices.<sup>15</sup>

**1.22** The Act specifies SIRA's principal objectives in exercising these functions:

- (a) to promote the efficiency and viability of the insurance and compensation schemes established under the workers compensation and motor accidents legislation and the other Acts under which SIRA exercises functions,
- (b) to minimise the cost to the community of workplace injuries and injuries arising from motor accidents and to minimise the risks associated with such injuries,
- (c) to promote workplace injury prevention, effective injury management and return to work measures and programs,
- (d) to ensure that persons injured in the workplace or in motor accidents have access to treatment that will assist with their recovery,
- (e) to provide for the effective supervision of claims handling and disputes under the workers compensation and motor accidents legislation,
- (f) to promote compliance with the workers compensation and motor accidents legislation.<sup>16</sup>

**1.23** SIRA is a NSW Government agency governed by a board comprising a chief executive (who manages and controls SIRA's affairs in accordance with the general policies and strategic direction determined by the board), the Secretary of the Department of Finance, Services and Innovation, and up to three other members appointed by the Minister for Finance, Services and Property.<sup>17</sup>

**1.24** In terms of the scale of its regulatory activities, SIRA informed the committee that in 2016-2017:

- for motor accidents insurance, 5.4 million CTP policies were sold, \$2.7 billion in premiums were collected and there were 13,649 reported CTP claims
- for workers compensation, the system protected 4.5 million workers, collecting \$3.33 billion in premiums and returning \$2.8 billion in claims costs
- for home building compensation, 74,499 home building and renovation projects were covered with a value of \$16.56 billion, and 864 new notifications or claims were received
- for dispute resolution services, 10,500 applications were lodged with around the same volume finalised, a 4.5 per cent increase in applications from 2015-2016.<sup>18</sup>

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<sup>15</sup> Submission 8, SIRA, p 6; *State Insurance and Care Governance Act 2015*, s 24.

<sup>16</sup> *State Insurance and Care Governance Act 2015*, s 23.

<sup>17</sup> *State Insurance and Care Governance Act 2015*, s 18.

<sup>18</sup> Submission 8, SIRA, pp 5-6.

1.25 The committee heard that SIRA's key achievements in its first two years of operation have included:

- in motor accidents insurance, working on significant reforms to improve the CTP scheme commencing on 1 December 2017, including a rebuild of the Green Slip calculator
- in workers compensation, developing a risk-based insurer supervision model, designing a new self-insurance licensing framework and introducing independent regulatory supervision of workers compensation premiums
- in home building compensation, working on changes to the scheme resulting in legislative reforms passed in June 2017.<sup>19</sup>

### ***SafeWork NSW***

1.26 The *State Insurance and Care Governance Act* amended the *Work Health and Safety Act 2011* to establish the Secretary of the Department of Finance, Service and Innovation as the state's new work health and safety regulator, to be known as SafeWork NSW.<sup>20</sup>

1.27 The *Work Health and Safety Act* adopts the national model work health and safety laws. SafeWork NSW's functions under this Act are to:

- advise and make recommendations to the Minister for Innovation and Better Regulation and report on the operation and effectiveness of the *Work Health and Safety Act*
- monitor and enforce compliance with the *Work Health and Safety Act*
- provide advice and information on work health and safety to duty holders under the *Work Health and Safety Act* and to the community
- collect, analyse and publish statistics relating to work health and safety
- foster a co-operative, consultative relationship between duty holders and the persons to whom they owe duties and their representatives in relation to work health and safety matters
- promote and support education and training on matters relating to work health and safety
- engage in, promote and co-ordinate the sharing of information to achieve the object of the *Work Health and Safety Act*, including the sharing of information with a corresponding regulator
- conduct and defend proceedings under the *Work Health and Safety Act* before a court or tribunal.<sup>21</sup>

1.28 In terms of governance, SafeWork NSW is subject to the control and direction of the Minister for Innovation and Better Regulation, except in relation to:

- the contents of any advice, report or recommendation given to the Minister

<sup>19</sup> Submission 8, SIRA, pp 7-10.

<sup>20</sup> *Work Health and Safety Act 2011*, Sch 2.

<sup>21</sup> Submission 9, SafeWork NSW, pp 3-4.

- any decision that relates to proceedings for offences under the Act
- any decision that relates to a work health and safety undertaking.<sup>22</sup>

**1.29** SafeWork NSW's key achievements in its first two years of operation include significant work on the *Work Health and Safety Roadmap for NSW 2022*, launched in August 2016. The roadmap is a six year strategy, aligning with the national roadmap, which aims to protect workers from harm, reduce unnecessary compliance costs and secure safety standards in New South Wales workplaces.<sup>23</sup>

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

**1.30** In its 2017 review of the workers compensation scheme, this committee commended the government for introducing the important structural reforms contained in the *State Insurance and Care Governance Act 2015*, responding to concerns about the potential conflicts of interest inherent in WorkCover's multiple roles. We are of the view, along with many review participants, that the policy objectives of the Act remain very much valid. The committee also believes it is important to acknowledge that much has been achieved by icare, SIRA and SafeWork NSW in their first two years of operation, bearing in mind the volume, scale and complex nature of their work.

### **Issues raised by stakeholders**

**1.31** During this review, stakeholders raised a number of concerns relevant to whether the *State Insurance and Care Governance Act* is meeting its objectives, and to the way icare, SIRA and SafeWork NSW are exercising their statutory functions. These concerns centre around three themes: transparency, organisational effectiveness, and conflict of interest.

#### **Transparency**

**1.32** As noted above, one of the policy objectives identified in the Act's second reading speech is that the new structure be 'far more transparent and accountable'. However, a number of review participants argued that there are areas for improvement in icare and SIRA's organisational transparency, namely in relation to icare governance documentation, scheme data, SIRA Merit Review Service decisions and premium information.

#### ***icare governance documentation***

**1.33** Section 11 of the Act requires icare to prepare and submit an annual statement of business intent to the Treasurer, setting out:

- icare's objectives and main undertakings
- the nature and scope of the activities to be undertaken
- the accounting policies to be applied in icare's financial reports

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<sup>22</sup> Submission 9, SafeWork NSW, p 4.

<sup>23</sup> Submission 9, SafeWork NSW, p 5.

- the performance targets and other measures by which icare's performance may be judged in relation to its stated objectives
- any other matter required by the Minister.<sup>24</sup>

**1.34** A number of stakeholders highlighted the importance of the information contained in the statement of business intent, and called for the document to be made public.<sup>25</sup>

**1.35** At the hearing, the Chief Executive Officer of icare, Mr Vivek Bhatia, explained that the Act does not require the statement of business intent to be published but noted that icare had recently published its strategic plan for 2017-2018, a document which is 'substantially' similar to the statement of business intent.<sup>26</sup> icare subsequently advised the committee that under the NSW Treasury Commercial Policy Framework, the statement of business intent is a commercially sensitive document, but that the publicly available strategic plan 'contains the essential components that underpin' the statement of business intent.<sup>27</sup>

**1.36** There was also a suggestion that the minutes of icare's board meetings should be published, as occurs with SIRA which publishes communiques of all board meetings, outlining what was discussed.<sup>28</sup>

**1.37** Finally, the Australian Federation of Employers and Industries expressed concern over the lack of transparency around expenditure and due diligence processes for funding grants from the icare Foundation. The Federation told the committee:

The Foundation does not make clear the proportion of its funding from the NSW workers compensation scheme. Recent announced expenditure includes \$1 million for small business mental health in the Hunter region; invitations for charities to receive up to \$100,000 for injury prevention/post injury care. There is no information on the due diligence processes followed by the Foundation. We have widespread concern about the nature of some of [icare] expenditure.<sup>29</sup>

**1.38** In response to these concerns, icare informed the committee that its average annual commitment to expenditure of \$20 million on foundation initiatives represents approximately 0.3 per cent of aggregate scheme expenses for 2016/17.<sup>30</sup> icare also provided the following information about the foundation's governance framework and due diligence processes:

- the foundation's operation and investment decisions are overseen by a committee established by the icare board, comprising icare's Chief Executive Officer and four non-executive directors, and which meets quarterly

<sup>24</sup> *State Insurance and Care Governance Act 2015*, s 11.

<sup>25</sup> Submission 10, RiskNet Pty Ltd, p 7; Submission 12, Australian Federation of Employers and Industries, p 9; Submission 14, Public Service Association of NSW, p 4.

<sup>26</sup> Evidence, Mr Vivek Bhatia, Chief Executive Officer, icare, 7 November 2017, p 36.

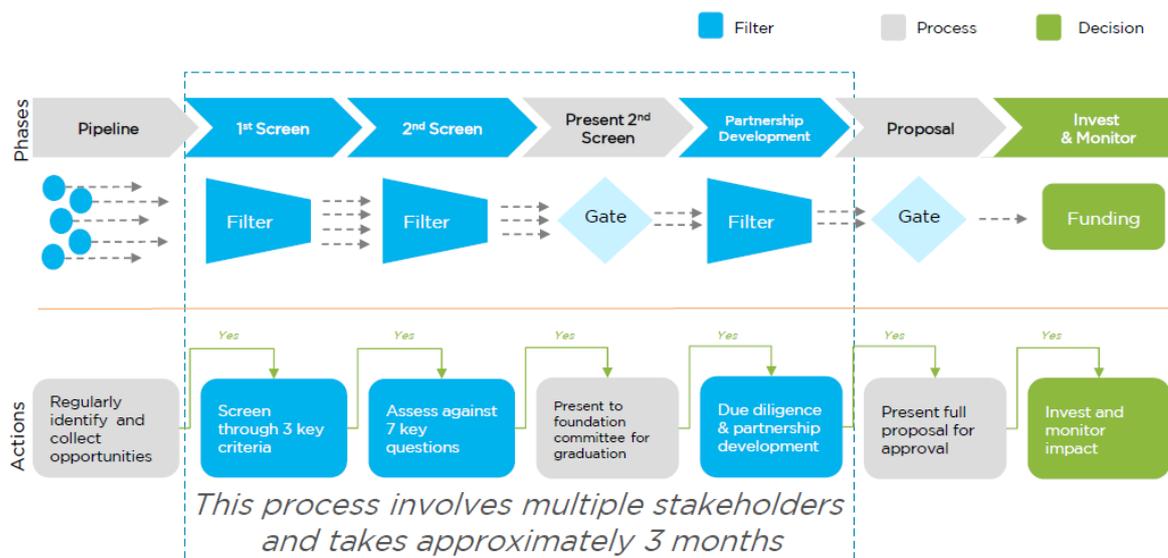
<sup>27</sup> Answers to questions on notice, icare, 24 November 2017, p 3.

<sup>28</sup> Submission 10, RiskNet Pty Ltd, p 3.

<sup>29</sup> Submission 12, Australian Federation of Employers and Industries, p 8.

<sup>30</sup> Answers to supplementary questions, icare, 24 November 2017, p 1.

- the primary responsibilities of the committee are to approve investment decisions and operating expenditure, and ensure that appropriate compliance frameworks and controls are in place
- the due diligence process, which is undertaken by the Foundation Team and overseen by the Group Leadership Team, is made up of two ‘screens’ and a deeper ‘partnership development phase’ before a formal proposal is considered, as shown in the following infographic:



*Answers to supplementary questions, icare, 24 November 2017, Tab A, p 3.*

- an oversight system then provides for regular progress and risk review of investments.<sup>31</sup>

### ***Scheme data***

**1.39** The absence of regular, consistent and timely publication of scheme data by icare and SIRA, particularly regarding the workers compensation scheme, was a key concern expressed by numerous participants in this review.

**1.40** In relation to publication of data by icare, the Australian Federation of Employers and Industries was critical of the lack of information available to employers on the nominal insurer’s liability valuation, and on scheme performance more generally:

December 2016 prudential information has only recently – mid October 2017 – been made publically available, [despite] indications in the June 2016 Nominal Insurer Liability Valuation that [icare] would be required “to publish an executive summary of the June valuation report and executive summaries of the future valuation reports within five months of each period ended – 30 June and 31 December”. ...

Whilst [icare] states it is a data driven organisation there is no public evidence for this, in fact to the contrary, they have published no timely information relevant to scheme operation and performance – injuries and claims rates, return to work data,

<sup>31</sup> Answers to supplementary questions, icare, p 1.

expenditure on rehabilitation and return to work assistance, all of which are crucial determinants of scheme performance.<sup>32</sup>

- 1.41** This evidence was echoed by Unions NSW at the hearing.<sup>33</sup>
- 1.42** Mr Bhatia acknowledged these concerns as ‘clear feedback for us’, and noted that icare is currently working to improve the quality and expand the types of data available, to be published in the first quarter of 2018.<sup>34</sup>
- 1.43** In relation to publication of data by SIRA, numerous stakeholders pointed to the long delay in the publication of the annual workers compensation statistical bulletin. The committee heard that the most recent bulletin, published in August 2017, relates to the financial year 2014-2015.<sup>35</sup> The Workers Compensation Independent Review Office (WIRO) observed that this two-year delay ‘significantly reduces’ the usefulness of the data in the bulletin, given that the aim of sharing this data is to increase ‘the likelihood that scheme problems which need addressing will be identified as soon as possible’.<sup>36</sup>
- 1.44** The Acting Chief Executive of SIRA, Ms Carmel Donnelly, acknowledged that the long delay was unsatisfactory<sup>37</sup> and explained that the publication of the 2014-2015 statistical bulletin was delayed by the late receipt of denominator data from the Australian Bureau of Statistics, with the corrected data not being provided to SIRA until June 2017.<sup>38</sup> The committee was advised that SIRA is currently investigating ways to reduce such delays by using statistical estimates of denominator data, which would enable faster reporting of indicative data.<sup>39</sup>
- 1.45** Ms Donnelly also advised the committee about a major project currently being undertaken by SIRA to build a significantly more sophisticated and responsive data capability for compulsory third party insurance claims:

We are now very close to going live with a SIRA data lake within the Data Analytics Centre, which has daily and, in some cases, close to real-time data feeds from the CTP insurers about both policy and claims information, in which we can detect early if there is an interesting, undesirable trend in the management of a claim or in any other area. That data is being built into visualisation tools—a dashboard—so that we have very rapid updating of the performance of the scheme. ...

One of the advantages is it is very flexible in terms of ... ingesting data so that you do not have the same issues that you have with the more traditional corporate data repository ... You do not have the problems of needing to have very structured data

<sup>32</sup> Submission 12, Australian Federation of Employers and Industries, pp 3-4.

<sup>33</sup> Evidence, Ms Emma Maiden, Assistant Secretary, Unions NSW, 7 November 2017, p 33; Evidence, Ms Natasha Flores, Industrial Officer, Unions NSW, 7 November 2017, p 25.

<sup>34</sup> Evidence, Mr Bhatia, 7 November 2017, p 45.

<sup>35</sup> Submission 5, Workers Compensation Independent Review Office, p 10.

<sup>36</sup> Submission 5, Workers Compensation Independent Review Office, pp 10-11; see also Evidence, Mr Ian Tuit, Industrial Officer, Public Service Association of NSW, 7 November 2017, p 28.

<sup>37</sup> Evidence, Ms Donnelly, 7 November 2017, p 55.

<sup>38</sup> Answers to questions on notice, Ms Carmel Donnelly, Acting Chief Executive, State Insurance Regulatory Authority, 24 November 2017, pp 1-2.

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

provided in exactly the right format or else it is not usable. Something that is far more contemporary, as in our data lake, does not have those sorts of barriers to bringing data in and being able to use it very quickly.<sup>40</sup>

**1.46** Ms Donnelly advised that one of the key drivers for the project was inclusion of data collection and sharing powers in the new *Motor Accident Injuries Act 2017*, telling the committee: ‘If you want to require an insurer to transfer information to a regulator in close to real time, my experience is it is easier if the legislation is very clear’.<sup>41</sup>

**1.47** Ms Donnelly also stated that while SIRA has prioritised building this capability for compulsory third party claims first, there was merit in looking to build a similar capability for workers compensation claims:

The advantage of SIRA having that sort of thing in workers compensation is, firstly, that we are regulating the self and specialised insurers as well as those insurers in workers compensation that are managed by icare. So we would be able to have a view of the whole system and the performance. Secondly, because SIRA funds and provides all the support for SafeWork, and we are both regulators, there can be appropriate mechanisms for that information to be made available to SafeWork for the whole system, again.<sup>42</sup>

### ***Merit Review Service decisions***

**1.48** Finally, several inquiry participants expressed concern about the extremely low publication rate in relation to decisions of SIRA’s workers compensation Merit Review Service, again echoing concerns raised during the first review of the workers compensation scheme.<sup>43</sup> The committee heard that the Merit Review Service hands down around 700 decisions annually,<sup>44</sup> but that SIRA has published only 18 ‘notable’ decisions overall, and only three to date in 2017.<sup>45</sup>

**1.49** In its submission, the WIRO highlighted the importance of transparency around Merit Review Service decisions for many participants in the workers compensation scheme:

Publication of all merit review decisions would provide a useful resource for workers, lawyers and insurers when considering the content of a work capacity decision. WIRO has commenced providing redacted merit review decisions on its website.

I see this as important because insurers only receive decisions from the MRS which relate to work capacity decisions which that insurer has made. A wider publication will enable the insurers to be better informed as to the views of the MRS.<sup>46</sup>

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<sup>40</sup> Evidence, Ms Donnelly, 7 November 2017, pp 50, 51.

<sup>41</sup> Evidence, Ms Donnelly, 7 November 2017, p 56.

<sup>42</sup> Evidence, Ms Donnelly, 7 November 2017, p 50.

<sup>43</sup> Standing Committee on Law and Justice, NSW Legislative Council, *First review of the workers compensation scheme* (2017), pp 75-76.

<sup>44</sup> Evidence, Ms Donnelly, 7 November 2017, p 52.

<sup>45</sup> Submission 5, Workers Compensation Independent Review Office, p 11.

<sup>46</sup> Submission 5, Workers Compensation Independent Review Office, p 11; see also Evidence, Mr Mick Franco, Honorary Executive Member, NSW Workers Compensation Self Insurers Association, 7 November 2017, p 19.

- 1.50 Further, the Law Society commented that this low publication rate was in fact contrary to SIRA’s own public commitments:

This low number of published decisions stands at odds with the SIRA Dispute Resolution Services publication “A guide to Workers Compensation Merit Reviews”, published in September 2017, which notes that that “The Authority is committed to the publication of merit reviews on the SIRA website ... “, and that “the publication of merit reviews is to enhance transparency, accountability and for education purposes ...”.<sup>47</sup>

- 1.51 According to Ms Donnelly, SIRA’s publication of such a small number of ‘notable’ decisions was due to a number of factors: ‘partly the resources, whether there is a benefit and the need to do so with care to protect privacy’.<sup>48</sup> However, she also stated that SIRA was ‘open to enlarging the practice’ of publishing notable decisions.<sup>49</sup>

### *Premium information*

- 1.52 Employer groups who participated in this review also called for greater transparency in how workers compensation insurer premiums are calculated, which was another issue raised during this committee’s first review of the workers compensation scheme.<sup>50</sup>
- 1.53 For example, the NSW Business Chamber told the committee that while SIRA’s Market Practice and Premium Guidelines require insurers to provide employers with information about how their premium has been calculated, in practice the onus is on employers to proactively seek this information from icare.<sup>51</sup>
- 1.54 Unions NSW also supported the idea of greater transparency around premium calculation.<sup>52</sup>
- 1.55 In response to these concerns, Ms Donnelly noted SIRA’s recent launch of an enhanced green slip price check website, and told the committee that SIRA would be looking to develop a similar online premium calculation tool for workers compensation premiums.<sup>53</sup>

### *Committee comment*

- 1.56 Greater transparency was a key policy objective of the *State Insurance and Care Governance Act 2015*. Two years in, it is clear that there is still some way to go before this objective is achieved.
- 1.57 For icare, it is clear that stakeholders want a better line of sight in relation to its organisational priorities, activities, policies and performance. While the committee accepts that the annual statement of business intent is commercially sensitive, we encourage icare to include as much

<sup>47</sup> Submission 16, Law Society of New South Wales, p 4.

<sup>48</sup> Evidence, Ms Donnelly, 7 November 2017, p 53.

<sup>49</sup> Evidence, Ms Donnelly, 7 November 2017, p 52.

<sup>50</sup> Standing Committee on Law and Justice, *First review of the workers compensation scheme*, pp 17-19.

<sup>51</sup> Submission 11, NSW Business Chamber, p 4; see also Submission 12, Australian Federation of Employers and Industries, p 4.

<sup>52</sup> Evidence, Ms Maiden, 7 November 2017, p 25.

<sup>53</sup> Evidence, Ms Donnelly, 7 November 2017, p 58.

information as possible in its publicly available strategic plan, and indeed to be more proactive about publishing information regarding its activities and performance throughout the year.

- 1.58** In addition, given that SIRA publishes communiques of all its board meetings, we can see no reason why icare should not be doing the same. Equally, there is no rationale provided to the committee as to why icare's statement of business intent is not promptly published on its website once it is delivered to the ministers.

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### **Recommendation 1**

That icare publish minutes and communiques of its board meetings and the statement of business intent prepared in accordance with s 11 of the *State Insurance and Care Governance Act 2015*.

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- 1.59** SIRA's focus in the area of transparency should be on improving its capacity to collect and process workers compensation scheme data, and to publish this data in a timely way. As SIRA itself acknowledges, the delay in the publication of workers compensation statistical bulletins, while understandable, is still unacceptably long. There was unanimous agreement among stakeholders that SIRA must do better, and the reporting of indicative data based on statistical estimates is a step in the right direction. We recommend that SIRA undertake the necessary work to ensure the timely publication of workers compensation statistical bulletins, within six months of the end of the financial year to which they refer.
- 1.60** The committee was encouraged to hear about SIRA's development of an innovative data lake and associated visualisation tools for compulsory third party insurance, which will allow for rapid publication of up-to-date scheme performance data. We also note the evidence suggesting that SIRA's new statutory information collection powers have made it easier to obtain the underlying data from insurers.
- 1.61** The committee recommends that SIRA immediately commence work on developing a similar data capability in the area of workers compensation. The committee also recommends that SIRA be given statutory information collection and sharing powers in the area of workers compensation, modelled on the equivalent provisions for compulsory third party insurance.

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### **Recommendation 2**

That SIRA undertake the necessary work to ensure the timely publication of workers compensation statistical bulletins, within six months of the end of the financial year to which they refer.

### **Recommendation 3**

That SIRA commence work on developing comprehensive real-time data for workers compensation claims, including visualisation tools such as a dashboard.

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#### **Recommendation 4**

That the NSW Government introduce legislative amendments to give SIRA statutory information collection and sharing powers in the area of workers compensation, modelled on the equivalent provisions in the *Motor Accident Injuries Act 2017* for compulsory third party insurance.

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- 1.62** The committee encourages SIRA to expand its publication of ‘notable’ workers compensation Merit Review Service decisions, which should be possible without putting an undue burden on its internal resources. The committee is also of the view that icare could be more proactive in providing employers with premium calculation information. The committee will keep a watching brief on these issues in its upcoming second review of the workers compensation scheme.

#### **Effectiveness in the performance of statutory functions**

- 1.63** As noted earlier, achieving clear operational separation between the provision and regulation of government insurance services, and the regulation of workplace health and safety, was the primary objective of the *State Insurance and Care Governance Act 2015*. This section of the report addresses stakeholders concerns around how effectively the three new organisations are performing their statutory functions.

#### ***Relationship between SIRA and icare***

- 1.64** The committee heard two key concerns relating to the relationship between icare as the insurer and SIRA as the regulator. The first relates to communication and coordination between the two organisations, with the committee hearing from several union stakeholders that this is not always apparent. For example, Ms Natasha Flores, Industrial Officer, Unions NSW, commented that:

We meet regularly with icare and SIRA and I must say that those meetings are often quite helpful and useful. However, what we do learn from those meetings is that SIRA does not usually know what icare is doing and icare does not know what SIRA is doing.<sup>54</sup>

- 1.65** The Construction, Forestry, Mining and Energy Union provided an example illustrating the lack of communication between icare and SIRA, in relation to the release of a new form for calculating a worker’s pre-injury average weekly earnings (PIAWE):

In September 2016, the CFMEU became aware that a new PIAWE form had come into existence after a member had complained to their insurer about the calculation of their PIAWE and the member was sent a copy of the form to complete. A search of the SIRA website at the time produced no such document and it later became apparent that the form was available from the icare website. The CFMEU raised a query with SIRA as to how the new form came into existence given that injured workers and unions had not be notified of the form. It came to light that SIRA had been sent some drafts of the form but since the form was not required to be

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<sup>54</sup> Evidence, Ms Flores, 7 November 2017, p 25; see also Submission 2, Construction, Forestry, Mining and Energy Union (New South Wales Branch), p 11.

authorised no action was taken. Stakeholders were not informed that the form had been changed. SIRA escalated the CFMEU's query to icare who later provided a response to the issues raised by the CFMEU. SIRA chose not to pass that response on to the CFMEU. After following up, icare sent the response to the CFMEU directly.

The existence of two forms created some anxiety among injured workers as they were concerned that failure to use one or the other of the forms might make their application for a recalculation void. Had icare and SIRA worked together to develop the form and then communicate with all stakeholders it would have saved injured workers some anxiety.<sup>55</sup>

**1.66** When asked about this issue at the hearing, Mr Bhatia stated that the creation of a new PIAWE form was an operational rather than a systemic matter, and as such falls squarely within icare's purview.<sup>56</sup> More generally, Mr Bhatia told the committee that icare has a 'very strong dialogue with the SIRA on a regular basis', including:

- regular meetings between the two chief executives, often joined by the Secretary of the Department of Finance, Services and Innovation and the Chair of the SIRA board
- biannual briefings of the SIRA board by icare's Chief Executive Officer and Group Executive, Workers Insurance
- a 'whole raft' of regular operator-level conversations in respect of the operation of the workers compensation, home building compensation, and lifetime care and dust diseases schemes.<sup>57</sup>

**1.67** However, Mr Bhatia also acknowledged that there is still work to be done on improving communication and coordination between icare and SIRA, commenting:

There is a regular dialogue in terms of how we work together, but I do admit that we are both evolving as organisations. We are learning to be regulated and I think they are learning how to regulate.<sup>58</sup>

**1.68** The second concern around the relationship between SIRA and icare relates to the lack of clear delineation between their respective roles. For example, the Law Society of New South Wales commented that:

Whilst the Act legislates a separation of the functions, the Law Society is of the view that this separation is not appropriately maintained in practice. As a result, the separation of functions is often unclear or not apparent. For example, it has been the case that (in the absence of timely guidance from SIRA), icare has issued its own guidance on various aspects of the scheme for the use of insurers. The result of this is that, despite apparent structural separation, the roles of icare and SIRA become confused and service providers can be uncertain as to where to obtain definitive

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<sup>55</sup> Submission 2, Construction, Forestry, Mining and Energy Union (New South Wales Branch), p 12; see also Submission 4, Unions NSW, p 4.

<sup>56</sup> Evidence, Mr Bhatia, 7 November 2017, p 43.

<sup>57</sup> Evidence, Mr Bhatia, 7 November 2017, p 35.

<sup>58</sup> Evidence, Mr Bhatia, 7 November 2017, p 35.

guidance on the scheme. This operational confusion undermines the statutory separation between these agencies.<sup>59</sup>

**1.69** Similarly, the WIRO gave evidence that ‘there remains some uncertainty or lack of clarity about the parameters of the roles’,<sup>60</sup> and gave as an example their recent experience regarding letters sent to workers affected by s 39 of the *Workers Compensation Act 1987*. WIRO stated that icare had responded appropriately when their attention was drawn to the potential of the letters to mislead workers about their rights, but that ‘SIRA has played no role with respect to the process for the management of these workers and their rights and entitlements’.<sup>61</sup> The WIRO argued that this is not consistent with SIRA’s role in monitoring and supervising insurers:

One of the roles which SIRA advocates on its website is to provide effective supervision of insurers. I have not observed any action by SIRA at all to deal with [icare] about the misleading of workers facing the loss of their weekly payments.<sup>62</sup>

### ***SIRA’s enforcement and compliance activities***

**1.70** Several stakeholders raised concern that SIRA’s approach to enforcing the workers compensation legislation, particularly against employers and insurers who are in breach or against whom complaints have been made, has not been satisfactory. For example:

- the WIRO indicated that its understanding is that ‘the financial penalties provided in the legislation are not enforced by SIRA and do not form part of its “insurer supervision model”, despite numerous complaints and reports from injured workers, often with respect to repeat errors’<sup>63</sup>
- Unions NSW commented that SIRA has demonstrated ‘a lack of willingness to engage with, or take action against, employers when complaints have been raised by injured workers or their representatives’<sup>64</sup>
- the Construction, Forestry, Mining and Energy Union stated that WIRO’s handling of complaints is easier, quicker and results in better outcomes compared with SIRA’s approach to complaints handling.<sup>65</sup>

**1.71** In response to these concerns, Ms Donnelly told the committee that SIRA’s enforcement and compliance activities range from ‘a very active, now quite sophisticated, process of insurer supervision right through to prosecutions’.<sup>66</sup> These activities include:

<sup>59</sup> Submission 16, Law Society of New South Wales, pp 3-4; see also Submission 13, Australian Lawyers Alliance, p 4.

<sup>60</sup> Submission 5, Workers Compensation Independent Review Office, p 6.

<sup>61</sup> Submission 5, Workers Compensation Independent Review Office, p 7.

<sup>62</sup> Submission 5, Workers Compensation Independent Review Office, p 7.

<sup>63</sup> Submission 5, Workers Compensation Independent Review Office, p 15.

<sup>64</sup> Submission 4, Unions NSW, p 3.

<sup>65</sup> Submission 2, Construction, Forestry, Mining and Energy Union (New South Wales Branch), p 11.

<sup>66</sup> Evidence, Ms Donnelly, 7 November 2017, p 59.

- an automated system which looks at the performance of all the insurers and scheme agents across the workers compensation system and alerts SIRA when a risk emerges, allowing SIRA to follow up and monitor the risk until it is addressed
- a program of compliance activity and prosecutions, including over 100 investigations currently on foot in the area of workers compensation, 40 of which are tracking towards prosecution
- a program of audits targeting high risk areas.<sup>67</sup>

### ***SafeWork NSW's enforcement and compliance activities***

**1.72** In its submission to this review, SafeWork NSW informed the committee that it undertakes a range of advisory, compliance monitoring and enforcement activities, using a graduated approach which takes into factors such as the level of risk, public interest and due diligence effort.<sup>68</sup> Guided by Safe Work Australia's National Compliance and Enforcement Policy, SafeWork NSW's enforcement actions in 2016-2017 included:

- 32,056 inspector interactions (of which 11,460 were proactive field based interactions such as workplace visits, 9,917 were reactive field based interactions, and 10,679 were proactive non-field based interactions such as resolving a dispute over the telephone)
- 10,496 inspectors notices issued
- 33 successful prosecutions
- 10 enforceable undertakings
- 10,201 inspector reports.<sup>69</sup>

**1.73** However, several union stakeholders expressed the view that SafeWork NSW was not adequately fulfilling its enforcement and compliance functions. In particular, unions raised concerns over the decline in enforcement activity undertaken by SafeWork NSW, questioning both the focus of the current work health and safety system on education and advice, and the willingness of SafeWork NSW to enforce the *Work Health and Safety Act* through penalties and prosecutions.

**1.74** Citing data showing a decline in enforcement activity between 2003-2004 and 2014-2015, Unions NSW argued that SafeWork NSW is failing to effectively regulate workplace safety.<sup>70</sup> In this regard, Ms Emma Maiden, Assistant Secretary, Unions NSW, told the committee that:

- Unions NSW is not seeing workplace inspection visits, improvement notices being issued or legal action being taken<sup>71</sup>
- the drop in prosecutions reflects a lack of interest in enforcement on the part of SafeWork NSW, rather than improved employer compliance<sup>72</sup>

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<sup>67</sup> Evidence, Ms Donnelly, 7 November 2017, pp 59-60.

<sup>68</sup> Submission 9, SafeWork NSW, p 8.

<sup>69</sup> Submission 9, SafeWork NSW, p 8; Answers to questions on notice, Mr Peter Dunphy, Executive Director, SafeWork NSW, 30 November 2017, p 11.

<sup>70</sup> Submission 4, Unions NSW, p 6.

<sup>71</sup> Evidence, Ms Maiden, 7 November 2017, p 29.

- the decline in enforcement activity commenced under WorkCover and had been continued rather than reversed by SafeWork NSW<sup>73</sup>
- due to its ‘educative approach to employers’, SafeWork NSW does not get ‘taken seriously’.<sup>74</sup>

**1.75** Similarly, the Construction, Forestry, Mining and Energy Union drew the committee’s attention to numerous examples from the construction industry where they believe SafeWork NSW had not performed effectively, reporting that union organisers have ‘expressed concern about the willingness of inspectors to intervene in safety matters’ and to take action, ‘despite the regulator being aware of the poor safety culture and the ongoing safety issues’ at certain worksites.<sup>75</sup>

**1.76** At the hearing, Mr Peter Dunphy, Executive Director, SafeWork NSW provided the following evidence in relation to SafeWork NSW’s compliance and enforcement work:

- the national model law, adopted under the *Work Health and Safety Act*, introduced a consistent framework for regulating work health and safety<sup>76</sup>
- under this framework, SafeWork NSW utilises a compliance pyramid, with tools ranging from ‘encouraging and assisting through to directing compliance, which may be through notices through to deterrence action, which can include prosecutions, injunctions or withdrawal of licences’<sup>77</sup>
- while every serious incident is assessed, prosecutions are only filed where SafeWork NSW’s independent panel assesses that there is sufficient evidence and that the case is appropriate to pursue, taking into account the level of harm, the seriousness of the breach, the previous compliance history of the operator, and whether it is a priority area in terms of risk<sup>78</sup>
- while there may have been more prosecutions a number of years ago, SafeWork NSW’s enforcement activity over the last five years has been focused on getting the best outcome, namely a reduction in the number of serious incidents and fatalities.<sup>79</sup>

**1.77** Mr Dunphy also acknowledged that despite historically low levels of fatalities and serious incidents and improving trends in incident and fatality data, the number of fatalities was still too high and that SafeWork NSW needed to ‘continue to do better’.<sup>80</sup>

**1.78** Following the hearing, Mr Dunphy informed the committee of a number of recent activities and initiatives to improve work health and safety in the construction sector:

<sup>72</sup> Evidence, Ms Maiden, 7 November 2017, p 27; see also Submission 4, Unions NSW, p 6.

<sup>73</sup> Evidence, Ms Maiden, 7 November 2017, pp 29-30.

<sup>74</sup> Evidence, Ms Maiden, 7 November 2017, p 27.

<sup>75</sup> Submission 2, Construction, Forestry, Mining and Energy Union (New South Wales Branch), p 19.

<sup>76</sup> Evidence, Mr Peter Dunphy, Executive Director, SafeWork NSW, 7 November 2017, p 68.

<sup>77</sup> Evidence, Mr Dunphy, 7 November 2017, p 62.

<sup>78</sup> Evidence, Mr Dunphy, 7 November 2017, pp 67, 68.

<sup>79</sup> Evidence, Mr Dunphy, 7 November 2017, p 62.

<sup>80</sup> Evidence, Mr Dunphy, 7 November 2017, p 62.

SafeWork NSW is currently undertaking a proactive Harm Prevention Program in the construction industry which focuses on formwork, scaffolding and electrical safety in the mid/high rise sector. This program involves intensive engagement with stakeholders in the industry through verification activities, drop-in visits and targeted engagements conducted by inspectors at construction sites throughout NSW. ...

The Formwork Project is only one aspect of SafeWork NSW's current extensive approach to securing compliance within the construction industry, which also includes:

- the introduction on 1 November 2017 of new penalty notices of up to \$3,600 to protect workers against falls from heights and unlicensed work
- an increase in compliance and inspection programs over the last 16 months targeting residential construction, civil infrastructure and mid-rise commercial construction
- commencement of a safety blitz on construction sites across NSW targeting falls
- recruitment of 12 additional construction safety inspectors as part of a \$2.5 million boost to safety on major infrastructure projects announced in the NSW Budget.

Further, under the Work Health and Safety Roadmap for NSW 2022, SafeWork NSW is currently undertaking consultation with the Construction Sector to develop a State-wide Construction Sector Plan.<sup>81</sup>

### ***Committee comment***

- 1.79** The committee notes the concerns expressed by review participants around the interaction between icare and SIRA, both in terms of operational communication and coordination, and in terms of having a clear delineation between their respective roles. These are important issues, particularly given the Act's primary purpose was to structurally separate these roles and promote greater efficiency.
- 1.80** The committee cannot ignore the fact that there has been considerable confusion between the agencies as to who is responsible for scheme information and the provision of advice in the workers compensation system. This has come to a head in dealing with the difficult issue of how s 39 of the *Workers Compensation Act 1987* impacts on injured workers.
- 1.81** Having said this, given that icare and SIRA were created only two years ago, it is perhaps not surprising that there are still some teething issues. This is particularly apparent when it comes to matters that lie at the intersection of what is 'operational' (and therefore icare's responsibility) and what is 'systemic' (and therefore within SIRA's remit). The committee acknowledges that the relationship between the insurer and the regulator is still evolving.
- 1.82** As for SIRA and SafeWork NSW's effectiveness in carrying out their enforcement and compliance functions, the committee does not believe that the criticisms are necessarily attributable to the new organisational structures and statutory functions created by the *State Insurance and Care Governance Act 2015*.

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<sup>81</sup> Answers to questions on notice, Mr Dunphy, p 4.

- 1.83 Nevertheless, we recommend that the government note the evidence in this regard, and keep a watching brief on these issues for consideration as part of the five-year statutory review of the Act.

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### Recommendation 5

That the NSW Government note the evidence received in this review concerning the relationship between icare and SIRA, and SIRA and SafeWork NSW's effectiveness in carrying out their enforcement and compliance functions, and keep a watching brief on these issues for consideration as part of the five-year statutory review of the *State Insurance and Care Governance Act 2015*.

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### Conflict of interest

- 1.84 As noted at the beginning of this report, the structural reforms brought about by the *State Insurance and Care Governance Act* were driven by concerns around the potential conflicts of interest inherent in having insurance, regulatory, and work health and safety functions being undertaken by the one body. However, the committee heard from several review participants about a conflict of interest that exists under the new structure, namely that between SIRA's regulatory functions, which have the objective of minimising the cost to the community of workplace injuries, and SIRA's dispute resolution functions, particularly the workers compensation Merit Review Service.

- 1.85 Comments made by stakeholders in this regard included:

- 'There are real concerns about the independence of the dispute resolution service where a regulator, whose primary concern is reporting back about the premium, is then able to influence the decision-makers within it'<sup>82</sup>
- '[T]he regulator should not be involved in any form of dispute resolution when its primary function is to regulate the insurance scheme'<sup>83</sup>
- 'The placing of the Merit Review Service within SIRA makes it impossible for SIRA to intervene in relevant cases without seeming to have an interest in protecting its own decision-making process from criticism'<sup>84</sup>
- '[I]t is completely inappropriate for a regulator to have stewardship over a part of the dispute system and that should cease'<sup>85</sup>
- 'We now have ... SIRA responsible for minimising the cost of injuries but also responsible for dispute resolution and advising on claims. A great way to minimise cost is to advise people not to pay them and to determine disputes in favour of insurers'.<sup>86</sup>

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<sup>82</sup> Evidence, Mr Andrew Stone SC, NSW State President, Australian Lawyers Alliance, 7 November 2017, p 3.

<sup>83</sup> Submission 16, Law Society of New South Wales, p 3.

<sup>84</sup> Submission 5, Workers Compensation Independent Review Office, p 18.

<sup>85</sup> Evidence, Mr Franco, 7 November 2017, p 12.

<sup>86</sup> Evidence, Mr Paul Macken, Law Society of New South Wales, 7 November 2017, p 4.

- 1.86** The Law Society of New South Wales suggested that this issue be considered as a part of the NSW Government's current review of workers compensation dispute resolution arrangements.<sup>87</sup>

***Committee comment***

- 1.87** The organisational reforms contained in the *State Insurance and Care Governance Act 2015* have succeeded in removing the potential conflicts of interests that were inherent within the former WorkCover governance structure. The conflict of interest regarding the workers compensation Merit Review Service has already been identified by this committee and is one of the reasons that we have previously recommended comprehensive reform of the dispute resolution system for workers compensation.

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<sup>87</sup> Submission 16, Law Society of New South Wales, p 3.

## Appendix 1 Submissions

No	Author
1	Name suppressed
1a	Confidential
2	Construction, Forestry, Mining and Energy Union (New South Wales Branch)
3	Mr Ryan Shaw
4	Unions NSW
5	Workers Independent Review Office (WIRO)
6	icare
7	National Insurance Brokers Association
8	State Insurance Regulatory Authority (SIRA)
9	Safework NSW
10	RiskNet Pty Ltd
11	NSW Business Chamber
12	Australian Federation of Employers and Industries
13	Australian Lawyers Alliance
14	Public Service Association
15	NSW Workers' Compensation Self Insurers Association Inc
16	The Law Society of New South Wales

## Appendix 2 Witnesses

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>
<b>Tuesday 7 November 2017</b>		
<b>Macquarie Room, Parliament of NSW</b>	Mr Paul Macken	Member, Law Society Injury Compensation Committee, Law Society of New South Wales
	Mr Andrew Stone SC	Australian Lawyers Alliance
	Mr Luke Aitken	Senior Manager, Policy, NSW Business Chamber
	Ms Elizabeth Greenwood	Policy Manager, Workers Compensation, WHS and Regulation, NSW Business Chamber
	Mr Garry Brack	Chief Executive, Australian Federation of Employers & Industries
	Ms Jill Allen	Policy Manager, Australian Federation of Employers & Industries
	Mr Alan Becken	Chairperson, NSW Workers Compensation Self Insurers Association Inc
	Mr Mick Franco	Honorary Executive Member, NSW Workers Compensation Self Insurers Association Inc
	Ms Emma Maiden	Assistant Secretary, Unions NSW
	Ms Natasha Flores	Industrial Officer, Unions NSW
	Mr Shay Deguara	Manager Industrial Specialists, Public Service Association of NSW
	Mr Ian Tuit	Industrial Officer, Public Service Association of NSW
	Mr Vivek Bhatia	Chief Executive Officer, icare
	Mr John Nagle	Group Executive, Workers Insurance, icare
	Mr Tim Plant	Group Executive, Self Insurance, Community and Innovation, icare
	Mr Don Ferguson	Group Executive, Integrated Care, icare
	Ms Carmel Donnelly	Acting Chief Executive, State Insurance Regulatory Authority
	Mr Peter Dunphy	Executive Director, Safework NSW

## Appendix 3 Minutes

### Minutes no. 21

Tuesday 19 September 2017

Standing Committee on Law and Justice

Members' Lounge, Parliament House, Sydney, 1.00 pm

#### 1. Members present

Mr Mallard, Chair

Mr Clarke

Mr Mookhey

#### 2. Apologies

Ms Voltz, *Deputy Chair*

Mr Khan

Mr Shoebridge

#### 3. Draft minutes

Resolved, on the motion of Mr Mookhey: That draft minutes no. 20 be confirmed.

#### 4. Correspondence

The committee noted the following items of correspondence:

##### *Received:*

- 11 September 2017 – Letter from Hon Victor Dominello MP, Minister for Finance, Services and Property, regarding the government response to the first review of the workers compensation scheme.

#### 5. Statutory review of the *State Insurance and Care Governance Act 2015*

Clause 12 of Schedule 4 of the *State Insurance and Care Governance Act 2015* requires a Legislative Council committee to conduct a statutory review of the Act as soon as practicable after the second anniversary of the commencement of the clause. As the clause commenced in September 2015, the statutory review is to commence any time from now.

The Law and Justice committee was designated by the House to be the committee to conduct this review.

##### 5.1 Commencement of inquiry

Resolved, on the motion of Mr Mookhey: That the committee commence its statutory review of the *State Insurance and Care Governance Act 2015* on 19 September 2017.

##### 5.2 Call for submissions

Resolved, on the motion of Mr Mookhey: That the call for submissions be made on Tuesday 19 September via twitter, stakeholder letters and a media release distributed to all media outlets in New South Wales, with a closing date of Tuesday 31 October 2017.

##### 5.3 Stakeholder list

Resolved, on the motion of Mr Mookhey: That members have until 3.00 pm Tuesday 19 September 2017 to nominate additional stakeholders to the stakeholder list.

##### 5.4 Hearing dates

Resolved, on the motion of Mr Mookhey: That the committee set aside one hearing date in early November 2017, the date of which is to be determined by the Chair after consultation with members regarding their availability.

#### 6. Adjournment

The committee adjourned at 1.04 pm *sine die*.

Teresa McMichael  
**Committee Clerk**

**Minutes no. 22**

Tuesday 7 November 2017

Standing Committee on Law and Justice

Macquarie Room, Parliament House, Sydney, 9.24 am

**1. Members present**

Mr Mallard, *Chair*

Ms Voltz, *Deputy Chair*

Mr Clarke

Mr Fang (substituting for Mr Khan)

Mr Shoebridge

**2. Apologies**

Mr Khan

Mr Mookhey

**3. Draft minutes**

Resolved, on the motion of Mr Shoebridge: That draft minutes no. 21 be confirmed.

**4. Correspondence**

The committee noted the following items of correspondence:

***Sent:***

- 27 October 2017 – Email from secretariat to stakeholders to the review providing guidance as to the committee's approach to the statutory review terms of reference

***Received:***

- 16 October 2017 – Letter from Mr Richard Gilley, RiskNet to secretariat, requesting information about icare and SIRA annual reports
- 23 October 2017 – Email from Mr Dallas Booth, National Insurance Brokers Association of Australia to secretariat, requesting a submission extension to allow for icare and SIRA annual reports to be incorporated
- 23 October 2017 – Email from Ms Fiona Cameron, Insurance Council of Australia to secretariat, advising that the Council will not be making a submission or appearing as a witness in the statutory review
- 23 October 2017 – Email from Alastair McConnachie, NSW Bar Association to secretariat, advising the NSW Bar Association will not be making a submission to the statutory review
- 24 October 2017 – Email from Alastair McConnachie, NSW Bar Association to secretariat, confirming the NSW Bar Association will not be appearing as a witness at the hearing
- 27 October 2017 – Email from Mr Dallas Booth, National Insurance Brokers Association of Australia to secretariat, regarding the scope of the statutory review terms of reference
- 30 October 2017 – Email from Ms Tracey Browne, Australian Industry Group, advising that the Australian Industry Group will not be making a submission to the statutory review and declining the committee's invitation to appear as a witness
- 2 November 2017 – Letter from the Hon Matt Kean MP, Minister for Innovation and Better Regulation to Chair, advising of the witness appearing on behalf of SafeWork NSW.

## 5. Statutory review of the State Insurance and Care Governance Act 2015

### 5.1 Public submissions

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 2, 4-9, 11, 13.

Resolved, on the motion of Ms Voltz: That the committee authorise the publication of submission nos. 12, 14 and 15.

### 5.2 Partially confidential submissions

Resolved, on the motion of Mr Shoebridge: That:

- the committee authorise the publication of submission nos. 1 and 3, with the exception of identifying information which is to remain confidential, as per the recommendation of the secretariat
- the committee authorise the publication of submission no. 10, with the exception of potential adverse mention which is to remain confidential, as per the recommendation of the secretariat.

### 5.3 Confidential submissions

Resolved, on the motion of Mr Shoebridge: That the committee keep submission no. 1a confidential, as per the request of the author, as it contains identifying and/or sensitive information.

### 5.4 Return of answers to questions on notice and supplementary questions

Resolved, on the motion of Mr Shoebridge: That witnesses be requested to return answers to questions on notice and supplementary questions by Friday 24 November 2017.

### 5.5 Reporting date

Resolved, on the motion of Mr Clarke: That the report be tabled on Friday 15 December 2017, and that this date be noted on the committee's webpage.

### 5.6 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 Paul Macken, Member, Law Society Injury Compensation Committee, Law Society of New South Wales
- Mr Andrew Stone SC, Australian Lawyers Alliance.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Luke Aitken, Senior Manager, Policy, NSW Business Chamber
- Ms Elizabeth Greenwood, Policy Manager, Workers Compensation, WHS and Regulation, NSW Business Chamber
- Mr Garry Brack, Chief Executive, Australian Federation of Employers & Industries
- Ms Jill Allen, Policy Manager, Australian Federation of Employers & Industries
- Mr Alan Becken, Chairperson, NSW Workers Compensation Self Insurers Association Inc
- Mr Mick Franco, Honorary Executive Member, NSW Workers Compensation Self Insurers Association Inc.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Emma Maiden, Assistant Secretary, Unions NSW
- Ms Natasha Flores, Industrial Officer, Unions NSW
- Mr Shay Deguara, Manager Industrial Specialists, Public Service Association of NSW
- Mr Ian Tuit, Industrial Officer, Public Service Association of NSW.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Vivek Bhatia, Chief Executive Officer, icare
- Mr John Nagle, Group Executive, Workers Insurance, icare
- Mr Tim Plant, Group Executive, Self Insurance, Community and Innovation, icare
- Mr Don Ferguson, Group Executive, Integrated Care, icare.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Ms Carmel Donnelly, Acting Chief Executive, State Insurance Regulatory Authority.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Peter Dunphy, Executive Director, Safework NSW.

The evidence concluded and the witness withdrew.

The public and media withdrew.

The public hearing concluded at 4.46 pm.

#### **6. Proposed timeline for second round of scheme reviews**

Resolved, on the motion of Mr Shoebridge: That the committee adopt the following timetable for the second round of scheme reviews:

- Compulsory Third Party insurance (with no pre-hearing questions on notice)
  - call for submissions mid-Feb 2018
  - report end June
- Workers compensation
  - call for submissions 1 June
  - report end October
- Dust Diseases/Lifetime Care and Support
  - Call for submissions 1 October
  - report early February 2019.

#### **7. Adjournment**

The committee adjourned at 4.48 pm, until Tuesday 12 December 2017, 9.30 am, Room 1254, Parliament House (report deliberative).

Teresa McMichael  
**Committee Clerk**

**Draft minutes no. 23**

Tuesday 12 December 2017

Standing Committee on Law and Justice

Room 1254, Parliament House, Sydney, 9.35 am

**1. Members present**Mr Mallard, *Chair*Ms Voltz, *Deputy Chair*

Mr Farlow (substituting for Mr Clarke)

Mr Khan

Mr Mookhey

Mr Shoebridge

**2. Apologies**

Mr Clarke

**3. Draft minutes**

Resolved, on the motion of Mr Shoebridge: That draft minutes no. 22 be confirmed.

**4. Correspondence**

The committee noted the following items of correspondence:

***Sent:***

- 22 November 2017 – Email from secretariat to Mr Ryan Shaw, advising that the committee will not be convening another hearing

***Received:***

- 17 November 2017 – Email from Mr Ryan Shaw to Chair, requesting that the committee convene another hearing to discuss his submission
- 29 November 2017 – Letter from Peter Dunphy, Executive Director, SafeWork NSW to Chair, attaching answers to questions on notice and transcript corrections.

**5. Statutory review of the State Insurance and Care Governance Act 2015****5.1 Public submissions**

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission no. 16.

**5.2 Answers to questions on notice**

The committee noted that the following answers to questions on notice and supplementary questions were published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to questions on notice from the Law Society of New South Wales, received 22 November 2017
- answers to questions on notice from Unions NSW, received 24 November 2017
- answers to questions on notice from the NSW Business Chamber, received 24 November 2017
- answers to questions on notice from the Australian Federation of Employers and Industries, received 24 November 2017
- answers to questions on notice from SIRA, received 24 November 2017
- answers to questions on notice and supplementary questions from icare, received 24 November 2017
- answers to questions on notice from SafeWork NSW, received 30 November 2017.

### 5.3 Consideration of Chair's draft report

The Chair submitted his draft report entitled 'Statutory review of the *State Insurance and Care Governance Act 2015*', which, having been previously circulated, was taken as being read.

The committee noted that it previously resolved that the report be tabled on Friday 15 December 2017.

Resolved, on the motion of Mr Shoebridge: That:

- a) paragraph 1.58 be amended by inserting at the end: 'Equally, there is no rationale provided to the committee as to why icare's statement of business intent is not promptly published on its website once it is delivered to the ministers.'
- b) Recommendation 1 be amended by omitting 'publish minutes or communiques of its board meetings' and inserting instead 'publish minutes and communiques of its board meetings and the statement of business intent prepared in accordance with s 11 of the *State Insurance and Care Governance Act 2015*'.

Mr Shoebridge moved: That the following new committee comment be inserted after paragraph 1.61:

**'Committee comment**

It is hard to understand why SIRA has not been able to provide far more timely public access to the information it holds on the workers compensation scheme. The delays in providing simple statistical bulletins are unacceptable. While the committee supports broader data sharing reforms, experience suggests this will likely take SIRA a significant amount of time to implement. In the interim the organisation must focus on improving the timeliness of the current systems it has in place.'

Question put.

The committee divided.

Ayes: Ms Voltz, Mr Mookhey, Mr Shoebridge.

Noes: Mr Farlow, 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:

- a) the following new recommendation be inserted after paragraph 1.61:  
**'Recommendation X**  
That SIRA undertake the necessary work to ensure the timely publication of workers compensation statistical bulletins, within six months of the end of the financial year to which they refer.'
- b) Recommendation 2 be amended by omitting 'a data lake' and inserting instead 'comprehensive real-time data'.

Resolved, on the motion of Mr Shoebridge: That the following new committee comment be inserted after paragraph 1.79:

**'Committee comment**

The committee cannot ignore the fact that there has been considerable confusion between the agencies as to who is responsible for scheme information and the provision of advice in the workers compensation system. This has come to a head in dealing with the difficult issue of how s 39 of the *Workers Compensation Act 1987* impacts on injured workers.'

Mr Shoebridge moved: That the following new committee comment be inserted after paragraph 1.82:

**'Committee comment**

At a minimum, the committee expects that major government agencies operating so closely will have regular communications and structured processes to ensure they are working, so far as possible, with consistency. This will prevent them either contradicting each other or double-handling the same issue.

The Parliament has created independent agencies to avoid conflicts of interest. However it is also expected that the agencies will, without necessarily being forced to do so by legislation, work together

to address common problems co-operatively. We do not believe that this common sense observation needs to be expressed either in a statute or a specific recommendation, it is an expectation that applies equally to all NSW Government agencies.’

Question put.

The committee divided.

Ayes: Ms Voltz, Mr Mookhey, Mr Shoebridge.

Noes: Mr Farlow, Mr Khan, Mr Mallard.

There being an equality of votes, question resolved in the negative on the casting vote of the Chair.

Mr Shoebridge moved: That the following committee comment and recommendation be inserted before paragraph 1.83:

**‘Committee comment**

The dramatic drop in prosecutions for work health safety breaches over the past 10 years is evidence of a system that has gone too far towards encouraging good behaviour by employers without having the necessary rigour to punish poor behaviour. To restore confidence in SafeWork NSW’s prosecution policy and performance we recommend an immediate tri-partite review of the policy and effectiveness of the current arrangements.

**Recommendation X**

That a tripartite review with representatives from a lead employer group, Unions NSW and the NSW Government undertake an immediate review of SafeWork NSW’s work health safety prosecution policy and performance.’

Question put.

The committee divided.

Ayes: Ms Voltz, Mr Mookhey, Mr Shoebridge.

Noes: Mr Farlow, 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 1.86 be amended by omitting ‘While the conflict of interest identified by stakeholders in this review is not necessarily of the same magnitude, the committee believes there would be merit in considering ways of strengthening the independence of the workers compensation Merit Review Service, as part of the government’s current review of workers compensation dispute resolution arrangements.’, and inserting instead: ‘This conflict of interest has already been identified by this committee and is one of the reasons that we have previously recommended comprehensive reform of the dispute resolution system for workers compensation.’

Mr Shoebridge moved: That the following new paragraph be inserted after paragraph 1.86:

‘The evidence we have received in this review only confirms the urgency required of the government to finalise that review and ensure there is a single, comprehensive and independent system to resolve workers compensation disputes in New South Wales.’

Question put.

The committee divided.

Ayes: Ms Voltz, Mr Mookhey, Mr Shoebridge.

Noes: Mr Farlow, 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 Recommendation 5 be omitted:

**‘Recommendation 5**

That the NSW Government consider ways of strengthening the independence of the workers compensation Merit Review Service as part of its review of workers compensation dispute resolution arrangements.’

Resolved, on the motion of Mr Khan: That:

- a) The draft report as amended be the report of the committee and that the committee present the report to the House;
- b) The transcripts of evidence, submissions, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry be tabled in the House with the report;
- c) Upon tabling, all unpublished attachments to submissions be kept confidential by the committee;
- d) Upon tabling, all unpublished transcripts of evidence, submissions, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;
- e) The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- f) The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- g) Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting.

**6. Timeline for second round of scheme reviews**

Resolved, on the motion of Mr Shoebridge: That the committee adopt the following timetable for the second round of scheme reviews:

- Workers compensation scheme:
  - call for submissions 1 May 2018
  - report end September
- Compulsory Third Party insurance (with no pre-hearing questions on notice), Dust Diseases and Lifetime Care and Support schemes:
  - call for submissions 3 September 2018
  - report early February 2019.

**7. Adjournment**

The committee adjourned at 10.00 am, *sine die*.

Teresa McMichael  
**Committee Clerk**

## Appendix 4 Dissenting statement

### Mr David Shoebridge MLC, The Greens

While the bulk of the report and each of its recommendations represent a consensus of the members, there was one significant area of disagreement.

As a Greens MP ensuring safe workplaces is a key priority. The evidence the committee received from Unions NSW and the CFMEU regarding the collapse in the number of work health safety prosecutions in NSW should trouble every Member of Parliament, regardless of their political affiliation.

There were 50 work health safety prosecutions in 2016 compared to 230 in 2006. There were 48 fatalities and 23,397 injuries in workplaces in NSW in 2014-2015 compared to 69 fatalities and 29,326 workplace injuries in 2006-2007.

Workplaces in NSW do not appear to have become dramatically safer, or more accountable, making the falling number of prosecutions deeply concerning.

The dramatic reduction of prosecutions at a state level has not been matched by any increased activity at a federal level. This means that many very serious breaches of work health safety laws, including where people have been killed at work, have not led to any prosecutions.

The last time that the Fair Work Ombudsman even mentioned a prosecution in its annual report was 2008. If industrial laws and workplace rights aren't being enforced, workers have no chance of getting a fair go in their workplace.

A tri-partite review of the policy and effectiveness of the current arrangements at SafeWork NSW needs to commence immediately.

Prosecutions for work health safety breaches are a vital tool in ensuring workplaces meet their safety obligations.

This is why I proposed the following commentary and recommendation be included in the report: *The dramatic drop in prosecutions for work health safety breaches over the past 10 years is evidence of a system that has gone too far towards encouraging good behaviour by employers without having the necessary rigour to punish poor behaviour. To restore confidence in SafeWork NSW's prosecution policy and performance we recommend an immediate tri-partite review of the policy and effectiveness of the current arrangements.*

#### *Recommendation:*

*That a tripartite review with representatives from a lead employer group, Unions NSW and the NSW Government undertake an immediate review of SafeWork NSW's work health safety prosecution policy and performance.*

It was extremely unfortunate that the government voted to reject this recommendation. It is a matter that the Greens will continue to campaign for in this Parliament and the next.

David Shoebridge  
Greens MP in the NSW Legislative Council  
13 December 2017