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STANDING COMMITTEE ON LAW AND JUSTICE

2020 review of the Workers Compensation Scheme

Report 75

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2020 Review of the Workers Compensation Scheme

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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 8 May 2019.¹

¹ *Hansard*, NSW Legislative Council, 8 May 2019, pp 122-125.

Committee details

Committee members

The Hon Wes Fang MLC	The Nationals	<i>Chair</i>
The Hon Greg Donnelly MLC	Australian Labor Party	<i>Deputy Chair</i>
The Hon Anthony D'Adam MLC	Australian Labor Party	
The Hon Scott Farlow MLC**	Liberal Party	
The Hon Trevor Khan MLC	The Nationals	
The Hon Taylor Martin MLC***	Liberal Party	
The Hon Daniel Mookhey MLC*	Australian Labor Party	
The Hon Rod Roberts MLC	Pauline Hanson's One Nation Party	
Mr David Shoebridge MLC	The Greens	

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- * The Hon Daniel Mookhey MLC was a participating member from 15 May 2020 for the duration of the inquiry.
- ** The Hon Scott Farlow MLC replaced the Hon Sam Farraway MLC as a substantive member of the committee from 8 July 2020.
- *** The Hon Taylor Martin MLC replaced the Hon Catherine Cusack MLC as a substantive member of the committee from 15 March 2021.

Chair's foreword

The necessary focus of this review was on the performance and operations of icare, given it manages the Nominal Insurer, which holds the majority of the workers compensation scheme's market share, and the Treasury Managed Fund. The financial position of both of these schemes have significantly deteriorated over time. The Nominal Insurer's net loss as at 30 June 2020 was \$1.894 billion, with a net underwriting loss of \$2.195 billion. It has also experienced a steady decline in its funding ratio, pre dating the COVID-19 pandemic. The financial position of the Treasury Managed Fund is equally concerning, given a recently reported net loss of \$635 million.

For the Nominal Insurer in particular, poorer return to work rates are a clear contributing factor to this decline, as is an increase in claim costs, including medical expenses. The new claims management model implemented by icare, which enables claims to be managed by one scheme agent, and the move to a single platform, have also contributed to the financial position of the scheme. Clearly, icare's ambitious approach to pursue a significant transformation has come at a detriment to not only injured workers but the public.

Against this backdrop, the committee examined icare's leadership, governance and culture. What unfortunately emerged was evidence of deficient procurement and contract practices, and failures to declare, record and manage potential conflicts of interest appropriately. Many of these matters involved the most senior staff at icare and were overlooked by the icare Board.

This review undoubtedly highlighted the need for significant leadership and cultural change at icare. It is clear that the icare Board must govern icare appropriately and have experience in personal injury management or workers compensation. Senior executives at icare must also demonstrate the high standard and level of responsibility expected of public sector officials.

In this regard, we note that several important changes have taken place at icare, including the appointment of a new Chief Executive Officer and Managing Director, and Chair of the Board. While we accept that the current leadership team is taking responsibility for the matters that have unfolded, including the poor financial state of the scheme, the committee remains concerned and intends to monitor the situation closely. Not only will we have a hearing later this year to further review these issues, we also expect icare to provide an update by the end of 2021 as to what actions it is taking to ensure it is complying with all the requirements expected of a public sector agency, along with the measures it is implementing to improve the financial performance of the Nominal Insurer and Treasury Managed Fund, including return to work rates.

We have also made a number of other findings and recommendations in relation to the workers compensation scheme, many of which are aimed at ensuring there is greater oversight, accountability and evaluation, so as to ensure icare is performing better and that injured workers are best supported and promoted to return to work.

This review was perhaps a perfect example of how a parliamentary inquiry can transgress political differences to undertake an important accountability and scrutiny role on behalf of the House. In this regard, I thank my committee colleagues for their considered contributions to this important review and for their collaboration with this report. I also thank both Hansard and the committee secretariat for their professional support.

I commend this report to the House.



The Hon Wes Fang MLC
Committee Chair

Findings

- Finding 1** **35**
 That the multi-billion losses incurred recently by the Nominal Insurer and Treasury Managed Fund have been caused, in large part, by a collapse in return to work rates arising from icare’s decision to introduce a new claims management model.
- Finding 2** **35**
 That return to work rates have fallen further in schemes managed by icare than in schemes managed by specialist and self-insurers.
- Finding 3** **35**
 That icare has failed to address the fall in return to work rates in the Nominal Insurer and the Treasury Managed Fund with either the urgency or thoroughness they deserved given the negative impacts falling return to work rates have on injured workers and the financial sustainability of the scheme.
- Finding 4** **35**
 That the Nominal Insurer and the Treasury Managed Fund will continue to sustain major underwriting losses until icare improves return to work rates.
- Finding 5** **35**
 That implementation of the Work Injury Screening and Early Intervention (WISE) protocols, that deliver early and active intervention for injured workers with musculoskeletal injury that have a risk of delayed return to work, have had a significant positive impact on return to work rates, and despite this evidence being available to icare they have not been adopted in the Nominal Insurer or the Treasury Managed Fund.
- Finding 6** **70**
 That icare has too often failed to reach the standards of behaviour expected of a New South Wales public sector agency.
- Finding 7** **70**
 That icare’s decision to select Guidewire and Capgemini to build the Nominal Insurer Single Platform appears to have been predetermined, and led to project costs rising from \$110 million to more than \$360 million.
- Finding 8** **70**
 That Mr Vivek Bhatia and Mr Michael Carapiet failed to take appropriate steps to declare, record and manage the conflict of interests arising from Mr Bhatia’s personal relationship with the leaders of Capgemini.
- Finding 9** **70**
 That Mr John Nagle's decision to appear in a video endorsing Guidewire’s software, and to accept their sponsorship of a trip to Las Vegas to appear at their 2018 conference, was inappropriate.

- Finding 10** 71
That icare failed to clearly notify bidders that it was considering the appointment of a sole scheme agent to manage Nominal Insurer claims in the 2018 tender and as a consequence, the tender process was not fairly conducted.
- Finding 11** 71
That icare's implementation of a claims management system that has a single scheme agent to manage all nominal insurer claims by using a sole scheme agent has failed.
- Finding 12** 71
That icare appears to have applied undue pressure on EML to engage The Bridge International using a Project Service Order mechanism.
- Finding 13** 71
That icare's decision to select the Perceptive Group to develop a Net Promoter Score transgressed all reasonable conflict of interest principles.
- Finding 14** 71
That icare's decision to award Mr Rob Craig unlimited authority to enter into contracts to build the Nominal Insurer Single Platform was inappropriate and contrary to an express policy determined by the Board.
- Finding 15** 72
That icare's systemic failure to comply with key requirements of the *Government Information (Public Access Act (2009))* is longstanding, systematic and remains unacceptable.
- Finding 16** 72
That icare's policy of permitting senior executives to engage in secondary employment is inappropriate, especially given the extraordinary levels of the salaries paid to icare executives to perform their work for icare.
- Finding 17** 72
That the icare Board failed to appropriately sanction the former Chief Executive Officer and Managing Director after his inadequate disclosure of a serious conflict of interest involving a close family member.
- Finding 18** 72
That icare failed to provide Mr Chris McCann with a safe workplace and inappropriately required him to enter into a non-disclosure agreement after he raised serious concerns with icare's governance.
- Finding 19** 73
That the icare Board comprehensively failed to properly govern icare.
- Finding 20** 73
That icare's Board lacked members with expertise in personal injury management or workers compensation.

Finding 21

73

That mechanisms between the icare Board and Treasurer have failed to work in making icare accountable for its conduct.

Finding 22

74

That the level of executive remuneration at icare is grossly excessive, and is likely to have contributed to poor cultural practices at icare, and is out of keeping with community expectations.

Recommendations

- Recommendation 1** **36**
That the Standing Committee on Law and Justice undertake a brief hearing to review the status of reforms in icare and the implementation of various reviews of the scheme towards the end of the 2021 calendar year.
- Recommendation 2** **36**
That icare, in consultation with the State Insurance Regulatory Authority, investigate and implement measures to reduce medical expenses, including measures to address over-utilisation and over-billing issues.
- Recommendation 3** **36**
That the State Insurance Regulatory Authority commission an independent evaluation of the effectiveness of icare's claims management model, in order to identify improvements that will ensure the model best supports injured workers, promotes return to work and improves the scheme's financial performance.
- Recommendation 4** **37**
That the NSW Government consider addressing the deteriorating financial position of the Nominal Insurer and the Treasury Managed Fund schemes primarily through administrative efficiencies and operational improvements to icare.
- Recommendation 5** **37**
That the NSW Government review and expand the regulatory powers of the State Insurance Regulatory Authority and NSW Treasury, to ensure both agencies have adequate oversight and powers to monitor the performance of the Nominal Insurer and Treasury Managed Fund.
- Recommendation 6** **72**
That the icare Board publicly apologise to Mr Chris McCann for his poor treatment while employed at icare.
- Recommendation 7** **74**
That icare provide the Standing Committee on Law and Justice with an update by the end of 2021 as to:
- any actions it has taken to ensure it is complying with all the requirements expected of a public sector agency, including compliance with information disclosure requirements, the procurement framework and policies relating to the management of conflicts of interest, gifts and benefits and public interest disclosures
 - the measures it is taking to improve the financial performance of the Nominal Insurer and Treasury Managed Fund and return to work rates.
- Recommendation 8** **88**
That icare, as part of the PIAWE remediation project, write to all potentially affected claimants not already remedied, to advise them of their right to apply for a re-assessment of their pre-injury average weekly earnings.

Recommendation 9

88

That the State Insurance Regulatory Authority investigate:

- whether the use of the whole person impairment test in the workers compensation scheme is appropriate and whether the restriction in terms of having one assessment of impairment could be removed for certain injuries
- whether the definition of 'suitable employment' used prior to the 2012 reforms might be more appropriate than the current definition
- other options for injured workers and insurers to reach settlements and exit the scheme
- the feasibility and potential impacts associated with increasing legal costs under the Workers Compensation Regulation 2016.

Conduct of inquiry

The terms of reference were referred to the committee by the Legislative Council on 8 May 2019.²

The committee received 25 submissions and 1 supplementary submission.

The committee held 8 public hearings at Parliament House in Sydney.

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

Procedural issues

There are three procedural matters to note in relation to the conduct of this review. The first relates to the House making a number of orders for the production of documents under standing order 52 in relation to the workers compensation scheme and performance of icare at the same time this review was underway. The returns to these orders helped to inform members of the Standing Committee on Law and Justice about particular workers' compensation issues, but the documents did not strictly form part of the evidence to the inquiry, except for those documents which were specifically tendered by members of the committee during hearings.

The second issue is that three individuals had to be summoned to give evidence at a public hearing. The decision to issue a summons is not taken lightly, and witnesses are always invited to attend voluntarily as a first step. Two of the individuals in this review had to be summoned due to concerns they raised about giving evidence that would be covered by commercial confidentiality. In relation to this, the committee reiterates its position that these claims generally have no application to parliamentary inquiries. The other individual was summoned on the basis they had declined even after being asked to re-consider the issue.

The final matter to note relates to procedural fairness, and the committee's consideration of adverse allegations and matters which could seriously damage the reputation of a person or body. In accordance with the procedural fairness resolution adopted by the House on 25 October 2018, the committee wrote to a number of individuals adversely named during evidence, in circumstances where the individuals were not witnesses and the allegations were very serious, in order to give those individuals an opportunity to respond. Despite only two responses being received in relation to this process, the committee respects and acknowledges the importance of this process in all parliamentary inquiries.

² *Hansard*, NSW Legislative Council, 8 May 2019, pp 122-125.

Chapter 1 Overview

This chapter provides an overview of the workers compensation scheme, including the oversight role played by the Standing Committee on Law and Justice, recent reforms to the scheme, and the roles of key public entities such as the State Insurance Regulatory Authority (SIRA) and Insurance and Care NSW (icare). The findings and outcomes of recent reviews on the scheme are also considered as part of this chapter.

Role of the Standing Committee on Law and Justice

- 1.1 Under section 27 of the *State Insurance and Care Governance Act 2015*, a committee of the Legislative Council is designated to supervise the operation of the workers compensation scheme. The Standing Committee on Law and Justice (the committee) has been designated to perform this oversight role.
- 1.2 The resolution appointing the committee requires the workers compensation scheme to be reviewed and reported to the Legislative Council at least every two years every Parliament. The same resolution also requires the committee to supervise the operation of other insurance and compensation schemes, including the Compulsory Third Party scheme, Workers' Compensation (Dust Diseases) scheme and the Motor Accidents (Lifetime Care and Support) scheme.³
- 1.3 The committee's last report on the workers compensation scheme, entitled the *2018 review of the Workers Compensation Scheme*, was tabled on 12 February 2019 (the 2018 review). The 2018 review followed a review completed in March 2017, entitled the *First review of the Workers Compensation Scheme* (the first review). Information on the committee's past reviews on the scheme, including the reports, can be found on the [committee's webpage](#).

Overview of the workers compensation scheme

- 1.4 The NSW workers compensation scheme supports people injured at work by providing assistance with the costs of medical and hospital expenses, and providing a range of other supports to aid recovery and return to work. The support provided comes in a number of forms, including weekly benefits, domestic assistance, and education and training, as well as a lump sum payment in the event of death.⁴
- 1.5 Section 3 of the *Workers Compensation and Injury Management Act 1998* sets out the objectives for the workers compensation system, being to:
 - secure workers' health, safety and welfare while preventing work-related injuries
 - provide prompt treatment and rehabilitation to assist injured workers to return to work
 - provide income and treatment payments to injured workers and their families
 - provide a fair, affordable and financially viable system

³ *Hansard*, NSW Legislative Council, 8 May 2019, pp 122-125.

⁴ Submission 22, State Insurance Regulatory Authority, pp 7-8.

- ensure fair pricing of risk considering injury prevention, injury management and return to work
 - deliver an efficient and effective system.⁵
- 1.6 The scheme is the largest defined benefit scheme in Australia and a critical social safety net. In 2019-20, the scheme covered over four million workers, representing \$271 billion in wages. The scheme collected \$3.8 billion in premiums and paid out \$3.2 billion in claim costs. The scheme received 94,689 new claims over the year.⁶
- 1.7 There are four types of insurers operating under the scheme that covers workers in NSW, these are:
- the Nominal Insurer – a statutory insurer responsible for the Workers Compensation Insurance Fund, administered by icare
 - 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, which is in turn administered by icare.
- 1.8 The significant role played by icare in the scheme should be noted at the outset. Ms Carmel Donnelly, Chief Executive of the State Insurance Regulatory Authority (SIRA), explained to the committee that while SIRA has a responsibility to supervise all insurers, its focus has been 'very strongly on icare', due to its impact on the overall scheme:

icare, through the nominal insurer, manages 67 per cent of the claims in the system and, with the Treasury Managed Fund, another 17 per cent. Together, that is 84 per cent of the claims in the system. It is clear that it has a much larger impact on the people of New South Wales than any of the other insurers.⁷

Scheme background

- 1.9 Compulsory workers compensation insurance for employers was introduced in NSW through the *Workers Compensation Act 1926*. Over time, the scheme grew in size and complexity, with concerns over its long term financial sustainability surfacing in the early 2000s. In response to these concerns, significant reforms to the scheme were introduced in 2012, with further changes implemented in 2014 and 2015.

⁵ Submission 22, SIRA, p 8.

⁶ SIRA, *Workers Compensation System Monthly Dashboard – June 2020*, <https://www.sira.nsw.gov.au/resources-library/list-of-sira-publications/accordion/workers-compensation-publications>.

⁷ Evidence, Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority, 3 August 2020, p 31.

- 1.10** The 2012 reforms were significant and controversial. Aiming to reverse the predicted deficits, the reforms introduced changes that were said to incentivise injured workers' return to work. The committee's 2014 *Review of the exercise of the function of the WorkCover Authority of New South Wales* noted that the reforms removed or placed limits on types of claims, introduced caps to weekly benefit entitlements and medical and related payments, and introduced work capacity assessments, among other changes.⁸
- 1.11** Following improvements to the scheme's financial position after the reforms, the NSW Government extended the range of benefits and entitlements available to workers in 2014.⁹ In August 2015, the NSW Government announced a \$1 billion reform package introducing further benefits and entitlements.¹⁰
- 1.12** The 2015 reforms also implemented the committee's 2014 recommendation for a clear separation between the insurance provider and regulator functions, both of which were previously carried by WorkCover NSW. This change led to the creation of three entities: SafeWork NSW as the workplace safety regulator; icare as the insurance and care service provider; and the State Insurance Regulatory Authority as the independent regulator of the NSW insurance schemes.¹¹ The roles of these agencies are discussed below.
- 1.13** Further information on the changes introduced between 2012 and 2015 can also be found in the committee's 2017 *First review of the workers compensation scheme* report, available from the [committee's webpage](#).

SafeWork NSW

- 1.14** SafeWork NSW was established as part of the 2015 reforms and, as the workplace health and safety regulator, inherited WorkCover NSW's functions relating to industry safety. Its role is 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 in NSW.¹²

⁸ Standing Committee on Law and Justice, NSW Legislative Council, *Review of the exercise of the functions of the WorkCover Authority* (2014), p 9.

⁹ Standing Committee on Law and Justice, NSW Legislative Council, *First review of the workers compensation scheme* (2017), p 9.

¹⁰ Standing Committee on Law and Justice, NSW Legislative Council, *First review of the workers compensation scheme* (2017), p 10.

¹¹ Submission 24, NSW Bar Association, p 24 and Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme* (2019), p 10.

¹² Submission 24, NSW Bar Association, p 24 and SafeWork NSW, *What We Do*, <<https://www.safework.nsw.gov.au/about-us/What-we-do>>

icare

- 1.15** icare was established as part of the 2015 reforms, through the commencement of the *State Insurance and Care Governance Act 2015*. It inherited WorkCover NSW's function of supervising scheme agents.¹³
- 1.16** 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.¹⁴
- 1.17** As mentioned previously, icare's role in the scheme is significant given its administration of both the Nominal Insurer (NI) and the Treasury Managed Fund (TMF).
- 1.18** As a public financial enterprise, icare is governed by an independent board of directors. The board consists of the chief executive officer and up to eight other non-executive directors, and is accountable to the NSW Treasurer.¹⁵

State Insurance Regulatory Authority (SIRA)

- 1.19** Established as part of the 2015 reforms, SIRA has responsibility for regulating the workers compensation scheme to ensure that the system is sustainable, fair and affordable, and provides support for workers with a work-related injury.¹⁶
- 1.20** SIRA regulates three statutory insurance schemes in NSW: Workers Compensation, Compulsory Third Party and Home Building Compensation. It also has regulatory functions in other schemes such as the Lifetime Care and Support and Dust Diseases schemes.¹⁷

¹³ Submission 24, NSW Bar Association, p 24.

¹⁴ Standing Committee on Law and Justice, NSW Legislative Council, *First review of the workers compensation scheme* (2017), p 5.

¹⁵ icare, *Our Board*, <<https://www.icare.nsw.gov.au/about-us/our-people/our-board>>

¹⁶ Standing Committee on Law and Justice, NSW Legislative Council, *First review of the workers compensation scheme* (2017), p 2.

¹⁷ Submission 22, SIRA, p 3.

1.21 SIRA's role involves:

- supervising insurers to ensure legislative compliance, and that they 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.¹⁸

1.22 As part of its role as the regulator, SIRA also conducts or commissions reviews in regard to the performance of the scheme. One such example is the 2019 *Independent compliance and performance review of the workers compensation Nominal Insurer*, also referred to as the Dore Review.

Independent Review Office

1.23 The Independent Review Office (replacing the Workers Compensation Independent Review Office (WIRO) from 1 March 2021) is an independent statutory office established under the *Personal Injury Commission Act 2020*.

1.24 The functions of the Independent Review Office, in respect of the workers compensation scheme, are to:

- find solutions for persons injured at work who have complaints about their insurers
- manage and administer the Independent Legal Assistance and Review Service
- conduct inquiries into matters arising in connection with the operation of the workers compensation legislation.¹⁹

1.25 In previous reviews, the committee examined concerns related to the financial independence of the Workers Compensation Independent Review Office – the Independent Review Office's predecessor. While similar concerns were raised during this review, the committee notes that the formation of the new Independent Review Office as a public service agency has, according to Mr Simon Cohen, the Independent Review Officer, involved: 'the setup of new financial, budgeting, information technology, governance and other arrangements necessary to support the effective functioning' of the office.²⁰ Importantly, the office of Independent Review Officer is a statutory office, appointed by the Governor, and the provisions of the *Government Sector Employment Act 2013* relating to the employment of Public Service employees do not apply to that office. This ensures the office's independence.

¹⁸ Standing Committee on Law and Justice, NSW Legislative Council, *First review of the workers compensation scheme* (2017), p 3.

¹⁹ Independent Review Office, *About the Independent Review Office*, <<https://iro.nsw.gov.au/about-iro>>

²⁰ Correspondence, from Mr Simon Cohen, Independent Review Officer to Chair, 23 February 2021.

Developments since the 2018 review

- 1.26** The committee's 2018 review focused on the establishment of a consolidated personal injury tribunal for compulsory third party and works compensation dispute resolution, which was a recommendation from the first review. In the 2018 review, the committee considered the appropriate model for the tribunal, its placement in NSW government, as well as guiding principles regarding its establishment.²¹
- 1.27** The 2018 review also focussed on other legislative and operational issues, including the complexity of calculations for pre-injury average weekly earnings (PIAWE), the cessation of weekly benefits after 260 weeks and the management of the transition, and other legislative ambiguities in the scheme. This section outlines key developments since the committee's 2018 review.

Personal Injury Commission Act 2020

- 1.28** The *Personal Injury Commission Act 2020* was enacted on 11 August 2020 to establish the Personal Injury Commission of New South Wales, consolidating the workers compensation and compulsory third party dispute resolution systems into a single personal injury tribunal. In introducing the legislation, the Hon Victor Dominello MP, Minister for Customer Service, noted that the Personal Injury Commission drew on the work and recommendations of the committee, as well as feedback from consultations with stakeholders in the scheme.²²
- 1.29** Effective from 1 March 2021, the *Personal Injury Commission Act 2020* consolidated the functions of the Workers Compensation Commission, the State Insurance Regulatory Authority's Dispute Resolution Service, the Motor Accidents Claim Assessment and Resolution Service, and the Motor Accidents Medical Assessment Service to the Personal Injury Commission.

Independent Compliance and Performance Review of the Nominal Insurer

- 1.30** In 2018, the State Insurance Regulatory Authority (SIRA) monitored aspects of the Nominal Insurer's performance and compliance and observed some concerning trends. In February 2019, the Chief Executive of SIRA commissioned the *Independent Compliance and Performance Review of the Workers Compensation Nominal Insurer managed by icare* and appointed Ms Janet Dore as the Independent Reviewer (hence it being referred to as the Dore Review). The Dore Review was supported by SIRA's officers as well as actuaries from Ernst and Young.²³
- 1.31** The terms of reference for the review were to:
- assess Nominal Insurer compliance with the market practice and premium guidelines and identify any unintended consequences, risks and priorities for improvement in SIRA regulation of the premiums of the Nominal Insurer

²¹ Standing Committee on Law and Justice, NSW Legislative Council, *2018 review of the workers compensation scheme* (2017), viii.

²² *Hansard*, Legislative Assembly of NSW, 3 June 2020, p 2,367.

²³ Submission 22, SIRA, p 10.

- identify the benefits and risks to the performance of the NSW workers compensation system arising from icare's implementation changes to the Nominal Insurer operating model and supporting digital platforms
 - assess the Nominal Insurer's performance in relation to return to work outcomes, claims management, customer experience and data quality and reporting.²⁴
- 1.32** The Dore Review observed that '... icare, as the responsible entity for the Nominal Insurer, has implemented an ambitious (case management) model based on principles of triage, injured worker empowerment and straight through processing', and that this was implemented within an equally ambitious timeframe.²⁵
- 1.33** The Independent Reviewer concluded:
- The new claims model led to a significant deterioration in the performance of the NI, through poorer return to work rates, underwriting losses, no competition and therefore, concentration of risk. While investment returns for icare have bridged the gap in underwriting losses, the current economic environment of low returns does not bode well.
- The deterioration in the performance of the NI... has continued, with much of the decline coinciding with the implementation of the new claims model. icare suggests that the deteriorating performance is the result of factors beyond its control.
- While there have been some external factors that affected the deteriorating performance of the NI, the primary driver for the decline is the implementation and operation of the new claims model implemented by icare.²⁶
- 1.34** These issues are examined further in Chapter 2 of this report.
- 1.35** Responding to the review, SIRA accepted 11 of the Dore Review's 13 recommendations, and introduced a 21-point action plan for improvement. icare also accepted the recommendations supported by SIRA.²⁷
- 1.36** According to SIRA, the 21-point action plan provides a 'foundation for fact-based steady improvement'. A number of initiatives within the plan will increase transparency and improve performance scheme wide. SIRA stated that it is 'continuing to hold icare accountable for delivery of actions in response to the Review, while noting that the impact of the COVID-19 pandemic has created some disruption to planned activities as well as some additional risk'.²⁸

²⁴ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme* (2019), p 6.

²⁵ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme* (2019), p 5.

²⁶ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme* (2019), p 5.

²⁷ Submission 22, SIRA, pp 11-12.

²⁸ Submission 22, SIRA, p 12.

- 1.37 SIRA is supervising the Nominal Insurer closely and will report publicly on progress against the action plan, the performance of the Nominal Insurer and the workers compensation system more broadly.²⁹

New South Wales Auditor-General's Report of Central Agencies 2020

- 1.38 On 10 December 2020, the NSW Auditor-General published an audit of the financial statements of central agencies, the scope of which included icare.³⁰
- 1.39 The Auditor General's report found that the Nominal Insurer, NSW Self Insurance Corporation and Lifetime Care and Support Authority of NSW – all managed by icare – had negative net assets at 30 June 2020. The report stated:

This means that at 30 June 2020, these icare entities did not hold sufficient assets to meet the estimated present value of all of their future payment obligations.

...

The implications of these agencies' net asset deficiencies is that they are not fully funded for all expected future payments from their schemes. Each agency needs to implement solutions to resolve all unfunded scheme positions. Possible actions could include changes to investment strategies or premium and contribution rates, or identifying cost savings in the claims and expense management areas.³¹

- 1.40 The Auditor General's report also noted increases in outstanding claim liabilities in both the Nominal Insurer and the Treasury Managed Fund schemes, and that icare's practices did not comply with the *Government Information (Public Access) Act 2019* and the NSW Government's Procurement Policy Framework.³² These matters are discussed further in Chapter 3 of this report.

Independent Review of icare governance, accountability and culture

- 1.41 As part of the 21-point action plan introduced in response to the Dore Review, SIRA recommended icare commission an independent review into 'the culture, governance and accountability in the icare team and agents managing the Nominal Insurer'.³³ icare commissioned PwC on 6 October 2020 to undertake such a review.
- 1.42 The PwC review, finalised in February 2021, found that:
- there is a lack of clarity in the type of organisation icare is seeking to be and the compliance standards it is seeking to achieve

²⁹ Submission 22, SIRA, p 12.

³⁰ Audit Office of NSW, *Central Agencies 2020*, 10 December 2020, p 26.

³¹ Audit Office of NSW, *Central Agencies 2020*, 10 December 2020, p 26.

³² Audit Office of NSW, *Central Agencies 2020*, 10 December 2020, pp 28-29; 32.

³³ State Insurance Regulatory Authority, *Response and Actions* <<https://www.sira.nsw.gov.au/fraud-and-regulation/review-of-the-nominal-insurer/Response-and-actions#21>>

- customer vision continues to be at the core of what drives and energises icare, however, the discipline for delivering timely and quality outcomes to customers and listening to customer feedback has not been appropriately represented in governance processes, and employees have not been fully held to account
- accountability, voice, challenge and framework for risk and compliance requires significant improvement and embedding into the organisation
- a need to significantly improve the identification, escalation and approach to issues management, with support through adequate policies, procedures and processes and well as organisation wide training
- icare's relationship with external stakeholders, in particular the State Insurance Regulatory Authority and EML, has not been as constructive as it should be
- accountabilities for decisions, outcomes and performance have not been well-defined or embedded, and need to be supported by an appropriate performance and consequence management framework
- icare's leadership has not invested sufficient time in reflecting, learning and course-correcting.³⁴

Independent review of icare and State Insurance and Care Governance Act 2015

- 1.43** On 4 August 2020, the Treasurer, the Hon Dominic Perrottet MP and the Minister for Customer Service, the Hon Victor Dominello MP, announced that a scheduled statutory five-year review into the workers compensation scheme would be brought forward.
- 1.44** Led by the Hon Robert McDougall QC as the Independent Reviewer, this review will conduct a comprehensive organisational review of icare, and consider operational matters such as claims management, the claims agent model and incentive structures, return to work performance and the service provided to injured workers. The review will also examine icare's delivery of recommendations from the Dore Review, as well as the organisation's culture, governance, executive remuneration, board effectiveness and accountability, procurement practices, the management of probity matters and relationship with SIRA.
- 1.45** In addition, it will:
- review the Nominal Insurer and Treasury Managed Fund schemes and the legislative framework that supports them, to consider whether they are meeting policy objectives and are financially sustainable
 - undertake a statutory review required by section 32 of the *State Insurance and Care Governance Act 2015*, to consider whether the policy objectives of the Act remain valid, and whether the terms of the Act remain appropriate for securing those objectives

³⁴ PwC, *Independent Review of icare governance, accountability and culture* (February 2021), p 5.

- make recommendations for improvement in relation to the organisational effectiveness of icare, the financial stability and management of the workers compensation schemes and any changes required to legislation.³⁵
- 1.46 The review is planned to be completed by the end of April 2021, with a possibility of the report being delivered earlier if practicable.³⁶

Committee comment

- 1.47 The committee notes that this review has followed or operated alongside a number of other investigations and reviews into icare, including the Dore Review, the Auditor General's report on Central Agencies and PwC's recent review of icare's governance, accountability and culture. These reviews have also occurred against a backdrop of intense media scrutiny about icare's operations. The committee's work in holding public hearings to test the responses of icare management and the government to the concerns being raised in the public arena has had an important role in delivering accountability.
- 1.48 Taking into account all the concerns that have come to light, this review has necessarily focussed on the financial performance of the workers compensation scheme as well as the performance and administration of icare, particularly in relation to the Nominal Insurer. Undeniably, it has been critical in identifying a number of significant issues relevant to icare's performance and operations, bringing these issues into the public domain.
- 1.49 The committee cannot stress enough that these issues need to be addressed by the NSW Government as a matter of priority. While we have made a number of recommendation to assist moving forward, and await the findings of the McDougall review due at the end of April 2021, it should come as no surprise that the committee will continue to closely monitor the performance of the scheme over the next six to twelve months. The committee takes its oversight responsibilities very seriously, and will, if necessary, conduct additional reviews to ensure the scheme and icare is performing appropriately.

³⁵ NSW Treasury and NSW Department of Customer Service, *Terms of Reference for the icare and State Insurance and Care Governance Act 2015 Independent Review*, September 2020, p 2.

³⁶ NSW Treasury and NSW Department of Customer Service, *Terms of Reference for the icare and State Insurance and Care Governance Act 2015 Independent Review*, September 2020, p 5.

Chapter 2 Scheme performance

This chapter focuses on the financial position of the Nominal Insurer and Treasury Managed Fund, both of which are managed by icare. In particular, it will consider the current funding ratio, claims liability and underwriting results of the Nominal Insurer. It will also consider whether icare's transition to a new claims management model has affected its performance. Relative to the overall performance of the workers compensation scheme, the chapter will also discuss return to work rates and consider the adequacy of SIRA's regulatory powers, particularly in relation to the Nominal Insurer.

Financial performance

- 2.1 As noted by SIRA, the performance of the workers compensation scheme has been impacted by declining return to work rates and increasing claim costs since 2017. This section will outline the financial position of the Nominal Insurer, particularly in terms of its funding ratio, underwriting loss and liabilities. The financial position of the Treasury Managed Fund will also be considered.

Financial position of the Nominal Insurer

- 2.2 The Nominal Insurer, managed by icare, holds the majority of the scheme's market share, accounting for around 65 per cent of total active claims, providing cover for more than 320,000 employers, collecting \$2.3 billion in premiums and paying around \$1.97 billion in claim-related costs per year.³⁷
- 2.3 At a hearing in December 2020, icare confirmed that the Nominal Insurer net loss for the year ending 30 June 2020 was \$1.894 billion, with a net underwriting loss of \$2.195 billion, translating to a net loss in excess of \$2.5 billion over the past two years and an underwriting loss above \$5 billion over the past three years.³⁸ Ms Rashi Bansal, Group Executive, Organisational Performance of icare, explained that the main difference between underwriting loss and net loss is investment income, which is a 'critical source of income and aspect that is used in all insurance companies'.³⁹
- 2.4 The Dore Review considered the Nominal Insurer's financial position, particularly in relation to liability valuations, costs, premium setting, operational reforms, risk management, return to work rates and data quality. In terms of the Nominal Insurer's financial performance, the Dore Review also looked at the funding ratio, which is the ratio of available assets to estimated liabilities.⁴⁰

³⁷ Submission 22, SIRA, p 10.

³⁸ Evidence, Ms Rashi Bansal, Group Executive Organisational Performance, icare, 2 December 2020, pp 7-8.

³⁹ Evidence, Ms Bansal, 2 December 2020, p 12.

⁴⁰ Submission 20, icare, p 2.

- 2.5 The Dore Review identified a steady deterioration in the funding ratio of the Nominal Insurer, with the trend pre-dating the COVID-19 pandemic. The Dore Review noted that the Nominal Insurer's financial position, while solvent, was below the target range set by the icare Board.⁴¹
- 2.6 The deterioration in the funding ratio over three financial years is illustrated in the figure below. Put simply, the figures show that the scheme's assets were 19 per cent more than its liabilities in 2016-17, but that this decreased to around 12 per cent in 2018-19.

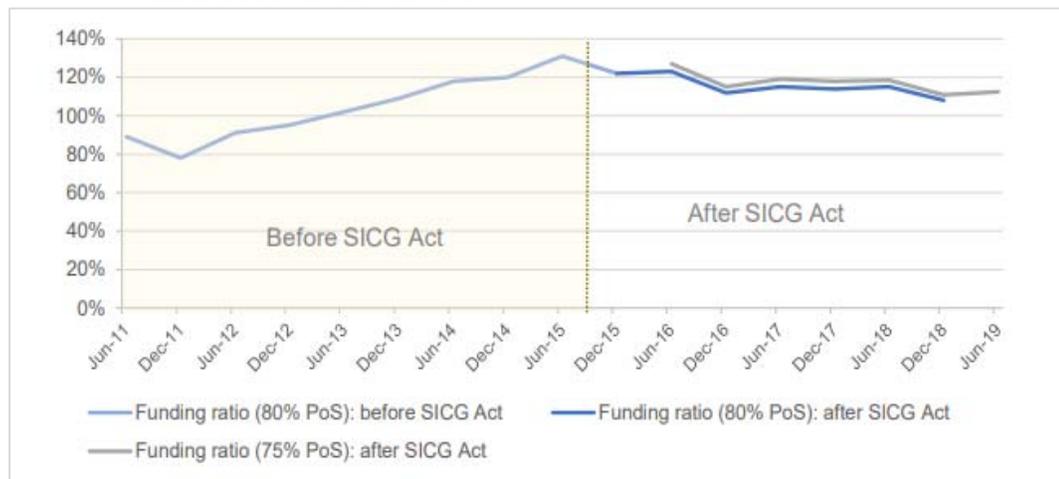
Figure 1 Nominal Insurer Funding Ratio



Source: Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme, p 36.

- 2.7 The Dore Review noted that the deterioration coincided with the 2015 reforms which replaced WorkCover with SafeWork NSW, icare and SIRA.⁴² This is demonstrated below in figure 2.

Figure 2 Nominal Insurer Funding Ratio before and after the *State Insurance and Care Governance Act 2015*



Source: Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme, p 37.

⁴¹ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, p 36.

⁴² Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, p 37.

- 2.8** When asked about the Nominal Insurer's funding ratio, Ms Bansal confirmed that the decline has continued since the publication of the Dore Review, advising that the funding ratio as at 30 June 2020 was 101 per cent at 75 per cent probability of adequacy.⁴³
- 2.9** As a point of comparison, Ms Donnelly explained that specialised insurers, regulated by the Australian Prudential Regulation Authority, had funding ratios that ranged from 170 per cent to 250 per cent as at June 2020.⁴⁴
- 2.10** Another metric considered in the Dore Review was the underwriting result, which refers to the amount of profit or loss in a given period, exclusive of net investment income. The Dore review noted that the Nominal Insurer's underwriting result was negative \$2.5 billion for 2018-19, representing a deterioration from the previous year.⁴⁵
- 2.11** The Dore Review attributed the deterioration in the finance position of the Nominal Insurer to a growth in outstanding claims liability – the estimated future costs associated with claims – which amounted to \$16.5 billion in 2018-19.⁴⁶ It also observed an increasing reliance on investment incomes by the Nominal Insurer to 'bridge the gap between the negative underwriting result and the final profitability figure'.⁴⁷
- 2.12** The Dore Review concluded that the deterioration in the Nominal Insurer financial position was an issue of growing costs, rather than an issue of income. The review stated: 'Much of the decline has been caused by increasing claims costs, mostly due to increasing weekly payments and medical costs. These costs may also be related to the declining RTW (return to work) rate'.⁴⁸
- 2.13** Further, the Dore Review found that the Nominal Insurer's financial position was vulnerable as a result:
- In financial terms, the position is somewhat fragile and while investment capacity is extensive on the icare Board, the fundamentals of RTW, underwriting, and claims management have not met expectations and do not compare well with the pre-reform outcomes.⁴⁹
- 2.14** When asked about the matter during her appearance before the committee, Ms Dore confirmed that she was concerned about the sustainability and solvency of the Nominal Insurer as she was working on the report, and that she continued to stand by the report's finding that 'the poor underwriting position of the Nominal Insurer is a real risk to the Nominal Insurer's sustainability'.⁵⁰
- 2.15** Other inquiry participants supported Ms Dore's concerns in relation to the financial position of the Nominal Insurer. Mr Peter McCarthy, a former actuary who served as the principal actuary for SIRA for the scheme, and was a partner of Ernst and Young, described the performance of

⁴³ Evidence, Ms Bansal, 2 December 2020, p 9.

⁴⁴ Answers to Questions on Notice, SIRA, 10 September 2020, p 7.

⁴⁵ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, p 38.

⁴⁶ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, p 40.

⁴⁷ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, p 38.

⁴⁸ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, p 56.

⁴⁹ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, p 77.

⁵⁰ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, p 39.

the Nominal Insurer as an 'unmitigated social and financial disaster' that has 'squandered billions of employer money'.⁵¹

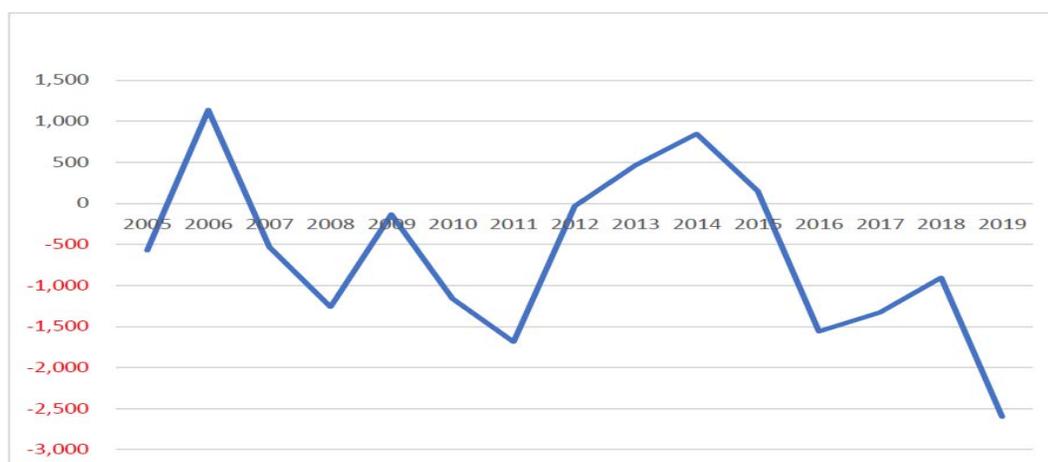
2.16 In his evidence, Mr McCarthy suggested to the committee that the financial position of the Nominal Insurer is back to levels that prompted the 2012 reforms:

icare inherited an NI funding ratio of 131% or a \$4b surplus when it was created. That strong funding ratio was due almost exclusively to the reduction in injured workers compensation benefits arising from the 2012 legislative reforms. Before the 2012 reforms the funding ratio was around 90%.

In the last five years the funding ratio has reduced from 131% to less than 100% (on icare's basis of accounting since 2015) – this is a dramatic reduction of \$4b over a relatively short period. Projecting current trends, the funding ratio will reduce to below 90% in the next two years and possibly even in 2021, that is worse than before the 2012 legislative reforms.⁵²

2.17 Figure 3, submitted to the committee by Mr McCarthy, illustrates the underwriting results since 2005, and was used to support his argument that the Nominal Insurer's position is 'now worse than any period leading up to the 2012 legislative reforms'.⁵³

Figure 3 Nominal Insurer underwriting result (\$m)



Source: Submission 25, Mr Peter McCarthy, p 53.

2.18 Mr McCarthy further contended that:

- Nominal Insurer premium rates are the least adequate they have been in the last 15 years, half as adequate as in 2012 and 2013 and more than 35 per cent less adequate than before 2011
- operational cash flow in the two years to 2019 is \$600 million per annum worse off than in the few years leading up to the 2012 reforms

⁵¹ Evidence, Mr Peter McCarthy, Former Partner, Ernst and Young and Former Principal Actuary, NSW Workers Compensation System and CTP, SIRA, 23 November 2020, p 18.

⁵² Submission 25, Mr Peter McCarthy, p 2.

⁵³ Submission 25, Mr Peter McCarthy, p 53.

- the metrics of underwriting losses, operational cash flow, premiums collection, premium debtors, claim payments, expense levels and return to work rates are all at historically low levels, and comparable to times before icare was created and the 2012 reforms.⁵⁴
- 2.19** Based on his analysis, Mr McCarthy argued that the Nominal Insurer's financial position will continue to deteriorate unless significant changes are made.⁵⁵
- 2.20** The Chief Executive of the State Insurance Regulatory Authority, Ms Carmel Donnelly, also explained to the committee her concerns regarding the viability of the Nominal Insurer scheme, observing that its existing vulnerabilities are compounded by the COVID-19 pandemic:
- ... I will say that right now is obviously a very challenging time in terms of COVID. It is an extraordinary time in terms of where the funding position may be for insurers ... in terms of both the investment performance and the underwriting performance.
- What I would say is that the nominal insurer stands out for the level of risk because we entered this period of the pandemic with them already having such a deterioration in return to work and in the funding ratio and, as has been called out by the independence compliance and performance review and commented on in budget estimates already, that means there is a reliance on returns on investment. And the size means it is very material for New South Wales'.⁵⁶
- 2.21** Subsequent to this review's hearings, the Auditor General published an audit of financial statements of central agencies, the scope of which included icare. As noted in Chapter 1, the Auditor General's report found that the Nominal Insurer had negative net assets as at 30 June 2020. According to the Auditor General this means that icare is not 'fully funded for all expected future payments'.⁵⁷

icare's perspective on the performance of the Nominal Insurer

- 2.22** Members of icare's executive team and Board acknowledged the financial position of the Nominal Insurer during this review, although some questions were raised as to whether factors outside of icare's control were affecting the performance of the scheme.
- 2.23** At a hearing on 2 December 2020, Ms Bansal explained that there are four main influences on the financial position of the Nominal Insurer that are outside icare's control: '... the 2012 reforms, the 2015 reforms, the change in the risk-free rates in this current environment and medical costs'.⁵⁸
- 2.24** In its submission, icare also explained that fluctuations in the funding ratio can be caused by a number reasons:

⁵⁴ Submission 25, Mr Peter McCarthy, p 2.

⁵⁵ Submission 25, Mr Peter McCarthy, p 2.

⁵⁶ Evidence, Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority, 3 August 2020, p 52.

⁵⁷ Audit Office of NSW, *Central Agencies 2020*, 10 December 2020, p 26.

⁵⁸ Evidence, Ms Bansal, 2 December 2020, p 13.

The funding ratio fluctuates up and down as the value of the assets and liabilities move. Volatility occurs from changes in accounting standards or practice, movements in global investment markets, legislative or regulatory changes that impact benefits or costs, long-term views on inflation, or overall investment expectations. Given the long-term nature of the scheme, small changes can lead to large, prolonged impacts on the funding ratio.⁵⁹

2.25 Mr David Plumb, a member of the icare Board and the Chair of the Board's audit and risk committee at the time of his appearance before the committee on 24 August 2020, explained that the drop in funding ratio since the creation of icare was due to a number of reasons, and that they were independent of icare's management and operations. Mr Plumb noted that the 2015 reforms – which reversed some of the 2012 changes to increase entitlements of injured workers – were not booked when icare was created. Instead, the changes were booked in 2016, and that 'the effect of that was \$1 billion, or 9.6 per cent approximately the funding ratio'.⁶⁰

2.26 Another significant factor noted was the additional claims liabilities arising from a 2017 program of work, where icare closely examined injured workers around the 20 per cent whole body impairment threshold, granting continued support to a significant number of injured workers as a result. Mr Plumb informed the committee that the additional claims liabilities cost the Nominal Insurer \$1.4 billion, or 11 per cent in terms of the funding ratio.⁶¹

2.27 Mr Plumb also noted the increase in medical costs and impact of COVID-19:

If we take those two amounts together, we end up with around about 109 per cent or 110 per cent as the funding ratio as applied after those legislative changes. Then, in addition to that, there are obviously a number of other factors that are what I would call ups and downs on the profile. The increase in medical costs previously referred to as the superimposed inflation, which impacted the scheme right through 2013-14—and you can see in various actuarial reports that covered out—led to about a \$1.4 billion decrease.

Then the other significant decrease that I could say has occurred in this period is the impact of COVID-19...⁶²

2.28 When asked to elaborate how COVID-19 has impacted the Nominal Insurer, Mr Plumb explained that it has translated to an impact of around \$1 billion, or around 5 per cent in terms of the funding ratio at 80 per cent probability of adequacy.⁶³

2.29 Mr Plumb explained that the \$1 billion impact comprised factors such as reductions in premiums collected, the need for additional reserves given changes in future claims assumptions, and the anticipated impact of the pandemic on investment income:

The impact has approximately been 5 per cent on the funding ratio at 80 per cent, and that is approximately \$1 billion. That is made up of a number of components.

⁵⁹ Submission 20, icare, p 2.

⁶⁰ Evidence, Mr David Plumb, Chair of Audit and Risk Committee, icare Board, 24 August 2020, p 55.

⁶¹ Evidence, Mr Plumb, 24 August 2020, p 55.

⁶² Evidence, Mr Plumb, 24 August 2020, p 55.

⁶³ Evidence, Mr Plumb, 24 August 2020, p 56.

The first component is there has been 110 million, in the current period, reduced in premiums in the final quarter of the year. Obviously, as we know, employment is dropping off and the wage bill has reduced. That has been booked in this year. In addition to that, there is approximately \$260 million that the actuary has reserved for on a future basis in relation to the current level of claims assumptions, which will impact through return to work because, inevitably in a situation such as COVID-19, there are less jobs available for people to go back to. They are more disparate from their employers, and that is one of the major issues that the scheme will face going forward.

The final issue is the investment markets have overall declined from where we were in the COVID period. That is approximately \$600 million on a net basis for the Nominal Insurer...⁶⁴

2.30 On this, the committee explored the context in which the Treasurer decided to freeze premiums at the beginning of COVID-19, taking into account the financial position of the Nominal Insurer. Mr Michael Pratt, Secretary of NSW Treasury, confirmed that he was aware of the Nominal Insurer's deteriorating financial position, even when the freeze on workers compensation premiums was announced in the early stages of the COVID-19 pandemic.⁶⁵

2.31 Mr Pratt told the committee that he would have raised issues with the Treasurer at the time the COVID-19 responses were being discussed, given the freeze would cost the Nominal Insurer scheme \$325 million. Mr Pratt stated that the Treasurer 'would have understood the trade-off between the funding issues of the NI and the desire to support businesses through COVID'.⁶⁶

2.32 Taking into account these external factors, and contrary to the views of Ms Dore and SIRA, icare representatives were of the view that the financial position of the Nominal Insurer remained 'reasonable'. Mr Michael Carapiet, former Chair of the icare Board, stated:

... we accept that we have to continue improving. icare acknowledges that the NI's return-to-work rate has fallen faster than other New South Wales workers compensation insurers and needs to get better ... However, the financials for the NI are in reasonable health—at 101 per cent at 75 per cent probability of adequacy. Subject to COVID-19 abating as expected, no drastic measures are needed.⁶⁷

2.33 The new chair of the icare Board, Mr John Robertson, who was appointed on 25 September 2020 following the departure of Mr Carapiet, also encouraged the committee to keep an open mind on the performance of icare, particularly given the difficult operating environment impacting the organisation:

I have spent 25 years around the workers compensation scheme. Starting from this premise that the scheme is in crisis is a very dangerous thing to be doing on the part of this Committee...

This is a scheme that is functioning in very difficult circumstances right now with the COVID pandemic. It is a one in 100 years.⁶⁸

⁶⁴ Evidence, Mr Plumb, 24 August 2020, p 56.

⁶⁵ Evidence, Mr Michael Pratt, Secretary, NSW Treasury, 9 September 2020, p 24.

⁶⁶ Evidence, Mr Pratt, 9 September 2020, p 24.

⁶⁷ Evidence, Mr Michael Carapiet, Chair, icare Board, 24 August 2020, p 41.

⁶⁸ Evidence, Mr John Robertson, Chair of the icare Board, 2 December 2020, p 13.

2.34 Mr Don Ferguson, then Interim Chief Executive of icare in December 2020, acknowledged that the Nominal Insurer will be in deficit in the coming financial year, and that icare is aiming to bring the scheme back into a positive financial territory within seven years. Accepting responsibility for the state of the scheme, Mr Ferguson stated:

... there are a number of factors that contribute to the financial position of the scheme and one of those factors is performance and certainly the performance of the Nominal Insurer when it comes to claims is not where the organisation would like to be.⁶⁹

2.35 Mr Ferguson explained to the committee that the organisation has introduced 'numerous key changes' in order to 'be the organisation that people expect us to be'.⁷⁰ The introduced changes included:

- improvements to the new claim management model, with the dedicated case manager threshold changed to seven days
- alignment of key performance metrics, including the return to work rate with SIRA
- establishment of the Nominal Insurer advisory group, comprising representatives from unions, employer groups and government bodies to provide advice on significant changes to icare operations
- a new tender for claims management to be implemented in mid-2021
- establishment of the new Board governance committee and appointment of an advisor
- stronger internal policies on conflicts of interest, secondments, declaration of interests
- strengthened procurement practices and policies.⁷¹

2.36 Mr Ferguson, echoing Mr Carapiet's earlier evidence that 'no drastic measures are needed',⁷² expressed a view that the performance of the Nominal Insurer is and will continue to improve through icare's renewed efforts:

Things are changing. Our fully unqualified audited workers compensation funding position at June 2020 is at 101 per cent. Our return to work rates are no longer declining and we are starting to see improvements. That said, we all recognise that we are still a way off what the community, the Government and this Committee expects of us. We will work tirelessly to earn your confidence through outcomes, not words.⁷³

2.37 However, Ms Carmel Donnelly, Chief Executive of SIRA, noted her reservations regarding icare's optimistic outlook. In explaining her position, Ms Donnelly provided the committee with a copy of the report, *Key risks associated with the 31 December 2019 Nominal Insurer valuation*. The report, commissioned by SIRA and completed by Ernst and Young, examined the December valuation of the Nominal Insurer scheme by the scheme actuary. Ms Donnelly stated that the

⁶⁹ Evidence, Mr Don Ferguson, Interim Chief Executive Officer, 2 December 2020, p 12.

⁷⁰ Evidence, Mr Ferguson, 2 December 2020, p 2.

⁷¹ Evidence, Mr Ferguson, 2 December 2020, p 2.

⁷² Evidence, Mr Carapiet, 24 August 2020, p 41.

⁷³ Evidence, Mr Ferguson, 2 December 2020, p 2.

report's findings had made her '... wonder whether there was a risk of a bias towards positivity' within icare in regard to its future outlook.⁷⁴

2.38 For instance, Ms Donnelly noted that the actuary's valuation of the liabilities included 'an expectation that an increased number of people – injured workers – will be exited off benefits through work capacity decision'.⁷⁵ SIRA further advised that other potential areas where a risk of bias towards positivity could exist include the valuation of weekly benefits, valuation of medical benefits and uncertainty in the valuation of work injury damages claims.⁷⁶

2.39 Mr McCarthy made a more critical assessment of the future outlook of the Nominal Insurer scheme managed by icare, predicting that the loss experienced by the Nominal Insurer would likely further deteriorate in coming years to a point where it becomes unsustainable:

If the level of the understatement of the NI's claims liabilities emerges at the levels I estimate then the NI's financial position will end up in an extremely poor situation over the next few years that will be considerably worse than the position the scheme was in prior to the 2012 legislative changes.⁷⁷

2.40 Mr McCarthy also observed that the persistence in underwriting loss of the Nominal Insurer will place an upward pressure on premiums, and that around a '40 per cent increase, or an additional \$1 billion a year' will be required to reduce the losses to 'a more sustainable level'.⁷⁸

2.41 To Mr McCarthy, the Nominal Insurer's performance was directly attributable to the lack of skills and experience held by icare's management and Board:

Do not be fooled by the message that the workers compensation scheme today is better than it was. The evidence indicates it is in substantially worse shape. The icare disaster was caused by appointment of Board members who had no experience in personal injury or workers compensation, who then appointed management with no experience in workers compensation or personal injury...

... the rest of icare's Board must be replaced with at least two people with extensive and successful experience in personal injury, one with claims management and one an actuary... icare executives must be replaced with people having successful experience in workers compensation, especially claims management...⁷⁹

2.42 While the experience of icare's management and Board is discussed in Chapter 3, the committee notes the significant turnover in these positions recently. This included the resignation of Mr Nagle in August 2020, which led to Mr Ferguson serving as the interim Chief Executive Officer and Managing Director until the appointment of Mr Richard Harding in February 2021. The Board has also seen resignations of three members in 2020, with the new chair, Mr John Robertson, appointed in September 2020.⁸⁰

⁷⁴ Evidence, Ms Donnelly, 3 August 2020, p 43.

⁷⁵ Evidence, Ms Donnelly, 3 August 2020, p 44.

⁷⁶ Answers to questions taken on notice, SIRA, 10 September 2020, p 3.

⁷⁷ Submission 25, Mr Peter McCarthy, p 4.

⁷⁸ Evidence, Mr McCarthy, 23 November 2020, p 23.

⁷⁹ Evidence, Mr McCarthy, 23 November 2020, p 18.

⁸⁰ icare, *News and Stories*, <<https://www.icare.nsw.gov.au/news-and-stories>>

The impact of the new claims management model

- 2.43** A number of stakeholders associated icare's new claim management model as a key factor affecting the performance of the Nominal Insurer.
- 2.44** In 2018, icare implemented a new claim management model based on principles of triage to be administered by one insurance agent – EML – for all new claims, with GIO and Allianz engaged to manage long-tail claims. The triaging is undertaken by an algorithm, and has been designed on the 80/20 rule assumption. This means that 80 per cent of new claims are considered to be medical only or a short-term loss of work, and the remaining 20 per cent assumed to be in need of more intensive case management. Under this model, the majority of injured workers are not assigned a case manager.⁸¹
- 2.45** The transition to this model also saw the introduction of the Nominal Insurer Single Platform in February 2019, a new, uniform IT platform that replaced the number of systems that were used by previous scheme agents.⁸²
- 2.46** According to the Dore Review, icare's transition to the new claims management model was 'too ambitious, too costly and too quick'.⁸³ It concluded:

The ambition of the model was matched by the ambition of the timeframe for implementation and the control by icare over the primary provider EML. This has caused substantial confusion within the market and employers in particular, have complained about the lack of involvement in return to work (RTW) plans and claims verification. The new claims model led to a significant deterioration in the performance of the NI, through poorer return to work rates, underwriting losses, no competition and therefore, concentration of risk.⁸⁴

...

While there have been some external factors that affected the deteriorating performance of the NI, the primary driver for the decline is the implementation and operation of the new claims model implemented by icare.⁸⁵

- 2.47** The Dore Review also observed a deterioration in the Nominal Insurer's return to work rate following the introduction of the Nominal Insurer Single Platform:

Deterioration in NI RTW performance followed shortly after the introduction of the new claims model in January 2018. Further deterioration occurred following the launch of the Nominal Insurer Single Platform (NISPS), in February 2019. The cohort operating

⁸¹ Evidence, Mr Anthony Fleetwood, Chief Executive Officer, Employers Mutual Limited, 24 August 2020, pp 27 and 29.

⁸² Evidence, Ms Janet Dore, Independent Reviewer, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, 24 August 2020, p 5.

⁸³ Evidence, Ms Dore, 24 August 2020, p 2.

⁸⁴ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, p 5.

⁸⁵ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, p 5.

under the new claims model will continue to grow and therefore further impact NP's overall performance.⁸⁶

2.48 Return to work rates are discussed from paragraph 2.79.

2.49 When asked by the committee to explain how the new claims model translated to poorer outcomes for the Nominal Insurer, Ms Dore noted that the principles of triage and self-management – integral to the new model – were incongruent with the fundamentals of personal injury management:

I certainly understood the intent of the triage model to process the majority of applications for compensation through the system to let people manage their own recovery. And that might work in the majority of cases.

But I go back to the fundamental point that in personal injury management early intervention through case management is a key principle. I think the triage model, consistently we saw that the model was putting cases into the wrong buckets for handling, if you like, so whether it was a severe or moderate injury. This was misaligning those things and I do not believe that case management was applied anywhere near thoroughly enough.⁸⁷

2.50 Similarly, Mr McCarthy was critical of the new claims management system, arguing that '... it is impossible to effectively triage a claim when the claim is first reported ... the triage process is poorly designed and underestimates the vast number of variables associated with personal injury claims'.⁸⁸

2.51 In criticising this approach to the triaging of claims, Mr McCarthy submitted that:

- there is insufficient medical information available about the injury when claims are first notified, as doctors need to see how the injury develops and responds to treatment, or conduct further diagnostic tests before making an accurate assessment
- the initial claim details will not have enough details on the work environment
- the injured workers personal circumstances, such as family support, financial situation and mental health state will not be comprehensively captured in the claim details at the onset of the claim report.⁸⁹

2.52 Mr McCarthy described the triaging as the 'core of the problem', because '... the longer it takes for active management of a claim to occur the worse the return to work outcomes'.⁹⁰

2.53 Similarly, Business NSW described the triaging of claims as one of 'a number of observable problems with the new model', contending that the approach '... takes a 'cookie cutter'

⁸⁶ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, pp 42-43.

⁸⁷ Evidence, Ms Dore, 24 August 2020, p 3.

⁸⁸ Submission 25, Mr Peter McCarthy, p 21.

⁸⁹ Submission 25, Mr Peter McCarthy, p 21.

⁹⁰ Submission 25, Mr Peter McCarthy, p 22.

approach and fails to take into account the nature of the workplace and the ability of the employer to offer suitable duties'.⁹¹

- 2.54** When asked about this issue at the hearing, Ms Dore noted a longitudinal study of clients conducted by the Transport Accident Commission of Victoria. The study, which tracked a cohort of 1,000 injured workers over a three-year period, found that individual circumstances made a significant difference in terms of return to work outcomes. Ms Dore explained:

... the bottom line was a person with a serious injury, loss of an eye, who was a university lecturer got back to work in less than two months and a woman with a neck injury, who had three children, was a sole parent, deteriorated into severe depression and did not get back to work at all.⁹²

- 2.55** Relevant to this, some stakeholders questioned the merits of appointing a single scheme agent. Stakeholders representing employers, workers and service providers generally preferred the previous model where multiple insurance providers operated in competition. On the other hand, representatives from icare reflected on the flaws of the old model, and contended that significant administrative efficiencies have been gained by the appointment of EML.

- 2.56** According to Unions NSW, the transition to a single scheme agent was a 'questionable move', resulting in a monopoly at the expense of claimant experience.⁹³ This view was supported by Business NSW, who noted that the level of service under the old model, with dedicated case management, was of a higher standard:

Prior to the 2015 amendments, employers could choose from five scheme agents. Choice ensured the interests of both employers and their injured workers were better protected as competitive tension resulted in a level of service far greater than what is currently available from today's system ...⁹⁴

- 2.57** Similarly, the Australian Rehabilitation Providers Association outlined that its members, as service providers, are: '... reporting a significant deterioration in their experiences engaging with the Nominal Insurer, and most particularly with their Scheme Agent EML for all new claims'.⁹⁵ Mr Derick Borean, NSW President of Australian Rehabilitation Providers Association, also explained that: 'delayed referral to rehab has extended by months since the introduction of the new claims model – not by days or weeks, by months'.⁹⁶

- 2.58** The Australian Rehabilitation Providers Association also raised a concern about the funding arrangements for the scheme agents in the new model, noting that the agents are remunerated on a 'cost plus' basis, which means that the 'the more the Agents spend in servicing the scheme for icare, the greater the revenue and profit that they will receive from the Nominal Insurer'. It asserted that the arrangement:

⁹¹ Submission 5, Business NSW, p 5.

⁹² Evidence, Ms Dore, 24 August 2020, p 3.

⁹³ Submission 13, Unions NSW, p 3.

⁹⁴ Submission 5, Business NSW, p 5.

⁹⁵ Submission 11, Australian Rehabilitation Providers Association, p 13.

⁹⁶ Evidence, Mr Derick Borean, NSW President, Australian Rehabilitation Providers Association, 28 July 2020, p 33.

... incentivises Scheme Agents to spend more on in house operations, administration and 'servicing' of the scheme, rather than in deploying external, qualified, capable and experienced experts to solve the complex problems of RTW for NSW employers and workers. In delivering services in house, there is clearly an erosion of the value being achieved for the scheme (noted by deteriorating RTW rates and escalating premiums). It is understood that just 5% of remuneration is tied to Return to Work Outcomes, which is in severe distortion to objectives of existing legislation.⁹⁷

- 2.59** In contrast with concerns raised about the decision to move to a single scheme agent model and the lack of competition, Mr Mark Lennon, a former member of the icare Board, disagreed that competition necessarily delivers better outcomes or experiences for injured workers. Reflecting on his extensive experience with the scheme, Mr Lennon expressed the view that the new model represented an improvement, as it offered injured workers greater digital access to their claims. Mr Lennon therefore contended that the new model 'empowers injured workers to be able to have more control over their claims and more understanding of where their claims are'.⁹⁸
- 2.60** Similarly, Mr Michael Carapiet, former chair of the icare Board, noted inefficiencies under the old system. Mr Carapiet explained that having multiple scheme agents led to duplication and delays, as there were 'five separate scheme agents ... each running independent IT systems, providing data that was months out date'. Mr Carapiet asserted that the transition to a single scheme agent has 'generated over \$1 billion in operational and claims savings'.⁹⁹
- 2.61** Regarding the remuneration of the single scheme agent, Mr Anthony Fleetwood, Chief Executive Officer of EML, confirmed that the organisation is paid on a 'cost-plus' basis, with an opportunity for additional, performance-based payments. Mr Fleetwood explained: 'the contract is cost plus 10 per cent and there is an opportunity to earn a slightly higher amount, which is based on performance. So it could be up to cost plus 10 per cent and 4.8 per cent at variable remuneration'.¹⁰⁰
- 2.62** Ms Tracey Harris, Chief Operating Officer and Service Provider Principal, EML, further explained that the 4.8 per cent variable component is split into two elements of 2.4 per cent each, one relating to key performance indicators such as return to work, and the other relating to operational and budgetary efficiencies.¹⁰¹
- 2.63** When asked whether the structure of the incentive payments created a situation where EML weighed up the benefits delivered to workers against the need to minimise costs, Mr Fleetwood explained that the structure reflected icare's caution given the novel nature of the single scheme agent model, and its intention 'to ensure that we as a service provider were not wasting money'. Mr Fleetwood acknowledged the concerns of the committee and stated that the issue has been a subject of discussions between icare and EML in the context of its potential contract extension.¹⁰²

⁹⁷ Submission 11, Australian Rehabilitation Providers Association, p 14.

⁹⁸ Evidence, Mr Mark Lennon, Former Director, icare, 24 August 2020, p 79.

⁹⁹ Evidence, Mr Carapiet, 24 August 2020, p 41.

¹⁰⁰ Evidence, Mr Anthony Fleetwood, Chief Executive Officer, EML, 24 August 2020, p 20.

¹⁰¹ Evidence, Ms Tracey Harris, Chief Operating Officer and Service Provider Principle, EML, 24 August 2020, p 20.

¹⁰² Evidence, Mr Fleetwood, 24 August 2020, p 22.

Medical costs

- 2.64** Relevant to the financial position of the Nominal Insurer is a reported increase in medical expenses, affecting the Nominal Insurer's claims liability.
- 2.65** The Dore Review identified an upward trend for both the Nominal Insurer's weekly payments and medical expenses, and found this to be distinct from other insurers, who all had relatively suppressed growth rates in terms of these costs. Further, the review found that the average duration of weekly payments to injured workers by the Nominal Insurer were at its highest in 10 years, and that 'it was those same trends in the pre-2012 period that pointed to the decline of the scheme and the ultimate legislative reform with reduced benefits to injured workers'.¹⁰³
- 2.66** The Dore Review found that medical costs have increased by around \$600 million for the Nominal Insurer between 2016-17 and 2018-19, representing a growth in excess of 10 per cent per year over a number of years. Further, the review found that the pace of growth of the Nominal Insurer's medical costs have been disproportionately steep compared to the rest of the scheme, and to schemes in other Australian jurisdictions.¹⁰⁴
- 2.67** Mr McCarthy supported the Dore Review's findings in relation to medical expenses, observing that the Nominal Insurer's increase has been disproportionate to the rest of the scheme and inconsistent with national trends.¹⁰⁵
- 2.68** In its submission, icare highlighted medical costs as one of the 'single biggest expense drivers' in the scheme, submitting to the committee that, for the financial years 2016-2019, medical costs across the Nominal Insurer and the Treasury Managed Fund grew by 13.6 per cent per annum from \$246 million to \$773 million.¹⁰⁶
- 2.69** Mr Carapiet, former Chair of the icare Board, observed that medical costs are heavily influenced by regulation and legislation, and that NSW was a high cost environment in terms of medical expenses. Mr Carapiet said: '... the big aspects of the medical costs are really regulatory and legislative. In New South Wales relative to Victoria, we are on a rate that for a few apples for apples comparisons, you can pay up to three times for the same treatment'.
- 2.70** Mr Carapiet further observed that it was harder to police medical costs in NSW, as : '... there are differences in legislation between New South Wales and Victoria that make it harder to police medical costs. The Victorian and Queensland systems have a test of *reasonable and necessary*, where in New South Wales it is *reasonably necessary*'. Mr Carapiet stated that aligning NSW's position with the Victoria and Queensland test would reduce medical costs in the state by several hundred million dollars.¹⁰⁷

¹⁰³ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, p 45.

¹⁰⁴ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, pp 41 and 47.

¹⁰⁵ Submission 25, Mr Peter McCarthy, pp 58-59.

¹⁰⁶ Submission 20, icare, p 3.

¹⁰⁷ Evidence, Mr Michael Carapiet, former Chair, icare Board, 24 August 2020, p 54.

2.71 When asked about Mr Carapiet's evidence by the committee, Ms Donnelly acknowledged the need to continually assess and reconsider regulated medical fees. However, Ms Donnelly disagreed with Mr Carapiet's attribution of cost growth to regulatory factors, highlighting that the rate of growth in medical costs for the Nominal Insurer outpaced the experience of other insurer types.¹⁰⁸

2.72 Ms Donnelly also made the following observation, explaining that the growth cannot be attributed to new claims:

The number of claims going to the Nominal Insurer are relatively stable—they do not have a problem with a whole lot of new claims, significantly. It is the number of people who are staying on benefit for longer because return to work has declined. Utilisation, which is using more services for the same profile of injured people, is accounting for about 52 per cent of the increase.¹⁰⁹

2.73 Further, Ms Donnelly noted that a review commissioned by SIRA found inadequate controls in one in four medical payments, demonstrating that significant rooms for savings existed in its medical costs through better administrative practices. Reflecting that the 'reasonably necessary' test has been in place since 1987, Ms Donnelly stated: 'what I do not understand is why it worked for 30 years and now, in the past three years, there has been an issue'.¹¹⁰

2.74 Mr McCarthy echoed this view, stating that 'icare lost control of medical costs on claims which resulted in significant over servicing and over billing by medical and allied health professionals',¹¹¹ and that '...it is clear that there is inadequate scrutiny of medical treatment and invoices by icare'.¹¹²

Financial position of the Treasury Managed Fund

2.75 The committee also received evidence on the financial position of the Treasury Managed Fund, which like the Nominal Insurer, has deteriorated over time.

2.76 icare advised that the May 2020 year to date net result for the Treasury Managed Fund was impacted by two major factors in the 2019-20 financial year. The first was the December 2019 actuarial valuation of the scheme which resulted in \$339 million in provisions, due to continued increases in police medical discharged claims and an increase in psychological injuries; an estimated loss of \$140 million due to the bushfires; and the ongoing impact of reported abuse claims. The second factor was the COVID-19 pandemic, which icare estimated as a \$1 billion impact, as at May 2020. It stated that this was 'predominantly due to falls in the investment markets, of which none have been realised'.¹¹³

2.77 icare noted that these factors have 'reduced the unaudited May 2020 funding ratio to approximately 98 per cent'. Further, it stated that 'the Net Assets Holding Policy provided for

¹⁰⁸ Evidence, Ms Donnelly, 24 August 2020, p 72.

¹⁰⁹ Evidence, Ms Donnelly, 24 August 2020, p 72.

¹¹⁰ Evidence, Ms Donnelly, 24 August 2020, p 72.

¹¹¹ Submission 25, Mr Peter McCarthy, p 59.

¹¹² Submission 25, Mr Peter McCarthy, p 61.

¹¹³ Answers to pre-hearing questions, icare, 24 July 2020, p 1.

NSW Treasury provided \$2 billion in funding in June 2020 to the TMF and will review the options for an additional \$2 billion funding by the end of 2020 to maintain full funding of liabilities'.¹¹⁴

- 2.78** During a hearing in September 2020, NSW Treasury also confirmed that the Treasury Managed Fund component of the scheme has deteriorated, resulting in a net loss of \$635 million.¹¹⁵ Mr Pratt, Secretary of NSW Treasury, provided a summary of the financial position of the Treasury Managed Fund:

...The larger numbers in that breakup: \$660 million increase in liabilities due to changes in economic assumptions, that is the actuarial valuation; \$647 million increase in workers compensation liabilities, mainly driven by higher than expected weekly and medical payments; \$790 million increase in TMF and Construction Risks Insurance Fund—CRIF—liabilities due to expected impact of bushfires; \$69 million increase due to emerging experience on medical indemnity claims; \$22 million increase on reported child abuse claims; and a few other minor items in there; and most significantly, year-to-date investment returns \$1.96 billion...¹¹⁶

Return to work rates

- 2.79** Relevant to the performance of the workers compensation scheme are return to work rates. As SIRA noted 'there is a strong body of evidence that shows the longer an injured person is away from work, the less likely they are to ever return'. As such, return to work is a key metric for the performance of the NSW workers compensation system.¹¹⁷

Trend across all insurers

- 2.80** The August 2020 dashBoard data published by SIRA showed return to work rates across the scheme, broken down by insurer, as indicated in Figure 4.

¹¹⁴ Answers to pre-hearing questions, icare, 24 July 2020, p 2.

¹¹⁵ Evidence, Mr Phil Gardner, Deputy Secretary, NSW Treasury, 9 September 2020, p 24.

¹¹⁶ Evidence, Mr Pratt, 9 September 2020, pp 24-25.

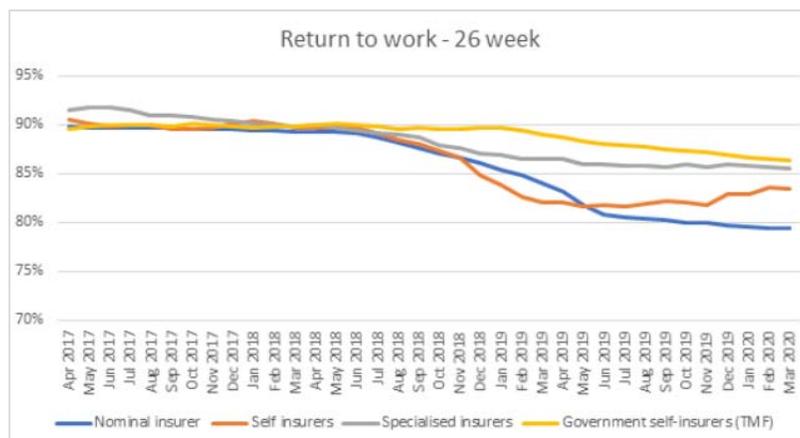
¹¹⁷ Submission 22, State Insurance Regulatory Authority, p 13.

Figure 4 Return to work rates across the scheme

	RTW rate 4 weeks	RTW rate 13 weeks	RTW rate 26 weeks	RTW rate 52 weeks	RTW rate 104 weeks
Scheme	66.2%	78.2%	83.2%	85.3%	88.6%
Scheme compared with last month	↓ Down by < 1%	↓ Down by < 1%	↓ Down by < 1%	↓ Down by < 1%	↓ Down by < 1%
Nominal insurer	67%	79%	84%	85%	88%
Government self insurer (TMF)	70%	83%	87%	90%	91%
Specialised Insurers	72%	81%	85%	87%	89%
Self insurers	70%	79%	81%	85%	88%

Source: SIRA, Workers Compensation System Monthly DashBoard (August 2020) <
https://www.sira.nsw.gov.au/__data/assets/pdf_file/0007/957427/workers-compensation-monthly-data-report-august-2020.pdf>

2.81 Ms Carmel Donnelly, Chief Executive, SIRA, explained to the committee that there has been a trend of decline in return to work rate for all insurers, but that the problem is particularly acute with the Nominal Insurer. The figure below, provided to the committee by SIRA, illustrates the fall in return to work rates for all four insurers between 2017 and 2020.

Figure 5 Return to work at 26 weeks – by insurer type

Source: Submission 22, SIRA, p 9.

2.82 Several inquiry participants expressed their concern about the reported drop in return to work rates. Unions NSW emphasised the significance of supporting workers to return to work, stating:

Unions know the longer it takes injured workers to return to work the less likely this return will be successful. A failure to return a worker to work also often results in secondary psychological injuries. A secondary injury makes a return to work very unlikely. This has a flow on effect with workers then not engaging in society and losing the capacity to feel they play a meaningful role in society. This destroys families and lives.¹¹⁸

- 2.83** Similarly, Mr Angus Skinner, Research Manager of the Police Association of NSW, described to the committee the importance of return to work rates as a key measure of the workers compensation scheme:

For the injured worker, it represents return to capacity, return to health and return to relative financial security. For the employer, it is the return of a skilled workplace asset. And for the insurer and the scheme as a whole, it is a return to earning capacity and reduced claims cost.¹¹⁹

- 2.84** The Police Association of NSW suggested that innovative approaches could be adopted to enhance return to work programs, particularly for injured workers in the NSW Police Force. It stated:

Our experience representing, supporting and advocating for our members indicates the key intervention required is an increased commitment and effectiveness at identifying suitable duties and (most importantly) permanent suitable positions for injured officers with work capacity, or making adjustment to positions when needed.¹²⁰

- 2.85** The committee also received evidence that early and active intervention in cases with musculoskeletal injury that had a risk of delayed return to work has a significant positive impact on return to work rates. This in fact is the direction that NSW Health, in particular, have taken since 2015 when they began working with an array of academics and specialists using the Work Injury Screening and Early Intervention (WISE) protocols.

- 2.86** The WISE protocols saw a 20 per cent reduction in days lost for workers who had total or partial incapacity to work, a 100 per cent sustained return to work at 6 months for those injured workers who had return to pre injury duties, a 20 percent reduction in long term costs to the employer and reduced long term disability and chronic pain for injured workers.¹²¹

- 2.87** Despite the success in NSW Health, despite repeated positive international reviews of the outcomes and despite even receiving an award from EML and Workcover for the work, the WISE protocols on early intervention were not adopted by icare for the Nominal Insurer or the Treasury Managed Fund. In fact, icare went in exactly the opposite direction with the implementation of their new platform which radically reduced interactions with injured workers

¹¹⁸ Submission 13, Unions NSW, p 4.

¹¹⁹ Evidence, Mr Angus Skinner, Research Manager of the Police Association of NSW, 28 July 2020, p 2.

¹²⁰ Submission 12, Police Association of NSW, p 2.

¹²¹ Tabled document, EML, *Swiss Re: Excellence & Innovation in return to work Award in 2015/16*. See also Tabled document, K.L. Cullen et al, *Effectiveness of workplace interventions in return to work for musculoskeletal, pain-related and mental health conditions: An update of the evidence and message for practitioners* (2017).

in the first stages of their injury, rather than increasing the number and types of interventions to assist with return to work.

Return to work rates for the Nominal Insurer

2.88 As noted above, the return to work rates for the Nominal Insurer are at lower levels in comparison to other insurers in the scheme.

2.89 Poor return to work rates for the Nominal Insurer was identified as an issue in the Dore Review, and as a relevant factor contributing to the deteriorating financial position of the Nominal Insurer. Essentially, the Independent Reviewer connected the new claims model which commenced in January 2018 with confusion in the market and a lack of involvement by the scheme agent with employers on return to work plans.¹²²

2.90 The Independent Reviewer found that 'since the introduction of icare and until mid to late 2018, the Nominal Insurer had RTW [return to work] rates at 26 weeks and 52 weeks that were consistent with other insurer types', however:

Deterioration in NI [Nominal Insurer] RTW [return to work] performance followed shortly after the introduction of the new claims model in January 2018. Further deterioration occurred following the launch of the Nominal Insurer Single Platform (NISP), in February 2019.¹²³

2.91 The Dore Review also concluded that the deteriorating financial position of the Nominal Insurer was caused by increasing claims costs, mostly due to increasing weekly payments and medical costs, which 'may also be related to the declining return to work rate'.¹²⁴

2.92 In support of the Dore Review, SIRA engaged the Social Research Centre to conduct an abridged return to work outcomes survey of the Nominal Insurer and the NSW workers compensation system. The Social Research Centre has managed the National Return to Work Survey on behalf of Safe Work Australia since 2012.

2.93 Using the same process it uses at the national level, the Social Research Centre looked at return to work outcomes from a sample of claims submitted with the Nominal Insurer between 1 January 2018 and 30 April 2019. The Dore Review explained the results of this survey:

The survey results show that both key RTW outcomes – the returned to work rate and the current return to work rate – are significantly lower compared to the rates for the Nominal Insurer in previous years. Further, it highlights the Nominal Insurer's poor RTW performance, compared to other insurers in the NSW workers compensation system.¹²⁵

2.94 While return to work rates declined for all insurers, Ms Donnelly highlighted that the rates are lower for the Nominal Insurer, pre-dating the COVID-19 pandemic:

¹²² Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, p 5.

¹²³ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, p 42.

¹²⁴ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme – for the State Insurance Regulatory Authority*, p 56 and 77.

¹²⁵ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, p 33.

I am concerned that overall there has been a level of decline in performance, but if I give you an example, the Treasury Managed Fund in January 2018 – I am going to go forward to January 2020 so we are not talking about COVID impacts – were from, at six months, some 90 per cent of injured workers being back at work after six months to 87 per cent, compared to 82 per cent for the nominal insurer. Everyone was at 89 per cent or 90 per cent two years ago. We are talking mid to high 80 per cent for others and lower for the nominal insurer.¹²⁶

- 2.95** At a hearing in August 2020, Ms Donnelly acknowledged that the most recent statistics available at the time suggested that the return to work rate for the Nominal Insurer may have stabilised. However, she explained that the rate remained at an unacceptably low level:

I am happy to confirm that in my view it has stabilised but at an unacceptable level, where thousands of injured workers who I would have expected to see – based on the performance from beginning of 2018 – returned to work ... Thousands have not returned to work that would have if there had not been a decline.¹²⁷

- 2.96** When asked about how the return to work rates translated in terms of the number of injured workers impacted, Mr Greg Keating, member of the SIRA Board, advised that a nine per cent differential in the return to work rate for the Nominal Insurer meant an extra 4,000 injured workers not returning to work every year.¹²⁸

- 2.97** Mr McCarthy discussed the long-term implications of low return to work rates on the financial position of the scheme. He observed that a decrease in the return to work rate could lead to a substantial increase in the scheme's liabilities going forward:

One of the key changes to the legislation in 2012 was the cut-off of weekly benefits at five years if you have a WPI impairment of 20 per cent or lower. It is clear—and I have spoken to lots of claims people, doctors, lawyers—that everyone is expecting a big blowout in the number of people who are going to get over the 15 per cent and 20 per cent impairment thresholds, which means they will be entitled to a lot more benefits, common law and ongoing weeklies. If that happens, the liabilities of the scheme are going to go up substantially.¹²⁹

- 2.98** icare representatives acknowledged the deterioration in return to work rates for the Nominal Insurer, but highlighted how this trend is similar to what other insurers have experienced in the scheme. In August 2020, Mr John Nagle, icare's former Chief Executive Officer and Managing Director, observed that the decline of the Nominal Insurer's return to work rate was not inconsistent with the rest of the scheme:

Over that period the industry as a whole reduced by about 7 percentage points and the nominal insurer reduced by 10. We have recovered from some of that so we are at about 8 percentage points, broadly in line with the overall industry model.¹³⁰

¹²⁶ Evidence, Ms Donnelly, 3 August 2020, p 53.

¹²⁷ Evidence, Ms Donnelly, 24 August 2020, p 68.

¹²⁸ Evidence, Mr Greg Keating, Member, SIRA Board, 24 August 2020, p 69.

¹²⁹ Evidence, Mr McCarthy, 23 November 2020, p 19.

¹³⁰ Evidence, Mr Nagle, 3 August 2020, p 83.

- 2.99** Ms Elizabeth Uehling, former Group Executive – Personal Injury Claims of icare, supported Mr Nagle's observations, and suggested that the Nominal Insurer's return to work rate deterioration was temporary:

I think it is absolutely true that the system-wide return to work rates where self-insurers have declined by six, specialised by seven, TMF by four, and the nominal insurer by 10. Our early return to work latest metrics show us as declining by about eight. Some of that is the regulatory environment, absolutely, because you can see it consistently across all insurers but that said the claims model is standing up. The teething in operationalisation has been more difficult than we anticipated.¹³¹

- 2.100** When asked about the possible cause for the overall fall in the return to work rate in the scheme, Mr Nagle informed the committee that icare did not have a firm position and was continuing to work with SIRA to identify the cause:

We have been trying to understand what that could be, and have that engagement with SIRA. We have a number of hypotheses that range from the impact of gig economy growing, and we have written about that previously and asked SIRA to review that... We have not been able to land a proper hypothesis that makes us feel comfortable... but it is evident that there has been some kind of systemic shift in the industry over this last period.¹³²

- 2.101** When asked about her views on the matter, Ms Donnelly informed the committee that her working hypotheses centred on the disruptions to the scheme by the Nominal Insurer and the increase in psychological claims:

One of the things that you raised there is what are the causes... I would also like to talk about the moment in time we have for a new strategy to improve return to work. Some of the causes are clearly not enough coordinated, complex human and health service delivery for an individual who needs to be supported—they have had a trauma, they need health care, they need their employer brought on Board to tailor a return-to-work plan for them. Not enough of that is happening upfront. It is clear from the coinciding of that decline with changes at the nominal insurer. The working hypothesis for me is that those operational changes were so massive, with case managers losing work and moving around and others being hired, et cetera, that there has been a disruption to the service providers in the market as a whole. I cannot as easily prove that, but I think that is a reasonable working hypothesis.

Another factor is there has been an increase in psych claims. We know from very good evidence—we have participated in analysis nationally—that for people who have a mental health issue returning to work has been harder...¹³³

- 2.102** The COVID-19 pandemic was also explained to have had an impact. Mr Don Ferguson, who served as the interim Chief Executive Officer of icare before the substantive appointment of Mr Richard Harding, informed the committee that the impact of the COVID-19 impact was around four per cent in terms of the Nominal Insurer's return to work rate.¹³⁴

¹³¹ Evidence, Ms Elizabeth Uehling, Group Executive, Personal Injury Claims, 3 August 2020, p 83.

¹³² Evidence, Mr Nagle, 3 August 2020, p 86.

¹³³ Evidence, Ms Donnelly, 3 August 2020, p 53.

¹³⁴ Evidence, Mr Ferguson, 24 August 2020, p 56.

- 2.103** As this review progressed, further updates were provided to the committee by icare on the return to work rate for the Nominal Insurer. At a hearing in early December 2020, Mr Rob Craig, the then Interim Group Executive, Personal Injury Claims of icare, informed the committee that the return to work rate for the Nominal Insurer was improving, to a point where it was performing better than some of the other insurers:

... using the 26-week work status measure and a 12-month rolling average, is about 84 and a bit, 84.5, and it has had a constant increase using the SIRA measure. It is now above that of specialised insurers and it is also above that of self-insurers....¹³⁵

Oversight of the Nominal Insurer

- 2.104** In light of the performance of the Nominal Insurer, and some concerns raised by stakeholders, the committee considered whether SIRA's regulatory powers are sufficient.
- 2.105** Business NSW noted that, under the current legislation, the Nominal Insurer's licence is 'unconditional', and that the regulator's powers are limited. It also referred to the findings of the Dore Review, which observed a 'strained' and 'poor' relationship between icare and SIRA, with icare having a 'low regard for SIRA as the regulator'.¹³⁶
- 2.106** Discussing the issue of oversight with the committee, Ms Donnelly noted that there is a lack of clarity about what SIRA's powers are over the Nominal Insurer and icare:

... There are elements of lack of clarity about what our powers are over the Nominal Insurer and icare and some legacy functions where we could, in fact, have some powers to act with the scheme agent that maybe there is more pushback if we were to do it with the Nominal Insurer.

The legislation has a lot of areas of poor clarity. That raises the question of when we look at what can we do about an issue that we come across, and we look at what powers are available to us—do we start to step in and direct scheme agents, in which case what is the point of having another layer of people managing? I do really understand and stand by the need for a strong independent regulator that is not conflicted, but there are certainly dilemmas that arise, and we have found them in enforcement choices that would effectively have us stepping in and doing icare's job for it.¹³⁷

- 2.107** This echoed Ms Donnelly's earlier evidence in the review, when she noted that there is legal ambiguity as to who the natural person accountable for the Nominal Insurer and the Treasury Managed Fund is:

... the nominal insurer is not on the State accounts. It is not the State Government. It is a unique legislated entity and this is one of the other issues that goes to powers. There are entities that I am regulating, the nominal insurer and the Treasury Managed Fund. It is ambiguous in law as to who is the natural person who is accountable? Who is the insurer in some of those matters? Therefore the nominal insurer is not captured by

¹³⁵ Evidence, Mr Rob Craig, Interim Group Executive Personal Injury Claims, icare, 2 December 2020, pp 3-4.

¹³⁶ Submission 15, Business NSW, p 9.

¹³⁷ Evidence, Ms Donnelly, 24 August 2020, p 75.

APRA but is also not governed without that prudential regulation by the State in terms of its capital adequacy.¹³⁸

2.108 On SIRA's limitations, Ms Nancy Milne, Deputy Chair of the SIRA Board, drew on her experience on other Boards to inform the committee that SIRA did not have the levels of access or power that the Australian Prudential Regulation Authority has at its disposal.¹³⁹ Ms Milne noted that an option for reform could be to grant SIRA some of the powers available to the Australian Prudential Regulation Authority.¹⁴⁰

2.109 Mr Pratt, Secretary of NSW Treasury, also agreed that the regulator's powers are constrained and that this issue warrants further consideration. Mr Pratt stated:

So what is clear, and it is clear again today through some of the questioning, is what are the governance roles of the various entities involved in the management of icare. Treasury, as I have already indicated, has no formal legislative role and perhaps it should. I do understand discussions with Ms Donnelly, who says that she does not have sufficient power and authority. Equally I could argue at the end of the day the Nominal Insurer is funded by business and serving private sector employees, so should it be privatised? These are all issues that I am encouraging the McDougall report, when that gets underway—these are the very issues they should be looking at, which goes in with a five-year governance review that is due now and will be part of his review. So I do not have answers to your question but I have thoughts around directions and things that should be explored.¹⁴¹

2.110 Mr Pratt further noted that the role of regulators in the area of workers' compensation seem to lack the clarity present in the banking sector:

I mean, the model of operator and regulator, I liken that to my banking background where you have absolute clarity around the roles of the banks and the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission. I do not think we have that clarity here in this instance. We have an operator and a regulator model but I am sure Ms Donnelly would say she needs more authority.¹⁴²

2.111 As to the extent to which Treasury can also get involved if there are concerns about the performance of icare or the Nominal Insurer, Mr Pratt noted that his role is limited in relation to icare's operations:

We have no formal authority under any legislation to act on these issues and I just need to make that clear. My role, as Treasury, clearly I have concerns about the issues you both raise but I am limited in any powers that I might be able to take to do anything about it.¹⁴³

¹³⁸ Evidence, Ms Donnelly, 3 August 2020, p 56.

¹³⁹ Evidence, Ms Nancy Milne, Deputy Chair, SIRA Board, 24 August 2020, p 76.

¹⁴⁰ Evidence, Ms Milne, 24 August 2020, p 77.

¹⁴¹ Evidence, Mr Pratt, 9 September 2020, p 33.

¹⁴² Evidence, Mr Pratt, 9 September 2020, p 33.

¹⁴³ Evidence, Mr Pratt, 9 September 2020, p 10.

- 2.112** Mr Pratt added: 'The fact that Treasury has no legislative requirement to be involved in the Nominal Insurer I do think is something that needs to be looked at so I would just flag that with the Committee as an open issue'.¹⁴⁴
- 2.113** PwC's *Independent Review of icare governance, accountability and culture* – commissioned by icare as part of the 21 point action plan in response to the Dore Review – found 'complexity and some lack of certainty' in terms of the regulatory standards that icare must follow. In making this assessment, the PwC review noted:
- icare is a NSW Government agency, yet exempt from its requirements regarding recruitment, and the Nominal Insurer is exempt from NSW public sector procurement rules
 - icare is subject to SIRA's regulation in regard to premiums, claims management and complaints, but only in regards to the scheme managed by SIRA and not all of the schemes operated by icare
 - icare operates a large insurance business but is not an Australian Prudential Regulation Authority regulated entity.
 - while NSW Treasury issues risk guidelines for icare to follow, this is broad in nature and does not provide the level of guidance or specificity relevant to a complex insurance organisation.¹⁴⁵

Committee comment

- 2.114** The committee is alarmed and disappointed to learn about the deteriorating financial position of the scheme, particularly in regard to the Nominal Insurer and the Treasury Managed Fund managed by icare. The committee is mindful of the fact that the 2012 reforms – which removed and limited the entitlements of injured workers – were justified on the basis of ensuring the scheme's ongoing financial sustainability. On the facts uncovered and considered during this review, it is clear that the scheme has once again become vulnerable, and that the liabilities of the Nominal Insurer and Treasury Managed Fund continue to grow, such that they are barely solvent.
- 2.115** We note that the deteriorating position of these schemes, which began before COVID-19 but are now compounded by the pandemic, has the potential to expose injured workers, employers, the public, and the government to significant financial risk. It is clear that the NSW Government and icare must take urgent steps to address the poor financial position of the Nominal Insurer and the Treasury Managed Fund.
- 2.116** While the committee understands that icare's position is that the deteriorating performance of the Nominal Insurer, in particular, is due to external factors, it is notable that the evidence received from all other inquiry participants – external to icare – suggests otherwise.

¹⁴⁴ Evidence, Mr Pratt, 9 September 2020, p 12.

¹⁴⁵ PwC, *icare – Independent Review of icare governance, accountability and culture* (February 2021), p 14.

- 2.117** In fact, the committee makes several findings in relation to the financial position of the Nominal Insurer Scheme and Treasury Managed Fund, and icare's responsibility for the deterioration in performance.

Finding 1

That the multi-billion losses incurred recently by the Nominal Insurer and Treasury Managed Fund have been caused, in large part, by a collapse in return to work rates arising from icare's decision to introduce a new claims management model.

Finding 2

That return to work rates have fallen further in schemes managed by icare than in schemes managed by specialist and self-insurers.

Finding 3

That icare has failed to address the fall in return to work rates in the Nominal Insurer and the Treasury Managed Fund with either the urgency or thoroughness they deserved given the negative impacts falling return to work rates have on injured workers and the financial sustainability of the scheme.

Finding 4

That the Nominal Insurer and the Treasury Managed Fund will continue to sustain major underwriting losses until icare improves return to work rates.

Finding 5

That implementation of the Work Injury Screening and Early Intervention (WISE) protocols, that deliver early and active intervention for injured workers with musculoskeletal injury that have a risk of delayed return to work, have had a significant positive impact on return to work rates, and despite this evidence being available to icare they have not been adopted in the Nominal Insurer or the Treasury Managed Fund.

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- 2.118** The committee was especially concerned at the fact that icare's position throughout this review was to look for external factors to explain the scheme's poor outcomes and to refuse to clearly accept responsibility for the outcomes of the scheme they manage. This inability to self-reflect and accept responsibility was seen at both a Board and senior management level. This also meant that the dramatic falls in the return to work rates in both the Treasury Managed Fund and the Nominal Insurer were not addressed with the urgency or thoroughness they deserved given the negative impact they have on injured workers and the financial sustainability of the scheme.

- 2.119** While we note that there has been a new Chief Executive Officer and Chair of the Board since then, the fact that the culture in icare is so unwilling to accept their agency in poor outcomes is of very real concern. For this reason, while we acknowledge the substantial change in the senior

leadership, we remain extremely concerned and will be looking to keep a close eye on the scheme in the coming 12 months.

Recommendation 1

That the Standing Committee on Law and Justice undertake a brief hearing to review the status of reforms in icare and the implementation of various reviews of the scheme towards the end of the 2021 calendar year.

- 2.120** In the committee's view, factors driving the growth in medical costs, such as over-utilisation and over-billing, are areas where icare can make changes. In addition, improved claims management techniques are likely to improve return to work outcomes, thereby reducing claims and financial liability. The committee therefore makes specific recommendations in relation to each of these matters. In particular, the committee believes that it is necessary for icare's claims management model to be independently and comprehensively evaluated, to ensure it best supports injured workers, promotes recovery to work and improves the scheme's financial performance. This review has also identified scope for reducing icare's operational expenses, such as on facilities and remuneration, as will be discussed in chapter 3 of this report.
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Recommendation 2

That icare, in consultation with the State Insurance Regulatory Authority, investigate and implement measures to reduce medical expenses, including measures to address over-utilisation and over-billing issues.

Recommendation 3

That the State Insurance Regulatory Authority commission an independent evaluation of the effectiveness of icare's claims management model, in order to identify improvements that will ensure the model best supports injured workers, promotes return to work and improves the scheme's financial performance.

- 2.121** In addition, the committee agrees that there needs to be a comprehensive review of the structure and sustainability of the Nominal Insurer and Treasury Managed Fund schemes. We note that this will be considered as part of the forthcoming McDougall Review, and look forward to seeing the outcomes of the review at the end of April 2021.
- 2.122** Some might think that an obvious solution to the scheme's financial woes would be to increase premiums and to cut entitlements of injured workers. The committee thinks this would be unacceptable given the outcomes of this review, and more specifically icare's poor performance and operational management practices.
- 2.123** As such we recommend that, as a matter of principle, any future efforts adopted by the NSW Government to improve the financial positions of the Nominal Insurer and Treasury Managed Fund schemes be primarily achieved through operational and administrative efficiencies and improvements on the part of icare.
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Recommendation 4

That the NSW Government consider addressing the deteriorating financial position of the Nominal Insurer and the Treasury Managed Fund schemes primarily through administrative efficiencies and operational improvements to icare.

- 2.124** During the course of this review, it became clear to the committee that the State Insurance Regulatory Authority and NSW Treasury have limited oversight of the Nominal Insurer. The strained relationship between icare and SIRA was also evident. The committee accepts that SIRA's powers, in particular, need to be strengthened, potentially in ways similar to the Australian Prudential Regulation Authority.
- 2.125** In the committee's view, legislative clarity is also required in terms of the regulatory standards that icare must follow. The committee accordingly recommends that the NSW Government review and expand the regulatory powers of the State Insurance Regulatory Authority and NSW Treasury, to ensure both have adequate oversight and power over the Nominal Insurer and Treasury Managed Fund.
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Recommendation 5

That the NSW Government review and expand the regulatory powers of the State Insurance Regulatory Authority and NSW Treasury, to ensure both agencies have adequate oversight and powers to monitor the performance of the Nominal Insurer and Treasury Managed Fund.

Chapter 3 icare's governance and operations

icare plays a significant role in the workers compensation scheme as the manager of the Nominal Insurer and Treasury Managed Fund. This chapter examines a number of concerns regarding various aspects of icare's operations and governance, including its procurement practices and management of conflicts of interest. It also considers secondment arrangements between icare and the Treasurer's office and a number of other governance related matters, including the skills and experience of icare's management team and executive remuneration.

Procurement practices

- 3.1** A number of concerns were raised during this review about the procurement practices at icare, and the lack of compliance with the public sector procurement framework. In particular, there were concerns about the procurement for a provider to develop and implement the Nominal Insurer Single Platform and the tender process that led to EML being appointed as the sole scheme agent, both of which will be covered below. There were also concerns raised in relation to a number of other contracts.
- 3.2** Many of the concerns relating to procurement practices were raised by Mr Chris McCann, the former General Manager – Compliance, Fraud and Corruption Control at icare between July 2016 and August 2018. In his view, a number of these matters demonstrated how senior managers at icare 'failed to comply with icare Board-approved policies, disregarded appropriate governance standards, treated risk and compliance management as a hindrance, covered up internal thefts, and completely ignored sound and fair procurement processes'.¹⁴⁶
- 3.3** Mr McCann indicated that when he arrived at icare in August 2016, there were 'some 915 service providers receiving in excess of \$150,000 per year', and that not all of these services were properly contracted. Mr McCann contended that he knew of these matters because, as part of his role, he had established and instituted policies which made disclosure and approval requirements clear.¹⁴⁷ Mr McCann gave his evidence in a clear, forthright and compelling fashion. His insights into the manner in which icare addressed risks, including regarding procurement and conflicts of interest, was of very real value to the committee, and through the committee, to injured workers, employers and the people of NSW.

Contract to develop the Nominal Insurer Single Platform

- 3.4** One of the procurements examined closely by the committee was the awarding of the contract to a number of vendors, including Guidewire and Capgemini, to develop and implement the Nominal Insurer Single Platform.
- 3.5** Mr McCann raised a concern about this procurement, specifically in relation to the actual cost of the contract compared to its budget and the manner in which the tender process was

¹⁴⁶ Evidence, Mr Chris McCann, Former General Manager – Compliance, Fraud and Corruption Control, icare, 23 November 2020, p 2.

¹⁴⁷ Evidence, Mr McCann, 23 November 2020, p 10.

- managed.¹⁴⁸ Mr McCann also gave evidence that icare's leadership personally knew key Capgemini and Guidewire personnel.¹⁴⁹
- 3.6** When asked about the concerns raised by Mr McCann, representatives from icare defended the decision to use the Guidewire platform – with Capgemini as its implementation partner – in relation to the build of the Nominal Insurer Single Platform, and maintained that proper processes were adhered to at all times.¹⁵⁰
- 3.7** During his appearance before the committee on 3 August 2020, the committee discussed with Mr John Nagle, former Chief Executive Officer and Managing Director of icare, the overall spend under the contract and the way in which the vendors were selected.
- 3.8** In terms of the total cost spent on the contract, Mr Nagle was specifically questioned whether the amount spent had ballooned from an original budget of \$110 million to \$360 million. Mr Nagle stated that the difference between the figures could be explained by the fact that the project was costed by components. He recollected that the original budget was lower than the understanding of the committee for the licence and build components of the program: '... it was about \$260 million – that was for the licence and the build'. Mr Nagle asserted that the additional costs could be accounted for by the transformation component of the contract.¹⁵¹
- 3.9** On this basis, Mr Nagle denied that the overall spend for the build of the Nominal Insurer Single Platform constituted a 'blowout'. To the contrary, Mr Nagle contended that the new system had in fact achieved savings, resulting in efficiencies of around \$110 million in underwriting activities, as well as helping to identify around \$90 million in leakages.¹⁵²
- 3.10** In answers to questions taken on notice, icare later clarified Mr Nagle's evidence, and informed the committee that the total IT project budget for the build and run of the insurance platform was \$241.1 million from 2016 to 2019, including a \$40.2 million contingency. The committee further learned that the final IT project cost for the build and running of the platform, including licence costs, was \$272.3 million. The transformation business change costs associated with operationalising of the platform and claims model across 2016-2019 was a further \$74.3 million in cost.¹⁵³
- 3.11** One of the concerns raised with the committee in relation to the contract was that the tender process to select the vendors for the build of the Nominal Insurer Single Platform may have been pre-determined. For instance, Mr McCarthy noted having seen a business plan that was presented to the icare Board with Capgemini's logo before the award of the tender,¹⁵⁴ while

¹⁴⁸ Evidence, Mr McCann, 23, November 2020, pp 6 and 8.

¹⁴⁹ Evidence, Mr McCann, 23, November 2020, p 6.

¹⁵⁰ Evidence, Mr John Nagle, former Chief Executive Officer and Managing Director of icare, 3 August 2020, pp 65-69; Evidence, Mr Vivek Bhatia, former Chief Executive Officer and Managing Director, icare, 13 November 2020, p 6.

¹⁵¹ Evidence, Mr Nagle, 3 August 2020, p 64.

¹⁵² Evidence, Mr Nagle, 3 August 2020, p 66.

¹⁵³ Answers to questions on notice, icare, 7 September 2020, p 5.

¹⁵⁴ Submission 25, Mr Peter McCarthy, p 8.

publicly available information indicated that the tender, despite its significant value and complexity, was open for a week only.¹⁵⁵

- 3.12** When questioned on this, Mr Nagle acknowledged that icare had indeed provided a week for interested parties to register a response. However, Mr Nagle clarified that the request was specific to pricing and needed to be considered in the context of the overall process.¹⁵⁶
- 3.13** Further information on the tender process was provided by icare in its answers to questions on notice. icare informed the committee that vendors were engaged as part of a feasibility and scoping exercise that began in 2013, before it was concluded that a 'unified technology approach was feasible' in February 2015.¹⁵⁷ icare submitted that software providers such as Guidewire, FINEOS, SSP-Worldwide, Computer Services Corporations, Sapiens, SAP, Curam Software and EIS Group were engaged as part of this process.¹⁵⁸ The committee heard that FINEOS ultimately withdrew from the process due to the timelines set out in the request for proposal document, which it stated were 'extremely aggressive' and 'unrealistic'.¹⁵⁹
- 3.14** icare further explained that a subsequent invitation to register was issued for one week between 10 July and 17 July 2015, followed by a closed request for proposal to firms that were successful in the invitation to register, which was open between 27 July and 13 August 2015. icare submitted that the evaluations, briefing and demonstrations concluded in October 2015.¹⁶⁰
- 3.15** In relation to materials with Capgemini's logo being presented to the Board prior to the award of the contract, it was explained that Capgemini was engaged in 2014 to assess the costs and benefits of future technology options, and that a report for the icare Board's consideration with Capgemini's logo was prepared in this context. icare noted that Capgemini staff members who worked on the 2014 report were not involved in the subsequent tender.¹⁶¹
- 3.16** Relevant to this issue, Mr Vivek Bhatia, who served as icare's Chief Executive Officer and Managing Director until January 2018, recollected that 'there was an express undertaking given by Capgemini about Chinese walls and conflict of interest management...'.¹⁶²
- 3.17** The committee also discussed with Mr Bhatia the nature of his relationships with staff from Capgemini and Guidewire. Mr Bhatia acknowledged his 'social relationship' with one or more senior executives from Capgemini, including Mr Deepak Nangia, who was the Chief Executive Officer of Capgemini in 2015.¹⁶³ However, Mr Bhatia also stated that he did not have a role in the selection of Capgemini as an implementation partner for the development of the Nominal

¹⁵⁵ Evidence, Mr Nagle, 3 August 2020, p 65.

¹⁵⁶ Evidence, Mr Nagle, 3 August 2020, p 65.

¹⁵⁷ Answers to questions on notice, icare, 7 September 2020, p 7.

¹⁵⁸ Answers to questions on notice, icare, 7 September 2020, p 8.

¹⁵⁹ Tabled document, Correspondence from Mr Dave Matthews, Director Sales & Marketing, FINEOS Asia Pac, to Mr Don Ferguson, General Manager, Lifetime Care Support Authority, dated 5 August 2015.

¹⁶⁰ Answers to questions on notice, icare, 7 September 2020, p 7.

¹⁶¹ Answers to questions on notice, icare, 7 September 2020, pp 8-9.

¹⁶² Evidence, Mr Vivek Bhatia, Former Chief Executive Officer and Managing Director, icare, 13 November 2020, p 8.

¹⁶³ Evidence, Mr Bhatia, 13 November 2020, p 5.

Insurer Single Platform, and that it was in fact Guidewire – who was first chosen as the software vendor – who suggested Capgemini as the implementation partner.¹⁶⁴ This was despite the unchallenged evidence before the committee that Mr Bhatia was present at the Board meetings where the Capgemini contract was considered and ultimately approved and there was no evidence to suggest either a conflict of interest declaration was made by Mr Bhatia or he excluded himself from any part of the Board's deliberations during these matters.

3.18 Mr Bhatia further maintained that he did not hold any discussions with representatives from Capgemini about the tender. Mr Bhatia asserted that, given his relationship with the leadership of Capgemini, he had recused himself from the steering committee, although he admittedly continued to sit in on Board meetings that considered the recommendations of the steering committee.¹⁶⁵

3.19 Noting that Mr Bhatia's potential conflict of interest was not recorded in any of the Board minutes, the committee asked Mr Michael Carapiet, who served as Chair of the icare Board until 25 September 2020, whether a disclosure of this kind would ordinarily be officially recorded. Mr Carapiet admitted that it would be unusual for a disclosure of the kind not to be recorded in the minutes. Further, when asked whether he recalled Mr Bhatia raising a conflict of interest regarding Capgemini, Mr Carapiet stated 'He may have, but I do not recollect'.¹⁶⁶

3.20 Mr Carapiet did recall, however, of instances where Mr Bhatia had withdrawn himself from committees making recommendations to the Board. Mr Carapiet stated: 'There were a couple of committees and I do not think Mr Bhatia was on either of the committees that brought the recommendation to the Board'.¹⁶⁷

3.21 Mr Carapiet also stated that Mr Bhatia would not have necessarily been expected to leave the room while the steering committee's recommendation involving Capgemini was considered. Mr Carapiet explained that this was because Mr Bhatia's interest was not fiduciary in nature:

... this issue of when you leave rooms and do not leave rooms in Boards is often up to the individual. It is pretty clear, as I said, that when there is a financial benefit you should leave the room. If there is no financial benefit then it just depends on the situation. I think he was being careful by not being on the committees. The fact that he was one of eight or nine Board members—I do not know if the minutes show that he had anything extra to say to anybody else, but he would have had a view, I suspect, at the Board. As the CEO, he would be the lead management person and making sure it all worked...¹⁶⁸

3.22 Another issue examined by the committee regarding the Nominal Insurer Single Platform contract was Mr Nagle's involvement in an endorsement video for Guidewire and attendance at a Guidewire conference. In answering questions put to him by the committee, Mr Nagle confirmed that he appeared in a video for Guidewire and presented as a keynote speaker at a conference run by Guidewire in Las Vegas in October 2018. Mr Nagle further informed the committee that his travel and accommodation costs were paid for by Guidewire.¹⁶⁹

¹⁶⁴ Evidence, Mr Bhatia, 13 November 2020, p 6.

¹⁶⁵ Evidence, Mr Bhatia, 13 November 2020, pp 6 and 10.

¹⁶⁶ Evidence, Mr Michael Carapiet, Former Chair, icare Board, 1 December 2020, p 25.

¹⁶⁷ Evidence, Mr Carapiet, 1 December 2020, p 26.

¹⁶⁸ Evidence, Mr Carapiet, 1 December 2020, p 26.

¹⁶⁹ Evidence, Mr Nagle, 3 August 2020, p 68.

- 3.23** Mr Nagle strongly defended these activities as usual in the course of a professional relationship, stating:

Guidewire approached us and asked us whether we could give commentary on their cloud environment and the use of their system. What we endorsed was our encouragement of the cloud because it gave us great security as we went forward, and that has actually proven to be even more valuable to us through this COVID period. In terms of appearing as a guest speaker, that is almost a normal scenario at any given time where you have a key relationship, and they are a key relationship. It was our opportunity to participate in their strategy, give our feedback as a customer on what has worked for us and what has not worked for us and also have a direct impact on where they were looking to design their product for the future.¹⁷⁰

- 3.24** When asked why his travel to the conference was not publicly disclosed when those of other icare's representatives were, Mr Nagle responded that he was unsure of the reason and would take the issue on notice. icare later clarified that the omission of Mr Nagle's travel to Las Vegas in the relevant section of the annual report was an error, and that this would be corrected in the next annual report.¹⁷¹

Tender process to appoint EML as the sole scheme agent

- 3.25** Separate to the concerns raised in relation to the transition to the new claims management model, specific concerns were also raised in relation to the tender process to appoint a sole scheme agent.
- 3.26** Mr Christopher McHugh, Executive General Manager, Personal Injury Insurance at Suncorp, told the committee that the outcome of the tender, which awarded the contract to EML as the single agent, was a 'shock'. Mr McHugh explained that this was because Suncorp GIO, as an existing scheme agent, participated in the tender on the understanding that the model of multiple scheme agents would continue.¹⁷²
- 3.27** Mr McHugh recounted that, after being notified that EML was awarded the tender as a sole scheme agent, Suncorp was given two options: to exit the scheme over three months or to exit over a period of nine months. However, following further discussions, Suncorp GIO was offered and accepted the management of tail claims.¹⁷³
- 3.28** When asked by the committee whether the transition to a single agent model was not made apparent in the tender process, Mr McHugh confirmed that Suncorp was only made aware of the transition when the tender was awarded. Mr McHugh stated: 'We were never aware that it was being tendered on a single-agent model', and that Suncorp learned of the transition 'when the outcome was discussed'.¹⁷⁴

¹⁷⁰ Evidence, Mr Nagle, 3 August 2020, p 67.

¹⁷¹ Evidence, Mr Nagle, 3 August 2020, p 68; Answers to questions on notice, icare, 7 September 2020, p 9.

¹⁷² Evidence, Mr Christopher McHugh, Executive General Manager, Personal Injury Insurance, Suncorp, 3 August 2020, p 11.

¹⁷³ Evidence, Mr McHugh, 3 August 2020, p 11.

¹⁷⁴ Evidence, Mr McHugh, 3 August 2020, p 12.

- 3.29** When asked by the committee whether feedback was sought, Mr McHugh indicated that it was delivered in a meeting between himself and Mr Nagle as the then Chief Executive Officer and Managing Director of icare. Mr McHugh noted this was a novel format that lacked the structure of prior processes:

I have been involved in the personal injury market in New South Wales for 20 years and I have participated in multiple managed-fund tenders and Treasury Managed Fund [TMF] tenders. The process around feedback here was different to what we have experienced historically. Historically, there has been a very structured process in relation to providing you exactly your outcomes across the performance metrics and evaluation criteria of a tender. That process was not employed in this instance.¹⁷⁵

- 3.30** icare's representatives provided a different account of these events when giving evidence to the committee. Mr Nagle, then Chief Executive Officer and Managing Director of icare, contended that the possibility of a transition to a single scheme agent model was explicit during the tender process. Mr Nagle stated: 'All people who participated in the tender were asked to provide pricing on a hundred per cent, 50 per cent, or their nominated preference', and that that it was 'very disingenuous of Suncorp to say they were not aware that there was a possibility of a hundred per cent'. Mr Nagle added:

... In various discussions leading up to the tender we had discussed with all scheme agents that we were looking to make a significant change and that that ranged from bringing the scheme in-house, potentially, taking it on ourselves, to combinations of maybe going to one agent.

There were no issues that we would not look at in the tender process, and we structured the tender to give us the ultimate flexibility about how we could reorganise the portfolio. And the outcome of the tender is that we still had three scheme agents at the end of it.¹⁷⁶

- 3.31** Ms Elizabeth Uehling, former Group Executive – Personal Injury Claims, icare, further noted that the tender included information sessions with all scheme agents, and that any questions fielded by icare were then distributed back to all other participants for transparency. Ms Uehling also explained that an external probity advisor was engaged to oversee the tender process.¹⁷⁷

- 3.32** Regarding the feedback provided, Mr Nagle explained that there was an 'extensive debriefing session provided to all tenderers', and that he had organised a personal conversation with Suncorp as he 'knew they were very disappointed'.¹⁷⁸ On Suncorp's account of the feedback process, Mr Nagle commented that he was 'frankly just amazed that GIO could make any comment like that'.¹⁷⁹

- 3.33** icare also explained that the management of tail claims as an option was part of the tender process. In its answers to questions taken on notice, icare provided the committee with further information on the structure of the tender and what was asked of the tender participants:

¹⁷⁵ Evidence, Mr McHugh, 3 August 2020, p 13.

¹⁷⁶ Evidence, Mr Nagle, 3 August 2020, pp 69- 70.

¹⁷⁷ Evidence, Ms Elizabeth Uehling, Group Executive – Personal Injury Claims, icare, 3 August 2020, p 70.

¹⁷⁸ Evidence, Mr Nagle, 3 August 2020, p 70.

¹⁷⁹ Evidence, Mr Nagle, 3 August 2020, p 70.

The selection document stated that:

"Scheme Agents may choose to provide a pricing model for one, two or all three Service Segments. Pricing submissions should make it clear which Service Segments Scheme Agents are expressing an interest in and how (if at all) they differ from the pricing guidelines detailed below.

In addition, Scheme Agents are invited to submit a pricing model 'Run Off' open claims as at 1 January 2018. The Nominal Insurer has not as yet determined if 'Run Off' open claims will be offered as a 'carved out' service under future contractual negotiations.

Scheme Agents may elect not to submit pricing models for the 3 Service Segments and may elect to submit a pricing model for 'Run Off' open claims only."

The pricing template asked for pricing for three scenarios of 33 per cent, 50 per cent and 100 per cent of each portfolio. In its submission, GIO submitted pricing for all three scenarios.¹⁸⁰

3.34 icare also stated that 'GIO was advised it was unsuccessful with the new claims portfolio as it had not demonstrated an extensive understanding of the claims model. GIO was offered the opportunity to manage the run-off of their business and one other exiting scheme agent'.¹⁸¹

3.35 During their appearance before the committee, EML representatives provided a consistent version of events to icare. Mr Anthony Fleetwood, Chief Executive Officer of EML, stated:

Our history was central in our focus when we participated in 2017 in the tender to manage 33, 50 or 100 per cent of the new return to work scheme. The potential to move to a more service-focused and empathetic case management model for customers was attractive. It would be a shift from a claims agent model to a claims service model. Icare was seeking to engage a service provider that was aligned in terms of focus on service to workers and employers.

The tender outcome saw icare award EML 100 per cent of the contract and move from five scheme agents to one, which was obviously a highly significant change to the scheme...¹⁸²

3.36 The committee also received evidence from a number of stakeholders questioning the selection and appointment of EML as the sole scheme agent in terms of its capacity to service the entire market.

3.37 Both Mr Timothy Concannon, Deputy Chair, Injury Compensation Committee of the Law Society of NSW, and Mr Shane Butcher, the NSW Spokesperson for Workers Compensation with the Australian Lawyers Alliance, stated that they were surprised EML was chosen as the

¹⁸⁰ Answers to questions on notice, icare, 7 September 2020, p 12.

¹⁸¹ Answers to questions on notice, icare, 7 September 2020, p 12.

¹⁸² Evidence, Mr Anthony Fleetwood, Chief Executive Officer, EML, 24 August 2020, pp 17-18.

sole provider.¹⁸³ Ms Sherri Hayward, Legal / Industrial Officer, Construction and General Division, NSW Branch, Construction, Forestry, Maritime, Mining and Energy Union explained that the selection of EML was unexpected as it was one of the smaller providers prior to the new system:

I am going to be honest, it was the smallest one, from our perspective, and we had the least amount of claims with EML prior to the conversion to the one-insurer model. It was a bit of a shock, although they were the agency that had the best person-to-person communication, in saying that, prior to the one model. But it was the smallest.¹⁸⁴

- 3.38** The observation that EML was one of the smaller operators prior to the introduction of the new model was also noted in the Dore Review.¹⁸⁵
- 3.39** The Dore Review also identified high staff turnover at EML as a factor limiting its performance. When asked about this matter, Ms Dore explained that she had discovered that staff turnover at EML was 'some 22.5 per cent per month'.¹⁸⁶ Noting EML's request to icare for further assistance and resourcing, Ms Dore explained that the high turnover seemed to have impacted EML's capacity to handle claims.¹⁸⁷
- 3.40** When asked about EML's turnover, Mr Fleetwood clarified that the turnover rate of 22.5 per cent rate was an annual turnover rate, and not a monthly rate. He also advised the committee that this annual rate was 'consistent with industry norms'.¹⁸⁸
- 3.41** Mr Fleetwood further explained that the error in reporting the rate as monthly rather than an annual figure originated from an icare Board report, which was in turn relied upon by the Dore Review. He noted that a formal correction was issued by SIRA at a later date.¹⁸⁹
- 3.42** When asked by the committee whether EML, as one of the smaller operators, possessed the capacity to handle the demands of the new system, Mr Mark Coyne, Chief Executive Officer of Employers Mutual Management, defended EML's selection and capability.
- 3.43** Mr Coyne acknowledged that EML was one of the smaller providers under the old scheme. However, Mr Coyne emphasised that EML's market share at the time needs to be understood relative to the market as well as EML's prior experience in other jurisdictions:

¹⁸³ Evidence, Mr Timothy Concannon, Deputy Chair, Injury Compensation Committee, Law Society of NSW, 3 August 2020, p 7; Evidence, Mr Shane Butcher, NSW Spokesperson for Workers Compensation, Australian Lawyers Alliance, 3 August 2020, pp 7-8.

¹⁸⁴ Evidence, Ms Sherri Hayward, Legal / Industrial Officer, Construction and General Division, NSW Branch, CFMEU, 28 July 2020, p 17.

¹⁸⁵ Evidence, Ms Janet Dore, Independent Reviewer, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, 24 August 2020, p 12.

¹⁸⁶ Evidence, Ms Janet Dore, Independent Reviewer, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, 24 August 2020, p 11.

¹⁸⁷ Evidence, Ms Janet Dore, Independent Reviewer, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, 24 August 2020, p 11.

¹⁸⁸ Evidence, Mr Fleetwood, 24 August 2020, p 23.

¹⁸⁹ Evidence, Mr Fleetwood, 24 August 2020, p 23.

From day one, obviously we did not have the people that we needed as the claims built, but I think your question is looking at the capability of EML to be able to scale up and I think we would have sat at around about 16 or 17 per cent of the market share when there were five agents and I think the highest market share of an agent would have been about 22, 23 per cent. So I would argue that whether it is 16 per cent or 22 per cent, to go to 100 per cent is a massive challenge for any organisation. So I think it is very unfair to say that...

...I think when you look at transitioning experience of claims, EML have by far the most experience. We ramped up in South Australia from scratch, we ramped up in Victoria from scratch, we started working in the TMF account from scratch, we transitioned 5,000 claims for one of the largest self-insurers in Australia and transferred over 110 of their people. So I think if you are looking at saying how could EML scale up, we had more transitioning experience than any other insurer.¹⁹⁰

Engagement of The Bridge International

- 3.44** The committee also explored EML's engagement of the management consulting firm, The Bridge International, whose founders were reported to be Mr Nagle's former colleagues. In particular, the committee examined icare's role in this contract arrangement and whether any conflict of interest had been declared.
- 3.45** When asked whether icare ever directed EML to enter into contracts with The Bridge International, Mr Nagle strongly expressed that no such direction had ever been given, stating that 'the only instructions we have given EML is that they needed support and they had a number of choices on the organisations they could choose. The Bridge... was one of those'.¹⁹¹ Mr Nagle also insisted that he had not disclosed his prior relationship with the leadership of The Bridge International because he had no particular involvement with the contract and as such, 'there was no conflict of interest'.¹⁹²
- 3.46** When asked about its contract with The Bridge International, Mr Anthony Fleetwood, Chief Executive Officer, EML, confirmed that EML's engagement of the consultancy was not at the direction of icare, but its own decision based on its prior working relationship with the firm.¹⁹³ Mr Mark Coyne, Chief Executive Officer, Employers Mutual Management, explained:

icare had initially contracted the Bridge to do a review of the implementation of the new model. We worked with the Bridge as part of that because obviously they had to come into our operation to look at how the new model was being operationalised. We felt that they did some good work. When icare suggested that we look to continue to embed some of the new ways of learning we agreed with icare that would be an appropriate thing to do and we then looked to contract with the Bridge through the PSO [Project Service Order].¹⁹⁴

¹⁹⁰ Evidence, Mr Mark Coyne, Chief Executive Officer, Employers Mutual Management, 24 August 2020, p 36.

¹⁹¹ Evidence, Mr Nagle, 3 August 2020, p 74.

¹⁹² Evidence, Mr Nagle, 3 August 2020, p 73.

¹⁹³ Evidence, Mr Fleetwood, 24 August 2020, p 30.

¹⁹⁴ Evidence, Mr Coyne, 24 August 2020, p 30.

- 3.47 Mr Coyne explained, under the Project Service Order mechanism, that the cost of engaging The Bridge International was not internalised in the EML budget but passed on to icare.¹⁹⁵
- 3.48 Ms Tracey Harris, Chief Operating Officer and Service Provider Principal, icare, confirmed that the engagement of The Bridge International was later cancelled unexpectedly by icare, with EML only given notice a day prior to the termination. Ms Harris stated: '... there was a sudden notice that the Bridge would be finishing the following day, however, that EML were expected to continue the project and still deliver on the targets'.¹⁹⁶
- 3.49 When asked by the committee whether she was aware that the relationship between Mr Nagle and The Bridge International was questioned in Parliament a few weeks prior to the termination, Ms Harris said it was not raised in any meetings or conversations.¹⁹⁷

Contract to implement the Net Promoter Score

- 3.50 Concerns were also raised in relation to an \$11 million contract icare awarded to a New Zealand company, Perceptive Group, to implement the Net Promoter Score, a metric to measure customer experience with icare, scheme agents and service providers.
- 3.51 Mr McCann informed the committee that the icare representative responsible for the contract was Mr Tony Pescott, who was engaged as a contractor by icare at the time. The committee also heard that members of the Pescott family, including Mr Tony Pescott and his son, Mr Chris Pescott, held financial interests in Perceptive group.¹⁹⁸ Mr McCann also advised that parts of icare's executive remuneration was tied to the Net Promoter Score.¹⁹⁹
- 3.52 In examining this issue, the committee asked Mr Pratt, Secretary of NSW Treasury and Mr Bhatia about their knowledge of this contract. Mr McHugh was also questioned about it, given his previous work connection to Mr Tony Pescott.
- 3.53 Mr Pratt confirmed that he was aware of the issues involving Mr Pescott, but could not recall any specific details. He stated that Treasury was not provided with any reports relevant to this contract.²⁰⁰
- 3.54 Mr Bhatia confirmed that Mr Tony Pescott was engaged by icare to 'set up the NPS (Net Promoter Score) framework', and that an investigation was initiated in May 2017 when icare became aware of Mr Pescott's beneficial interest.²⁰¹ Mr Bhatia stated that he did not have any

¹⁹⁵ Evidence, Mr Coyne, 24 August 2020, p 30.

¹⁹⁶ Evidence, Ms Tracey Harris, Chief Operating Officer and Service Provider Principal, Employers Mutual Management, 24 August 2020, p 32.

¹⁹⁷ Evidence, Ms Tracey Harris, Chief Operating Officer and Service Provider Principal, Employers Mutual Management, 24 August 2020, p 32.

¹⁹⁸ Evidence, Mr McCann, 23 November 2020, p 8 and 14; Evidence, Mr Bhatia, 13 November 2020, p 23.

¹⁹⁹ Evidence, Mr McCann, 23 November 2020, p 13.

²⁰⁰ Evidence, Mr Michael Pratt, Secretary, NSW Treasury, 9 September 2020, p 27.

²⁰¹ Evidence, Mr Vivek Bhatia, Former Chief Executive Officer and Managing Director, icare, 13 November 2020, pp 23-24.

relationship with Mr Tony Pescott prior to his engagement at icare, and had no social interaction with Mr Tony Pescott or Mr Chris Pescott at any time.²⁰²

- 3.55** Mr McHugh informed the committee that he was involved in discussions around Mr Tony Pescott's hiring by Suncorp, although he was not responsible for the hiring. The committee learned that Mr McHugh asked Mr Nagle, the then Chief Executive Officer of icare, about the reason for Mr Pescott's departure from icare during a casual conversation at the icare CASE awards in November 2018. Mr McHugh recollected that it was explained by Mr Nagle that the transition was prompted due to an issue of perceived conflict, although no actual conflict existed:

... this is paraphrasing because it was a very brief conversation a couple of years ago—indicated that there was no issue, however, there was an audit going on and that from a general perspective it was considered best—there was an audit or inquiry or something of that nature.²⁰³

Investigation of matters by the Independent Commission Against Corruption

- 3.56** In terms of the concerns raised by Mr McCann relating to procurement practices, Mr Carapiet explained that the allegations were 'thoroughly investigated by ICAC, by external parties and by internal people as well'.²⁰⁴
- 3.57** In answers to questions taken on notice, icare explained that an 'information request' was received from the Independent Commission Against Corruption in June 2018, in relation to certain contract matters, including matters related to Mr Chris Pescott, RSA Archer and Capgemini. A number of other matters were also investigated, including alleged thefts and a matter related to a former contractor employed by icare. On 16 November 2018, icare was advised by the Independent Commission Against Corruption that it was not pursuing investigation of the matters any further.²⁰⁵

Financial delegations

- 3.58** Relevant to icare's procurement practices and the management of contracts, questions were also raised in relation to financial delegations at icare.
- 3.59** It became apparent during this review that members of icare's executive and the icare Board had a different understanding in terms of the financial delegations to approve contracts. For example, Mr Rob Craig, former Interim Group Executive, Personal Injury, icare, gave evidence that he was given unlimited delegation to approve contracts when it came to the build of the

²⁰² Evidence, Mr Vivek Bhatia, Former Chief Executive Officer and Managing Director, icare, 13 November 2020, p 25.

²⁰³ Evidence, Mr Christopher McHugh, Executive General Manager, Personal Injury Insurance, Suncorp, 3 August 2020, p 20.

²⁰⁴ Evidence, Mr Carapiet, 24 August 2020, p 50.

²⁰⁵ Answers to questions on notice, icare Board, 30 September 2020, p 2.

Nominal Insurer Single Platform.²⁰⁶ By contrast, Mr David Plumb, a non-executive director on the icare Board, was of the view that any contract above the value of \$10 million required Board approval.²⁰⁷

- 3.60** It is notable that Mr Plumb was also the head of the Audit and Risk Committee with the icare Board. When he was asked if he was aware that an executive within icare had unlimited authority on behalf of icare in that matter, Mr Plumb responded:

No, I was not... My understanding is that the delegation is that contracts above \$10 million have to be approved by the Board. Obviously, not physically signed—the Board can delegate to that—but \$10 million is the Board threshold.²⁰⁸

- 3.61** When Mr Plumb was asked what the risks are in having unlimited delegations at an executive level which informed a \$10 million policy, Mr Plumb replied:

The risks are, obviously, of concentration of approval that can obviously occur, and the risks of, if there is a process deficiency, that there is not that extra level of challenge and governance that deals to that.²⁰⁹

- 3.62** Mr Plumb was then asked 'were you kept in the dark, as the Chair of the Audit and Risk Committee, that a senior executive of icare, contrary to Board policy, had unlimited delegations to contract on behalf of the Nominal Insurer?'. He responded:

I was not aware that there were unlimited delegations to contract on behalf of the Nominal Insurer. However, I am aware of the requirement that all contracts above \$10 million are required to be reported to the Board— sorry, the Board to approve those contracts. I am also aware of the requirement to report significant contracts to the Board.²¹⁰

- 3.63** The evidence from icare was that this unlimited delegation was in regards to the construction of the Nominal Insurer Single Platform and the 'transformation' program that followed it, having a total contract value in the end that exceeded \$300 million. This was confirmed in correspondence received from icare following the last hearing day.²¹¹

- 3.64** It was also clarified that, of the contracts that were approved by Mr Craig for the build of the Nominal Insurer Single Platform, one exceeded \$10 million in value, and that this contract was approved by the Board on 27 November 2017.²¹²

²⁰⁶ Evidence, Mr Rob Craig, interim Group Executive , Personal Injury Claims, 2 December 2020, pp 27 and 29.

²⁰⁷ Evidence, Mr David Plumb, non-executive director, icare Board, 2 December 2020, p 28.

²⁰⁸ Evidence, Mr David Plumb, non-executive director, icare Board, 2 December 2020, pp 25-28.

²⁰⁹ Evidence, Mr David Plumb, non-executive director, icare Board, 2 December 2020, pp 25-28.

²¹⁰ Evidence, Mr David Plumb, non-executive director, icare Board, 2 December 2020, pp 25-28.

²¹¹ Answers to questions on notice, icare, 25 January 2021, pp 6 and 12.

²¹² Answers to questions on notice, icare, 25 January 2021, p 11.

Findings of the Auditor General

- 3.65** As mentioned in Chapter 1, the NSW Auditor-General's Report to Parliament regarding the performance of Central Agencies found that icare's procurement policies during 2019-2020 did not reflect key requirements specified in the NSW Government's Procurement Policy Framework, including NSW Procurement Board Directions and other better practice procurement processes. Requirements that were omitted included:
- the Chief Executive Officer or Treasury's Chief Financial Officer to approve the engagement of consultants where the engagement of the supplier is not compliant with NSW Procurement's Standard Commercial Framework
 - approvals for direct negotiations to be sought using a specified template, and obtained from the procurement business unit before proceeding with the procurement
 - procurement above \$650,000 with unaccredited agencies to be conducted by an accredited agency within the Treasury cluster or NSW Procurement
 - tender evaluation plans to be prepared and approved by the tender evaluation committee before the procurement documentation is issued
 - conflict of interest declarations by tender evaluation committee members including nil returns
 - evaluation committees to prepare an evaluation report that sets out the results and makes recommendations for awarding a contract based on overall value for money and capability.²¹³
- 3.66** The Auditor General's report noted that icare's procurement policies were updated to address the above omissions in August 2020.²¹⁴
- 3.67** The Auditor General's report also identified significant policy and practice shortcomings in relation to conflict of interest practices in icare's procurement processes (discussed in paragraph 3.70).²¹⁵

Compliance with the Government Information (Public Access) Act 2009

- 3.68** On 9 March 2020, icare's conduct in relation to its responsibilities under the *Government Information (Public Access) Act 2009* (GIPA Act) were brought to the attention of the Information Commissioner during a NSW Parliament Budget Estimates Inquiry before Portfolio Committee No. 6 – Transport and Customer Service.²¹⁶
- 3.69** In a subsequent report, the Information Commissioner found 'long-standing non-compliance with the contract reporting requirements' and that public assurances of future compliance,

²¹³ Audit Office of NSW, *Central Agencies 2020*, 10 December 2020, p 32.

²¹⁴ Audit Office of NSW, *Central Agencies 2020*, 10 December 2020, p 32.

²¹⁵ Audit Office of NSW, *Central Agencies 2020*, 10 December 2020, p 33.

²¹⁶ Information and Privacy Commission NSW, *icare – GIPA compliance report phase 1*, October 2020, p 5.

which dated back to 2016, were not realised. Nonetheless, the Information Commissioner was satisfied with icare's willingness exhibited since March 2020 to engage and comply.²¹⁷

- 3.70** Separately, the NSW Auditor General, in her report of central agencies, found that 'icare did not comply with the Government Information (Public Access) Act 2009 (GIPA) contract disclosure requirements in 2019–20 and has not complied for several years'.²¹⁸ Key procurements considered by this committee were also noted in the Auditor General's report in this regard, including the contract with EML for claims management services for the Nominal Insurer, and the contract for the build and operation of the Nominal Insurer Single Platform.²¹⁹
- 3.71** When asked about this issue during a hearing, Mr Plumb assured the committee that 'there has been clear directive from the Board and from the audit risk committee to uplift processes and a buildout of the contracts register and framework to do that which was oversighted with a degree of urgency'.²²⁰
- 3.72** When reminded by the committee that icare has been providing assurances about its intention to comply with the GIPA Act for a number of years, Mr Plumb conceded that the organisation had not been given sufficient priority to the matter in the past:

I would agree that the remedial plan—with the benefit of hindsight—was not effective to achieve an urgent enough priority...

... I think the issue was a complexity in icare to build its central contract register to be all-encompassing to accomplish that. I think as well, despite a clear mandate, that the organisation was managing a lot of matters and may not have given this as much on the ground operational priority as it should have had.²²¹

Management of conflicts of interest

- 3.73** In addition to concerns relating to procurement practices at icare, the committee also received concerns about how icare manages potential conflicts of interest.
- 3.74** As noted earlier, the Auditor General's recent report to the Parliament regarding the performance of Central Agencies also noted some concerns in relation to icare's management of conflicts of interest. In particular, the report noted:
- 19.6 per cent of senior executive and applicable staff did not complete a conflict of interest declaration in 2019–20
 - icare's Conflict of Interest Policy does not require Senior Executives to submit 'nil' conflict of interest declarations on appointment
 - one in six procurement contracts tested in the audit highlighted that there was no documentation available around the declaration of conflicts of interest

²¹⁷ Information and Privacy Commission NSW, *icare – GIPA compliance report phase 1*, October 2020, p 5.

²¹⁸ Audit Office of NSW, *Special Report – Agency compliance with the GIPA Act*, 17 October 2016, p 32.

²¹⁹ Audit Office of NSW, *Special Report – Agency compliance with the GIPA Act*, 17 October 2016, p 32.

²²⁰ Evidence, Mr David Plumb, non-executive director, icare Board, 2 December 2020, pp 32-33.

²²¹ Evidence, Mr David Plumb, non-executive director, icare Board, 2 December 2020, p 33.

- icare's procurement processes did not require checking against the centralised conflict of interest register
 - no centralised storage of procurement documentation within procurement.²²²
- 3.75** During this review, there were three specific matters discussed in relation to the declaration and management of conflicts of interest at icare. The first related to the secondary employment undertaken by a senior icare executive, and the second related to the engagement of the former Chief Executive Officer and Managing Director's wife as a consultant at icare. The third matter concerned icare's practices in relation to the registration of gifts and benefits.

Secondary employment of senior executives

- 3.76** During this review some concerns were raised about secondary employment and other business interests pursued by icare's senior executives.
- 3.77** In particular, the committee questioned Mr Rob Craig, the former Interim Group Executive – Personal Injury Claims at icare, about the disclosure of his business interests and income outside of icare, to determine whether the potential conflicts of interest were managed appropriately.
- 3.78** Mr McCann has raised a concern with the committee that Mr Craig, a senior employee of icare, was 'double-dipping' by receiving payments as an employee as well as a director-consultant of Internal Consulting Group, a company engaged by icare.²²³
- 3.79** Given this allegation, the committee explored Mr Craig's disclosures relating to his role at the Internal Consulting Group (ICG) while undertaking work for icare. Mr Craig explained that he had first joined icare as a contractor, and that he had continued his commitments as a consultant for ICG during this initial period. However, Mr Craig emphasised that there was no overlap between the fields of work:

I started with icare in October of 2015. I started as a contractor. The process to commence with icare occurred very quickly. I had some components of work that I had made previous commitments to that I needed to deliver out. There was a period in the first month of contracting to icare. I was not an employee. I did a couple of days of work and completed a commitment for a client of ICG (Internal Consulting Group), but there was no overlap between the work that I did for the ICG client this and the work that I did for icare. The time is very separately accounted for.²²⁴

- 3.80** Mr Craig also confirmed that he was never a partner or shareholder of ICG, and that he did not receive any payment of referrals from ICG with any icare work, although a 'small referral payment' was received for work that was unrelated to icare.²²⁵

²²² Audit Office of NSW, *Central Agencies 2020*, 10 December 2020, p 33.

²²³ Evidence, Mr McCann, 23 November 2020, p 8.

²²⁴ Evidence, Mr Craig, 2 December 2020, p 19.

²²⁵ Evidence, Mr Craig, 2 December 2020, p 19.

- 3.81** Mr Craig stated that his involvement with ICG was disclosed verbally to Mr Bhatia, and that he, at Mr Bhatia's request, committed to and did not seek any further consulting work while engaged at icare.²²⁶
- 3.82** Mr Craig's other professional roles outside of icare include chairmanships with the Australian Payments Network and Squirrel Group. Mr Craig also disclosed to the committee that he has one-third ownership of Oversight, a film lighting design and manufacturing company, and family ownership (50 per cent) of Mind My Health, a specialised cancer-focused psychology business of which his wife is a director. Mr Craig's indicated that his interests were first verbally disclosed to Mr Bhatia in 2015, before a written disclosure was made at a later date when Mr Nagle became the Chief Executive Officer of icare.²²⁷
- 3.83** Further information on Mr Craig's disclosures were provided by icare in answers to questions on notice. icare indicated that these interests, while initially disclosed verbally, were also documented in Mr Craig's CV. icare further noted that Mr Craig entered all of his business interests into the relevant register when it was instituted in late 2019.²²⁸ icare also noted that Mr Craig '... sought explicit agreement to maintain his involvement with AusPayNet, Oversight and Mind My Health, which was agreed'.²²⁹
- 3.84** When asked whether it was appropriate for Mr Craig, who has a senior executive position at icare, to have secondary employment, Mr Ferguson noted that such arrangements were permitted:
- ... many employees have secondary employment... and that is not against the rules ... The first focus for Mr Craig and all employees is on their role at icare. As long as they are performing that role appropriately and their attention is not distracted by other interests then there is no rule against having secondary employment.²³⁰
- 3.85** When asked by the committee whether it was appropriate for Mr Craig to have been appointed as a group executive when he held interests in a firm that provided psychological services, Mr Ferguson maintained that he stood by the decision, stating: 'As I said before, I had a comprehensive conversation not long after his appointment to discuss the various interests Mr Craig has. There were no interests that were pertinent to the role'.²³¹
- 3.86** The committee notes that icare is a common user of psychological services, and that this presents a potential conflict of interest.

Engagement of former Chief Executive Officer and Managing Director's wife

- 3.87** Concerns were also raised in relation to the engagement of Mr Nagle's wife at icare between February 2016 and March 2019.

²²⁶ Evidence, Mr Craig, 2 December 2020, pp 19 - 20.

²²⁷ Evidence, Mr Craig, 2 December 2020, p 17.

²²⁸ Answers to questions on notice, icare, 25 January 2021, p 4.

²²⁹ Answers to questions on notice, icare, 25 January 2021, p 5.

²³⁰ Evidence, Mr Don Ferguson, interim Chief Executive Officer, icare, 2 December 2020, p 18.

²³¹ Evidence, Mr Ferguson, 2 December 2020, p 23.

- 3.88** The committee learned that Mr Nagle's wife was engaged by icare's capability and knowledge team as a learning consultant, at a time when Mr Nagle was a Group Executive at icare. The committee was informed that Mr Nagle's wife was engaged as a contingent worker at a rate standard for a worker of that type.²³² The engagement commenced on 1 February 2016 and ended on 31 March 2019, at a total cost of \$772,524.²³³
- 3.89** When asked how this potential conflict of interest was managed, Mr Nagle stated that he had declared the conflict to the then Chief Executive Officer and Managing Director, Mr Bhatia, who in turn spoke to the Chief People Officer to ensure that there were adequate separation in terms of arrangements. When asked whether the notification to Mr Bhatia was in writing, Mr Nagle replied 'I believe so', and agreed to table the correspondence and the notification on notice. The committee did not receive a copy of these documents as Mr Nagle resigned following his appearance before the committee, and icare advised that it was unable to locate any documentation from the records available to it.²³⁴
- 3.90** When asked about this issue, Mr Bhatia stated that he could not recall the exact details of the appointment and whether or not Mr Nagle's notification occurred before or after his wife accepted the offer.²³⁵ However, Mr Bhatia did recall the issue being raised by Mr Nagle, and confirmed that he had discussed the matter with the then Chief People Officer to ensure that structural separations were implemented. Mr Bhatia explained: '... when I was informed we made sure that there were the right protocols put into place so that Mr Nagle's wife was not in the same part of the organisation and reported through to Mr Nagle.'²³⁶ Mr Bhatia further confirmed that he did not have any issues with the appointment, provided that adequate structural separation continued to be in place.²³⁷
- 3.91** During the review, the committee learned that the icare Board remained unaware of this conflict until a complaint was lodged following Mr Nagle's appointment as the Chief Executive Officer and Managing Director at icare.²³⁸
- 3.92** Mr Nagle informed the committee that the Board, believing 'that the disclosure that I had made should have been clearer', sanctioned him by removing 100 per cent of his short term incentive for the 2018-19 financial year.²³⁹ Mr Carapiet later added that Mr Nagle's sanction also included a one-third reduction in his long term bonus and a pause to his salary increase.²⁴⁰
- 3.93** Subsequent to this, the committee was informed by Mr Nagle that he had considered tendering his resignation at icare. However, Mr Nagle told the committee that he had decided to stay on at icare after being encouraged to reconsider by Mr Carapiet.²⁴¹ Mr Mark Lennon, former Board

²³² Answers to questions on notice, icare, 7 September 2020, p 18.

²³³ Correspondence, Mr David Plumb, Chair, Audit and Risk Committee, icare Board, clarification to transcript of 24 August 2020, p 2.

²³⁴ Answers to questions on notice, icare, 7 September 2020, p 19.

²³⁵ Evidence, Mr Bhatia, 13 November 2020, p 31.

²³⁶ Evidence, Mr Bhatia, 13 November 2020, p 32.

²³⁷ Evidence, Mr Bhatia, 13 November 2020, p 32.

²³⁸ Evidence, Mr Nagle, 3 August 2020, p 81.

²³⁹ Evidence, Mr Nagle, 3 August 2020, pp 81-82.

²⁴⁰ Evidence, Mr Carapiet, 24 August 2020, p 45.

²⁴¹ Evidence, Mr Nagle, 3 August 2020, p 82.

member at icare, recollected that Mr Nagle appeared to be 'disappointed' and 'very bewildered' by the Board's decision about this matter.²⁴²

- 3.94** While Mr Carapiet stated that Mr Nagle never offered his resignation, he noted that the Board collectively came to the view that the sanction imposed was sufficient and it supported Mr Nagle to continue in his position.²⁴³
- 3.95** Mr Lennon confirmed this to be the Board's position, noting that given Mr Nagle's experience, the Board felt it was in icare's best interests for Mr Nagle to remain:

I just wanted to make the point with regard to Mr Nagle remaining on. I accept what people are saying around the table about some of his actions, but you have to make a judgment. Certainly in the short- to medium-term what was in the best interests of the organisation, given the position it was in at the time, and I think this afternoon Mr Carapiet or someone else referred to the fact we were in the middle of the SIRA review, the fact that the previous CEO had only left 14 months before, the fact that Mr Nagle is very competent when it comes to his skills in the insurance industry, the fact that prior to his appearance here he was performing and dealing with the issues of the day quite well and actually had improved his performance. For all those reasons, that is the reason he remained'.²⁴⁴

- 3.96** Mr Nagle last appeared before the committee on 3 August 2020 when he commenced his evidence stating that he wanted 'to thank the committee for the opportunity to correct the campaign of misinformation and accusations based on inaccuracies that has recently been generated'. He resigned from his position at icare at the conclusion of the hearing that day.

Recording of gifts and benefits

- 3.97** The committee also examined icare's practices in relation to the recording of gifts and benefits, and more specifically, declarations in relations to gifts received by Mr Bhatia from various suppliers during his time as icare's Chief Executive Officer and Managing Director.
- 3.98** During his appearance before the committee, Mr McCann expressed a concern that Mr Bhatia had never declared 'any gifts or benefits, or any conflicts of interest' during the time he was General Manager of Compliance, Fraud and Corruption Control at icare. Mr McCann explained that he would have been notified if a declaration had been made, as the policy required that the relevant documents be delivered to him.²⁴⁵
- 3.99** Mr McCann reported these concerns to ICAC in early 2018, and two months later, despite Mr Bhatia having left the organisation, the gift register was updated to reflect the 42 gifts received by Mr Bhatia.²⁴⁶
- 3.100** When asked about this issue at a hearing, Mr Bhatia confirmed that he had received various gifts, and explained that he had delegated the registration of all gifts and benefits to his assistant.

²⁴² Evidence, Mr Mark Lennon, former member of the icare Board, 24 August 2020, p 85.

²⁴³ Evidence, Mr Carapiet, 24 August 2020, p 46.

²⁴⁴ Evidence, Mr Lennon, 24 August 2020, p 86.

²⁴⁵ Evidence, Mr McCann, 23 November 2020, p 4.

²⁴⁶ Tabled document 'Bhatia gifts summary', 13 November 2020, p 1.

When asked by the committee when the disclosures were made, Mr Bhatia replied: 'I do not know. It would have been disclosed as part of the normal process, which is my assistant enters the gifts and benefits register based on my entries in the diary'.²⁴⁷

- 3.101** While agreeing that the policy in place at icare at the time created a personal responsibility to ensure that all gifts received were disclosed, Mr Bhatia expressed the view that it would not be reasonable for him to be expected to contemporaneously check with his assistant as to whether the registrations were being made:

... I do not want to sound disrespectful Mr Mookhey ... but if you are expecting that I would be checking whether my assistant has entered the gifts and benefits entries contemporaneously, I think there is probably a difference of ... there is a different expectation about the role that I played at icare.²⁴⁸

- 3.102** It was Mr Bhatia's view that he had fulfilled his obligations by asking his assistant to complete the register. When asked why the declarations were made in bulk after he had left the organisation, Mr Bhatia commented:

That is very strange for me to know because my assistant is very efficient and she registers all lunches or gifts, Christmas hampers that come through on Christmas, on the register... I put every single piece of gift that comes in or a lunch or a dinner, they are all recorded by my assistant in the gifts and benefits register. That is part of her responsibilities and she discharges them. It is the same process that is followed by everybody else in the organisation. I am not quite sure any executive is going down and entering a gift benefit register themselves.²⁴⁹

- 3.103** When it was put to Mr Bhatia that the failure to make timely disclosures is significant, given the gifts came from companies who won contracts with icare, Mr Bhatia disagreed with any allegations of impropriety. Rather, Mr Bhatia contended that his meetings over meals and gifts from key stakeholders were part of standard business networking practice in the industry:

Smartgroup, State Super, NAB, Citibank, Waterman ... The point I was trying to make, Mr Mookhey, is that you represented names of companies that had contracts, not the ones that did not have any contracts and as a matter of course, being part of the industry, you do go to lunches and dinners and breakfasts...²⁵⁰

- 3.104** While Mr Carapiet did not recall signing off on any declarations in this regard for Mr Bhatia, he also observed that Mr Bhatia never received a gift that would be considered 'material'.²⁵¹ Looking at the list of gifts received by Mr Bhatia, which was provided by the committee, Mr Carapiet asserted that the gifts need to be considered relative to icare's scale of operations:

—just to put it in context, this is a \$38 billion organisation with expenses annually of about \$4 billion to \$5 billion. That is the annual expense. There is not one item here that I can see that has an individual item for Mr Bhatia—for himself—too much over

²⁴⁷ Evidence, Mr Bhatia, 13 November 2020, p 16.

²⁴⁸ Evidence, Mr Bhatia, 13 November 2020, p 16.

²⁴⁹ Evidence, Mr Bhatia, 13 November 2020, pp 17-18.

²⁵⁰ Evidence, Mr Bhatia, 13 November 2020, p 20.

²⁵¹ Evidence, Mr Carapiet, 1 December 2020, pp 14-15.

\$100. I think the threshold for declaration is \$100, so a lot of these he did not even have to disclose. So if you are asking me if I checked whether someone ...

... You are saying was it relevant and should I have checked these individual—should I have checked he had a cup of coffee or a sandwich? It is just not practical for you to ask me that question. It is just not practical ... and if I have not done it, I have not done it.²⁵²

- 3.105** When asked by the committee whether this created a perception that icare was indifferent to policies and process, Mr Carapiet made it clear that this was not his intention, but he emphasised the nominal value of the gifts relative to the overall scheme of operations:

I do not wish to create that perception at all. I am raising an objection to your line of questioning to ask me about \$50 and \$100 expense items and how much I should have delved into them in 2018 about something that happened in 2015, 2016 and 2017 for relatively small amounts of money in the overall scheme of things.²⁵³

Cases of employee misconduct

- 3.106** The committee also received evidence of lax policies at icare that may have created scope for employee misconduct.

- 3.107** In his evidence, Mr McCann noted that icare, unlike other organisations he had previously worked in, did not maintain an asset register. Mr McCann informed the committee that such failure to monitor assets meant that numerous thefts occurred:

Numerous reports were made to me about the theft of property from icare over a period of time...

Thefts have been occurring since July 2016, after they had gone through this major refurbishment of the building in Kent Street. It is hard to believe but overnight, property such as tables, chairs, cushions, microwave ovens, television sets, iPads, toasters, kettles, crockery, knives and forks were going missing.²⁵⁴

- 3.108** Mr McCann's evidence was that he had determined that 47 to 50 thefts had taken place over a period of six months, with assets such as laptops and furniture going missing. Mr McCann asserted that his investigation into the thefts were not supported, as the value of the missing goods were deemed to be of low value:

I reported it ... I was told to drop it. I was told not to investigate it, not to waste my time on it; it was a waste of time and the amounts were of no consequence. They were of low value. I said, "But it is not about the value; it is about what it is doing to the culture of this company internally...".²⁵⁵

- 3.109** The committee also received evidence in relation to icare's former head of facilities and services engaging two external contractors to undertake office fit out work over a number of years. The

²⁵² Evidence, Mr Carapiet, 1 December 2020, p 15.

²⁵³ Evidence, Mr Carapiet, 1 December 2020, p 17.

²⁵⁴ Evidence, Mr McCann, 23 November 2020, p 14.

²⁵⁵ Evidence, Mr McCann, 23 November 2020, p 15.

engagement comprised eight contracts with one supplier to a total value of \$26.4 million, and a number of ad hoc purchase orders with the other supplier.²⁵⁶

3.110 A review conducted by Allens Linklaters in relation to this matter found several anomalies in the execution of four of the contracts, as well as evidence that the relationship between certain icare facilities staff and contractors' employees were 'characterised by informality, banter, in-jokes and innuendo ... beyond what can be regarded as appropriate in a professional context'. The report also noted that emails reviewed during the process included references to 'sexual acts, consumption of alcohol and the possible use of drugs' with these activities possibly having taken place '... in a storeroom on icare premises'.²⁵⁷

3.111 When asked about this matter, Mr Plumb and Mr Craig confirmed that the issue was identified internally, and then referred to the external investigator, Allens Linklaters, who completed the report. Subsequently, referrals were also made to the ICAC and NSW Police. Mr Plumb explained:

Once again, this was a matter that was actually picked up by icare staff, and it originally came in relation to looking at overtime and related issues around that. And then an investigation was undertaken in conjunction with Allens and internal audit. It was reported up, I think initially, to the Audit and Risk Committee somewhere in June or July 2018 and updates provided, and then the full Board would have received the summary of this report around that... These were investigated. My recollection is there was no conclusive proof but there was reference made to the police in relation to the issues where they may have been illegal substances consumed.²⁵⁸

3.112 A separate issue discussed during the review was a matter in which icare staff had employed people via companies they had set up themselves, without any declaration or permission. This matter was referred to legal firm Norton Rose for investigation and then subsequently referred to the ICAC.²⁵⁹

3.113 Ms Samantha Liston, Group Executive - People and Workplace, icare, informed the committee that icare is pursuing civil proceedings against the two individuals involved in this matter and looking to recover the funds.²⁶⁰

3.114 When asked whether the incidents occurred because of a lack of clear policies and procedures, Mr Plumb acknowledged that some weaknesses were identified and brought to the Board's attention.²⁶¹ However, Mr Plumb also contended that, in his view, the fact that the frauds were detected indicated that the mechanisms in place in icare were working well overall:

I think that the Audit and Risk Committee and the Board have acted very strongly to actually enhance internal controls. In a large organisation, frauds or poor activity do occur. What is actually important is the ability to actually—that they do get detected,

²⁵⁶ Tabled document, Allens Linklaters, *Report on Investigation: Summary*, 2 December 2020, p 1.

²⁵⁷ Tabled document, Allens Linklaters, *Report on Investigation: Summary*, 2 December 2020, pp 1-2.

²⁵⁸ Evidence, Mr David Plumb, non-executive director, icare Board, 2 December 2020, p 38.

²⁵⁹ Evidence, Mr David Plumb, non-executive director, icare Board, 2 December 2020, p 36.

²⁶⁰ Correspondence, Ms Samantha Liston, Group Executive – People and Workplace, icare to secretariat, 25 January 2021, p 1.

²⁶¹ Evidence, Mr Plumb, 2 December 2020, p 36.

appropriately investigated and dealt to. I cannot give a zero confidence that we will never have suspect issues.²⁶²

Secondments to the Treasurer's Office

3.115 Also examined during this review were secondment arrangements between icare and the Treasurer's office, based on media reports that the salaries of a couple of members of the Treasurer's ministerial staff, including a senior advisor and receptionist, were paid for by icare. The committee explored whether these secondments were appropriate and the context of each situation. The case of the senior advisor in particular was closely examined.

3.116 The senior advisor was an employee of icare but in practice served as an advisor in the Treasurer's Office for a number of years. Mr Nigel Freitas, the former Chief of Staff to the Treasurer, who was involved in the arrangement that seconded the senior advisor, gave evidence about how this secondment came to be in place. Mr Freitas advised that:

- the senior advisor first joined Minister Perrottet's office in October 2015²⁶³
- due to visa complications, the senior advisor was rehired in April 2016 as a temporary work (skilled) visa (subclass 457) worker sponsored by the labour hire firm, Robert Walters. This was pursuant to advice Mr Freitas received from the Human Resources section of the Department of Premier and Cabinet²⁶⁴
- as part of the rehire, the senior advisor became a contractor of the Department of Premier and Cabinet, and was in turn seconded to Minister Perrottet's Office²⁶⁵
- in June 2017, the senior advisor expressed an interest in working at icare, which was subsequently conveyed to Mr Bhatia. The senior advisor then met with icare's Chief People Officer and subsequently underwent a recruitment process and was appointed as a manager in icare's strategy section²⁶⁶
- after this, Mr Freitas arranged to have the senior advisor remain in the Treasurer's Office to complete outstanding assigned work activities before commencing with icare. This was intended to be a 'short-term secondment' but was subsequently extended due to increased workload in the office²⁶⁷
- in 2019 a discussion took place and it was agreed that the senior advisor would commence with icare in the first quarter of 2020. This did not occur as the workload in the Treasurer's Office substantially increased as a result of the bushfires and the COVID-19 pandemic.²⁶⁸

²⁶² Evidence, Mr Plumb, 2 December 2020, p 36.

²⁶³ In camera evidence, Mr Nigel Freitas, former Chief of Staff, NSW Treasurer, 23 November 2020, pp 7-8, published by resolution of the committee.

²⁶⁴ In camera evidence, Mr Freitas, 23 November 2020, p 9, published by resolution of the committee.

²⁶⁵ In camera evidence, Mr Freitas, 23 November 2020, p 15, published by resolution of the committee.

²⁶⁶ In camera evidence, Mr Freitas, 23 November 2020, p 12, published by resolution of the committee.

²⁶⁷ In camera evidence, Mr Freitas, 23 November 2020, p 13, published by resolution of the committee.

²⁶⁸ In camera evidence, Mr Freitas, 23 November 2020, p 21, published by resolution of the committee.

- 3.117** At the time of this secondment, Mr Carapiet was Chair of the icare Board and Mr Bhatia was CEO and Managing Director at icare. Both were asked questions by the committee about this specific arrangement, and secondments generally.
- 3.118** Mr Carapiet explained that secondments to the Treasurer's office were never actively considered by the icare Board. He stated: 'I have no knowledge of the details of any secondments. Whether someone mentioned that there was someone from the Treasurer's office is not something that I ever paid any attention to, I must admit'.²⁶⁹
- 3.119** When asked about his thoughts on the appropriateness of the arrangements that were in place, Mr Carapiet suggested that these type of secondments are common in government, and noted that arrangements such as this were 'handled at the management level'.²⁷⁰
- 3.120** Mr Bhatia told the committee that it was 'very typical for people to be seconded or posted as DLOs [Department Liaison Officers] and there was a process that the organisation ran to ensure that it was legal'.²⁷¹
- 3.121** Mr Ferguson, Interim Chief Executive of icare before Mr Harding was appointed, also noted that the practice of secondments predated icare, with WorkCover also having funded Department Liaison Officers in the past.²⁷²
- 3.122** When the committee questioned the decision of icare to engage the senior advisor, noting his lack of experience in the insurance industry, Mr Bhatia defended the decision, noting that 'a lot of people in our strategy function do not have insurance expertise', and that this in fact helped the organisation by helping it '... see the wood from the trees and are not captive to practices that have always happened without challenging them'.²⁷³ Mr Bhatia further explained:
- There were reasonable amounts of people, especially in functional roles, not in the claims areas or underwriting areas or the product areas, but in the functional areas such as HR, finance, strategy, customer. For instance, the person that we brought on to manage our customer interaction and to create customer insights did not come from the insurance sector because we thought that some other sectors do it much better, so why not learn from their insights and their expertise into that?²⁷⁴
- 3.123** The committee also noted that the senior advisor, while having his salary paid for by icare, had responsibilities for matters beyond icare. When asked whether this was appropriate, Mr Freitas emphasised that 'these secondment arrangements happen all of the time in government' and 'when agencies second staff to a Minister's office, they do that on the understanding that it is a broader remit than just a DLO and that comes from agency funds'.²⁷⁵
- 3.124** Mr Freitas explained that he had relied on advice from agencies regarding staffing arrangements, and acted on the understanding that all the arrangements he had organised were permitted. Mr

²⁶⁹ Evidence, Mr Carapiet, 24 August 2020, p 58.

²⁷⁰ Evidence, Mr Carapiet, 24 August 2020, p 61.

²⁷¹ Evidence, Mr Bhatia, 13 November 2020, p 29.

²⁷² Evidence, Mr Ferguson, 24 August 2020, pp 61-62.

²⁷³ Evidence, Mr Bhatia, 13 November 2020, p 30.

²⁷⁴ Evidence, Mr Bhatia, 13 November 2020, p 33.

²⁷⁵ In camera evidence, Mr Freitas, 23 November 2020, p 18, published by resolution of the committee.

Freitas confirmed that he would not have proceeded with any of the arrangements had he been advised otherwise.²⁷⁶ Mr Freitas said:

There is a Minister's handbook, but ...—because the responsibilities are so broad ranging and the regulations are so specific—rather than sit down and read handbooks you go to the agency for advice. My practice was when I wanted to do something I would go to the agency which is the HR expert and I would say, "I would like to do this. Can I do it? Is it possible? Can it happen?" They would come back with the advice in terms of if it was possible and if it could happen, and if not, how it could happen—if that makes sense.²⁷⁷

3.125 The committee also learned that a receptionist position in the Treasurer's office was also occupied by an icare employee. When asked why icare personnel were being used to fill vacancies in the Treasurer's Office, Mr Freitas contended that this too is a common practice across all political offices:

Because agencies are there also to help supplement a Minister's office and help the Minister's office where they could and in the past we had done that for numerous agencies. Where we had a short-term vacancy in the office we would go to the agency and ask them to help fill that. That was pretty common...²⁷⁸

... As I said, I had seen this in the Premier's office and other Ministers' offices. Agencies often provide front desk staff. That is just a routine part of government²⁷⁹

3.126 When asked by the committee whether having a position funded by icare was slightly different from having a position funded by a department – given that one of icare's key sources of funds is insurance premiums – Mr Freitas acknowledged that there may be a difference, but noted that he had never received such feedback when organising the arrangements. Mr Freitas said: 'If the view from the agency was that this should not have occurred because that was a different source of funds, then I would have accepted that advice. There was never a time in government that I did not accept the advice I received on human resources matters.'²⁸⁰

3.127 During this inquiry, a review of these secondments arrangements was undertaken by NSW Treasury. This review found:

- that there were three staff members who were identified as contractors of the relevant agencies (two from icare and one from the Department of Finance, Services and Innovation) and who were purported to be assigned as Department Liaison Officers (DLOs) or seconded to the Minister's Office under clause 35 of the Government Sector Employment Regulations (GSE Regulations) during the Relevant Period. However, under the relevant requirements, only employees of agencies and not contractors can be assigned as DLOs or seconded under the GSE Regulations and paid for by the agency.

²⁷⁶ In camera evidence, Mr Freitas, 23 November 2020, p 3, published by resolution of the committee.

²⁷⁷ In camera evidence, Mr Freitas, 23 November 2020, p 15, published by resolution of the committee.

²⁷⁸ In camera evidence, Mr Freitas, 23 November 2020, p 22, published by resolution of the committee.

²⁷⁹ In camera evidence, Mr Freitas, 23 November 2020, p 29, published by resolution of the committee.

²⁸⁰ *In camera* evidence, Mr Freitas, 23 November 2020, p 24, published by resolution of the committee.

- There were instances of administrative process deficiencies across the hiring arrangements where requirements were partially met or administrative processes were incomplete reflecting inconsistent application of process and controls.²⁸¹
- 3.128 When asked by the committee whether the findings essentially indicated that icare's secondments to the Treasurer's Office were unlawful, Mr Pratt, the Secretary of NSW Treasury, agreed and said: 'effectively, yes. Had they not been contractors, this would have been lawful'.²⁸²

Governance

- 3.129 This section explores a number of issues to governance arrangements at icare, including the expertise of icare's management and Board, executive remuneration and performance bonuses and expenditure on facilities. It will also consider the workplace culture at icare.

Expertise and skills of icare's management and Board

- 3.130 The Board of icare is a governing Board, comprising the Chief Executive Officer and up to eight directors appointed by the Treasurer under the *State Insurance and Care Governance Act 2015*. The Board holds the ultimate authority over icare's management with the day to day operations delegated to the Chief Executive Officer, who is also a Director of the Board.²⁸³
- 3.131 Under the *State Insurance and Care Governance Act*, the Board has the following functions:
- to give the Minister any information relating to the activities of icare that the Minister requests,
 - to keep the Minister informed of the general conduct of icare's activities and of any significant development in icare's activities,
 - to determine general policies for icare and to give directions to the chief executive of icare in relation to the icare's activities,
 - such other functions as are conferred or imposed on it by or under this or any other Act or law.
- 3.132 In addition, under section 6 of that Act, the Minister may give the Board a written direction in relation to icare if the Minister is satisfied that it is necessary to do so in the public interest. In the case of icare, the Minister in question has at all times been the Treasurer.
- 3.133 During this review, the experience and skills of both icare's management and the Board was examined. This was due to concerns that were raised in relation to the lack of experience the management and Board possessed specific to workers compensation. Ms Dore and Mr McCarthy, in particular, suggested that the implementation of the new claims management model by icare was demonstrative of a lack of understanding of personal injury management.

²⁸¹ Tabled document, NSW Treasury, *Report on audit of staff hiring arrangements in Minister Perrottel's Office between 1 Sep 2015 – 10 Aug 2020*, 23 November 2020.

²⁸² Evidence, Mr Michael Pratt, Secretary, NSW Treasury, 9 September 2020, p 4.

²⁸³ icare, *Our Board*, <<https://www.icare.nsw.gov.au/about-us/our-people/our-Board#gref>>

- 3.134** For instance, Ms Dore noted that icare's management introduced changes from the general insurance sector – including triaging – and recruited staff for their 'customer management skills, not technical workers compensation skills'.²⁸⁴
- 3.135** To Ms Dore, icare's new approach did not only constitute 'quite a different approach to any compensation scheme that I have been involved in',²⁸⁵ but was a cause for concern: 'I was always worried about the absence of knowledge about the real complexities of workers compensation with all the groups involved and the lack of focus on individual cases'.²⁸⁶
- 3.136** Ms Dore stated that icare's Board seemed to lack personal injury management experience:
- I had the feeling that there was nobody who really understood the difference between managing health systems or managing individual health issues and the complexities of personal injury management, which, I believe, is a very separate kind of approach.²⁸⁷
- 3.137** Mr McCarthy, noting that the new claims model leaves up to eighty per cent of claimants without the support of a claim officer, argued that the system could only have been implemented by a Board that lacked an understanding of workers compensation:
- The icare disaster was caused by appointment of Board members who had no experience in personal injury or workers compensation, who then appointed management with no experience in workers compensation or personal injury. Icare launched a new, unproven claims operational model with a single provider, bringing key decision-making in-house and under-resourcing claims management functions. This was disastrous and resulted in poor return-to-work rates and a major deterioration in the claims performance and financial position of the Nominal Insurer.²⁸⁸
- 3.138** The evidence provided by Mr McCarthy and Ms Dore were supported by the PwC review into icare governance, accountability and culture, publicly released on 1 March 2021. The review found that the Board, while equipped with a range of relevant and deep skills and with experience in insurance and financial services, possessed 'limited experience in the public sector' and '... also lacked depth of experience in personal injuries, in particular workers compensation'.²⁸⁹
- 3.139** In this regard, the committee also notes the 2020 Challis and Company report (Challis Report). The Challis Report was commissioned by the icare Board, and was part of a regular three year process to provide the Board with 'proper feedback' on its performance.²⁹⁰ While the Challis Report found the Board to be overall effective and well regarded, it also noted internal concerns at the general lack of workers compensation experience on the Board.²⁹¹

²⁸⁴ Evidence, Ms Dore, 24 August 2020, p 9.

²⁸⁵ Evidence, Ms Dore, 24 August 2020, p 9.

²⁸⁶ Evidence, Ms Dore, 24 August 2020, p 14.

²⁸⁷ Evidence, Ms Dore, 24 August 2020, p 7.

²⁸⁸ Mr Peter McCarthy, Former Partner, Ernst and Young and Former Principal Actuary, NSW Workers Compensation System and CTP, SIRA, 23 November 2020, pp 18 and 20.

²⁸⁹ PwC, *icare – Independent Review of icare governance, accountability and culture* (February 2021), p 23.

²⁹⁰ Evidence, Mr Carapiet, 1 December 2020, p 29.

²⁹¹ Tabled document, Challis & Company, *Confidential Board Report: icare*, 2 December 2020, p 20.

- 3.140** When asked about these concerns during their appearance, current and former members of the icare Board strongly defended the expertise of the Board and the executive team. Mr Michael Carapiet, who appeared before the committee on 24 August 2020 as the then chair of the icare Board, stated:

I do not believe that the current team there is a weak team. They need a strong, good leader. The technical competence in their respective areas of competence is good. You have got a good chief financial officer. You have got a good actuary. You have got a good chairperson. You have good human resources [HR]. The challenge really was in the workers compensation area, where I thought we could have handled that a lot better...

There is a good executive team now...²⁹²

- 3.141** Mr Carapiet also defended the Nominal Insurer's performance and the decision to transition to the new claims management model. Mr Carapiet stated that icare was 'making the scheme fairer to injured workers and more reliable and predictable for business'. He also contended that the Net Promoter Score was an indicator of satisfaction within the sector in terms of the Nominal Insurer's performance:

Injured workers and employers are increasingly satisfied with the Nominal Insurer, evidenced by the injured worker Net Promoter Score for June 2020 being positive 23, up from negative three 12 months ago. For employers, it was positive eight up from negative 29—lots of progress.²⁹³

- 3.142** Mr Carapiet also provided context to the current composition of the Board, noting the experience of several Board members:

... if I can remind the entire Committee that the first chief executive of the workers compensation system in New South Wales—prior to Mr Bhatia or Mr Nagle, there was not one chief executive who had any experience...

... Not one chief executive from the prior four had any workers compensation experience, any insurance experience or any financial services experience. Here you had an organisation—one of the largest insurance companies—being run without any executive experience with insurance or financial services. A number of the Board members who were appointed to the icare Board—including Mr Lennon, who had been on the workers compensation Board for many years previously, and including myself, Mr Gupta, Mr Bell and Ms Carr—had been on the Safety, Return to Work and Support and the workers compensation Board previously since 2012. Mr Plumb was the chair of the NSW Self Insurance Corporation [SICorp]. When icare came together, Mr Pratt was—I think his title was public service commissioner and he was instrumental in terms of the transformation of Service NSW. So when icare was formed, you had a Board who had previous workers compensation experience, having done approximately three years of Safety, Return to Work and Support and some, like Mr Lennon, many, many more years.²⁹⁴

²⁹² Evidence, Mr Carapiet, 1 December 2020, pp 9-10.

²⁹³ Evidence, Mr Carapiet, 24 August 2020, p 41.

²⁹⁴ Evidence, Mr Carapiet, 1 December 2020, pp 12-13.

3.143 Relevant to this, the PwC review, published after the conclusion of the committee's hearings, highlighted examples where risks were delayed and 'filtered' by management when reported to the Board. One example noted was in respect to the Return to Work (RTW) rate. The PwC review stated:

There is also evidence over 2018-19 that management was slow to bring forward a number of material nonfinancial risks and issues, and that reporting was filtered in some material respects. An example is the reporting on the decline in RTW and deterioration of EML's performance as the primary service provider of the NI scheme which was raised to the Board in October 2018. Continued reference to EML's underperformance or data quality issues were accepted as an explanation for the declining performance of RTW and poor claims management performance. There was limited challenge from the Board in relation to icare's role in the design and management of the model.²⁹⁵

Executive remuneration and bonuses

3.144 In the context of the deteriorating financial position of the Nominal Insurer, and concerns raised in relation to the management and operations of icare, the committee also examined the remuneration of icare's executives and level of performance bonuses.

3.145 icare provided the following details with respect to executive remuneration:

- Mr Nagle, former Chief Executive Officer and Managing Director, was paid fixed remuneration of \$700,000 for 2019-2020. In September 2019, Mr Nagle was paid a portion of his long-term bonus of \$106,667 with respect to the period 2016-17 to 2018-2019.
- Ms Uehling, former Group Executive, Personal Injury Claims, was paid fixed remuneration of \$451,000 for 2019-2020. In September 2019, Ms Uehling was paid an annual bonus of \$133,538 in respect of the 2018-2019 financial year. Ms Uehling's bonus entitlement for 2019-2020 had not been determined as at 2 September 2020.
- Mr Andrew Ziolkowski, Group Executive, Prevention and Underwriting, was paid fixed remuneration of \$489,250 for 2019-2020. In September 2019, Mr Ziolkowski was paid an annual bonus of \$101,973 in respect of the 2018-19 financial year. Mr Ziolkowski's bonus entitlement for 2019-2020 had not been determined as at 2 September 2020.
- Ms Rashi Bansal, Group Executive, Organisational Performance, was paid fixed remuneration of \$446,250 for 2019-2020. In September 2019, Ms Bansal was paid an annual bonus of \$48,136 in respect of the 2018-2019 financial year. Ms Bansal's bonus entitlement for 2019-2020 had not been determined as at 2 September 2020.²⁹⁶

3.146 On 24 August 2020, the committee was provided with further information about the total amount paid to various group executives in 2018-2019:

In that financial year John Nagle received \$860,667; Nick Allsop received \$546,543; Elizabeth Uehling received \$571,048; Sara Kahlau is now a group executive but was not at that stage, so I do not have the figure for her; Sam Liston was only employed for part of the year so the figure, I think, is misleading, but the figure is \$185,253; the figure for

²⁹⁵ PwC, *icare – Independent Review of icare governance, accountability and culture* (February 2021), p 25.

²⁹⁶ Answers to questions on notice, icare, 7 September 2020, pp 3-4

Mr Ferguson I gave you but, to repeat, it was \$735,357; Rashi Bansal, who you met on the last occasion, was only a group executive for part of the year so, once again, the figure is not terribly representative, but her figure was \$194,848; Andrew Ziolkowski received \$366,151, but I suspect he was not employed for the full year; and Rob Craig received \$870,817.²⁹⁷

3.147 By comparison, the committee learned that Ms Carmel Donnelly, the Chief Executive of SIRA, is paid a salary of \$420,000 per year.²⁹⁸

3.148 Reflecting on the executive remuneration at icare being higher than other NSW public entities, Mr Nagle contended that the remuneration of icare's group executives is 'in line' with the public service, but also reflective of the need to recruit the capabilities and experiences from the private sector:

Our remuneration is set in line with the public service, right, in terms of our basic salary. Everyone at this table representing icare takes a significant salary reduction to work at icare. All of us could work and receive substantially more in the commercial sector. We have chosen to be here, chosen to accept the salary that is on offer and the terms that are on offer.

...

We set our remuneration in alignment with the dictates of the public service. Our Board review that. They review what is available in the open market and they make a determination about what the available offer is. So wherever possible we try to align our salaries with the expectation of the community and the public service. Having said that, because we are in a competitive position for talent, we have made arrangements where we have a bonus pool available.²⁹⁹

3.149 The committee also received evidence that for:

- financial year 2019, 103 executives were paid a total of \$3.08 million for short term performance payments
- financial year 2018, 101 executives were paid a total of \$3.19 million for short term performance payments.³⁰⁰

Expenditure on facilities

3.150 There was a concern raised during this review about icare's decision to fund an 'Imaginarium' and whether the cost of this facility was reasonable, taking into account icare's status as a public sector agency.

3.151 Through a statement made to SIRA by Mr McCann, the committee learned of icare's decision to approve a \$5 million - \$6 million contract to create a workspace known as the 'Imaginarium',

²⁹⁷ Evidence, Mr Gavin Bell, Chair of People and Remuneration Committee, icare Board, 24 August 2020, pp 43-44.

²⁹⁸ Evidence, Ms Carmel Donnelly, Chief Executive, SIRA, 3 August 2020, p 56.

²⁹⁹ Evidence, Mr Nagle, 3 August 2020, pp 61- 62.

³⁰⁰ Answers to questions on notice, icare Board, 30 September 2021, p 1.

which was to have writable walls and electronic Boards, and intended to be a space conducive to creativity and inclusivity.³⁰¹

- 3.152** Ms Donnelly, Chief Executive, SIRA, informed the committee of an impending audit of the use of the workers compensation insurance fund by icare and indicated that the contract for the 'Imaginarium' would be included in the review.³⁰²
- 3.153** Mr Pratt, Secretary of NSW Treasury, when asked whether the room constituted a waste of resources, expressed the view that it is difficult to comment 'without knowing the intent, and what it is being used for...'.³⁰³

Workplace culture

- 3.154** Taking into account the evidence received about procurement practices, conflicts of interest and other governance related issues, and in the context of recent reports on icare, including the Auditor General's report and the PwC report, the committee also considered the workplace culture more generally at icare.

- 3.155** In particular the committee noted the following concerns relevant to culture at icare:

- the lack of support Mr McCann received from icare management, and in particular the CEO, in relation to his complaints and investigations³⁰⁴
- Mr Nagle's comment on ABC's *Four Corners* observing a 'culture of complaint' in the public service. Ms Donnelly expressed her strong disagreement with this comment, noting that a person who raises an issue with suspected corruption 'is a whistleblower' and that this does not represent a 'culture of complaint'.³⁰⁵

- 3.156** The findings of the PwC review also highlighted a 'positive bias' within the organisation:

We observed a wide-spread tendency to share good news across the organisation, with a bias towards the positive aspects, and to ignore negative aspects. The focus on positive news, and over-emphasis on selective reporting, was identified consistently across all levels and functions...

Internally, the tendency to share positive news was described as 'inherited' particularly from the period of icare's established... Interviewees and focus group participants referred to icare as 'Australia's largest-start-up'...³⁰⁶

- 3.157** Indeed, the PwC review further found that 'icare did not fully view itself as a NSW government agency until after the current scrutiny', and that this meant 'there was no evidence to suggest the

³⁰¹ Evidence, Ms Donnelly, 24 August 2020, p 75.

³⁰² Evidence, Ms Donnelly, 24 August 2020, p 75.

³⁰³ Evidence, Mr Pratt, 9 September 2020, p 28.

³⁰⁴ Evidence, Mr McCann, 23 November 2020, pp 9 and 12-13.

³⁰⁵ Evidence, Ms Donnelly, 3 August 2020, pp 54-55.

³⁰⁶ PwC, *icare – Independent Review of icare governance, accountability and culture* (February 2021), p 94.

Board was sufficiently emphatic or insistent enough in holding management to account to ensure that icare met its obligations as a NSW government agency'.³⁰⁷

3.158 Further, the PwC review noted that icare's self-view as a start-up was also '... likely to encourage management to take on higher levels of risk and to favour urgency and speed over quality, process and controls'.³⁰⁸

3.159 When icare representatives appeared before the committee at a hearing in December 2020, Mr Ferguson stressed that the organisation is changing and working to address the issues that have been raised about it, both in this review and more broadly. He stated:

We have changed the relationship with the regulator to emphasise constructive feedback, accountability and collaboration. We have introduced new tougher workplace policies on conflicts of interest, secondments, gifts and benefits, travel and more. And, we have strengthened procurement practices and policies so the community can have confidence with any new contract icare enters into at the same time as we continue to remediate past contracts. We have removed NI exemption delegations such that only the icare Board can approve its use. Further changes have been made with key personnel in members of the executive team and the Board.³⁰⁹

3.160 In this regard, the committee notes that Mr Richard Harding was appointed as Chief Executive Officer and Managing Director of icare on 18 January 2021, and that Board membership has changed. Mr John Walsh and Mr Michael Cameron were appointed as Board members following the resignations of Mr Gavin Bell and Mr Mark Lennon, and the Chair of the Board is now Mr John Robertson, who replaced Mr Carapiet.³¹⁰

3.161 Mr Ferguson also told the committee that 'any employee of icare can raise an issue and be heard', and he reassured the committee that public interest disclosures would be dealt with appropriately.³¹¹ He also stated to the committee that: 'we all recognise that we are still a way off what the community, the Government and this Committee expect of us' and that icare will 'work tirelessly to earn' confidence 'through outcomes, not words'.³¹²

3.162 Mr Ferguson reiterated icare's concerns about a number of issues raised during this review and stated: 'I can assure this Committee that such matters are entirely contrary to icare's values and purpose and should not occur in any organisation'.³¹³

Committee comment

3.163 The committee is deeply troubled by the lack of compliance icare has shown in relation to its procurement practices, management of conflicts of interest and management of gifts and benefits. In our view, the previous management team and Board demonstrated a significant

³⁰⁷ PwC, *icare – Independent Review of icare governance, accountability and culture* (February 2021), p 22.

³⁰⁸ PwC, *icare – Independent Review of icare governance, accountability and culture* (February 2021), p 22.

³⁰⁹ Evidence, Mr Ferguson, 2 December 2020, p 2.

³¹⁰ Evidence, Mr Ferguson, 2 December 2020, p 2.

³¹¹ Evidence, Mr Ferguson, 2 December 2020, p 3.

³¹² Evidence, Mr Ferguson, 2 December 2020, p 2.

³¹³ Evidence, Mr Ferguson, 2 December 2020, p 2.

disregard for public sector policies and practices. Like the PwC report noted, this has created a culture of operating with risk and speed, at the expense of high quality, proper process and controls.

Finding 6

That icare has too often failed to reach the standards of behaviour expected of a New South Wales public sector agency.

3.164 In our view, poor decisions and practices within the leadership team have contributed to this culture, and fostered an environment in which standards, transparency and accountability have been compromised. Unfortunately, the number and seriousness of the issues raised in this review have painted a picture of an organisation in desperate need of cultural change. icare's standards need to be lifted, and there must be greater accountability and transparency in relation to its operations.

3.165 The committee was especially concerned about icare's contract and procurement practices, particularly in relation to the contract awarded to Guidewire and Capgemini to develop the Nominal Insurer Single Platform. The evidence we received showed that icare's most senior officers failed to appropriately declare and manage conflicts of interests in relation to this contract.

Finding 7

That icare's decision to select Guidewire and Capgemini to build the Nominal Insurer Single Platform appears to have been predetermined, and led to project costs rising from \$110 million to more than \$360 million.

Finding 8

That Mr Vivek Bhatia and Mr Michael Carapiet failed to take appropriate steps to declare, record and manage the conflict of interests arising from Mr Bhatia's personal relationship with the leaders of Capgemini.

Finding 9

That Mr John Nagle's decision to appear in a video endorsing Guidewire's software, and to accept their sponsorship of a trip to Las Vegas to appear at their 2018 conference, was inappropriate.

3.166 The committee was also concerned about the tender process to appoint EML as the sole scheme agent, and believes that icare did not notify bidders clearly that it was considering the appointment of a sole scheme agent. In our view, this tender process was not undertaken fairly, and ultimately, icare's implementation of the new claims management system with a single scheme agent has failed.

Finding 10

That icare failed to clearly notify bidders that it was considering the appointment of a sole scheme agent to manage Nominal Insurer claims in the 2018 tender and as a consequence, the tender process was not fairly conducted.

Finding 11

That icare's implementation of a claims management system that has a single scheme agent to manage all nominal insurer claims by using a sole scheme agent has failed.

-
- 3.167** The committee also makes findings in relation to the engagement of The Bridge International by EML and icare's involvement in this contract, and icare's decision to select the Perceptive Group to develop a Net Promoter Score. In our view, these matters further highlight the lack of compliance icare has shown in relation to its contract and procurement practices.

Finding 12

That icare appears to have applied undue pressure on EML to engage The Bridge International using a Project Service Order mechanism.

Finding 13

That icare's decision to select the Perceptive Group to develop a Net Promoter Score transgressed all reasonable conflict of interest principles.

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- 3.168** The committee is also deeply concerned about the financial delegations to approve contracts at icare, and in particular, icare's decision to allow Mr Rob Craig, former Interim Group Executive, Personal Injury, icare, unlimited delegation to approve contracts in relation to the build of the Nominal Insurer Single Platform.

Finding 14

That icare's decision to award Mr Rob Craig unlimited authority to enter into contracts to build the Nominal Insurer Single Platform was inappropriate and contrary to an express policy determined by the Board.

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- 3.169** We are also troubled by icare's failure to undertake its responsibilities to comply with contract reporting requirements, in accordance with the *Government Information (Public Access) Act 2009*. This is unacceptable and must change.

Finding 15

That icare's systemic failure to comply with key requirements of the *Government Information (Public Access Act (2009))* is longstanding, systematic and remains unacceptable.

- 3.170** In the committee's view, it is also unacceptable for senior executives at icare to be permitted to engage in secondary employment, given the high salaries and demands of their role.
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Finding 16

That icare's policy of permitting senior executives to engage in secondary employment is inappropriate, especially given the extraordinary levels of the salaries paid to icare executives to perform their work for icare.

- 3.171** Turning now to the engagement of Mr Nagle's wife as a learning consultant at icare, the committee believes that the icare Board failed to appropriately sanction the former Chief Executive Officer and Managing Director in relation to his inadequate disclosure of this serious conflict of interest.
-

Finding 17

That the icare Board failed to appropriately sanction the former Chief Executive Officer and Managing Director after his inadequate disclosure of a serious conflict of interest involving a close family member.

- 3.172** The committee valued the evidence provided by Mr McCann in this review, given his experience as former General Manager of Compliance, Fraud and Corruption Control at icare. We were deeply concerned to hear how Mr McCann was treated and believe that icare failed to provide him with a safe workplace and inappropriately required him to enter into a non-disclosure agreement after he raised serious concerns with icare's governance.
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Finding 18

That icare failed to provide Mr Chris McCann with a safe workplace and inappropriately required him to enter into a non-disclosure agreement after he raised serious concerns with icare's governance.

Recommendation 6

That the icare Board publicly apologise to Mr Chris McCann for his poor treatment while employed at icare.

- 3.173** The committee was also concerned to learn about the inappropriate secondment arrangements between icare and the Treasurer's office, which were found to be unlawful following the Treasury review. The two staff members, who were identified as contractors of icare, were
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purported to be assigned as Department Liaison Officers or seconded to the Minister's Office under clause 35 of the Government Sector Employment Regulations. However, under the relevant requirements, only employees of agencies and not contractors can be assigned as Department Liaison Officers or seconded under the Government Sector Employment Regulations and paid for by the agency.

- 3.174** The committee considers it unacceptable for icare to pay the salary of secondees to the Treasurer's Office, when one secondee in particular had never worked a day at icare, and icare is ultimately accountable to the Treasurer. The perception that this created was problematic and should be avoided in the future.
- 3.175** The committee notes, however, that Mr Freitas was cooperative with this review and voluntarily appeared at a hearing. The committee also understands that the senior advisor was cooperative with the Treasury's *Report on audit of staff hiring arrangements in Minister Perrottet's Office between 1 September 2015 and 10 August 2020*. The committee acknowledges that the secondees were unaware of the issues around their employment and at no time sought to subvert the ministerial employment system.
- 3.176** This review also highlighted significant concerns in relation to the performance of the icare Board, and the expertise and skills held by Board members to properly govern the operations of icare. Like others, we were concerned about the lack of expertise held by the icare Board in relation to personal injury management or workers compensation.
- 3.177** On the evidence before the committee, we were unable to determine if icare failed to keep the Treasurer informed of the general conduct of its activities and of any significant development in its activities, or if the Treasurer failed to act on any evidence that may have been provided to him by the icare Board concerning the many systemic failures identified in this report. However, in our view, the mechanisms to make icare accountable for its conduct between the Treasurer and the Board have failed to work.

Finding 19

That the icare Board comprehensively failed to properly govern icare.

Finding 20

That icare's Board lacked members with expertise in personal injury management or workers compensation.

Finding 21

That mechanisms between the icare Board and Treasurer have failed to work in making icare accountable for its conduct.

-
- 3.178** Turning now to the executive remuneration of senior leaders at icare and performance bonuses. The committee spent some time during this review bringing the salaries and bonuses paid to icare's leadership into the public spotlight. This was not a frivolous exploration of private details. Rather, it was the committee's motivation to demonstrate that the salaries and bonuses of icare's

leaders are some of the highest on offer by the NSW Government, and that this in turn bestows a very high standard and level of responsibility on icare's executives. These salaries and bonuses, in the context of a scheme that is suffering financially, and icare's management and performance over the last few years, is nothing short of alarming.

- 3.179** In the committee's view, the executive team at icare need to have salaries consistent with that of any other public sector agency. We note that the McDougall review is examining this matter, and we look forward to its findings.
-

Finding 22

That the level of executive remuneration at icare is grossly excessive, and is likely to have contributed to poor cultural practices at icare, and is out of keeping with community expectations.

- 3.180** The committee notes the recent turnover of members in icare's management team and representatives of the Board. While this is one step towards change, it is clear there is more work to be done, not only in terms of lifting the Nominal Insurer's performance and return to work rates, but also in relation to addressing organisational culture.

- 3.181** While the committee acknowledges that icare leadership has now taken responsibility for the issues that have unfolded, and have publicly stated they are committed to change, we remain unsure as to whether the changes being implemented will ultimately lift icare's standards and performance. As such, not only do we encourage SIRA as the regulator to monitor the scheme closely, we also recommend that icare provide this committee with an update by the end of this year as to the actions it has taken to ensure icare complies with all the requirements expected of a public sector agency, and measures it is taking to improve the financial performance of the Nominal Insurer and Treasury Managed Fund and return to work rates.
-

Recommendation 7

That icare provide the Standing Committee on Law and Justice with an update by the end of 2021 as to:

- any actions it has taken to ensure it is complying with all the requirements expected of a public sector agency, including compliance with information disclosure requirements, the procurement framework and policies relating to the management of conflicts of interest, gifts and benefits and public interest disclosures
 - the measures it is taking to improve the financial performance of the Nominal Insurer and Treasury Managed Fund and return to work rates.
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Chapter 4 Other issues

This chapter discusses a number of other legislative and operational issues related to the workers compensation scheme. This includes icare's remediation work in relation to historical errors identified in calculating pre-injury average weekly earnings; as well as legislative and operational amendments suggested to improve outcomes and user experience for injured workers accessing the scheme.

PIAWE remediation

- 4.1 Pre-Injury Average Weekly Earnings (PIAWE) is the income that an injured worker earned over the 52 week period prior to their injury. The calculation of PIAWE is used to determine the amount of weekly payments made to a person for a work-related injury while they are unable to work, as part of their workers compensation claim in NSW.
- 4.2 In 2019, icare identified discrepancies in how PIAWE was calculated for injured workers' weekly payments, meaning that some workers were not paid their correctly rate of payment. To identify the extent of errors, icare completed an initial review of 3,000 Nominal Insurer claims between March and November 2019. Subsequent to this, a further review of 100 claims was undertaken to determine actual incorrect payments.³¹⁴
- 4.3 icare told the committee that of the 100 detailed claim assessments, 19 were identified as potentially requiring additional payments, although further checks were being undertaken. The average weekly potential difference was estimated to be \$56, as at August 2020.³¹⁵
- 4.4 However, Mr Darren Parker, Executive Director, Workers and Home Building Compensation Regulation, State Insurance Regulatory Authority (SIRA), advised that icare had found 60 of its 100 claims to have insufficient information to re-calculate pre-injury average weekly earnings, leading icare to deem that all of those 60 were paid correctly. Mr Parker said that 'When that was raised, there were some questions we immediately had about that'.³¹⁶
- 4.5 Mr Parker also noted with the 19 that were found as needing remediation, 'the underpayment amounts ranged from \$1 to \$358 per week, or \$2 to \$5,000 per claim'.³¹⁷ Ms Carmel Donnelly, Chief Executive, SIRA, advised the committee that in the early stages of the process, Mr Nagle, then Chief Executive Officer of icare, had provided an estimate of \$40 million in total underpayment and overpayments regarding this matter.³¹⁸
- 4.6 Providing further insight into the value of underpayments, Ms Donnelly explained that claims before 2016 generally had a higher level of underpayment as an estimate, being \$3,500, whereas for claims from 2016 on, it was a lower amount of approximately \$1,123. She stated that 'one thing to note, though, is that it is clear from the report that while the size of the error is higher

³¹⁴ Answers to pre-hearing questions, icare, 24 July 2020, date, p 3.

³¹⁵ Answers to pre-hearing questions, icare, 24 July 2020, date, p 3.

³¹⁶ Evidence, Mr Darren Parker, Executive Director, Workers and Home Building Compensation Regulation, State Insurance Regulatory Authority, 3 August 2020, p 33.

³¹⁷ Evidence, Mr Parker, 3 August 2020, p 34.

³¹⁸ Evidence, Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority, 3 August 2020, p 35.

pre-2016, the rate of error, the number of errors, the proportion where there were errors, is higher from 2016 and later'. The average size of overpayments was also outlined by Ms Donnelly to be of a similar 'magnitude'.³¹⁹

- 4.7 When icare representatives appeared at a hearing in early December 2020, Dr Nick Allsop, Group Executive – Care, icare, provided an update to the committee on these issues. He explained that icare is currently in the process of remediating between 4,500 and 6,000 injured workers who are 'the most impacted'. He clarified that this has involved 1,900 reviews where PIAWE has been assessed. Dr Allsop also noted that the reviews are complex:

Once we assess whether or not there is information available in order to determine PIAWE we have to assess whether or not any inaccuracies in that PIAWE determination have led to inaccuracies in the entitlements paid to injured workers—either underpayments or overpayments. That involves going through every week of entitlements paid to those injured workers from the point of their claim to the point they return to work all the present day if they are still in receipt of benefits.³²⁰

- 4.8 Noting that 52,000 workers were originally assessed as potentially being affected, Dr Allsop clarified that this was an 'early estimate set back in 2019' and 'is probably not the most accurate estimate of the number of people who could potentially be remediated through this program'.³²¹ According to Dr Allsop, the estimate, as at 2 December 2020, was about 12,000.³²²

- 4.9 Dr Allsop also clarified that icare had abandoned its earlier presumption that if cases have insufficient information to calculate PIAWE they are deemed correct.³²³ He also provided an update as to the estimated liability of these errors for the Nominal Insurer, as at early December 2020:

We have booked a contingent liability into our 30 June 2020 accounts of approximately \$14 million in terms of remediation payments to injured workers in the Nominal Insurer. I should stress that has a high degree of uncertainty about it.³²⁴

- 4.10 Dr Allsop explained that the liability is 'dependent upon the number of people who reach out through our approaches and request reviews'.³²⁵ In this regard, the committee learned that icare is inviting injured workers potentially impacted to submit information and have their claim re-assessed.³²⁶

- 4.11 When asked why icare is not writing to all injured workers covered under the Nominal Insurer to inform them of their rights, Mr John Robertson, who was appointed as Chair of the icare Board on 25 September 2020, explained that they are 'conscious of the fact that there could be

³¹⁹ Evidence, Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority, 3 August 2020, pp 34-35.

³²⁰ Evidence, Dr Nick Allsop, Group Executive – Care, icare, 2 December 2020, p 41.

³²¹ Evidence, Dr Allsop, 2 December 2020, p 41.

³²² Evidence, Dr Allsop, 2 December 2020, p 42.

³²³ Evidence, Dr Allsop, 2 December 2020, p 42.

³²⁴ Evidence, Dr Allsop, 2 December 2020, p 44.

³²⁵ Evidence, Dr Allsop, 2 December 2020, p 44.

³²⁶ Evidence, Dr Allsop, 2 December 2020, p 41.

some ramifications on people's mental health as a result of revisiting this experience'.³²⁷ Mr Robertson stated:

I argued a case in which I argued against that option because I was conscious of the potential risks of somebody getting a letter like that out of the blue who may well have moved on with their life. It was not ruled out forever, but it was my opinion that was subsequently supported that that was the most appropriate course of action at this time.³²⁸

4.12 icare did, however, advise that it will re-consider its strategy at a later stage to determine whether it needs a broader media approach or to write letters to injured workers. Dr Allsop explained:

We are very aware of the potential impact on individuals wellness and wellbeing. Even through the approach we have at the moment, we have one person who has gone on to the self-harm risk list as a result of this program. So we are very cognisant of not wanting to endanger people's wellbeing through this approach but we will actively look at who we can contact, how we can contact them and make sure that we are giving every injured worker ample opportunity to be part of the program should they wish to—again remembering that this is back to WorkCover days and some of the address information, contact details for claims that closed up to seven years ago may not be of a level sufficient to be able to make contact directly.³²⁹

4.13 In terms of the time required to complete the remediation work, given there may be 12,000 claims and only 1,900 had been assessed, Dr Allsop advised: 'We anticipate that the program for the Nominal Insurer should be as complete as it can be by the end of next year accepting that people can come back and request a review at any stage'. He noted that they are currently reviewing PIAWE determinations of about 200 injured workers each week, with work 'ramping up as we gain additional resources with the scheme agents and additional quality assurance resources within our own team'.³³⁰

4.14 The committee also heard that investigations are underway to determine the extent of any PIAWE issues related to the Treasury Managed Fund. Dr Allsop stated:

We have done some initial work to look at the extent of any PIAWE issues there. The Treasury Managed Fund operates very differently to the Nominal Insurer, particularly for the larger government agencies. For the larger agencies, they undertake the PIAWE determination themselves. They assess from that what the entitlements to be paid to injured workers are. They then send basically a remittance advice to the claims manager seeking reimbursement of the cost for that.³³¹

4.15 Dr Allsop explained that there has been a review of 50 cases from large government agencies and that icare has sought information directly from them to determine whether or not PIAWE determinations and weekly entitlements were calculated correctly.³³²

³²⁷ Evidence, Mr John Robertson, Chair, icare Board, 2 December 2020, p 45.

³²⁸ Evidence, Mr John Robertson, 2 December 2020, p 45.

³²⁹ Evidence, Dr Allsop, 2 December 2020, p 46.

³³⁰ Evidence, Dr Allsop, 2 December 2020, p 42.

³³¹ Evidence, Dr Allsop, 2 December 2020, p 43.

³³² Evidence, Dr Allsop, 2 December 2020, p 43.

4.16 In terms of SIRA's regulatory powers and oversight of remediation work related to PIAWE errors, the committee received evidence that:

- icare did not notify SIRA of the PIAWE issues within the required timeframe or raise the matter with Ms Dore when she was undertaking a review of the Nominal Insurer.³³³
- early on, icare was waiting on advice on the impact of lump sum repayments on taxation and Centrelink payments, which Ms Donnelly said was not the role of SIRA: '...as a regulator our job is not to give legal advice to the regulated entities. They are supposed to undertake the work'.³³⁴
- SIRA's regulatory powers in relation to this matter have been somewhat limited, and that while it can impose any licence condition on self and specialised insurers, it does not have this power for the Nominal Insurer and the Treasury Managed Fund.³³⁵

4.17 On this last point, Ms Donnelly explained:

With the Treasury Managed Fund and with the nominal insurer we have less of that ability up-front before there is a compliance problem that we can enforce, up-front when it is still in play for the experience of those injured workers. We have less ability and less force to be able to direct as to how they will undertake their case management. Clearly we can send warning shots that this is a noncompliance and we need to have it rectified. Our focus has initially been on assuming that they will understand that the absolute priority should be to find where the errors are and repay but one of the factors here is that we do not have the same array of powers.³³⁶

4.18 Given the PIAWE issues that have unfolded, SIRA also explained that it undertook an initial review of 10 self and specialised insurers to assess PIAWE compliance, so as to determine if there were system wide issues. SIRA stated that 'this initial review indicated compliance of around 90 per cent in main areas of timeliness, accuracy and completeness of information'. In late 2020, SIRA noted that this review process was being extended to all self and specialised insurers, and it will be completed by late July 2021.³³⁷

4.19 In the *Independent Review of icare governance, accountability and culture report*, a report completed by PwC in February 2021, inadequacies in icare's management of this underpayment issue was highlighted. PwC noted that the issues were reported to the icare Board in November 2019, despite icare commencing an internal risk discovery review in relation to the matter in March 2019. Further, the incident was then reported to SIRA in February 2020, which PwC said was 'in breach of the reporting obligations agreed between the two parties to report within five business days on any matter that may have a significant regulatory impact, has the potential to bring a government agency, SIRA and/or icare into disrepute or be of significant public interest'.³³⁸

³³³ Evidence, Ms Donnelly, 3 August 2020, p 38.

³³⁴ Evidence, Ms Donnelly, 3 August 2020, p 38.

³³⁵ Evidence, Ms Donnelly, 3 August 2020, p 38.

³³⁶ Evidence, Ms Donnelly, 3 August 2020, p 39.

³³⁷ Answers to pre-hearing questions, SIRA, 24 July 2020, p 3.

³³⁸ PwC, *Independent Review of icare governance, accountability and culture* (February 2021), p 55.

Legislative issues

4.20 This section will outline a number of specific issues raised in relation to workers compensation legislation. In particular it will consider the use of the whole person impairment rating as a determinant of entitlements, problems with the definition of 'suitable employment', and legislative restrictions in terms of parties agreeing to a settlement so the injured worker can exit the scheme. It will also discuss concerns regarding legal costs.

Use of the whole person impairment rating

4.21 Like in the committee's previous reviews, concerns were raised in relation to the use of the whole person impairment rating to determine an injured workers entitlements. There were broad concerns about the centrality of this test to the entitlements provided under the scheme, and concerns that only one assessment of the level of impairment can be undertaken, which may be unfair if an injured worker's condition deteriorates.

4.22 The Australian Lawyers Alliance noted that since the 2012 reforms, the workers compensation scheme has based claimants' entitlements to treatment, care and weekly payments on a determination as to the level of whole person impairment (WPI).³³⁹

4.23 Generally, a higher WPI rating broadens an injured workers' eligibility for support as well as payments. The table below, submitted to the committee by the Workers Compensation Independent Review Office, now known as the Independent Review Office, outlined how a difference in the WPI rating can influence the support and entitlements of an injured worker.

Figure 6 Examples of entitlements based on Whole Person Impairment

WPI	Entitlement
More than 10%	Ongoing entitlement to medical expenses between two (2) and five (5) years after cessation of weekly payments or after the date of injury Lump sum compensation for permanent impairment (excluding psychological injury)
15% or more	Entitlement to pursue a work injury damages claim (statutory) Ability to negotiate a commutation of full future statutory rights and entitlements Lump sum compensation for permanent impairment (psychological injury) Payment of the cost of domestic assistance
More than 20%	Ongoing entitlement to weekly payments after 260 weeks Ongoing entitlement to medical expenses

Submission 8, Workers Compensation Independent Review Office, p 15.

4.24 While acknowledging that the use of an impairment based system means that a consistent measure can be applied across a range of injuries, the Workers Compensation Independent Review Office also outlined a number of issues with using the degree of impairment for the purpose of assessing eligibility for support, including:

³³⁹ Submission 6, Australian Lawyers Alliance, p 6.

- whether the level of impairment is a fair measure to determine the ability of an injured worker to undertake work and the worker's need for ongoing medical and other treatment and support for injuries
 - whether the requirement that injured workers can only have one assessment of the degree of permanent impairment provides wrong incentives of early and invasive intervention for injuries that might preferably be treated in a more conservative manner
 - the inability, in circumstances where both the injured workers and insurer agree the workers has not reached a maximum medical improvement but that the WPI arising for the injury is likely to be more than 20 per cent, for entitlements to continue without a formal assessment and medical assessment certificate from the Commission.³⁴⁰
- 4.25** The Workers Compensation Independent Review Office noted a number of recommendations which it said 'would go some way to ameliorating these impacts', including allowing more than one assessment of impairment where the purpose is other than for a lump sum impairment claim. It also suggested that an injured worker be permitted to receive medical treatment that is claimed before the expiry of a relevant entitlement period, irrespective of whether the treatment was approved, given or received in that period.³⁴¹
- 4.26** The WIRO's evidence was supported by the Australian Lawyers Alliance, who argued that it is 'inherently unfair' to base the support an injured worker needs on a test set out in a book. It noted that this book, the fifth edition of the *American Medical Association Guidelines to the Evaluation of Permanent Impairment* outlines that a whole person impairment rating is not a predictor for work capacity. It quoted the following extract from Chapter 1 of the book which discusses the purpose of the guide:
- The whole person impairment percentages listed in the guides estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, excluding work....
- The medical judgment used to determine the original impairment percentages could not account for the diversity or complexity of work but could account for daily activities common to most people. Worker is not included in the clinical judgment for impairment percentages for several reasons: (1) work involves many simple and complex activities; (2) work is highly individualized, making generalizations inaccurate; (3) impairment percentages are unchanged for stable conditions, but work and occupations change; and (4) impairments interact with other factors as the worker's age, education and prior work experience to determine the extent of work disability.....³⁴²
- 4.27** Similarly, the NSW Bar Association noted that these guidelines are not intended for use as a 'direct determinant of work disability'.³⁴³ It noted that the authors had specifically stated:
- Impairment ratings should not be used as direct estimates of disability. Impairment percentages estimated the extent of the impairment on a whole person function and

³⁴⁰ Submission 8, Workers Compensation Independent Review Office, p 15.

³⁴¹ Submission 8, Workers Compensation Independent Review Office, p 16.

³⁴² Submission 6, Australian Lawyers Alliance, p 7.

³⁴³ Submission 24, NSW Bar Association, p 8.

account for basis activities of daily living. The complexity of work activities require individual analysis.³⁴⁴

- 4.28** The Bar Association stated that this 'warning is being ignored' as the legislation currently uses the percentage estimates as a basis for deciding whether a worker can obtain more than 260 weeks of weekly compensation. It also expressed concerns with the WPI assessment being used as a way of determining entitlements to medical expenses.³⁴⁵
- 4.29** Some stakeholders contended that the current application of the WPI rating in determining entitlements can lead to a mismatch between injured workers' needs and support provided by the scheme.
- 4.30** For instance, the Australian Manufacturing Workers Union noted that chronic lower back injuries, while commonly 'career ending' for its members, are typically awarded a WPI rating of around 10 per cent.³⁴⁶ The union further submitted that many of its members, who have been awarded a WPI rating of under 20 per cent, nonetheless suffer complex and severe injuries that last beyond the two and five year entitlement periods applied by sections 38 and 39 of the *Workers Compensation Act 1987*.³⁴⁷
- 4.31** This evidence was supported by Ms Natasha Flores, WHS and Workers Compensation Industrial Officer with Unions NSW. Ms Flores explained that she is aware of many injured workers who have had their payments and supports ceased when they were not ready to return to work. Ms Flores noted that this has resulted in hardship for the workers, and the workers relying on other forms of government support:

As section 39 was being introduced, we did all receive many, many calls and we had a lot of injured workers who were extremely distraught because they had no income, they had very, very slim chances of gaining employment. For the most part, these workers are middle-aged—50 to 60-year-old—men. They have physical issues. They have spent their lives working in physical labouring jobs. Their education may be limited. English may be their second language. There are often many, many barriers to these people gaining employment again, plus they still have a significant injury. When you factor all of those things in, they stand very, very little chance of finding a job... They are put onto Newstart and they get told that they have to search for work...

Further to that, section 59A comes in a couple of years later, which basically prevents injured workers who were on section 39 from getting medical treatment. If they cannot get that medical treatment through Medicare or they cannot afford that treatment through Medicare, they do not get that treatment...³⁴⁸

- 4.32** The NSW Bar Association in its submission echoed Ms Flores' evidence in regard to cost shifting, asserting that withdrawing support from the scheme does not result in a net decrease in government expenses:

³⁴⁴ Submission 24, NSW Bar Association, p 8.

³⁴⁵ Submission 24, NSW Bar Association, p 8.

³⁴⁶ Submission 19, Australian Manufacturing Workers Union, p 3.

³⁴⁷ Submission 19, Australian Manufacturing Workers Union, p 3.

³⁴⁸ Evidence, Ms Natasha Flores, WHS and Workers Compensation Industrial Officer, Unions NSW, 28 July 2020, p 11.

It is important to note that many medical costs which were previously paid for out of WorkCover funds are now being funded through injured workers being treated at NSW Public Hospitals. As such, the consolidated revenue of the NSW Government is now funding much the treatment needs of injured workers, which could be paid for out of the large reserves of the Nominal Insurer's funds. Self-evidently this is preventing certain consolidated revenue funds from being used for other state government obligations.³⁴⁹

- 4.33** The committee also received evidence that the time limits placed on benefits and entitlements can influence the treatment delivered to injured workers. For instance, the Law Society of NSW noted that surgery tends to increase the WPI rating awarded, meaning that the current design of the scheme encourages surgery.³⁵⁰ In a similar vein, the Australian Lawyers Alliance submitted:

The fear of entitlements being cut off can lead doctors and injured workers to try to bring forward treatment that might otherwise have been delayed. Some might see it is as better to have treatment at a less optimal time than to not have it all because it can't be afforded if workers compensation entitlements are removed at some time in the future. The converse is also true, a worker's entitlement to treatment can be extinguished either deliberately or inadvertently by decisions made by insurers.³⁵¹

- 4.34** To Ms Rita Mallia, State President, Construction and General Division, NSW Branch of the Construction, Forestry, Maritime, Mining and Energy Union (CFMEU), the WPI based time limits constituted a flaw in the scheme:

... there were a lot of problems with previous iterations of the workers compensation system ... but you would have to say where we have ended up in 2020 is a real disaster for injured workers ... ultimately when you have a system that throws people off at various points in the scheme to get them off the system as being the structure of the system then it is flawed, and from that perspective workers are worse off.³⁵²

- 4.35** Similarly, the NSW Bar Association was of the view that the centrality of the WPI in determining benefits and entitlements – and the concerns related to this approach – mean that the scheme is failing to achieve its objectives as set out by the *Workplace Injury Management and Workers Compensation Act 1998*.³⁵³ In particular, the Association referred the committee to section 3(c) of the legislation, which states that an objective of the scheme is 'to provide injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses'.³⁵⁴
- 4.36** One of the particular concerns relating to the use of the whole person impairment test was that the scheme only allows one assessment to be undertaken. This issue has been raised in the committee's previous reviews.

³⁴⁹ Submission 24, NSW Bar Association, p 7.

³⁵⁰ Submission 9, The Law Society of NSW, p 2.

³⁵¹ Submission 6, Australian Lawyers Alliance, p 8.

³⁵² Evidence, Ms Rita Mallia, State President, Construction and General Division, NSW Branch, Construction, Forestry, Maritime, Mining and Energy Union, 28 July 2020, p 20.

³⁵³ Submission 24, NSW Bar Association, p 7.

³⁵⁴ Submission 24, NSW Bar Association, p 7.

- 4.37 Indeed, in the committee's *First review of the Workers Compensation Scheme*, published in 2017, it was recommended that the NSW Government investigate the possibility of amending the legislation to enable up to two assessments of permanent impairment for certain clearly defined injuries that are prone to deteriorate over time.³⁵⁵
- 4.38 In this review, the Australian Lawyers Alliance again noted that the limitation of a single assessment and claim prohibits workers who suffer a deterioration in condition to be properly compensated for their impairment.³⁵⁶ Similarly, the Workers Compensation Independent Review Office questioned whether limitation to a single assessment may unduly impact treatment and medical decisions of injured workers.³⁵⁷
- 4.39 The NSW Bar Association observed that workers with certain conditions commonly suffer further deterioration after their single assessment has been made, thereby highlighting the issues with the current legislation:

... a worker with a lumbar spine disc protrusion might have been assessed at 12%. 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%. 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. Even if everyone agrees the impairment was now 24%, the legislation continues to provide that it is only 12% ...

Under the current regime the above outcome would prevent the worker from having any entitlement to medical expenses five years after he or she ceased to be entitled to weekly compensation. Thus, in this not uncommon scenario, the scheme operates so that a person who has an accepted 24% whole person impairment is not entitled to any support.³⁵⁸

- 4.40 Accordingly, the Bar Association of NSW recommended that the restriction relating to one assessment be removed from the legislation.³⁵⁹

Definition of 'suitable employment'

- 4.41 Another issue noted by legal and union stakeholders during this review was the definition of 'suitable employment' and its significance in relation to the determination of an injured worker's work capacity.
- 4.42 The Australian Lawyers Alliance referred the committee to section 32A of the *Workers Compensation Act 1987*, which defines current work capacity with respect to suitable employment. The section provides: 'Current work capacity in relation to a worker means a present inability

³⁵⁵ Standing Committee on Law and Justice, NSW Legislative Council, *First review of the workers compensation scheme*, March 2017, p 97.

³⁵⁶ Submission 6, Australian Lawyers Alliance, p 11.

³⁵⁷ Submission 8, Workers Compensation Independent Review Office, p 15.

³⁵⁸ Submission 24, NSW Bar Association, p 9.

³⁵⁹ Submission 24, NSW Bar Association, p 9.

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'.³⁶⁰

4.43 The Australian Lawyers Alliance noted that the legislation permits the insurer to consider the suitability of employment regardless of whether the work is available, whether it is of a type or nature that is generally available in the employment market, whether it is in the nature of the worker's pre-injury employment, and regardless of the worker's place of residence.³⁶¹

4.44 The Australian Lawyers Alliance described the above assessment of suitability of employment as a 'theoretical' exercise that needs to be replaced with a 'test of actual'.³⁶²

4.45 This position was supported by the Law Society of NSW, who considered that if the workers compensation system is to have 'return to work' as a key objective, then 'it must adopt a realistic approach to what alternative employment is suitable in the labour market and reasonably accessible to the worker'. It stated:

Any system that enables suitable employment to be determined solely by 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. It could allow insurers to adopt unrealistic approaches to return to work and to use the work capacity decision process as a means to terminate a worker's benefits rather than to achieve a sustainable and realistic return to work objective.³⁶³

4.46 The Law Society of NSW recommended that the definition of suitable employment used prior to the 2012 reforms be reinstated. It stated that the definition back then 'afforded greater fairness to injured workers and delivered some support when challenging employers who could not provide suitable employment to their injured employees'.³⁶⁴

4.47 Indeed, representatives from unions and the legal community explained to the committee how the current definition of 'suitable employment' did not work well in practice based on their experiences.

4.48 Ms Angela Catallo, Research / Industrial Officer from the NSW Teachers Federation, noted that a teacher with a psychological injury would typically be suggested by a doctor to make a graduated return at another school, discounting the administrative complexities of such an arrangement within the school system.³⁶⁵

4.49 Ms Kirsty Membreno, Assistant Secretary – Industrial of the Police Association of NSW, noted that officers who become injured and restricted from front-line duties as a result often struggled with the transition due to the culture of the organisation.³⁶⁶

³⁶⁰ Submission 6, Australian Lawyers Alliance, p 10.

³⁶¹ Submission 6, Australian Lawyers Alliance, p 10.

³⁶² Submission 6, Australian Lawyers Alliance, p 10.

³⁶³ Submission 9, The Law Society of NSW, p 4.

³⁶⁴ Submission 9, The Law Society of NSW, p 4.

³⁶⁵ Evidence, Ms Angela Catallo, Research / Industrial Officer, NSW Teachers Federation, 28 July 2020, p 3.

³⁶⁶ Evidence, Ms Kirsty Membreno, Assistant Secretary – Industrial of the Police Association of NSW, 28 July 2020, p 4.

- 4.50** Mr Concannon, Deputy Chair, Injury Compensation Committee of Law Society of NSW, recollected an instance where an injured worker was suggested a position of a ticket holder in a theatre, when the nearest venue from the individual's residence was a couple of hundred kilometres away.³⁶⁷
- 4.51** An example of some of the problems arising from the current definition of suitable employment is presented in the following case study. This case study provides an account of the experience of Mr H, who suffered a workplace injury in 2016 and has struggled to navigate the scheme and find suitable employment since.

Case study: Mr H³⁶⁸

Mr H worked as a labourer for a large mining engineering company for a number of decades, working up to be a leading hand over time.

On 14 January 2016, Mr H suffered a workplace injury, with a right shoulder cuff tear and a tear to his bicep muscle. While Mr H reported the injury to his supervisor on the day, no further action was taken for six months, with no treatment or any other form of support offered over the period. The uncertainty negatively impacted Mr H's mental health, who developed a depressive disorder during this time.

After six months of waiting, Mr H confronted his employer and succeeded in seeing a doctor. After undergoing surgery, Mr H returned to work on suitable duties in January 2017. Unfortunately, Mr H's injury was aggravated about a year after his return, leading to a reduction in his suitable duties hours. The employer, without notifying Mr H, proceeded to pay out the non-worked hours from Mr H's leave entitlements. This was only corrected after Mr H engaged a lawyer to intervene on his behalf.

In March 2019, the treating doctor certified Mr H as fully incapacitated as a result of his injury not getting any better. Mr H subsequently received further surgery on his right shoulder, but also developed chronic pain on his left shoulder, which a specialist attributed to overuse to compensate for his original injury.

Mr H did not find accessing care and treatment from the scheme to be straight forward. For example, on one occasion a MRI ordered by his specialist doctor was refused by his insurer, on the ground that an ultrasound would be sufficient. In the end both the ultrasound and MRI was performed, incurring the scheme additional costs, wasting Mr H's time, and delaying the diagnosis needed. Further, it was never explained to Mr H that he had the right to choose his treating doctor and rehabilitation service provider.

On 1 July 2020, the insurer provided Mr H with a notice of intention to make a work capacity decision. Attached to this notice was a functional assessment and a vocational assessment. Although Mr H was

³⁶⁷ Evidence, Mr Concannon, Deputy Chair, Injury Compensation Committee, Law Society of NSW, 3 August 2020, p 3.

³⁶⁸ Evidence, Mr David Henry, National Work Health and Safety Officer, Australian Manufacturing Workers' Union, 28 July 2020, pp 18-19. This case study is not taken verbatim from the witness, but is an accurate reflection of how the witness presented Mr H's story to the committee.

not able to complete the functional assessment due to a loss of balance and his injury, the vocational assessment was nevertheless completed with three suitable positions identified.

Unfortunately, each of the identified positions did not actually suit Mr H. The first position identified was a long haul truck driver. Mr H noted that his bilateral shoulder damage meant that it was impossible for him to access a truck's cab. The second and third positions identified were those of a construction manager and a facilities manager. Mr H struggled to understand these recommendations, since he did not have the qualifications needed for these roles, and he lacked the necessary computer skills.

On 20 July 2020, the insurer determined Mr H to be no longer entitled to weekly benefits. Mr H decided to take the matter to the Workers Compensation Commission.

Options to exit the scheme

- 4.52 Stakeholders also raised concerns about the limited ways in which settlements can be reached under the legislation.
- 4.53 The Australian Lawyers Alliance contended that the current design of the scheme unduly restricted ways in which an injured worker can exit the scheme by way of settlement.³⁶⁹ Similarly, the Law Society of NSW noted that there are limited options to resolve disputes between parties.³⁷⁰
- 4.54 The Australian Lawyers Alliance noted that while the *Workers Compensation Act 1987* allows commutation of compensation, this is restricted to injuries with a WPI rating of at least 15 per cent by section 87EA of the legislation. The Australian Lawyers Alliance contended that 'workers and insurers should be able to avail themselves of a mechanism by which they may resolve a dispute or ongoing 'liability' for benefits under the scheme which brings finality to the claim' irrespective of the WPI rating.³⁷¹
- 4.55 The Law Society of NSW also contended that a dispute resolution process should 'include the availability of a proper mechanism by which claims can be resolved', and therefore recommended that section 87EA be removed.³⁷²

Legal costs

- 4.56 Stakeholders from the legal industry also raised concerns that the regulated legal costs, as set by the scheme's regulations, are becoming increasingly prohibitive for legal practitioners.
- 4.57 The Law Society of NSW contended that the legal costs available to lawyers under schedule 6 of the *Workers Compensation Regulation 2016* have failed to keep pace with other comparable rates and have in fact decreased in real terms. The Law Society of NSW explained:

³⁶⁹ Submission 6, Australian Lawyers Alliance, p 9.

³⁷⁰ Submission 9, The Law Society of NSW, p 3.

³⁷¹ Submission 6, Australian Lawyers Alliance, p 9.

³⁷² Submission 9, The Law Society of New South Wales, pp 4-5; Submission 6, Australian Lawyers Alliance, p 9.

We note that over the last 10 years, the rates payable to lawyers acting for the NSW Government have increased from \$240 per hour to \$295 per hour (an increase of 23% since 2010). In contrast, since 1 November 2006, there has been only one increase to the fees for lawyers under the workers compensation scheme, in 2012, which represented an increase of 15% on the rates originally prescribed in 2006. The regulated fees under Schedule 6 to the Regulation have not been reviewed or revised at all since October 2012, despite increases to the Consumer Price Index (CPI) of 14% from September 2012 to March 2020. This represents a substantial reduction in costs able to be recovered in real terms.³⁷³

- 4.58** The Law Society of NSW further noted that the regulation makes 'no provision for the annual indexation of legal costs...' while most other benefits under the scheme and legal fees for the new compulsory third party scheme are indexed each year.³⁷⁴
- 4.59** With similar concerns, the Australian Lawyers Alliance contended that the decrease in real terms of legal fees for the workers compensation scheme will result in a decrease in number of legal practitioners in the field, and that this will particularly impact regional areas, where larger firms that can achieve economies of scale do not operate.³⁷⁵
- 4.60** The NSW Bar Association also noted that the scheme requires solicitors, acting on behalf of employers or scheme agents, to meet counsel's fees from within their fixed fee. The NSW Bar Association asserted that this effectively means that the current fees are not enough to cover overheads for solicitors for protracted matters. Furthermore, counsel's fees are separately provided for by the insurer under the *Motor Accidents Compensation Act 1999*.³⁷⁶
- 4.61** Accordingly, the Law Society of NSW and Australian Lawyers Alliance recommended that the schedule of fees should be reviewed, with fees indexed as an interim measure.³⁷⁷

Committee comment

- 4.62** The committee is very concerned about icare's management of the remediation work to rectify historical errors in the calculation of Pre-Injury Average Weekly Earnings. It is troubling that the full extent of the liability is still largely unclear, and that the progress of the remediation project appears to be very slow.
- 4.63** icare's early approach to this issue is also concerning. Not only did it fail to report the incident to the regulator within the required timeframe, it also underpinned its early estimates on incorrect and unfair assumptions. Instead of an agency doing what it could to resolve the issues in a fair, transparent, accountable and timely manner, icare adopted an approach that put its own interests first. This is unacceptable, and has undermined icare's efforts to genuinely take responsibility for rectifying the errors.

³⁷³ Submission 9, The Law Society of NSW, p 6.

³⁷⁴ Submission 9, The Law Society of NSW, p 7.

³⁷⁵ Submission 6, Australian Lawyers Alliance, p 9.

³⁷⁶ Submission 24, NSW Bar Association, p 14.

³⁷⁷ Submission 9, The Law Society of NSW, p 7; Submission 6, Australian Lawyers Alliance, pp 8-9.

- 4.64** While we acknowledge that the remediation work is underway, the committee is concerned that icare is not doing enough to ensure injured workers who may be affected are advised of their rights. In our view, and in the absence of any medical advice to the contrary, potentially affected claimants, not already remedied, need to be directly advised of the issue and provided with clear information about how to apply for a re-assessment.
-

Recommendation 8

That icare, as part of the PIAWE remediation project, write to all potentially affected claimants not already remedied, to advise them of their right to apply for a re-assessment of their pre-injury average weekly earnings.

- 4.65** We also note that concerns regarding the implementation of PIAWE in the Nominal Insurer extend to the Treasury Managed Fund. Remediation efforts relating to PIAWE need to be addressed by icare in both the Nominal Insurer and Treasury Managed Fund as a matter of priority.
- 4.66** The committee acknowledges that the origins of these incorrect payments predate icare and may impact payments beyond the Nominal Insurer and Treasury Managed Fund. We therefore encourage SIRA to continue to actively monitor the approach, time and transparency of icare's response in relation to this work, and look forward to further updates on this work by both icare and SIRA in the future.
- 4.67** The committee also acknowledges the specific legislative concerns raised by legal groups and unions in this review, including concerns related to the use of a whole person impairment rating in the scheme and concerns regarding the definition of suitable employment. We also acknowledge feedback about the limited settlement options under the legislation and concerns relating to legal costs. In our view, there is merit in the NSW Government investigating these issues further, with input from a wide range of stakeholders within the scheme, including injured workers, insurers, lawyers and medical providers. We therefore make a recommendation in this regard.
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Recommendation 9

That the State Insurance Regulatory Authority investigate:

- whether the use of the whole person impairment test in the workers compensation scheme is appropriate and whether the restriction in terms of having one assessment of impairment could be removed for certain injuries
 - whether the definition of 'suitable employment' used prior to the 2012 reforms might be more appropriate than the current definition
 - other options for injured workers and insurers to reach settlements and exit the scheme
 - the feasibility and potential impacts associated with increasing legal costs under the Workers Compensation Regulation 2016.
-

Appendix 1 Submissions

No.	Author
1	Name suppressed
2	NSW Health
3	Name suppressed
4	Suncorp
5	Business NSW (formerly NSW Business Chamber)
6	Australian Lawyers Alliance
7	AEU NSW Teachers Federation
8	Workers Compensation Independent Review Office (WIRO)
9	The Law Society of NSW
10	Name suppressed
11	Australian Rehabilitation Providers Association
12	Police Association of NSW
13	Unions NSW
14	Maurice Blackburn Lawyers
15	Name suppressed
16	Name suppressed
17	Confidential
18	Construction, Forestry, Maritime, Mining and Energy Union, Construction and General Division, NSW Divisional Branch
19	Australian Manufacturing Workers' Union
20	Insurance & Care NSW (icare)
21	Insurance Council of Australia
22	State Insurance Regulatory Authority (SIRA)
23	Ms Jennifer Lynch
24	New South Wales Bar Association
25	Mr Peter McCarthy
25a	Confidential
26	Confidential

Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
Tuesday 28 July 2020		
Macquarie Room	Ms Angela Catallo	Research/Industrial Officer NSW Teachers Federation
Parliament House, Sydney	Mr Angus Skinner	Research Manager Police Association NSW
	Ms Kirsty Membreno	Assistant Secretary – Industrial Police Association NSW
	Ms Natasha Flores	Work, Health and Safety and Workers Compensation Industrial Officer Unions NSW
	Ms Sherri Hayward	Legal / Industrial Officer, Construction and General Division NSW Branch Construction, Forestry, Maritime, Mining and Energy Union
	Ms Rita Mallia	State President, Construction and General Division, NSW Branch Construction, Forestry, Maritime, Mining and Energy Union
	Mr David Henry	National Work Health and Safety Officer Australian Manufacturing Workers' Union
	Mr Alan Mansfield	Workers Compensation and Rehabilitation Officer Australian Manufacturing Workers' Union
	Ms Elizabeth Greenwood <i>via teleconference</i>	Policy Manager, Workers Compensation, WHS and Regulation Business NSW
	Mr Mark Frost <i>via teleconference</i>	Chief Economist Business NSW
	Mr Derick Borean	NSW President Australian Rehabilitation Providers Association
	Mr Shaun Lane	NSW Secretary Australian Rehabilitation Providers Association

Date	Name	Position and Organisation
Monday 3 August 2020 Macquarie Room Parliament House, Sydney	Mr Shane Butcher	NSW Spokesperson for Workers Compensation Australian Lawyers Alliance
	Mr Richard Harvey	President Law Society of NSW
	Mr Timothy Concannon	Deputy Chair, Injury Compensation Committee, Law Society of NSW Partner, Carroll & O'Dea Lawyers
	Mr Rod Hodgson <i>via teleconference</i>	Queensland Leader of Litigation and Legal Strategy Maurice Blackburn
	Mr Christopher McHugh	Executive General Manager Personal Injury Insurance Suncorp
	Ms Sarah Hilt	Head of Workers Insurance Claims Contracts, NSW WC Claims & Customer Solutions, Personal Injury Insurance Suncorp
	Mr Simon Cohen	Workers Compensation Independent Review Officer Workers Compensation Independent Review Office
	Ms Carmel Donnelly	Chief Executive State Insurance Regulatory Authority (SIRA)
	Mr Darren Parker	Executive Director, Workers and Home Building Compensation Regulation SIRA
	Dr Petrina Casey	Director, Health Policy, Prevention and Supervision SIRA
	Mr John Nagle	Chief Executive Officer and Managing Director icare
	Ms Elizabeth Uehling	Group Executive, Personal Injury Claims icare
	Mr Andrew Ziolkowski	Group Executive, Prevention and Underwriting icare
Ms Rashi Bansal	Group Executive, Organisational Performance, icare	

Date	Name	Position and Organisation
Monday 24 August 2020 Macquarie Room Parliament House, Sydney	Mr Dai Liu	Chief Actuary icare
	Ms Janet Dore <i>via videoconference</i>	Former Independent Reviewer, State Insurance Regulatory Authority
	Mr Anthony Fleetwood	Chief Executive Officer Employers Mutual Limited
	Mr Mark Coyne	Chief Executive Officer Employers Mutual Management
	Ms Tracey Harris	Chief Operating Officer & Service Provider Principal Employers Mutual Management
	Mr Matthew Vickers	General Manager Workers Insurance & Scheme Agent Principal Employers Mutual Management
	Mr Michael Carapiet	Chair, icare Board
	Mr David Plumb	Chair of Audit and Risk Committee, icare Board
	Mr Gavin Bell	Chair of People and Remuneration Committee, icare Board
	Mr Don Ferguson	Former Interim Chief Executive Officer, icare
	Mr Trevor Matthews	Chair, SIRA Board
	Ms Nancy Milne OAM	Deputy Chair, SIRA Board
	The Hon Greg Keating	Member, SIRA Board
	Ms Carmel Donnelly	Chief Executive, SIRA
Mr Mark Lennon	Former member, icare Board	
Wednesday 9 September 2020 Macquarie Room Parliament House, Sydney	Mr Michael Pratt AM	Secretary, NSW Treasury
	Mr Phil Gardner	Deputy Secretary – Commercial NSW Treasury
	Mr Stewart Walters	Chief Financial and Operations Officer, NSW Treasury

Date	Name	Position and Organisation
Friday 13 November 2020 Jubilee Room Parliament House, Sydney	Mr Vivek Bhatia	Former Chief Executive Officer, icare

Monday 23 November 2020 Macquarie Room Parliament House, Sydney	Mr Chris McCann	Former General Manager – Compliance, Fraud and Corruption Control, icare
	Mr Peter McCarthy	Former Partner Ernst & Young Former Principal Actuary NSW Workers Compensation System and CTP, SIRA
Tuesday 1 December 2020 Macquarie Room Parliament House, Sydney	Mr Michael Carapiet	Former Chair, icare Board
Tuesday 1 December 2020 Macquarie Room, Parliament House, Sydney	Mr John Robertson	Chair, icare Board
	Mr David Plumb	Non-Executive Director, icare Board
	Mr Don Ferguson	Former Interim Chief Executive Officer, icare
	Ms Rashi Bansal	Group Executive Organisational Performance, icare
	Mr Rob Craig	Interim Group Executive Personal Injury Claims, icare
	Dr Nick Allsop Ms Samantha Liston	Group Executive – Care, icare Group Executive People & Workplace, icare

Appendix 3 Minutes

Minutes no 16

Wednesday 18 March 2020

Standing Committee on Law and Justice

McKell Room, Parliament House, Sydney at 2.38 pm

1. Members present

Mr Fang, *Chair*

Mr Donnelly, *Deputy Chair*

Ms Cusack (until 3.35 pm)

Mr Farraway (until 4.34 pm)

Mr Khan

Mr Mookhey (*substituting for Mr D'Adam*)

Mr Roberts

Mr Shoebridge

2. Previous minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 15 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received

- 18 March 2020 – Email from Hon Mark Buttigieg MLC advising that the Hon. Daniel Mookhey MLC will be substituting for the Hon. Anthony D'Adam MLC at Law and Justice Committee's deliberative meeting
- 10 March 2020 – Email from Mr David Cullen, Australian Engineered Stone Advisory Group, to secretariat, confirming AESAG's request to keep the Excel list attachment to answers to questions on notice confidential
- 6 March 2020 – Email from individual to committee, regarding the workers compensation scheme
- 4 March 2020 – Email from Mr David Hamer to committee, concerning the Evidence Amendment (Tendency and Coincidence) Bill 2020, and an attachment from the Australian Law Journal
- 27 February 2020 – Email from Louisa Wilson, Analyst, Adjudication, Merger and Authorisation Review Division, Australian Competition & Consumer Commission (ACCC) to secretariat advising that the Australian Engineered Stone Advisory Group (AESAG) withdrew its substantive application for authorisation with the ACCC on 27 February 2020
- 26 February 2020 – Letter from Mark Speakman, Attorney General to Clerk of the Parliaments providing Government response regarding Report 71 on the Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2019
- 17 February 2020 – Email from Louisa Wilson, Analyst, Adjudication, Merger and Authorisation Review Division, Australian Competition & Consumer Commission (ACCC) to secretariat advising that the Australian Engineered Stone Advisory Group (AESAG) withdrew its application for interim authorisation with the ACCC on 7 February 2020

Sent

- 14 February 2020 – Letter from Chair to Ms Danielle Staltari, Director, Adjudication, Australian Competition and Consumer Commission (ACCC) requesting a copy of ACCC's regarding Australian Engineered Stone Advisory Group (AESAG)'s application for interim authorisation

4. **Inquiry into the Crimes Appeal and Review (Double Jeopardy) Bill 2019 – Government response**
The committee noted that the government response to the report on the Crimes Appeal and Review (Double Jeopardy) Bill 2019 was received on 26 February 2020.

5. **2020 Review of the Workers Compensation Scheme**

Resolved, on the motion of Mr Shoebridge: That the committee commence the 2020 review of the Workers Compensation Scheme and adopt the following timeline/activities:

- Briefing by SIRA and icare – on a date to be confirmed
- Submissions closing date – end of May 2020
- Two hearing dates – on dates to be confirmed
- Table report – by end of October 2020.

5.1 **Advertising**

The committee noted that the inquiry will be advertised via social media, stakeholder letters and a media release distributed to all media outlets in New South Wales.

5.2 **Stakeholders**

Resolved, on the motion of Mr Khan: That the secretariat circulate to members the Chairs' proposed list of stakeholders to provide them with the opportunity to amend the list or nominate additional stakeholders, and that the committee agree to the stakeholder list by email, unless a meeting of the committee is required to resolve any disagreement.

6. **2019 Review of the Dust Diseases Scheme**

6.1 **Answers to questions on notice and supplementary questions**

Resolved, on the motion of Mr Khan: That all attachments to the Australian Engineered Stone Advisory Group's answers to questions on notice and supplementary questions be published, except the following:

- Safety data sheets of pigment and resin as part of Attachment 2, as the information has come from third parties
- Research provided as part of Attachment 3, as it concerns a study that is being submitted to a scientific journal and publication could affect the chances of the study being published
- The names and contact details contained in the Excel list of fabricators in Australia, as names and contact details have been provided for businesses and it is confidential commercial information of AESAG members.

6.2 **Consideration of the Chair's draft report**

The Chair tabled his draft report entitled '2019 Review of the Dust Diseases Scheme: Silicosis in the Manufactured Stone Industry', which, having been previously circulated, was taken as being read.

Chapter 1

Resolved, on the motion of Mr Shoebridge: That paragraph 1.9 be amended by omitting 'signs of' after 'but have no'.

Resolved, on the motion of Mr Mookhey: That all references to 'self-employed workers' be omitted and 'independent contractors' be inserted instead.

Resolved, on the motion of Mr Shoebridge: That paragraph 1.10 be amended by inserting '*Workers Compensation (Dust Diseases) Act*' before 'legislation'.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 1.15:

"They are managed in accordance with the hierarchy of controls, which first looks at elimination of the risk, then substitution, then what engineering controls can be applied to eliminate or mitigate the risk, and then administrative controls. Personal protective equipment (PPE) is generally considered the last line of

control.' [FOOTNOTE: Evidence, Mr Michael Shearer, President, Mine Ventilation Society of Australia, 20 September 2019, p 2].

Resolved, on the motion of Mr Shoebridge: That paragraph 1.27 be amended by inserting 'review and monitor policy settings and regulatory controls as well as' before 'determine the contributions'.

Resolved, on the motion of Mr Shoebridge: That paragraph 1.28 be amended by inserting 'prior' before 'reviews of the Dust Diseases Scheme'.

Resolved, on the motion of Mr Shoebridge: That paragraph 1.36 be amended by omitting 'its completion on 30 June 2019' and inserting instead 'it concluded on 30 June 2019'.

Resolved, on the motion of Mr Mookhey: That:

- a) the section heading 'Manufactured Stone Industry Taskforce' be amended by inserting 'New South Wales' at the beginning
- b) paragraph 1.36 be amended by omitting 'Manufactured Stone Industry Taskforce (Taskforce) was established', and inserting instead 'NSW Government established the Manufactured Stone Industry Taskforce (Taskforce)'.

Resolved, on the motion of Mr Shoebridge: That paragraph 1.48 be omitted: 'A set of initial findings that point to areas for further examination were also included in the advice, such as regulation and governance, workplace organisation and culture, resourcing and capability, and research and development.', and the following new paragraph be inserted instead:

"The National Taskforce made a number of critical findings about the actions to date and existing protection measures across the country. This included:

Regulation and Governance – Government interventions undertaken in response to the rise in cases of accelerated silicosis appear to have been inconsistently implemented and monitored, creating an unequal and fragmented level of health protection.

Workforce Organisation and Culture – Culture is an important consideration to address the problems identified. All stakeholders have an important role to shape the attitudes and behaviours required to achieve meaningful change.

Resourcing and Capability – To ensure the health of workers there are opportunities to align and harness the skills and knowledge of industry, workplaces, workers and governments to identify, and control silica dust exposure.

...and

Research and Development – To inform government decision making there is limited information on the development pathway of accelerated silicosis resulting from working with engineered stone, and no identified treatment plan.'

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 1.57:

'In March 2020, SafeWork NSW further advised that there were 12 businesses who had applied for the rebate.' [FOOTNOTE: Portfolio Committee No. 6 – Budget Estimates 2019-2020, Evidence, Ms Megan McCool, Director, Hazardous Chemical Facilities and Safety, SafeWork NSW, 16 March 2020, p 42.]

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 1.58:

'When questioned about the litigation, Mr David Cullen, Australian Engineered Stone Advisory Group and Managing Director, Caesarstone Australia, stated: "Most of the liability will sit with workers compensation in reality. There will be some liability from manufacturers, potentially, but that has to go through a process".' [FOOTNOTE: Evidence, Mr David Cullen, Australian Engineered Stone Advisory Group and Managing Director, Caesarstone Australia, 15 November 2019, p 22.]

Chapter 2

Resolved, on the motion of Mr Donnelly: That paragraph 2.3 be amended by omitting 'used within many industries' and inserting instead 'found within many industries'.

Resolved, on the motion of Mr Donnelly: That paragraph 2.21 [p 22] be amended by omitting 'being experienced by stonemasons' and inserting instead 'being experienced by manufactured stone workers'.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.24 [p 22] be amended by omitting ', which may commence in early 2021,' and inserting instead ' in 2021'.

Resolved on the motion of Mr Donnelly: That paragraph 2.50 [p 28] be amended by omitting 'get a full picture' and inserting instead 'get a complete picture'.

Resolved, on the motion of Mr Donnelly: That paragraph 2.50 [p 28] be amended by inserting at the end: 'It is the committee's view that the limitations and gaps in the information and data is of particular concern. Complete, accurate and up-to-date information and data is fundamental in enabling work health and safety threats to be properly addressed in a timely way.'

Resolved, on the motion of Mr Donnelly: That paragraph 2.54 [p 28] be amended by omitting 'we hope that our report' and inserting instead 'we expect that our report'.

Resolved, on the motion of Mr Donnelly: That paragraph 2.54 [p 28] be amended by omitting 'help to' before 'spur New South Wales further'.

Chapter 3

Resolved, on the motion of Mr Shoebridge: That all references to 'false positive' be omitted and 'false negative' be inserted instead.

Resolved, on the motion of Mr Donnelly: That paragraph 3.46 be amended by inserting at the end: 'The committee notes that the term "stonemason" is too narrow in its application. The correct term to be used, to ensure the appropriate capture of persons engaged in the manufactured stone industry is "manufactured stone worker". This term is intended to include suppliers, fabricators and installers of manufactured stone.'

Resolved, on the motion of Mr Donnelly: That paragraph 3.47 be amended by omitting 'one-off' before 'free screening service'.

Resolved, on the motion of Mr Mookhey: That:

- a) paragraph 3.47 be amended by inserting at the end: 'Thereafter exiting and new workers in the manufactured stone industry must be tested regularly.'
- b) Recommendation 2 be omitted: 'That the NSW Government provide a one-off free health screening service to all stonemasons within the manufactured stone industry.', and the following new recommendation be inserted instead:

"That icare provide a free screening service for all workers within the manufactured stone industry. This service will be offered and actively promoted over the next 12 months. Thereafter exiting and new workers in the manufactured stone industry must be tested regularly.'

Resolved, on the motion of Mr Shoebridge: That the following new paragraph and recommendation be inserted after Recommendation 2:

'We accept the evidence from the radiologists that low dose high resolution CT scanning is the preferred diagnostic measure for any person who has had significant exposure to silica dust from manufactured stone. As such we believe that the regulations should change to provide that low dose high resolution CT scanning, and not a chest x-ray, be the standard diagnostic tool for any such person.'

Recommendation X

'That low dose high resolution CT scanning, and not a chest x-ray, should be the preferred diagnostic measure for any person who has had significant exposure to silica dust from manufactured stone.'

Mr Donnelly moved: That:

- a) paragraph 3.63 be omitted: 'Therefore, the committee recommends that icare review and expand the financial assistance it provides for retraining and vocational support when an individual has been diagnosed with a silica related condition, to ensure workers feel appropriately supported to leave the industry if they wish.', and the following new paragraph be inserted instead:

'Therefore, the committee recommends that icare review and expand the financial assistance it provides for retraining and vocational support when an individual has been diagnosed with a silica-related health condition. This support should not be conditional on a specific level of impairment and must be sufficient to ensure workers feel appropriately supported to leave the industry if they choose to.'

- b) Recommendation 3 be omitted: That icare review and expand the financial assistance it provides for retraining and vocational support when an individual has been diagnosed with a silica-related health condition, to ensure workers feel appropriately supported to leave the industry, if they wish.', and that the following new recommendation be inserted instead:

'That icare review and expand the financial assistance it provides for retraining and vocational support when an individual has been diagnosed with a silica-related health condition. The support should not be conditional on a specific level of impairment and must be sufficient to ensure workers feel appropriately supported to leave the industry if they choose to.'

Question put.

The committee divided.

Ayes: Mr Donnelly, Mr Mookhey, Mr Shoebridge.

Noes: Ms Cusack, Mr Fang, Mr Faraway, Mr Khan, Mr Roberts.

Question resolved in the negative.

Resolved, on the motion of Mr Donnelly: That paragraph 3.74 be amended by omitting 'It is entirely likely' and inserting instead 'It is expected'.

Resolved, on the motion of Mr Donnelly: That paragraph 3.75 be amended by omitting 'Consideration could be given' and inserting instead 'Consideration should be given'.

Resolved, on the motion of Mr Donnelly: That Recommendation 4 be amended by inserting at the end: 'Consideration should be given to imposing a specific levy on the manufactured stone industry.'

Chapter 4

Resolved, on the motion of Mr Donnelly: That paragraph 4.35 be amended by omitting 'stonemasons' and inserting instead 'manufactured stone workers'.

Resolved, on the motion of Mr Donnelly: That paragraph 4.37 be amended by:

- a) omitting 'some of' before 'the outcomes we are now seeing'
- b) inserting 'Work' before 'health and safety standards'.

Ms Cusack left the meeting.

Moved by Mr Shoebridge: That paragraphs 4.37 and 4.38 be amended by omitting:

'The committee is not, however, in a position to make a recommendation about this, given a ban would need to operate at a federal level.

The committee believes that there are other measures which can be taken to improve health and safety standards in the manufactured stone industry. We understand that workers need to be protected, and we believe that some of the initiatives already underway will assist in this regard. This report also makes a number of other recommendations which we believe will help to respond to the silicosis problem within the industry.'

and inserting instead the following new paragraphs:

'Manufactured stone is a relatively new product, first being distributed in the NSW construction sector in or about 2001. There are numerous credible alternatives for it in all aspects of construction. Consistent with the hierarchy of control measures that form the core of work health safety responses in Australia the first response to an identifiable hazard like manufactured stone is, where possible, to remove it from the workplace.

There is no doubt that manufactured stone has certain attributes that make it attractive to use; it is consistent, it is relatively cheap and it provides a relatively low cost high gloss finish that is attractive to certain consumers. However in its time asbestos also had certain attributes that made it attractive. It was low cost, highly fire resistant and easily cut and affixed. However as the full medical and human cost of its use became apparent asbestos was nevertheless eventually banned. This was after initial attempts by the industry to seek safer handling procedures and more restricted uses.

We believe that the committee should learn from this history and with the evidence available to date make the call to ban the use of manufactured stone in NSW. Of course a federal ban would be preferable and we acknowledge that NSW cannot ban its importation or availability in NSW, however we can regulate construction and WHS and under those heads of power a ban is entirely possible.

Recommendation x

That the NSW Government implement a ban on the use of manufactured stone in NSW.'

Question put.

The committee divided.

Ayes: Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farraway, Mr Khan, Mr Mookhey, Mr Roberts.

Question resolved in the negative.

Resolved, on the motion of Mr Mookhey: That paragraph 4.37 be amended by omitting 'need to operate' and inserting instead 'best operate'.

Mr Mookhey moved: That paragraph 4.37 be amended by inserting at the end: 'This should be considered by the Commonwealth.' and adding the following new recommendation:

'Recommendation X

That the Commonwealth Government consider implementing a ban on manufactured stone products'.

Question put.

The committee divided.

Ayes: Mr Donnelly, Mr Mookhey, Mr Shoebridge.

Noes: Mr Fang, Mr Farraway, Mr Khan, Mr Roberts.

Question resolved in the negative.

Resolved, on the motion of Mr Donnelly: That paragraph 4.38 be amended by inserting 'work' before 'health and safety standards'.

Resolved, on the motion of Mr Donnelly: That paragraph 4.63 and Recommendation 5 be amended by inserting ', in a comprehensive range of languages' after 'safety data sheets for all manufactured stone products'.

Resolved, on the motion of Mr Shoebridge: That paragraph 4.115 be amended by omitting 'is encouraged by' and inserting instead 'notes'.

Resolved on the motion of Mr Mookhey: That paragraph 4.118 be amended by:

- a) inserting 'a time weighted average of' before '0.02mg/m³'
- b) inserting 'for non-mining industries' after '0.02mg/m³'.

Mr Mookhey left the meeting.

Mr Donnelly moved: That:

- a) paragraph 4.118 be amended by omitting 'as soon as possible' and inserting instead 'immediately'
- b) Recommendation 6 be omitted: 'That the Minister for Better Regulation ensure that steps are taken to further reduce the workplace exposure standard to 0.02mg/m³ as soon as possible, to ensure workers are protected from the harmful effects of silica dust' and the following new recommendation be inserted:

'Recommendation X

That the Minister for Better Regulation take immediate steps to reduce the workplace exposure standard with respect to crystalline silica dust to a time weighted average of 0.02mg/m³ for non-mining industries.'

Question put.

The committee divided.

Ayes: Mr Donnelly, Mr Roberts, Mr Shoebridge.

Noes: Mr Fang, Mr Farraway, Mr Khan.

Question resolved in the negative, on the casting vote of the Chair.

Mr Mookhey joined the meeting.

Resolved, on the motion of Mr Mookhey: That recommendation 6 be amended by:

- a) inserting 'a time weighted average of' before '0.02mg/m³'
- b) inserting 'for non-mining industries' after '0.02mg/m³'.

Resolved, on the motion of Mr Donnelly: That:

- a) paragraph 4.120 be amended by inserting after the first sentence 'Given this, all businesses engaged in the fabrication of manufactured stone will be required to register with SafeWork NSW, and will maintain such registration every 12 months.'
- b) paragraph 4.120 be amended by omitting 'Given that' and inserting instead 'Furthermore'
- c) Recommendation 7 be amended by inserting 'registered with SafeWork NSW, and will maintain such registration every 12 months and are' after 'fabrication sites and employers'.

Mr Shoebridge moved: That recommendation 7 be amended by inserting 'independent' before 'air monitoring'.

Question put.

The committee divided.

Ayes: Mr Donnelly, Mr Mookhey, Mr Shoebridge.

Noes: Mr Fang, Mr Farraway, Mr Khan, Mr Roberts.

Question resolved in the negative.

Resolved, on the motion of Mr Shoebridge: That paragraph 4.171 be amended by inserting 'there' before 'has not been a clear'.

Resolved, on the motion of Mr Shoebridge: That paragraph 4.185 be amended by omitting 'that the first line of defence must be to use vacuum extraction or water suppression tools' and inserting instead 'that prior to consideration of PPE, workplaces must as least ensure the use of vacuum extraction or water suppression tools'.

Mr Shoebridge left the meeting.

Mr Donnelly moved: That the following new paragraph and recommendation be inserted after paragraph 4.185:

'However, given the dangerous impact of inhaling silica-related dust and drawing on the submissions and oral evidence to the inquiry, it is clear that must more can be done to ensure that P3 filtering face piece respiratory protection is provided to and is worn by workers in the manufactured stone industry.'

Recommendation X

'That given the dangerous impact of inhaling silica-related dust, SafeWork NSW commence and continue a high profile campaign in the manufactured stone industry to ensure that P3 filtering face piece respiratory protection is provided to and is worn by workers.'

Question put.

The committee divided.

Ayes: Mr Donnelly, Mr Mookhey, Mr Roberts.

Noes: Mr Fang, Mr Faraway, Mr Khan.

Question resolved in the negative, on the casting vote of the Chair.

Mr Shoebridge joined the meeting.

Resolved, on the motion of Mr Shoebridge: That paragraph 4.200 be amended by inserting at the end:

'However the fact that the MBA has equated the safety concerns that arise from manufactured stone with those that arise from asbestos show how much more serious and considered protection measures need to be adopted across the board as contained in other recommendations from this committee.'

Chapter 5

Resolved, on the motion of Mr Donnelly: That paragraph 5.34 be amended by omitting 'manufactured stone sites' and inserting instead 'manufactured stone workplaces'.

Mr Donnelly moved: That the following new paragraph and recommendation be inserted after paragraph 5.36:

'Given the serious impact of crystalline silica dust on workers, the committee supports the establishment of a register for all current and future workers engaged in the manufactured stone industry. This register should be established by the NSW Government as soon as possible.'

Recommendation X

'That given the serious impact of crystalline silica dust on workers, the committee supports the establishment of a register for all current and future workers engaged in the manufactured stone industry. This register should be established by the NSW Government as soon as possible.'

Question put.

The committee divided.

Ayes: Mr Donnelly, Mr Mookhey and Mr Shoebridge.

Noes: Mr Fang, Mr Faraway, Mr Khan and Mr Roberts.

Question resolved in the negative.

Resolved, on the motion of Mr Mookhey: That the following new paragraph be inserted before paragraph 5.37:

'With the risks associated with exposure to crystalline silica dust, the committee believes that all those working in the manufactured stone industry should complete a recognised portable safety training certificate. This is a matter that should be reviewed closely by SafeWork NSW as a matter of priority'.

Mr Mookhey moved: That the following new paragraph and recommendation be inserted after Recommendation 9:

'Given the known dangers of exposure to crystalline silica dust in the manufactured stone industry, all worksites in the industry must have elected occupational health and safety representatives and committees comprising of a majority of workers.'

Recommendation X

'That given the known dangers of exposure to crystalline silica dust in the manufactured stone industry, all worksites in the industry must have elected occupational health and safety representatives and committees comprising of a majority of workers.'

Question put.

The committee divided.

Ayes: Mr Donnelly, Mr Mookhey and Mr Shoebridge.

Noes: Mr Fang, Mr Faraway, Mr Khan and Mr Roberts.

Question resolved in the negative.

Mr Donnelly moved: That paragraph 5.37 and Recommendation 9 be amended by:

- a) inserting 'an appropriate level of' after 'that the NSW Government provide'
- b) inserting 'annual' before 'funding to SafeWork NSW'.

Question put.

The committee divided.

Ayes: Mr Donnelly, Mr Mookhey, Mr Roberts and Mr Shoebridge.

Noes: Mr Fang, Mr Faraway and Mr Khan.

Question resolved in the affirmative.

Resolved, on the motion of Mr Shoebridge: That paragraph 5.72 be amended by omitting 'hopes' and inserting instead 'notes'.

Mr Donnelly moved: That paragraph 5.73 be omitted: 'The committee recognises that any self-regulatory proposal implemented by the industry is not the only answer to addressing the issue. It is clear that there must also be stronger government regulation of the standards, among other initiatives we recommend and/or support in this report' and the following new paragraph be inserted instead:

'The committee does not believe that self-regulation is a satisfactory framework for maintaining and protecting the occupational health and safety of those working in the manufactured stone industry. It is clear to the committee that there is an immediate need for government sponsored legislation and regulation of occupational health and safety for workers in the manufactured stone industry.'

Question put.

The committee divided.

Ayes: Mr Donnelly, Mr Mookhey, Mr Roberts and Mr Shoebridge.

Noes: Mr Fang, Mr Faraway and Mr Khan.

Question resolved in the affirmative.

Chapter 6

Resolved, on the motion of Mr Donnelly: That paragraph 6.12 be amended by omitting 'installers of manufactured stone products' and inserting instead 'suppliers, fabricators and installers of manufactured stone products'.

Resolved, on the motion of Mr Donnelly: That paragraph 6.30 be amended by omitting 'may help' and inserting instead 'will help'.

Resolved, on the motion of Mr Donnelly: That paragraph 6.30 and Recommendation 10 be amended by inserting 'in conjunction with SafeWork NSW' before 'co-ordinate a case finding study'.

Mr Faraway left the meeting.

Mr Mookhey moved: That:

- a) paragraph 6.73 be amended by inserting 'immediate' before 'establishment of a dust disease register'
- b) Recommendation 11 be amended by omitting 'ensure that the new Silicosis Health Register' and inserting instead 'immediately establishes the Silicosis Health Register and ensures that it'.

Question put.

The committee divided.

Ayes: Mr Donnelly, Mr Mookhey, Mr Roberts and Mr Shoebridge.

Noes: Mr Fang and Mr Khan.

Question resolved in the affirmative.

Resolved, on the motion of Mr Donnelly:

- a) that paragraph 6.96 be amended by inserting 'being' after 'acknowledges the work'
- b) that paragraph 6.96 be amended by omitting 'likely' and inserting instead 'need to'
- c) Recommendation 12 be amended by inserting at the end: 'In doing so, SafeWork NSW should consult with suppliers, fabricators, installers and unions involved in the manufactured stone industry.'

Resolved, on the motion of Mr Donnelly: That paragraph 6.107 and Recommendation 13 be amended by inserting at the end 'In terms of sourcing additional funding for research projects, the NSW Government should commission icare to scope out possible funding models that would be based on a cost recovery basis from the industry.'

Resolved, on the motion of Mr Shoebridge: 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 supplementary questions, 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 supplementary questions, 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 committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;
- That the report be tabled on Tuesday, 24 March 2020.

Resolved, on the motion of Mr Mookhey: That the Chair request that a government response to the report be provided as early as possible, preferably by Friday, 29 May 2020.

7. Adjournment

The committee adjourned at 4.40 pm, *sine die*.

Tina Higgins

Committee Clerk

Minutes no. 17

Thursday 14 May 2020

Standing Committee on Law and Justice

e-meeting via Webex at 10.00am

1. Members present

Mr Fang, *Chair*

Mr Donnelly, *Deputy Chair*

Mr D'Adam

Mr Farraway (from 10.12am)

Mr Khan (from 10.05am)

Mr Roberts

Mr Shoebridge

2. Apologies

Ms Cusack

3. 2020 Review of the Workers Compensation Scheme

3.1 Briefing by icare and SIRA

The committee received a private briefing from icare and SIRA regarding their roles and work relevant to the workers compensations scheme. Attendees included:

- Ms Carmel Donnelly, Chief Executive, SIRA
- Mr Darren Parker, Executive Director, Workers and Home Building Compensation Regulation, SIRA
- Dr Petrina Casey, Director, Health Policy, Prevention and Supervision, SIRA
- Ms Theresa Fairman, Executive Director, Strategy and Governance, SIRA
- Mr John Nagle, CEO and Managing Director, icare
- Ms Elizabeth Uehling, Group Executive – Personal Injury, icare
- Mr Andrew Ziolkowski, Group Executive – Prevention and Underwriting, icare
- Ms Rashi Bansal, Group Executive / CFO – Organisational Performance, icare.

3.2 Provisions of documents to participating member

Resolved, on the motion of Mr D'Adam: That the Hon Daniel Mookhey MLC be provided with copies of inquiry related documents.

3.3 Pre-hearing questions

Mr Shoebridge moved: That pre-hearing questions be directed to SIRA and icare, and be drafted as soon as practicable following the receipt of submissions.

The committee divided.

Ayes: Mr Donnelly, Mr D'Adam, Mr Roberts, Mr Shoebridge.

Noes: Mr Fang, Mr Farraway, Mr Khan.

Question resolved in the affirmative.

3.4 Hearing

The committee discussed next steps of the inquiry following the close of submissions, including potentially having virtual hearings.

3.5 Submissions from other jurisdictions

Resolved, on the motion of Mr Shoebridge: That the Chair write to the SIRA equivalent workers compensation regulators in Western Australia and Tasmania to invite them to make a submission to the review of the workers compensation scheme, focusing on their respective jurisdiction's regulatory approach and tools they use to exercise their regulatory role.

4. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 16 be confirmed.

5. Correspondence

The committee noted the following items of correspondence:

Received:

- 5 May 2020 – Email from the Department of Customer Service on behalf of SafeWork NSW, to secretariat, declining an invitation to make a submission .
- 29 April 2020 – Email from Ms Clemency Morony, Head of Ministerial and Parliamentary Support, iCare to secretariat, confirming attendance at the briefing to be held 14 May 2020
- 29 April 2020 – Email from Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority to secretariat, confirming attendance at the briefing to be held 14 May 2020
- 29 April 2020 – Email from Mr Ben Folino, Policy and Advocacy Adviser, the Royal Australian & New Zealand College of Psychiatrists, to secretariat, seeking an extension on behalf of its members to make a submission
- 26 March 2020 – Letter from Mr David Shoebridge MLC, Chair of the Public Accountability Committee to Chair, sharing a submission by the Workers Compensation Independent Review Office

Sent:

- 5 May 2020 – Email from secretariat, to Mr Ben Folino, Policy and Advocacy Adviser, the Royal Australian & New Zealand College of Psychiatrists, granting its members an extension until 17 June 2020 to make a submission

6. Adjournment

The committee adjourned at 11.17am, *sine die*.

Joseph Cho
Committee Clerk

Minutes no. 18

Tuesday 28 July 2020

Standing Committee on Law and Justice

Macquarie Room, Parliament House, Sydney at 9.16 am

1. Members presentMr Fang, *Chair*Mr Donnelly, *Deputy Chair*

Ms Cusack

Mr D'Adam

Mr Farlow (from 9.23 am)

Mr Khan

Mr Roberts

Mr Shoebridge

2. Previous minutes

Resolved, on the motion of Mr Shoebridge: That draft minutes no. 17 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence:

Received

- 27 July 2020 – Email from the author of submission no. 15 to secretariat, updating the requested publication status of submissions.
- 27 July 2020 – Email from the author of submission no. 15 to secretariat, regarding the Personal Injury Commission Bill.
- 19 July 2020 – Email from the author of submission no. 15 to secretariat, providing the committee with information on the professional background of some of the signatories.
- 17 July 2020 – Email from Mr John Daley, Director, the Change Room to secretariat, inviting committee members to the Change Room Live Program being held at ANZ Stadium.
- 7 July 2020 – Email from Mr Andrew Monk, Executive Director, NSW Health to secretariat, declining an invitation to appear at a hearing for the 2020 Review of the Workers Compensation Scheme.
- 7 July 2020 – Email from Mr Tom Lunn, Senior Policy Manager, Insurance Council of Australia to secretariat, declining an invitation to appear at a hearing for the 2020 Review of the Workers Compensation Scheme.
- 19 June 2020 – Letter from Ms Robyn Pearce, Acting Chief Executive, WorkSafe Tasmania, providing information on the regulation of the workers compensation scheme in Tasmania.
- 18 June 2020 – Email from Mr Kevin Gillingham, Manager Policy and Legislative Services, WorkCover WA, providing information on the regulation of the workers compensation scheme in Western Australia.
- 4 June 2020 – Email from author of submission nos 15 and 16 to secretariat, confirming publication status of submissions and raising concerns regarding the Personal Injury Compensation Bill 2020.
- 15 May 2020 – Email from the Hon Mark Buttigieg MLC, Opposition Whip, advising that the Hon Daniel Mookhey MLC will be participating in the 2020 Review of the Workers Compensation Scheme for the duration of the inquiry.
- 13 May 2020 – Email from Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority to secretariat, providing materials to be presented to the committee on 14 May 2020.
- 13 May 2020 – Email from Ms Clemency Morony, Head of Ministerial and Parliamentary Support, icare to secretariat, providing materials to be presented to the committee on 14 May 2020.
- 5 May 2020 – Email from Mr Greg Marshall to the committee, regarding the government's response to recommendations of the Mining Amendment (Compensation of Exploration Licence) Bill 2019 inquiry.
- 30 April 2020 – Email from Mr and Mrs Lantry to the committee, regarding the government's response to recommendations of the Mining Amendment (Compensation of Exploration Licence) Bill 2019.

Sent

- 30 June 2020 – Email from secretariat to Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority, providing pre-hearing questions for a response.
- 30 June 2020 – Email from secretariat to Ms Clemency Morony, Head of Ministerial and Parliamentary Support, icare, providing pre-hearing questions for a response.
- 18 May 2020 – Letter from Chair to Ms Robyn Pearce, Acting Chief Executive Officer, WorkSafe Tasmania, inviting WorkSafe Tasmania to make a submission to the 2020 Review of the Workers Compensation Scheme.
- 18 May 2020 – Letter from Chair to Mr Chris White, Chief Executive Officer, WorkCover WA, inviting WorkCover WA to make a submission to the 2020 Review of the Workers Compensation Scheme.

4. 2020 Review of the Workers Compensation Scheme**4.1 Public submissions**

The committee noted that submission nos. 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 18, 19, 20, 21, 22 and 23 were published by the Committee Clerk under the authorisation of the resolution appointing the committee.

4.2 Name suppressed submissions

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of submission nos. 1, 10 and 15, with the exception of the author's name, which is to remain confidential, at the request of the authors.

4.3 Confidential submissions

Resolved, on the motion of Mr Shoebridge: That the committee keep submission 16 and 17 confidential, as per the request of the author.

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, as agreed by members via email:

- answers to questions on notice by SIRA, received from Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority, 21 July 2020.
- answers to questions on notice by icare, received from Ms Clemency Morony, Head of Ministerial and Parliamentary Support, icare, 17 July 2020.

4.5 Report deliberative meeting

Resolved, on the motion of Mr Shoebridge: That the committee hold the report deliberative meeting on Friday 23 October 2020 in person, noting that the date may need to be revised subject to the third hearing date.

4.6 Camera operator arrangements for committee hearings

Members noted that the new three-year funding from Treasury has enabled the Parliament to extend its existing camera operator arrangements to cover committee hearings.

4.7 Public hearing

The hearing commenced at 9.30am.

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:

- Ms Angela Catallo, Research/Industrial Officer, NSW Teachers Federation
- Mr Angus Skinner, Research Manager, Police Association NSW
- Ms Kirsty Membreno, Assistant Secretary – Industrial, Police Association NSW
- Ms Natasha Flores, Work, Health and Safety and Workers Compensation Industrial Officer, Unions NSW

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Sherri Hayward, Legal / Industrial Officer, Construction and General Division, NSW Branch, CFMEU
- Ms Rita Mallia, State President, Construction and General Division, NSW Branch, CFMEU
- Mr David Henry, National Work Health and Safety Officer, Australian Manufacturing Workers' Union
- Mr Alan Mansfield, Workers Compensation and Rehabilitation Officer, Australian Manufacturing Workers' Union

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined via teleconference:

- Ms Elizabeth Greenwood, Policy Manager, Workers Compensation, WHS and Regulation, Business NSW
- Mr Mark Frost, Chief Economist, Business NSW

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Derick Borean, NSW President, Australian Rehabilitation Providers Association
- Mr Shaun Lane, NSW Secretary, Australian Rehabilitation Providers Association

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 1.45pm. The public and the media withdrew.

4.8 *In camera* hearing

The committee proceeded to take *in camera* evidence.

Persons present other than the committee: Ms Madeleine Foley, Ms Angeline Chung, Mr Joseph Cho and Hansard reporters.

The following witnesses were sworn and examined:

- Witness A, B and C.

The evidence concluded and the witness withdrew.

The *in camera* hearing concluded at 2.46pm.

4.9 Additional hearing date

Resolved, on the motion of Mr Shoebridge: The Chair and the secretariat to canvass the appearance of following possible witnesses on an additional hearing day for a duration of 1 hour and 20 minutes each:

- Representatives from the board of the State Insurance Regulatory Authority
- Representatives from the board of Insurance and Care NSW
- Ms Janet Dore
- Representatives from Employers Mutual Limited, trading as EML.

5. Adjournment

The committee adjourned at 3.00pm until 9.15am, 3 August 2020 (2020 Workers Compensation Review hearing).

Joseph Cho
Committee Clerk

Minutes no. 19

Monday 3 August 2020

Standing Committee on Law and Justice

Macquarie Room, Parliament House, Sydney at 9.15 am

1. Members present

Mr Fang, *Chair*

Mr Donnelly, *Deputy Chair*

Ms Cusack (until 12.00pm, from 5.04 pm)

Mr D'Adam

Mr Farlow

Mr Khan

Mr Mookhey (participating member)

Mr Roberts

Mr Shoebridge

2. 2020 Review of the Workers Compensation Scheme**2.1 Public hearing**

The hearing commenced at 9.30am.

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 Shane Butcher, NSW Spokesperson for Workers Compensation, Australian Lawyers Alliance
- Mr Richard Harvey, President, Law Society of NSW
- Mr Timothy Concannon, Deputy Chair, Injury Compensation Committee, Law Society of NSW
- Mr Rod Hodgson, Queensland Leader of Litigation and Legal Strategy, Maurice Blackburn (via teleconference).

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Christopher McHugh, Executive General Manager, Personal Injury Insurance, Suncorp
- Ms Sarah Hilt, Head of Workers Insurance Claims Contracts, NSW WC Claims and Customer Solutions, Personal Injury Insurance, Suncorp.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Simon Cohen, Workers Compensation Independent Review Officer, Workers Compensation Independent Review Office

The evidence concluded and the witness withdrew.

Ms Cusack left the meeting.

The following witnesses were sworn and examined:

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

- Mr Darren Parker, Executive Director, Workers and Home Building Compensation Regulation, State Insurance Regulatory Authority
- Dr Petrina Casey, Director, Health Policy, Prevention and Supervision, State Insurance Regulatory Authority.

Ms Carmel Donnelly tendered the following documents:

- 21 point action plan update
- Copy of a report completed by Ernst and Young, summarising key risks identified with the Nominal Insurer valuation

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr John Nagle, Chief Executive Officer and Managing Director, icare
- Ms Elizabeth Uehling, Group Executive, Personal Injury Claims, icare
- Mr Andrew Ziolkowski, Group Executive, Prevention and Underwriting, icare
- Ms Rashi Bansal, Group Executive, Organisational Performance, icare
- Mr Dai Liu, Chief Actuary, icare.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 5.04pm. The public and the media withdrew.

Ms Cusack re-joined the meeting.

2.2 Tendered documents

Resolved, on the motion of Mr Khan: That the committee accept and publish the following documents tendered during the public hearing.

- Appendix 5 - icare's 2018-19 annual report, documenting overseas travel, tendered by Mr Mookhey
- 21 point action plan update, tendered by Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority.

Resolved, on the motion of Mr Khan: That the committee accept and publish the following document tendered during the public hearing with appropriate redactions taking into consideration the wishes of the document providers:

- Letter from Ms Elizabeth Uehling, Group Executive Personal Injury, icare to claimant, declining claim for psychological injury, tendered by Mr Shoebridge.
- Copy of a report completed by Ernst and Young, summarising key risks identified with the Nominal Insurer valuation, tendered by Ms Carmel Donnelly.

2.3 Post hearing correspondence and supplementary questions

Resolved, on the motion of Mr Shoebridge: That

- the Chair write to icare advising them of the committee's powers to issue a summons if the committee has concerns over the completeness of the answers provided to questions on notice.
- members are to provide any supplementary questions to the secretariat by midday Friday 7 August 2020, for circulation and comment by the committee by the afternoon of Monday 10 August 2020.

3. Adjournment

The committee adjourned at 5.16 pm, *sine die*

Joseph Cho
Committee Clerk

Minutes no. 21

Thursday 20 August 2020
Standing Committee on Law and Justice
Jubilee Room, Parliament House, 11.20 am

1. Members present

Mr Fang, *Chair*
Mr Donnelly, *Deputy Chair*
Ms Cusack (via Webex) (until 1.00 pm, from 3.30 pm)
Mr D'Adam
Mr Farlow (until 11.52 am, from 12.45 pm)
Mr Khan (until 12.40 pm, from 2.30 pm until 2.56 pm, from 3.45pm)
Mr Roberts
Mr Shoebridge (via Webex) (from 2.30 pm)
Mr Mookhey (participating)

2. Previous minutes

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

3. Correspondence

The committee noted the following items of correspondence:

Received

- 12 August 2020 – Email from Ms Carmel Donnelly, Chief Executive, SIRA to secretariat, advising that SIRA will not make a submission to the inquiry but will attend hearing
- 13 August 2020 – Letter from Dr Chris Colquhoun, Chief Medical Officer, icare to Chair providing submission but declining invitation to give evidence
- 13 August 2020 – Email from Mr David Cullen, Managing Director, Caesarstone Asia Pacific on behalf of the Australian Engineered Stone Advisory Group (AESAG) to secretariat, advising that the bill is outside AESAG's field of expertise and therefore the group will not be participating in the inquiry
- 14 August 2020 – Email from Ms Michelle Falstein, Secretary, NSW Council for Civil Liberties to secretariat, advising that the organisation will make a submission but are unable to attend hearing
- 17 August 2020 – Email from Hon Mark Buttigieg MLC, Opposition Whip to secretariat, advising that Hon Daniel Mookhey MLC will be a participating member on the inquiry into the Work Health and Safety Amendment (Information Exchange) Bill 2020 for the duration of the inquiry
- 17 August 2020 – Email from Ms Elizabeth Early, Program Manager – Priority Populations, Lung Foundation Australia to secretariat, declining the invitation to make a submission or give evidence to the inquiry
- 17 August 2020 – Email from Mr Jonathan Walsh, Principal Lawyer, Maurice Blackburn Lawyers to secretariat, providing submission but declining invitation to attend hearing
- 18 August 2020 – Email from Mr Andrew Orfanos, President, Australian Institute of Occupational Hygienists Inc to secretariat, advising that the Institute will be attending the hearing

- 18 August 2020 – Email from Ms Michelle Vo, Business Partner, Parliament and Cabinet, Executive and Ministerial Services, NSW Health to secretariat, advising that NSW Health will not be making a submission but will attend the hearing.

4. Inquiry into the Work Health and Safety Amendment (Information Exchange) Bill 2020

4.1 Public submissions

The committee noted that following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1-8.

4.2 Report deliberative

The committee noted that the report deliberative is confirmed for Monday 7 September 2020 from 12.30 pm until 1.30 pm. The secretariat has coordinated with the PC3 secretariat to ensure that the PC3 hearing lunch break commences at 12.30 pm.

4.3 Answers to question on notice

The committee noted that they had previously resolved that answers to questions on notice be returned by witnesses within 24 hours of the hearing.

4.4 Provision of documents to participating member

Resolved, on the motion of Mr Donnelly: That Mr Mookhey, who has advised the committee that he intends to participate for the duration of the inquiry into the Work Health and Safety Amendment (Information Exchange) Bill 2020, be provided with copies of inquiry related documents.

4.5 Witnesses

The committee discussed the process for the selection of witnesses for the inquiry. The committee noted that Ms Natasha Flores, WHS/WC Officer, Unions NSW was no longer able to attend the public hearing due to illness.

Resolved, on the motion of Mr Farlow: That the appearance time of Ms Rita Mallia, President, CFMMEU be reduced from 1 hour to 45 minutes.

4.6 Allocation of questioning

Resolved, on the motion of Mr D'Adam: That the sequence of questions to be asked during the hearing be left in the hands of the Chair.

4.7 Public hearing

Witnesses were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was sworn and examined via Webex:

- Mr Andrew Orfanos, President, Australian Institute of Occupational Hygienists.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined via Webex:

- Ms Rita Mallia, President, CFMMEU.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined via Webex:

- Associate Professor Deborah Yates, Respiratory Medicine Physician, Royal Australasian College of Physicians
- Dr Graeme Edwards, Occupational and Environmental Medicine Physician, Royal Australasian College of Physicians.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Carmel Donnelly, Chief Executive Officer, SIRA
- Dr Petrina Casey, Director, Health Policy, Prevention and Supervision SIRA
- Ms Rose Webb, Deputy Secretary, Better Regulation Division, Department of Customer Service
- Ms Meagan McCool, Director, Chemicals, Explosives and Safety Auditing, SafeWork NSW, Better Regulation Division, Department of Customer Service
- Dr Richard Broome, Acting Executive Director, Health Protection NSW

Mr Mookhey tabled the following document:

- Silicosis notification form

Ms Donnelly tendered the following document:

- Dust disease: Update on SIRA programs of work August 2020

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 4.45 pm.

4.8 Tendered documents

Resolved, on the motion of Mr Farlow: That the committee accept and publish the following documents tendered during the public hearing:

- Silicosis notification form, tabled by Mr Mookhey
- Dust disease: Update on SIRA programs of work August 2020, tendered by Ms Carmel Donnelly, Chief Executive Officer, SIRA.

5. 2020 Review of the Workers Compensation Scheme

5.1 Witnesses at public hearing on 24 August 2020

The Chair advised the committee that he and the secretariat, on behalf of the committee, had written to EML on multiple occasions inviting them to attend the hearing and reminding them of the committee's powers to summon witnesses under the *Parliamentary Evidence Act 1901*.

The committee discussed and considered the next steps to be taken in relation to the witnesses of EML invited to attend the hearing on Monday 24 August 2020.

Resolved, on the motion of Mr Khan: That the letters between the Chair and EML be tabled.

Mr Farlow moved: That the committee issue summons to Mr Mark Coyne, Chief Executive Officer, Employers Mutual Management, EML and Mr Anthony Fleetwood, Chief Executive Officer, Employers Mutual Limited, EML to give evidence at the hearing on Monday 24 August at 10.50 am.

Mr Shoebridge moved: That the motion of Mr Farlow be amended by omitting all words after 'That' and inserting instead: 'the committee affirm its capacity to summon witness but that on this occasion Mr Mark Coyne, Chief Executive Officer, Employers Mutual Management, EML and Mr Anthony Fleetwood, Chief Executive Officer, Employers Mutual Limited, EML be invited to give evidence on a future date'.

Amendment of Mr Shoebridge put.

The committee divided.

Ayes: Mr D'Adam, Mr Donnelly, Mr Roberts, Mr Shoebridge.

Noes: Ms Cusack, Mr Fang, Mr Farlow, Mr Khan.

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

Original question of Mr Farlow put and passed.

Mr D'Adam moved: That the appearance time for icare witnesses be extended to 2 hours.

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Donnelly, Mr Shoebridge.

Noes: Ms Cusack, Mr Fang, Mr Farlow, Mr Khan, Mr Roberts.

Question resolved in the negative.

Resolved, on the motion of Mr Farlow: That the hearing schedule for Monday 24 August 2020, as circulated and amended with the addition of Mr Fleetwood and Mr Coyne be adopted.

Resolved, on the motion of Mr Shoebridge: That the deliberative meeting on Monday 24 August 2020 commence at 9.00 am.

Resolved, on the motion of Mr Shoebridge: That, if EML request legal representation to be present at the hearing, the secretariat is to advise that the committee has resolved that legal representation may be present in the room in an advisory capacity, but that legal representatives will not be sworn or give evidence.

Resolved, on the motion of Mr Khan: That the secretariat notify Ms Justine Brindley, General Counsel & Company Secretary, Legal, Cossec and Fraud, Shared Services, EML, what the committee has resolved at this meeting regarding the attendance of EML representatives at the hearing on Monday 24 August 2020 and that a copy of the procedural fairness resolution be provided.

6. Adjournment

The committee adjourned at 6.00 pm, until Monday 24 August 2020, 9am, Macquarie Room, Parliament House (Workers Compensation hearing).

Emma Rogerson
Committee Clerk

Minutes no. 22

Monday 24 August 2020

Standing Committee on Law and Justice

Macquarie Room, Parliament House, Sydney at 8.45 am

1. Members present

Mr Fang, *Chair*

Mr Donnelly, *Deputy Chair*

Ms Cusack

Mr D'Adam

Mr Farlow

Mr Khan

Mr Mookhey (participating member)

Mr Roberts

Mr Shoebridge

2. Previous minutes

Resolved, on the motion of Mr Donnelly: That draft minutes nos 18 and 19 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 4 August 2020 – Email from Dr Arthur Chesterfield-Evans, medical practitioner and a former member of the Legislative Council to the committee, providing a summary of issues concerning the Workers Compensation Scheme.
- 8 August 2020 – Email from Mr Peter McCarthy, former principal actuary of SIRA to secretariat, offering to attend the 24 August hearing as a witness.
- 11 August 2020 – Letter from Ms Carmel Donnelly, Chief Executive of SIRA to Chair, clarifying some evidence given and objecting to statements made by another witness.
- 14 August 2020 – Email from Ms Justine Brindley, General Counsel and Company Secretary, EML to secretariat, noting inability to respond to an invitation to the 24 August 2020 hearing.
- 18 August 2020 – Email from Mr Mark Lennon, former icare board member and President, NSW Labor to secretariat, declining an invitation to appear before the committee on 24 August 2020.
- 18 August 2020 – Email from Ms Carmel Donnelly, Chief Executive of SIRA to secretariat, regarding potential publication status of document tendered at a hearing.
- 20 August 2020 – Email from Mr Mark Coyne, Chief Executive, EML to Chair, noting inability to respond to invitation to the 24 August 2020 hearing.
- 20 August 2020 – Email from Ms Justine Brindley, General Counsel and Company Secretary, EML to secretariat, noting inability to respond to the invitation to the 24 August 2020 hearing.
- 20 August 2020 – Email from Ms Clemency Morony, Head of Ministerial and Parliamentary Support, icare to secretariat, confirming icare's support for EML to participate in the 24 August 2020 hearing.
- 20 August 2020 – Email from Dr Chesterfield-Evans to Chair, recommending that the Health Care Complaints Commission be invited to a future hearing for the 2020 Review of the Workers Compensation Scheme.
- 20 August 2020 – Email from Dr Chesterfield-Evans to Chair, providing information on issues related to choice of rehabilitation provider
- 21 August 2020 – Email from Ms Justine Brindley, General Counsel and Company Secretary, EML to secretariat, providing details of EML attendees at the hearing on 24 August 2020.

Sent:

- 19 August 2020 – Letter from Chair to Mr Mark Lennon, President, NSW Labor, asking for a reconsideration of his decision to decline an invitation to appear before the committee on 24 August 2020.
- 19 August 2020 – Letter from Chair to Mr Mark Coyne, Chief Executive, EML reiterating the invitation to appear before the committee on 24 August 2020.
- 20 August 2020 – Email from secretariat to Ms Clemency Morony, Head of Ministerial and Parliamentary Support, icare seeking icare's support for EML to participate in the 2020 Review of the Workers Compensation Scheme.
- 20 August 2020 – Email from secretariat to Ms Justine Brindley, General Counsel and Company Secretary, EML, forwarding icare's support for EML to participate in the 2020 Review of the Workers Compensation Scheme.

4. 2020 Review of the Workers Compensation Scheme

4.1 Public submissions

The committee noted that submission no.24 was published by the Committee Clerk under the authorisation of the resolution appointing the committee.

4.2 Clarification of evidence

Resolved, on the motion of Mr Khan: That the committee authorise the publication of the correspondence from Ms Carmel Donnelly, Chief Executive of SIRA to Chair, clarifying some evidence given and objecting to statements made by another witness.

4.3 Publication of tendered document

The committee considered the appropriate publication status of a report completed by Ernst and Young, summarising key risks identified with the Nominal Insurer valuation, tendered by Ms Carmel Donnelly, Chief Executive, SIRA during the 3 August 2020 hearing.

Mr D'Adam moved: That the committee publish the Ernst and Young report.

Mr Khan moved: That the motion of Mr D'Adam be amended by omitting all words after 'That and inserting instead: 'the Chair write to icare, providing an opportunity to object to the publication of the report by the afternoon of Thursday, 27 August 2020'.

Amendment of Mr Khan - put and passed.

Original question, as amended – put and passed.

4.4 Public hearing

Witnesses were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was sworn and examined via videoconference:

- Ms Janet Dore, Former Independent Reviewer, SIRA.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Anthony Fleetwood, Chief Executive Officer, Employers Mutual Limited
- Mr Mark Coyne, Chief Executive Officer, Employers Mutual Management
- Ms Tracey Harris, Chief Operating Officer & Service Provider Principal, Employers Mutual Limited
- Mr Matthew Vickers, General Manager Workers Insurance & Scheme Agent Principal, Employers Mutual Limited

Mr Mookhey tabled the following documents:

- Answers to supplementary question no 75 - Budget Estimates 2019-2020, Portfolio Committee No. 1 – Treasury
- Notice from NSW Government eTendering website outlining contract awarded to EML

Mr Shoebridge tabled the following documents:

- Article from Springerlink.com titled: *Effectiveness of Workplace Interventions in Return-to-Work for Musculoskeletal, Pain-Related and Mental Health Conditions: An Update of the Evidence and Messages for Practitioners*
- EML publication titled *Swiss Re: Excellence & Innovation in return to work award in 2015/16 – Work Injury Screening and Early Intervention Study (Wise)*

The evidence concluded and the witness withdrew

The following witnesses were sworn and examined:

- Mr Michael Carapiet, Chair, icare Board
- Mr David Plumb, Chair of Audit and Risk Committee, icare Board
- Mr Gavid Bell, Chair of People and Remuneration Committee, icare Board
- Mr Don Ferguson, Interim Chief Executive Officer, icare

The evidence concluded and the witness withdrew

The following witnesses were sworn and examined:

- Mr Trevor Matthews, Chair, SIRA Board
- Ms Nancy Milne OAM, Deputy Chair, SIRA Board
- the Hon Greg Keating, Member, SIRA Board
- Ms Carmel Donnelly, Chief Executive, SIRA

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Mark Lennon, Former member, icare Board,

The evidence concluded and the witness withdrew.

The public hearing concluded at 5.00 pm. The public and the media withdrew.

4.5 Tendered documents

Resolved, on the motion of Mr D'Adam: That the committee accept and publish the following documents tendered during the public hearing:

- Answers to supplementary question no 75 - Budget Estimates 2019-2020, Portfolio Committee No. 1 – Treasury, tendered by Mr Mookhey
- A contract award notice from the NSW Government eTendering website, service provider agreement no. – 4600002815, tendered by Mr Mookhey
- Article from Springerlink.com titled *Effectiveness of Workplace Interventions in Return-to-Work for Musculoskeletal, Pain-Related and Mental Health Conditions: An Update of the Evidence and Messages for Practitioners*, tendered by Mr Shoebridge
- EML publication titled *Swiss Re: Excellence & Innovation in return to work award in 2015/16 – Work Injury Screening and Early Intervention Study (Wise)*, tendered by Mr Shoebridge.

5. Other business

Resolved, on the motion of Mr Shoebridge, that:

- the secretariat canvass members' availability for a possible further hearing
- members provide any supplementary questions directed to icare and the icare Board to the secretariat by midday Thursday, 27 August 2020.

6. Adjournment

The committee adjourned at 5.18 pm, *sine die*

Joseph Cho
Committee Clerk

Minutes no. 23

Friday 4 September 2020

Standing Committee on Law and Justice

Videoconference via WebEx, 12.30pm

1. Members presentMr Fang, *Chair*Mr Donnelly, *Deputy Chair*

Ms Cusack

Mr D'Adam

Mr Farlow

Mr Khan

Mr Roberts

Mr Shoebridge

Mr Mookhey (participating member)

2. Apologies**3. Correspondence**

The Committee noted the following items of correspondence:

Received

- 27 August 2020 – Email from Ms Clemency Morony, Head of Ministerial and Parliamentary Support, icare to secretariat, confirming that icare has no concerns with the publication of the Ernst and Young report: *Key risks associated with the 31 December 2019 Nominal Insurer Valuation*.
- 2 September 2020 – Email from Ms Selene Hung, Associate Director, Ministerial and Parliamentary Services, NSW Treasury to secretariat, advising that invited officials are unavailable and asking for the hearing to be rescheduled.
- 3 September 2020 – Email from Ms Selene Hung, Associate Director, Ministerial and Parliamentary Services, NSW Treasury to secretariat, reiterating the request for the hearing to be rescheduled.
- 3 September 2020 – Email from Ms Selene Hung, Associate Director, Ministerial and Parliamentary Services, NSW Treasury to secretariat, noting pre-existing commitment of witnesses and providing an outline of their availability.

Sent:

- 25 August 2020 – Email from Chair to Mr Don Ferguson, interim Chief Executive Officer, icare NSW, noting the committee's intention to publish the Ernst and Young report titled *Key risks associated with the 31 December 2019 Nominal Insurer Valuation*, and providing an opportunity to express any concerns.
- 31 August 2020 – Email from secretariat to Ms Selene Hung, Associate Director, Ministerial and Parliamentary Services, NSW Treasury, inviting Mr Pratt and Mr Gardner to a hearing to be held on 9 September 2020.
- 3 September 2020 – Email from secretariat to Ms Selene Hung, Associate Director, Ministerial and Parliamentary Services, NSW Treasury, reiterating the invitation.

4. 2020 Review of the Workers Compensation Scheme**4.1 Hearing Date**

Resolved, on the motion of Mr Farlow: That the Chair write to NSW Treasury, explaining the committee's wish to proceed with the hearing on 9 September and noting the change in proposed appearance time to 3pm – 5pm to better suit witnesses' availability.

4.2 Publication of tendered document

The committee noted that the Ernst and Young report titled *Key risks associated with the 31 December 2019 Nominal Insurer Valuation*, tendered by Ms Carmel Donnelly, Chief Executive, SIRA on 3 August 2020 has been published.

5. Adjournment

The committee adjourned at 12.43pm until 12.30pm, 7 September 2020 (Information Exchange Bill 2020 report deliberative)

Joseph Cho
Committee Clerk

Minutes no. 25

Wednesday 9 September 2020
Standing Committee on Law and Justice
Macquarie Room, Parliament House, Sydney at 2:48pm

1. Members present

Mr Fang, *Chair*
Mr Donnelly, *Deputy Chair*
Ms Cusack
Mr D'Adam
Mr Farlow
Mr Khan
Mr Roberts
Mr Shoebridge (from 3:01 pm)
Mr Mookhey (participating member)

2. Previous minutes

Resolved, on the motion of Mr Khan: That draft minutes nos 22 and 23 be confirmed.

3. Correspondence

Resolved, on the motion of Ms Cusack: That the committee note the following items of correspondence:

Received

- 3 September 2020 – Email from Ms Georgia Lovell, Senior Advisor, Government, Industry and Public Policy, Suncorp to secretariat, regarding the publication status of responses to questions taken on notice.
- 4 September 2020 – Email from Ms Selene Hung, Associate Director, Ministerial and Parliamentary Services, NSW Treasury to secretariat, confirming acceptance of invitation for NSW Treasury officials to appear before a hearing on 9 September 2020.
- 8 September 2020 – Email from Ms Gabbie Gallagher, Director Public and Product Safety, Department of Customer Service to secretariat, providing rationale for why draft MOU should not be published.

Sent

- 4 September 2020 – Letter from Chair to Mr Michael Pratt, Secretary, NSW Treasury, reiterating the committee's wish to proceed with a hearing on 9 September and advising adjusted appearance time.

4. 2020 combined review of the Compulsory Third Party insurance scheme and Lifetime Care and Support scheme

The committee considered the timeline and conduct of the review of the Compulsory Third Party insurance scheme and Lifetime Care and Support scheme, noting that it was previously resolved to be conducted as a combined review, with joint hearings and a joint report in early 2020.

4.1 Terms of reference

Committee noted that this review will meet the committee's responsibilities under section 27 of the State Insurance and Care Governance Act 2015.

4.2 Proposed timeline

Resolved, on the motion of Mr Khan: That submissions for this review open on 21 September 2020 and close on 24 October 2020.

4.3 Advertising

The committee noted that the inquiry will be advertised via social media, stakeholder letters and a media release distributed to all media outlets in New South Wales.

5. 2020 Review of the Workers Compensation Scheme

5.1 Answers to questions on notice and supplementary questions

Resolved, on the motion of Mr D'Adam: That:

- the committee keep the email from Suncorp to the Chair, providing responses to questions taken on notice, confidential
- the committee publish appendix A to the response with all identifying and personal information removed.

5.2 Public Hearing

Witnesses were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Michael Pratt AM, Secretary, NSW Treasury
- Phil Gardner, Deputy Secretary, Commercial, NSW Treasury
- Stewart Walters, Chief Financial and Operations Officer, NSW Treasury

Mr Mookhey tabled the following documents:

- Letter from Carmel Donnelly, Chief Executive, SIRA to Michael Pratt AM, Secretary, NSW Treasury dated 6 June 2019
- Letter from Michael Pratt AM, Secretary, NSW Treasury to Carmel Donnelly, Chief Executive, SIRA, dated 28 June 2019
- Letter from Carmel Donnelly, Chief Executive, SIRA to Michael Pratt AM, Secretary, NSW Treasury dated 10 September 2019
- Treasury Secretary Briefing Note titled: *Secretary's meeting with the Chair of Insurance and Care NSW*
- Email from Andy Hobbs, Director, Investment Management, NSW Treasury to John Nagle, Former CEO of icare, dated 9 December 2019
- NSW Treasury document titled *Attachment E: Examples of Previous Experiences*
- Icare procurement complaint report concerning a complaint lodged by Whitecoat Pty Ltd on 18 September 2019
- Email from Jon Doyle, Director Capability and Governance, NSW Procurement to Phil Gardner, Deputy Secretary, Commercial, NSW Treasury dated 3 June 2020.

Mr Shoebridge tabled the following document:

- Email from Phil Gardner Deputy Secretary, Commercial, NSW Treasury to Charlotte Alexander, Andy Hobbs and Laura Lombe, dated 26 May 2020.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 5.00 pm. The public and the media withdrew.

Resolved, on the motion of Mr Khan: That the committee accept and publish the following documents tendered during the public hearing:

- Letter from Carmel Donnelly, Chief Executive, SIRA to Michael Pratt AM, Secretary, NSW Treasury dated 6 June 2019, tendered by Mr Mookhey
- Letter from Michael Pratt AM, Secretary, NSW Treasury to Carmel Donnelly, Chief Executive, SIRA, dated 28 June 2019, tendered by Mr Mookhey
- Letter from Carmel Donnelly, Chief Executive, SIRA to Michael Pratt AM, Secretary, NSW Treasury dated 10 September 2019, tendered by Mr Mookhey
- Treasury Secretary Briefing Note titled: *Secretary's meeting with the Chair of Insurance and Care NSW*, tendered by Mr Mookhey
- Email from Andy Hobbs, Director, Investment Management, NSW Treasury to John Nagle, Former CEO of icare, dated 9 December 2019, tendered by Mr Mookhey
- NSW Treasury document titled *Attachment E: Examples of Previous Experiences*, tendered by Mr Mookhey
- Icare procurement complaint report concerning a complaint lodged by Whitecoat Pty Ltd on 18 September 2019, tendered by Mr Mookhey
- Email from Jon Doyle, Director Capability and Governance, NSW Procurement to Phil Gardner, Deputy Secretary, Commercial, NSW Treasury dated 3 June 2020, tendered by Mr Mookhey
- Email from Phil Gardner Deputy Secretary, Commercial, NSW Treasury to Charlotte Alexander, Andy Hobbs, and Laura Lombe, dated 26 May 2020, tendered by Mr Shoebridge.

5.3 Further hearings

The committee discussed further hearings and potential witnesses for the inquiry.

The committee noted that the secretariat would circulate a proposal regarding witnesses for two future hearing dates, with this proposal to be discussed by members at a future meeting.

5.4 Extension to the reporting date

Resolved, on the motion of Mr Shoebridge: That the committee report on or before Thursday 10 December 2020.

6. Inquiry into the Work Health and Safety Amendment (Information Exchange) Bill 2020

6.1 Publication of draft MOU provided by SafeWork NSW

Resolved, on the motion of Mr Donnelly: That the draft MoU and the correspondence from the Department of Customer Service be published, with a watermark to signal that the MoU is a draft.

7. Adjournment

The committee adjourned at 5.18pm, *sine die*

Joseph Cho
Committee Clerk

Minutes no. 26

Thursday 24 September 2020

Standing Committee on Law and Justice

Members' Lounge, Parliament House, Sydney at 1:35pm

1. Members present

Mr Fang, *Chair*

Mr Donnelly, *Deputy Chair*

Ms Cusack

Mr D'Adam

Mr Farlow

Mr Khan

Mr Roberts

Mr Shoebridge

Mr Mookhey (participating member)

2. 2020 Review of the Workers Compensation Scheme

2.1 Further hearings

The committee considered witnesses and dates for further hearings.

Mr Shoebridge moved: That the committee invite Mr Chris McCann, former corrective services officers who have made submissions, Mr Peter McCarthy and SIRA representatives to appear before the committee for the fifth hearing.

Mr Khan moved: That the motion of Mr Shoebridge be amended by omitting the words 'former corrective services officers who have made submissions'.

Amendment put.

The committee divided.

Ayes: Mr Fang, Mr Khan, Ms Cusack, Mr Farlow, Mr Roberts

Noes: Mr Donnelly, Mr D'Adam, Mr Shoebridge

Amendment resolved in the affirmative.

Original question, as amended, put and passed.

Resolved, on the motion of Mr Shoebridge: That:

- Mr Michael Carapiet, former chair, icare board and Mr Vivek Bhatia, former CEO of icare be invited to the sixth hearing, and that they appear separately
- representatives from the icare board and management be invited as witnesses for the seventh hearing
- the committee reconsider inviting the Treasurer and his former staff at a later date.

The committee discussed possible dates for the hearings. The Committee noted that the Chair through the secretariat will canvass and confirm dates, including the afternoon of 23 November, via email.

2.2 Extension to the reporting date

Resolved, on the motion of Mr Khan: That the committee report by end of February 2021.

3. Adjournment

The committee adjourned at 1.59pm, *sine die*.

Joseph Cho

Committee Clerk

Minutes no. 27

Thursday 22 October 2020

Standing Committee on Law and Justice

Members' Lounge, Parliament House, Sydney at 1:29 pm

1. Members present

Mr Fang, *Chair*

Mr Donnelly, *Deputy Chair*

Ms Cusack

Mr D'Adam

Mr Farlow

Mr Khan

Mr Roberts

Mr Mookhey (participating member)

2. Apologies

Mr Shoebridge

3. 2020 Review of the Workers Compensation Scheme**3.1 Witnesses**

The committee considered witnesses to be invited to and the structure of the hearings to be held on 23 November, 1 December and 2 December 2020.

Mr Donnelly moved: That the committee, in regard to the 23 November hearing:

- withdraw the previous decision to invite representatives of SIRA to the 23 November hearing; and instead seek further information in writing.
- invite Mr Nigel Freitas, former chief of staff to the Treasurer, to appear before the committee from 3.30pm to 5.30pm, with the last 30 minutes reserved for Government questions.

Mr Farlow moved: That the motion of Mr Donnelly be amended by inserting the following words: 'and that the committee proceed to take evidence from Mr Nigel Freitas *in camera*, and authorise the publication of the transcript of *in camera* evidence provided, subject to potential redactions' after 'invite Mr Nigel Freitas, former chief of staff to the Treasurer, to appear before the committee from 3.30pm to 5.30pm, with the last 30 minutes reserved for Government questions'.

Amendment put and passed.

Original question, as amended, put and passed.

Resolved, on the motion of Mr Donnelly: That the committee:

- commence the 1 December hearing at 12.45 pm with Mr Vivek Bhatia, Former CEO of icare, appearing for a duration of 1 hour and 45 minutes, and then Mr Michael Carapiet, former chair of the icare board, appearing from 2.45 pm for a duration of 1 hour and 45 minutes; with the last 15 minutes of each session to be reserved for Government questions.
- in regard to the 2 December hearing, invite representatives from icare board and management for 3 hours, with the last 30 minutes to be reserved for Government questions.

4. Adjournment

The committee adjourned at 1.49pm, *sine die*.

Joseph Cho
Committee Clerk

Minutes no. 28

Tuesday 10 November 2020

Standing Committee on Law and Justice

Room 1043, Parliament House, Sydney at 1:32 pm

1. Members presentMr Fang, *Chair*Mr Donnelly, *Deputy Chair*

Ms Cusack

Mr D'Adam

Mr Farlow

Mr Khan

Mr Roberts

Mr Shoebridge

Mr Mookhey (participating member)

2. Correspondence

The committee noted the following items of correspondence:

Received:

- 3 November 2020 – Email from Ms Clemency Morony, Head of Ministerial and Parliamentary Support, icare to secretariat, confirming the four representatives who will be attending the 2 December 2020 hearing.
- 4 November 2020 – Email from Ms Michele Hopkins, EA to Mr Vivek Bhatia, former CEO of icare, to secretariat, notifying that Mr Bhatia is unlikely to be in Sydney on 1 December.
- 5 November 2020 – Email from Ms Michele Hopkins, EA to Mr Vivek Bhatia, former CEO of icare, to secretariat, notifying that Mr Bhatia is unlikely to be in Sydney on 23 November and 1 December.
- 9 November 2020 - Email from Ms Michele Hopkins, EA to Mr Vivek Bhatia, former CEO of icare, to secretariat noting Mr Bhatia's general unavailability to give evidence.
- 10 November 2020 – Letter from Mr Vivek Bhatia, former CEO of icare, to Chair, further explaining the reasons for his general unavailability to give evidence.

Sent:

- 9 November 2020 – Letter from Chair to Mr Vivek Bhatia, former CEO of icare, reiterating the invitation to appear before the committee on 13 November 2020.

3. 2020 Review of the Workers Compensation Scheme**3.1 Witness invitation for the 13 November 2020 hearing**

Resolved, on the motion of Mr Khan: That the committee issue a summons to Mr Vivek Bhatia, former Chief Executive Officer, icare to give evidence at the hearing on Friday 13 November at 10.00 am.

3.2 Witness invitation for the 2 December 2020 hearing

The committee noted that icare has nominated four representatives to give evidence at the 2 December hearing.

Resolved, on the motion of Mr Shoebridge: That, in addition to the witnesses already proposed by icare to give evidence at the 2 December hearing, Mr David Plumb, Chair of the Audit and Risk Committee, icare, also be invited to give evidence.

4. Adjournment

The committee adjourned at 1.39 pm, until Friday 13 November 2020 (public hearing – 2020 Review of the Workers Compensation Scheme)

Joseph Cho
Committee Clerk

Minutes no. 29

Friday 13 November 2020
Standing Committee on Law and Justice
Jubilee Room, Parliament House, Sydney at 9.48 am

1. Members present

Mr Fang, *Chair*
Mr Donnelly, *Deputy Chair*
Ms Cusack
Mr D'Adam
Mr Farlow
Mr Khan
Mr Roberts
Mr Shoebridge
Mr Mookhey (participating member)

2. Draft minutes

Resolved, on the motion of Ms Cusack: That draft minutes nos. 25, 26, 27 and 28 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 5 August 2020 – Email from Mr Maamo to secretariat, regarding the Commonwealth Modern Day Slavery Act 2018
- 22 August 2020 – Email from Mr Cooper to secretariat, regarding a workplace injury and his workers compensation case
- 10 September 2020 – Emails from Mr Danis to the Hon Mark Speakman MP, copied to the committee, regarding a complaint to the Office of the Legal Service Commissioner (including a number of attached documents)
- 23 September 2020 – Email from Mr Andrew Orfanos, President, Australian Institute of Occupational Hygienists to Chair, expressing disappointment that the report on the Work Health and Safety Amendment (Information Exchange) Bill 2020 did not contain a record of the organisation's concerns
- 24 September 2020 – Email from Mr Danis to the secretariat, regarding preferred publication status of the previous email and offering further information
- 27 September 2020 – Email from Ms Janet Dore to the secretariat, regarding answers to questions taken on notice and transcript corrections
- 29 September 2020 – Correspondence from Mr Simon Cohen, Workers Compensation Independent Review Officer, to Chair, providing a copy of the Key Findings of the Assessment of WIRO's Solutions and ILARS work
- 6 October 2020 – Correspondence from Mr Simon Cohen, Workers Compensation Independent Review Officer, to Chair, regarding the WIRO Direction 2020-22
- 20 October 2020 – Email from Mr Andrew George to committee, regarding the right to protest

- 28 October 2020 – Email from Mr Leighton Barr to committee, regarding a workers compensation matter, including attachments
- 3 November 2020 – Email from Mr Leighton Barr to committee, regarding a workers compensation matter, including attachments.

Resolved, on the motion of Mr Khan: That the following correspondence be kept confidential due to identifying / sensitive information:

- Email from Mr Maamo to secretariat, regarding the Commonwealth Modern Day Slavery Act 2018
- Email and attachments from Mr Cooper to secretariat, regarding a workplace injury and the subsequent workers compensation case.

Resolved, on the motion of Mr Khan: That emails and attachments from Mr Danis to the Hon Mark Speakman MP, regarding a complaint to the Office of the Legal Service Commissioner, be kept confidential, and that Mr Danis be advised that the committee will not be taking any action in response to his emails.

Resolved, on the motion of Mr Khan: That the emails from Mr Leighton Barr to committee, dated 28 October 2020 and 3 November 2020, regarding a workers compensation matter, be kept confidential, including the attachments provided.

4. 2020 combined review of the Compulsory Third Party insurance scheme and Lifetime Care and Support scheme

Resolved, on the motion of Mr Farlow: That the committee adopt the following timeline for the inquiry:

- One to two hearing dates in February/March 2021
- Table report by May 2021.

Resolved, on the motion of Mr Khan: That submissions be reopened, with stakeholders invited to make comments in relation to the six month limitation period under the CTP insurance scheme, in which claimants are entitled to claim benefits irrespective of fault.

5. 2020 Review of the Workers Compensation Scheme

5.1 Answers to questions on notice and supplementary questions

The committee considered the publication status of the KPMG claim file review report and the accompanying supplementary report provided as an answer to questions on notice from Unions NSW.

Resolved, on the motion of Mr Khan: That the committee keep the claim file review reports confidential, noting:

- that the documents were provided to the committee by a third party, who was not involved in the commissioning nor the writing of the report
- the documents contain names of staff in various organisations involved
- key information contained in the report are already on the public record.

5.2 Future hearings

The committee noted, in terms of witness invitations for future hearings, the following:

- Mr Chris McCann accepted the invitation to appear on 23 November, from 1.15pm to 2.15pm
- Mr Peter McCarthy accepted the invitation to appear on 23 November, from 2.15pm to 3.15pm
- Mr Nigel Frietas accepted the invitation to appear on 23 November, from 3.30pm to 5.30pm (in camera)

- Mr Michael Carapiet accepted the invitation to appear on 1 December, but has maintained he would still like to only give evidence for an hour, despite being invited from 2.45pm to 4.30pm
- icare has accepted the invitation to appear on 2 December, from 10.00am to 1.00pm, nominating the following witnesses: Mr John Roberston (Chair of icare's Board), Mr Don Ferguson (Interim CEO), Ms Rashi Bansal (Group Executive Organisational Performance) and Mr Rob Craig (Interim Group Executive Personal Injury Claims).

The committee noted that Mr David Plumb has also accepted the invitation to come along with other icare representatives, in accordance with the committee's previous resolution.

Resolved, on the motion of Mr Shoebridge: That the Chair write to Mr Carapiet to reiterate the invitation request and ask again for him to attend for the full allocated time.

Resolved, on the motion of Mr Donnelly: That the following additional icare representatives be invited to attend the 2 December hearing:

- Ms Samantha Liston, Group Executive, People and Workplace, as a witness
- Mr Peter Bell, potentially in an advisor capacity, or as witnesses if necessary.

5.3 Public Hearing

The witness was admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

Mr Mookhey tabled the following documents:

1. Board Briefing re ITP
2. CIT Committee Meeting Minutes
3. Correspondence to Fineos re tender
4. Internal Procurement report
5. CapGemini-Guidewire Evaluation Report
6. icare Facebook post
7. Board Briefing re ITP Business Case
8. Correspondence from Korn Ferry re recruitment
9. Correspondence from Carapiet to Pratt re Nagle complaint
10. Gilbert Tobin report to board re Nagle complaint
11. Audit report re TO staffing arrangements
12. Gilbert Tobin Project Stanley investigation report
13. Interviews from Audit Report
14. Payment of TO staff by icare
15. Email re Yap recruitment
16. Excerpt of gift registry
17. Bhatia gifts summary
18. Board Briefing re CEO Performance Payment
19. Board memo re CEO remuneration
20. Board briefing re ICAC referrals

The following witness was sworn and examined:

- Mr Vivek Bhatia, former Chief Executive Officer, icare.

The evidence concluded and the witness withdrew.

The public hearing concluded at 11.55 am. The public and the media withdrew.

Mr Mookhey agreed to circulate via email which of the documents he tendered should be accepted by the committee and/or published, noting that there are two documents which at this stage should not be published – an affidavit of an individual and a document from Treasury.

6. Video footage

Resolved, on the motion of Mr Khan: That Mr Nigel Freitas be provided with video footage from Mr Bhatia giving evidence, in advance of his appearance at an upcoming hearing.

7. Adjournment

The committee adjourned at 12.14 pm until 23 November 2020 (Public hearing for the 2020 review of the workers compensation scheme).

Tina Higgins

Committee Clerk

Minutes no. 30

Monday 23 November 2020

Standing Committee on Law and Justice

Macquarie Room, Parliament House, Sydney at 1.03 pm

1. Members present

Mr Fang, *Chair*

Mr Donnelly, *Deputy Chair*

Ms Cusack (*by videconference, from 2.15pm*)

Mr D'Adam (*until 3.15pm*)

Mr Farlow

Mr Khan

Mr Mallard (*participating member for the inquiry into the Mandatory Disease Testing Bill 2020*)

Mr Mookhey (*participating member for the 2020 review of the workers compensation scheme, until 3.15 pm, and substituting for Mr D'Adam from 3.30pm*)

Mr Roberts

Mr Shoebridge

2. Draft minutes

Resolved, on the motion of Mr Farlow: That draft minutes no.29 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 23 November 2020 – Email from the Hon Mark Buttigieg, Opposition Whip, to committee, advising that Mr Mookhey will substitute for Mr D'Adams when Mr D'Adams is not present in the hearing on the 23 November
- 17 November 2020 – Email from the Office of the Hon. Shayne Mallard to committee, requesting to participate in the Mandatory Disease Testing Bill 2020 inquiry
- 16 November 2020 – Email from Mr Michael Carapiet to secretariat, confirming he will be attending for the full time allocated to his hearing on 1 December 2020
- 13 November 2020 – Email from Mr Michael Carapiet to secretariat, acknowledging the correspondence from the Chair dated 13 November 2020

- 27 October 2020 – Various audio files from Ms Jennifer Lynch to committee, outlining her views about the workers compensation scheme.

Sent:

- 16 November 2020 – Email from secretariat to Mr Michael Carapiet, following up correspondence from the Chair dated 13 November 2020
- 13 November 2020 – Correspondence from the Chair to Mr Michael Carapiet, regarding the invitation to give evidence on 1 December 2020
- 9 November 2020 – Chair to Ms Jennifer Lynch, regarding her audio files and request to give evidence to the committee.

Resolved, on the motion of Mr Roberts: That:

- the audio files from Ms Jennifer Lynch to committee, received 27 October 2020, be kept confidential, as they contain identifying information
- any future audio files received from Ms Jennifer Lynch be kept confidential, and be available to members on request.

4. Inquiry into the provisions of the Mandatory Disease Testing Bill 2020

4.1 Terms of reference

The committee noted that the terms of reference for the inquiry are as follows:

That:

- (a) the provisions of the Mandatory Disease Testing Bill 2020 be referred to Standing Committee on Law and Justice for inquiry and report,
- (b) the bill be referred to the committee upon receipt of the message from the Legislative Assembly,
- (c) the committee report by Wednesday 17 February 2021.

4.2 Participating member

The committee noted that Mr Mallard has requested to be a participating member for the duration of the inquiry.

Resolved, on the motion of Mr Khan: That Mr Mallard, who has advised the committee that he intends to participate for the duration of the inquiry into the provisions of the Mandatory Testing Bill 2020, be provided with copies of all inquiry related documents and be entitled to participate in all deliberative meetings.

4.3 Proposed timeline and activities

The committee considered the timeline for the inquiry, including the potential for the inquiry to be extended and have a later reporting date than 17 February 2020.

Debate ensued.

Resolved, on the motion of Mr Khan: That submissions close on 21 December 2020, and a timeline be circulated via email regarding potential hearing dates.

Mr Mallard left the meeting.

4.4 Submissions, online questionnaire and proformas

Mr Khan moved: That the committee open submissions in the standard way, allowing individuals and organisations to make a submission, but not accept proformas or conduct an online questionnaire.

Mr Shoebridge moved: That the motion of Mr Khan be amended by omitting at the end 'but not accept proformas'.

Amendment put and negatived.

Original question put and passed.

4.5 Submission and witness invitations

Resolved, on the motion of Mr Shoebridge: That the following stakeholders be invited to make a submission and also be invited to appear as a witness, and that members be given until midday Thursday 26 November 2020 to nominate additional stakeholders/witnesses.:

- ACON
- Hepatitis NSW
- NSW Users and Aids Association
- Council for Civil Liberties
- Law Society of NSW
- NSW Bar Association
- Australian Lawyers for Human Rights
- Australian Medical Association NSW
- NSW Health
- Aboriginal Affairs NSW
- Multicultural NSW
- Positive Life NSW
- Sex Workers Outreach Project (SWOP)
- Mental Health Commission.

4.6 Advertising

The committee noted that the inquiry would be advertised via social media, stakeholder letters and a media release distributed to all media outlets in New South Wales.

5. 2020 combined Reviews of the Compulsory Third Party insurance scheme and Lifetime Care and Support scheme

5.1 Submissions

The committee noted that in accordance with the committee's previous resolution:

- submissions were reopened for the review of the CTP insurance scheme until 10 December 2020
- stakeholders for the review of the CTP insurance scheme have been invited to make a submission on the operation of the 6 month limitation period in which claimants are entitled to claim benefits irrespective of fault.

6. 2020 Review of the Workers Compensation Scheme

6.1 Answers to questions on notice

Resolved, on the motion of Mr Shoebridge: That the committee keep the second version of answers to questions on notice from Treasury NSW, dated 9 October 2020, confidential at this stage (this document being entitled 'Privileged – Treasury responses').

6.2 Video footage

The committee noted that in accordance with the committee's resolution, on 16 November 2020 Mr Nigel Freitas was provided with video footage of Mr Bhatia's evidence to the committee.

The committee further noted that Mr Peter McCarthy and Mr Chris McCann have also been provided with video footage on 19 November 2020 following agreement by email.

6.3 Support person

The committee noted that it agreed via email to the *in camera* witness bringing along a support person to the hearing.

6.4 Public Hearing

The witness was admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was sworn and examined:

- Mr Chris McCann, Former General Manager – Compliance, Fraud and Corruption Control, icare.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Peter McCarthy, Former Partner, Ernst & Young and Former Principal Actuary, NSW Workers Compensation System and CTP, SIRA.

The evidence concluded and the witness withdrew.

The public and media withdrew.

6.5 *In camera* hearing

The committee proceeded to take evidence *in camera*.

Persons present other than the committee: Ms Tina Higgins (*via videoconference*), Mr Sam Griffith, Mr Joseph Cho, Ms Angeline Chung, Mr Ky Chow (support person) and Hansard reporters.

The following witness was sworn and examined:

- Mr Nigel Freitas, Former Chief of Staff, NSW Treasurer.

The evidence concluded and the witness withdrew.

The hearing concluded at 5.06 pm.

7. Other Business

The committee considered the publication of evidence received *in camera*, noting a previous resolution to publish the evidence subject to redactions.

Resolved, on the motion of Mr Mookhey: That:

- the secretariat request Hansard to fast track the preparation of transcript of evidence received today *in camera*
- the transcript of the *in camera* evidence, if prepared by Hansard before icare's appearance on 2 December, be provided to icare on a confidential basis without any redaction
- the transcript of the *in camera* evidence be published on inquiry's webpage on the morning of 2 December prior to icare's appearance, with the names of all persons previously seconded from icare to the Treasurer's Office redacted (with the exception of Mr Edward Yap).

8. Adjournment

The committee adjourned at 5.16 pm until 1 December 2020 (Public hearing for the 2020 review of the workers compensation scheme).

Tina Higgins / Joseph Cho
Committee Clerks

Minutes no. 31

Tuesday 1 December 2020

Standing Committee on Law and Justice

Macquarie Room, Parliament House, Sydney at 2.15 pm

1. Members present

Mr Fang, *Chair*

Mr Donnelly, *Deputy Chair*

Ms Cusack (*from 2.25pm*)

Mr D'Adam

Mr Farlow

Mr Khan

Mr Roberts

Mr Shoebridge (*from 2.19pm*)

Mr Mookhey (*participating member*)

2. Draft minutes

Resolved, on the motion of Mr Roberts: That draft minutes no.30 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 18 November 2020 – Correspondence from Ms Clemency Morony, Head of Ministerial and Parliamentary Support, icare, to secretariat, confirming additional icare witnesses for the hearing on 2 December 2020.
- 14 November 2020 – Email from Mr Leighton Barr to committee, regarding incomes rates and the workers compensation system.

4. Inquiry into the provisions of the Mandatory Disease Testing Bill 2020

4.1 Timeline

Resolved, on the motion of Mr Khan: That the Chair seek an extension of the reporting date from the House until the end of March 2021.

5. 2020 combined Reviews of the Compulsory Third Party insurance scheme and Lifetime Care and Support scheme

5.1 Timeline

The committee considered adjusting the inquiry timeline, taking into account the new Bill inquiry it has been referred.

Resolved, on the motion of Mr Farlow: That the hearings be arranged in April / early May and the report be tabled by late July.

6. 2020 Review of the Workers Compensation Scheme

6.1 Partially confidential submission

Resolved, on the motion of Mr Farlow: That the committee authorise the publication of submission no. 25, with the exception of identifying and/or sensitive information which is to remain confidential, as per the request of the author and the recommendation of the secretariat.

6.2 Confidential submissions

Resolved, on the motion of Mr Farlow: That the committee keep supplementary submission no. 25a confidential and submission no. 26 confidential, as per the recommendation of the secretariat, as it contains potential adverse mention.

6.3 Report deliberative and tabling date

The committee deferred the consideration of the tabling and report deliberative dates to the meeting scheduled on 2 December 2020.

6.4 Transcript from 23 November

The committee considered whether it wishes to have the transcript from 23 November 2020 reviewed by the secretariat before publication.

Resolved, on the motion of Mr Shoebridge: That the secretariat review the transcript from 23 November 2020, and in consultation with the Chair, circulate via email any proposed redactions of individual names and any suggestions in relation to allowing an individual / organisation to provide a written response to potential adverse mention, to provide for procedural fairness.

Ms Cusack joined the meeting.

6.5 Public Hearing

The witness was admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was examined on his former oath:

- Mr Michael Carapiet, Former Chair - icare Board.

Mr Mookey tendered the following documents:

- 1 - Letter -10 September 2020 - C Alexander - NSW Treasury - to C Morgan - icare - Appointment of John Robertson
- 2 - icare - information - Tuesday 4 August 2020 - entitled - Leadership change at icare'
- 3 - Confidential Board Report - icare - Board Effectiveness Review - 29 May 2020 - prepared by Challis and Co Pty Ltd
- 4 - Page from Gift register
- 5 - Board paper - Conflicts of Interest - Deep Dive - reference no item 3.4 - Meeting 24 May 2019
- 6 Email from Gilbert and Tobin to John Nagle 7 May 2019
- 7 Note from John Nagle to Kate - 13 May 2019
- 8 icare letter dated 4 June 2019 - to Michael Pratt
- 9 - icare briefing for the board - Overseas travel to Las Vegas for Guidewire 2018
- 10 Email from Michael Carapiet - to Larissa Auditore - cc Michael Carapiet - 23 April 2018
- 11 Appendix 05 - Overseas travel - icare annual report 2018-19
- 12 icare briefing for the board - current matters with ICAC - 29 Oct 2018
- 13 icare briefing for the board - Insurance Technology platform - 25 October 2015
- 14 Briefing for the board - Nominal Insurer Unified Technology Platform - 31 August 2015
- 15 Letter from Wayne Smith, Contact Officer, Safety, Return to Work & Support to Mr Dave Matthews, Director Sales & Marketing Asia Pacific, FINEOS Corporation dated 17 August 2015
- 16 Letter from Anthony Stevens, Corporate Council, Strategic Business Consulting to Mr Wayne Smith, NSW Safety, Return to Work and Support – dated 13 August 2015
- 17 Email from Wayne Smith to Tara Moore, dated 7 August 2015 – CSC questions
- 18 Letter from Mr Dave Mathews, Fineos Asia Pacific to Don Ferguson, Lifetime Care Support Authority dated 5 August 2015

- 19 Meeting minutes – ITR Evaluation Committee – 21 July 2015
- 20 SRWS Board paper cover - for discussion – SRWS & SICorp Technology Business Case – 31 March 2015
- 21 icare article – Monday 27 July 2020 – icare provides further update on PIAWE remediation
- 22 Letter from John Nagle, CEO & Managing Director, icare to Ms Carmel Donnelly, Chief Executive, SIRA, 4 March 2020 – Incorrect Weekly Payments to Injured Workers
- 23 icare board meeting minutes – 25 November 2019
- 24 icare board meeting – Minutes – 25 November 2019

The evidence concluded and the witness withdrew.

The public and media withdrew.

The hearing concluded at 4.30pm.

7. Adjournment

The committee adjourned at 4.35pm until 2 December 2020 (Public hearing for the 2020 review of the workers compensation scheme).

Joseph Cho
Committee Clerk

Minutes no. 32

Wednesday 2 December 2020

Standing Committee on Law and Justice

Macquarie Room, Parliament House, Sydney at 10.00 am

1. Members present

Mr Fang, *Chair*

Mr Donnelly, *Deputy Chair*

Ms Cusack (*from 10.15 am*)

Mr D'Adam

Mr Farlow

Mr Khan

Mr Shoebridge

Mr Mookhey (*participating member*)

2. Apologies

Mr Roberts

3. 2020 Review of the Workers Compensation Scheme

3.1 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 John Robertson, Chair – icare board
- Mr Rob Craig, Interim Group Executive – Personal Injury Claims, icare

- Dr Nick Allsop, Group Executive – Care
- Ms Samantha Liston, Group Executive – People and Workplace, icare

The following witnesses were examined on their former oath/affirmation:

- Mr David Plumb, Non-Executive Director – icare board
- Mr Don Ferguson, Interim Chief Executive Officer, icare
- Ms Rashi Bansal, Group Executive – Organisation Performance, icare
- Mr Andrew Ziolkowski, Group Executive – Prevention and Underwriting, icare.

Mr Mookhey tendered the following documents:

- icare Workers Insurance - Nominal Insurer Liability Valuation as at 30 June 2020
- Email J Nagle to M Pratt 13 Dec 2019
- Uncorrected Transcript of hearing – 2020 Review of the Workers Compensation Scheme - 9 September 2020
- Return to work data by insurer type – Month
- Answers to questions on notice – page 77 of transcript of hearing – 3 August 2020
- Appendix 8 – Overseas travel – icare annual report 2015-16
- Appendix 8 – Overseas travel - icare annual report 2016-17 p 157
- Appendix 06 - 09 – Insurance activities to protect NSW government
- Appendix 05 – Overseas travel 2018-2019
- Major contracts - CEO Report - July 2018
- Major contracts - CEO Report - August 2018
- Major contracts - CEO Report - October 2018
- Major contracts - CEO Report - p 15 - November 2018
- Major contracts - CEO Report - p 18 - July 2019
- Major contracts - CEO Report - p 18 - November 2019
- Major contracts - CEO Report - p 19 - November 2019
- Major contracts - CEO Report - p 20 - November 2019
- Major contracts - CEO Report - p 18 - February 2020
- Major contracts - CEO Report - p 18 - March 2020
- Major contracts - CEO Report - p 13 - February 2020
- Major contracts - CEO Report - p 14 - June 2018
- Major contracts - CEO Report - p 16 - February 2019
- Major contracts - CEO Report - p 16 - March 2019
- Spreadsheet - goods and services
- Email - Confidential - from Michael Carapiet to John Nagle dated 9 October 2019
- icare Audit and Risk Committee - Conflicts of interest Deep Dive - 24 May 2019
- icare - webpage - 27 July 2020 - icare provides further update on PIAWE remediation
- Letter from John Nagle - icare - to Carmel Donnelly - SIRA - incorrect weekly payments to injured workers - 4 March 2020
- ipc NSW - icare - GIPA - Compliance Report - Phase 1 - October 2020
- Email from Leah Kang to Peter Bell - 13 February 2020 - Ed Yap renewal of Visa
- Letter from Samatha Liston - icare - to Mr Nigel Freitas - re Secondment arrangements for Mr Edward Yap - 5 August 2020
- Salary variation - Edward Yap
- Email from Sarah Hardwick - icare Contractor Centre - 22 April 2020 - to Kerry Taylor - re Ed Yap
- icare insurance - for the board - Overseas travel to Las Vegas for Guidewire Connections Conference 2018

- Safety Return to Work and Support - briefing for the Board - Item 10. 2 - Nominal Insurer Unified Technology Platform - 31 Aug 2015
- Safety Return to Work and Support - briefing for the Board - Item 10. 2 - Nominal Insurer Unified Technology Platform - 31 Aug 2015
- Letter from Wayne Smith - Contact Officer - Safety Return to Work and Support - to Dave Matthews - FINEOS Corp - 17 Aug 2015
- Letter from Anthony Stevens - SBC to Wayne Smith - NSW Safety Return to Work and Support - 13 Aug 2015
- Email - 7 Aug 2015 - CSC questions - from Wayne Smith to Tara Moore
- Letter - Dave Matthews - Fineos - to Lifetime Care Support Authority re SRWS'RFP
- Meeting minutes - ITR Evaluation Committee - 21 July 2015
- SRWS and SICorp Technology business Case - 31 March 2015
- tendering - Managed services for icare contingent Workforce
- tendering - Managed services for nominal insurer contingent workforce.

Mr Rob Craig tendered the following document:

- Graph - 12 month rolling average for 26-week RTW measure.

Mr Shoebridge tendered the following documents:

- Workers compensation system monthly dashboard.

The evidence concluded and the witness withdrew.

The public and media withdrew.

The hearing concluded at 12.55pm.

Resolved, on the motion of Mr Khan: That the committee accept and publish the following documents tendered during the public hearing:

- icare Workers Insurance - Nominal Insurer Liability Valuation as at 30 June 2020
- Email J Nagle to M Pratt 13 Dec 2019
- Uncorrected Transcript of hearing – 2020 Review of the Workers Compensation Scheme - 9 September 2020
- Return to work data by insurer type – Month
- Answers to questions on notice – page 77 of transcript of hearing – 3 August 2020
- Appendix 8 – Overseas travel – icare annual report 2015-16
- Appendix 8 – Overseas travel - icare annual report 2016-17 p 157
- Appendix 06 - 09 – Insurance activities to protect NSW government
- Appendix 05 – Overseas travel 2018-2019
- Major contracts - CEO Report - July 2018
- Major contracts - CEO Report - August 2018
- Major contracts - CEO Report - October 2018
- Major contracts - CEO Report - p 15 - November 2018
- Major contracts - CEO Report - p 18 - July 2019
- Major contracts - CEO Report - p 18 - November 2019
- Major contracts - CEO Report - p 19 - November 2019
- Major contracts - CEO Report - p 20 - November 2019
- Major contracts - CEO Report - p 18 - February 2020
- Major contracts - CEO Report - p 18 - March 2020
- Major contracts - CEO Report - p 13 - February 2020

- Major contracts - CEO Report - p 14 - June 2018
- Major contracts - CEO Report - p 16 - February 2019
- Major contracts - CEO Report - p 16 - March 2019
- Spreadsheet - goods and services
- Email - Confidential - from Michael Carapiet to John Nagle dated 9 October 2019
- icare Audit and Risk Committee - Conflicts of interest Deep Dive - 24 May 2019
- icare - webpage - 27 July 2020 - icare provides further update on PIAWE remediation
- Letter from John Nagle - icare - to Carmel Donnelly - SIRA - incorrect weekly payments to injured workers - 4 March 2020
- ipc NSW - icare - GIPA - Compliance Report - Phase 1 - October 2020
- Email from Leah Kang to Peter Bell - 13 February 2020 - Ed Yap renewal of Visa
- Letter from Samatha Liston - icare - to Mr Nigel Freitas - re Secondment arrangements for Mr Edward Yap - 5 August 2020
- Salary variation - Edward Yap
- Email from Sarah Hardwick - icare Contractor Centre - 22 April 2020 - to Kerry Taylor - re Ed Yap
- icare insurance - for the board - Overseas travel to Las Vegas for Guidewire Connections Conference 2018
- Safety Return to Work and Support - briefing for the Board - Item 10. 2 - Nominal Insurer Unified Technology Platform - 31 Aug 2015
- Safety Return to Work and Support - briefing for the Board - Item 10. 2 - Nominal Insurer Unified Technology Platform - 31 Aug 2015
- Letter from Wayne Smith - Contact Officer - Safety Return to Work and Support - to Dave Matthews - FINEOS Corp - 17 Aug 2015
- Letter from Anthony Stevens - SBC to Wayne Smith - NSW Safety Return to Work and Support - 13 Aug 2015
- Email - 7 Aug 2015 - CSC questions - from Wayne Smith to Tara Moore
- Letter - Dave Matthews - Fineos - to Lifetime Care Support Authority re SRWS'RFP
- Meeting minutes - ITR Evaluation Committee - 21 July 2015
- SRWS and SICorp Technology business Case - 31 March 2015
- etendering - Managed services for icare contingent Workforce
- etendering - Managed services for nominal insurer contingent workforce
- Graph - 12 month rolling average for 26-week RTW measure
- Workers compensation system monthly dashboard.

Resolved, on the motion of Mr Shoebridge: That the secretariat review the tabled document 'Allens Linklaters - Report on Investigation - Summary - 22 October 2018' for sensitive and/or identifying information and circulate proposed redactions for committee agreement.

3.2 Written questions for SIRA

Resolved, on the motion of Mr Farlow: That the committee withdraw the 22 October 2020 resolution to seek further information in writing from SIRA.

3.3 Documents tendered in previous proceedings

The committee considered whether to accept and publish the documents tendered during hearings held on 13 November, 23 November and 1 December.

Resolved, on the motion of Mr Shoebridge: That the committee accept and publish any tendered document received during the previous hearings if they were referred to in the Hansard transcripts.

3.4 Additional Hearing

The committee noted that the Audit Office of New South Wales will be publishing the outcomes and findings of the financial audit of central agencies, including icare, by 15 December 2020. The committee considered whether to invite the Auditor General to a hearing.

Resolved, on the motion of Mr Farlow: That the committee seek further information from the Auditor General in writing, if needed, following the publication of the report around 15 December 2020.

3.5 Publication of *in-camera* evidence

Resolved, on the motion of Mr Khan: That the committee authorises the publication of the transcript of *in camera* evidence given on 23 November, with the exception of the witness' closing remarks and the names of persons seconded from icare to the Treasurer's Office other than Mr Edward Yap, which are to remain confidential.

3.6 Reporting date

The committee reconsidered its previous resolution to report by end of February 2021 and considered possible dates for a report deliberative.

Resolved, on the motion of Mr Shoebridge: That the secretariat canvass members' availability for the earliest possible time in March for a report deliberative and set a corresponding reporting date.

4. Adjournment

The committee adjourned at 1.20pm *sine die*.

Joseph Cho
Committee Clerk

Minutes no. 33

Thursday 11 February 2021
Standing Committee on Law and Justice
Macquarie Room, Parliament House, Sydney at 9.04 am

1. Members present

Mr Fang, *Chair*
Mr Donnelly, *Deputy Chair*
Ms Cusack (*from 9.51am to 12.27pm*)
Mr D'Adam
Mr Farlow
Mr Khan
Mr Mallard (*participating member for Mandatory Disease Testing inquiry*) (*from 9.25 am*)
Mr Roberts
Mr Shoebridge (*from 9.28 am to 12.27pm and 1.58 pm to 2.25 pm*)

2. Apologies

3. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no.31 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- 24 September 2020 – Letter from Mr David Plumb, member of the icare board, to Chair, clarifying evidence given to the committee on 24 August 2020.
- 8 December 2020 - Email from Ms Michelle Falstein, Secretary, NSW Council for Civil Liberties, declining the invitation to make a submission to the Mandatory Disease Testing Bill 2020 inquiry.
- 13 January 2021 – Email from Ms Clemency Morony, Head of Ministerial and Parliamentary Support, icare, to committee, advising of the new icare Chief Executive Officer.
- 19 January 2021 – Email from Mr Chris McCann to secretariat, providing a statement made as part of his workers compensation claim.
- 22 January 2021 – Letter from Mr Frank Zimmermann to Chair, responding to evidence provided by Mr Chris McCann on 23 November 2020.
- 25 January 2021 – Letter from Ms Samantha Liston, Group Executive People and Workplace, icare to secretariat, clarifying evidence given to the committee on 2 December 2020.

Sent:

- 18 December 2020 – Letter from Chair to Mr Greg Barnier, former Chief People Officer, icare, inviting a response to evidence provided to the committee on 23 November 2020.
- 21 December 2020 – Letter from Chair to Mr Gavin Pearce, former Group Executive Risk and Governance, icare, inviting a response to evidence provided to the committee on 23 November 2020.
- 12 January 2021 – Letter from Chair to Mr Frank Zimmermann, inviting a response to evidence provided to the committee on 23 November 2020.

Resolved, on the motion of Mr Khan: That the correspondence from Mr McCann to secretariat, providing a statement made as part of his workers compensation claim, be kept confidential as per the recommendation of the secretariat, as it contains identifying and sensitive information, and potential adverse mention.

5. 2020 Review of the Workers Compensation Scheme

5.1 Clarification of evidence

Resolved, on the motion of Mr Farlow: That the committee authorise the publication of the correspondence from Mr David Plumb, member of the icare board, clarifying the evidence given to the committee on 24 August 2020.

Resolved, on the motion of Mr Roberts: That the committee authorise the publication of the correspondence from Ms Samantha Liston, Group Executive People and Workplace, icare, to committee, clarifying the evidence given to the committee on 2 December 2020.

5.2 Provision of an opportunity for individuals to respond – procedural fairness

Resolved, on the motion Mr Farlow: That the committee authorise the publication of correspondence from Mr Frank Zimmermann, dated 22 January 2021, responding to a statement made by a witness on 23 November 2020.

5.3 Reporting Date

Resolved, on the motion of Mr Khan: That the committee table its report by the end of March 2021.

6. 2020 combined Reviews of the Compulsory Third Party insurance scheme and Lifetime Care and Support Scheme

6.1 Public submissions – Compulsory Third Party insurance scheme

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1-10.

6.2 Public submissions – Lifetime Care and Support scheme

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1-4.

7. Inquiry into the Mandatory Disease Testing Bill 2020

7.1 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. 1-27.

7.2 Report deliberative date

Resolved, on the motion of Mr Khan: That the Chair seek an extension of time via the House to report until the end of April 2021.

7.3 Answers to questions on notice and supplementary questions

Resolved, on the motion of Mr Farlow: That the witnesses appearing at the hearings on 11 and 12 February 2021 be requested to return answers to questions on notice and/or supplementary questions from members within 14 days of the date on which questions are forwarded to witnesses by the committee clerk.

7.4 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 Patrick Gooley, Secretary, Police Association of NSW
- Mr Tony Bear, Manager, Strategy and Relationships, Police Association of NSW
- Mr Stewart Little, General Secretary, Public Service Association of NSW
- Ms Nicole Jess, Senior Vice-President, Chair, Prison Officers Vocational Branch, Public Service Association of NSW.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Dr Nicholas Medland, President, Australasian Society of HIV, Viral Hepatitis and Sexual Health Medicine (ASHM) (*by videolink*)
- Dr Nicholas Parkhill, Chief Executive Officer, ACON
- Ms Karen Price, Deputy Chief Executive Officer, ACON
- Mr Steven Drew, Chief Executive Officer, Hepatitis NSW.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Dr Mary Ellen Harrod, Chief Executive Officer, NSW Users and AIDS Association (NUAA)
- Ms Kali Kanivale, Special Projects and Advocacy Specialist, NUAA
- Ms Jane Costello, Chief Executive Officer, Positive Life NSW
- Mr Neil Fraser, Deputy Chief Executive Officer, Positive Life NSW
- Professor Andrew Grulich, Head, HIV Epidemiology and Prevention Program, The Kirby Institute, UNSW Sydney
- Mr Cameron Cox, Chief Executive Officer, Sex Workers Outreach Project (SWOP).

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Dr Danielle McMullen, President, Australian Medical Association (NSW) (*by videolink*)
- Professor kyliE valentine, Deputy Director, Social Policy Research Centre, UNSW Sydney
- Professor Martin Holt, Research Convenor, Centre for Social Research in Health, UNSW Sydney
- Dr Kari Lancaster, Scientia Senior Research Fellow, Centre for Social Research in Health, UNSW Sydney.

The evidence concluded and the witnesses withdrew.

Mr Shoebridge left the meeting.

The following witnesses were sworn and examined:

- Mr Alastair Lawrie, Senior Policy Officer, Public Interest Advocacy Centre (*by videolink*)
- Ms Gabrielle Bashir SC, Senior Vice-President and Co-Chair of Criminal Law Committee, NSW Bar Association
- Ms Jane Sanders, Member, Law Society of NSW Criminal Law Committee.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Ms Natalie Lang, Branch Secretary, Australian Services Union NSW and ACT (Services) Branch.

The evidence concluded and the witness withdrew.

The public and media withdrew.

The hearing concluded at 4.39 pm.

8. Adjournment

The committee adjourned at 4.52 pm until 9.15 am 12 February 2021 for the second public hearing for the Inquiry into the Mandatory Disease Testing Bill 2020.

Joseph Cho and Peta Leemen

Committee Clerks

Draft minutes no. 35

Tuesday 27 April 2021

Standing Committee on Law and Justice Committee

Room 1043, Parliament House, 9.34 am

1. Members present

Mr Fang, *Chair*

Mr Donnelly, *Deputy Chair*

Mr D'Adam

Mr Farlow

Mr Khan

Mr Mallard (substituting for Mr Khan)

Mr Martin (from 9.36 am)

Mr Mookhey (participating member for the 2020 Review of the Workers Compensation Scheme)

Mr Roberts

Mr Shoebridge (from 9.35 am)

2. Committee membership

The committee noted that the Hon Taylor Martin replaced the Hon Catherine Cusack on the committee from 16 March 2021.

3. Previous minutes

Resolved, on the motion of Mr Donnelly: That draft minutes nos. 31, 32, 33 and 34 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received

- 5 December 2020 – Letter from a former icare employee to Chair, requesting redactions to the 23 November 2020 transcript
- 15 December 2020 – Email from Ms Vanessa Gill, Executive Officer, Office of the Auditor General to secretariat, providing a copy of the Central Agencies 2020 report for the committee's information
- 8 January 2021 – Letter from Mr Greg Barnier to committee, providing a response to matters raised at the hearing on 23 November 2020
- 11 February 2021 - Email from Felix Delhomme, Acting Manager - Policy, Strategy & Research, ACON, providing documents 'NAPWHA's The System is Broken' and 'ACON's Ending HIV-related Stigma for All'
- 23 February 2021 – Letter from Mr Simon Cohen, Independent Review Officer, Independent Review Office to Chair, informing the committee about the Workers Compensation Independent Review Office's re-establishment as the Independent Review Office
- 1 March 2021 - Email from Michelle Vo, Executive and Ministerial Services, NSW Health, on behalf of Gary Forrest, Chief Executive, Justice Health and Forensic Mental Health Network, to the committee, responding to the committee's request for information
- 10 March 2021 – Letter from the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, to the clerk of the Legislative Council, providing the Government response to the *WHS Amendment (Information Exchange) Bill* inquiry
- 24 March 2021 – Email from an injured worker to secretariat, requesting change to the workers compensation scheme based on her experience.

Sent

- 15 February 2021 – Letter from the Hon Wes Fang MLC, Committee Chair, to Gary Forrest, Chief Executive, Justice Health and Forensic Mental Health Network, requesting information on the current procedures for screening inmates for blood borne viruses, current programs or procedures in NSW correctional facilities to diagnose and treat blood borne viruses, and any data relating to the prevalence, incidence, transmission and treatment rates of blood borne viruses in NSW correctional facilities.

Resolved, on the motion of Mr Shoebridge: That:

- the letter from a former icare employee to Chair, requesting redactions to the 23 November 2020 transcript be kept confidential, as per the recommendation of the secretariat, as it contains identifying information
- the email dated 24 March 2021, from an injured worker to the committee, requesting changes to the workers compensation scheme be kept confidential, as per the recommendation of the secretariat, as it contains identifying information
- the letter from Mr Barnier to the committee, dated 8 January 2021, be published.

5. 2020 Review of the Compulsory Third Party insurance and Lifetime Care and Support schemes

5.1 Pre-hearing questions

The committee noted that on 1 March 2021 SIRA and icare were forwarded the pre-hearing questions the committee agreed to via email. Responses are due 14 April 2021, ahead of the hearings on 25 and 26 May 2021.

6. 2020 Review of the Workers Compensation scheme

6.1 Answers to questions on notice

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

- answers to questions on notice from Mr Vivek Bhatia, former Chief Executive Officer and Managing Director, icare, received on 7 January 2021
- answers to questions on notice from Mr Nigel Freitas, former Chief of Staff to the Treasurer, received on 8 January 2021
- answers to questions on notice from Mr Michael Carapiet, former Chair, icare Board, received on 20 January 2021
- answers to questions on notice from icare received on 25 January 2021.

Resolved, on the motion of Mr Shoebridge: That all documents provided as Mr McCann's answers to questions on notice be kept confidential, as they contain adverse mention and sensitive and identifying information, except for the cover page which can be published, with the exception of the last sentence.

6.2 Tabled documents

Resolved, on the motion of Mr Shoebridge: That:

- the document 'Appointment Letter – Receptionist – tendered on 23 November 2020' be kept confidential as it contains identifying and personal information.
- the document 'Icare letter 4 June 2019 – tendered on 1 December 2020' be accepted and published, with the name of Mr Nagle's wife removed.

Resolved, on the motion of Mr Farlow: That the document 'Allens Linklaters - Report on Investigation - Summary - 22 October 2018' be accepted and published, with the names of the individuals and businesses redacted.

6.3 Consideration of the Chair's draft report

The Chair submitted his draft report entitled '2020 Review of the Workers Compensation Scheme', which, having been previously circulated was taken as being read.

Chapter 1

Resolved, on the motion of Mr Shoebridge: That paragraph 1.10 be amended by:

- a) inserting 'and controversial' after 'were significant'
- b) inserting 'that were said' after 'introduced changes'.

Resolved, on the motion of Mr Shoebridge: That paragraph 1.25 be amended by inserting at the end: 'Importantly, the office of Independent Review Officer is a statutory office, appointed by the Governor, and the provisions of the Government Sector Employment Act 2013 relating to the employment of Public Service employees do not apply to that office. This ensures the office's independence'.

Resolved, on the motion of Mr Shoebridge: That paragraph 1.47 be amended by inserting at the end: 'The committee's work in holding public hearings to test the responses of icare management and the government to the concerns being raised in the public arena has had an important role in delivering accountability'.

Chapter 2

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 2.84, with the secretariat to include references:

"The committee received evidence that early and active intervention in cases with musculoskeletal injury that had a risk of delayed return to work has a significant positive impact on return to work rates. This in fact is the direction that NSW Health in particular have taken since 2015 when they began working with an array of academics and specialists using the WISE protocols.

The WISE protocols saw a 20 per cent reduction in days lost for workers who had total or partial incapacity to work, a 100 per cent sustained return to work at 6 months for those injured workers who had return to pre injury duties, a 20 percent reduction in long term costs to the employer and reduced long term disability and chronic pain for injured workers.

Despite the success in NSW Health, despite repeated positive international reviews of the outcomes and despite even receiving an award from EML and Workcover for the work, the WISE protocols on early intervention were not adopted by icare for the Nominal Insurer or the TMF. In fact icare went in exactly the opposite direction with the implementation of their new platform which radically reduced interactions with injured workers in the first stages of their injury, rather than increasing the number and types of interventions to assist with return to work.'

Resolved, on the motion of Mr Shoebridge: That the following new finding be inserted in the committee comments section in Chapter 2 in appropriate place:

Finding x

The implementation of the WISE protocols that deliver early and active intervention for injured workers with musculoskeletal injury that have a risk of delayed return to work has a significant positive impact on return to work rates, and despite this evidence being available to icare they have not been adopted in the Nominal Insurer or the Treasury Managed Fund.'

Resolved, on the motion of Mr Shoebridge: That paragraph 2.112 be amended by inserting 'injured workers' after 'potential to expose'.

Resolved, on the motion of Mr Farlow: That Finding 1 be omitted: 'That the multi-billion losses incurred recently by the Nominal Insurer and Treasury Managed Fund have been primarily caused by a collapse in return to work rates arising from icare's implementation of a new claims management model', and the following new Finding inserted instead:

'The multi-billion losses incurred recently by the Nominal Insurer and Treasury Managed Fund has been caused, in large part, by a collapse in return to work rates arising from icare's decision to introduce a new claims management model'.

Resolved, on the motion of Mr Shoebridge: That the following new committee comment and recommendation be inserted above paragraph 2.115:

'Committee comment

"The committee was especially concerned at the fact that icare's position throughout the inquiry was to look for external factors to explain the scheme's poor outcomes and to refuse to clearly accept responsibility for the outcomes of the scheme they manage. This inability to self-reflect and accept responsibility was seen at both a board and senior management level. This also meant that the dramatic falls in the RTW rates in both the TMF and the NI were not addressed with the urgency or thoroughness they deserved given the negative impact they have on injured workers and the financial sustainability of the scheme.

While we note that there has been a new Chief Executive Officer and Chair of the Board since then, the fact that the culture in icare is so unwilling to accept their agency in poor outcomes is of very real concern. For this reason, while we acknowledge the substantial change in the senior leadership, we remain extremely concerned and will be looking to keep a close eye on the scheme in the coming 12 months.

Recommendation x

That the Standing Committee on Law and Justice undertake a brief hearing to review the status of reforms in icare and the implementation of various reviews of the scheme towards the end of the 2021 calendar year'.

Chapter 3

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 3.3:

'Mr McCann gave his evidence in a clear, forthright and compelling fashion. His insights into the manner in which icare addressed risks, including regarding procurement and conflicts of interest, was of very real value to the committee, and through the committee, to injured workers, employers and the people of NSW.'

Resolved, on the motion of Mr Shoebridge: That paragraph 3.11 be amended by inserting 'that was presented to the icare Board' after 'business plan'.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.17 be amended by inserting at the end: "This was despite the unchallenged evidence before the committee that Mr Bhatia was present at the Board meetings where the Capgemini contract was considered and ultimately approved and there was no evidence to suggest either a conflict of interest declaration was made by Mr Bhatia or he excluded himself from any part of the Board's deliberations during these matters.'

Resolved, on the motion of Mr Shoebridge: That a new paragraph, drafted by the committee secretariat, be inserted after paragraph 3.13 outlining the reasons as to why Fineos withdrew from the tender process.

Resolved, on the motion of Mr Shoebridge: That the following paragraph 3.60 be omitted: 'Subsequent to this, the committee received written confirmation that Mr Craig, along with Mr Nagle, had unlimited delegation to contract in relation to the build of the Nominal Insurer Single Platform', and the following new paragraph be inserted instead:

'It is notable that Mr Plumb was also the head of the audit and risk committee of the icare Board's audit. When he was asked were you aware that an executive within icare had unlimited authority on behalf of icare in that matter, Mr Plumb responded:

No, I was not... My understanding is that the delegation is that contracts above \$10 million have to be approved by the board. Obviously, not physically signed—the board can delegate to that—but \$10 million is the board threshold.

[FOOTNOTE: Evidence, Mr David Plumb, non-executive director, icare Board, 2 December 2020, pp 25-28].

When Mr Plumb was asked what the risks are in having unlimited delegations at an executive level which informed a \$10 million policy, Mr Plumb replied:

The risks are, obviously, of concentration of approval that can obviously occur, and the risks of, if there is a process deficiency, that there is not that extra level of challenge and governance that deals to that.

[FOOTNOTE: Evidence, Mr David Plumb, non-executive director, icare Board, 2 December 2020, pp 25-28].

Mr Plumb was then asked 'were you kept in the dark, as the Chair of the Audit and Risk Committee, that a senior executive of icare, contrary to board policy, had unlimited delegations to contract on behalf of the Nominal Insurer?'. He responded:

I was not aware that there were unlimited delegations to contract on behalf of the Nominal Insurer. However, I am aware of the requirement that all contracts above \$10 million are required to be reported to the board— sorry, the board to approve those contracts. I am also aware of the requirement to report significant contracts to the board.[FOOTNOTE: Evidence, Mr David Plumb, non-executive director, icare Board, 2 December 2020, pp 25-28].

The evidence from icare was that this unlimited delegation was in regards to the construction of the Nominal Insurer single platform and the “transformation” program that followed it, having a total contract value in the end that exceeded \$300 million. This was confirmed in correspondence received from icare following the last hearing day.'

Resolved, on the motion of Mr Shoebridge: That paragraph 3.82 be amended by the committee secretariat, to acknowledge icare's use of psychological services.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.83 be amended by omitting 'Some' before 'concerns'.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.85 be amended by omitting 'the documentation' and inserting instead 'any documentation'.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 3.91:

'Mr Nagle last appeared before the Committee on 3 August 2020 when he commenced his evidence stating that he wanted “to thank the committee for the opportunity to correct the campaign of misinformation and accusations based on inaccuracies that has recently been generated.” He resigned from his position at icare at the conclusion of the hearing that day'.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 3.125:

'Under the State Insurance and are Governance Act, the ICNSW Board has the following functions:

- (a) to give the Minister any information relating to the activities of ICNSW that the Minister requests,
- (b) to keep the Minister informed of the general conduct of ICNSW's activities and of any significant development in ICNSW's activities,
- (c) to determine general policies for ICNSW and to give directions to the chief executive of ICNSW in relation to the ICNSW's activities,
- (d) such other functions as are conferred or imposed on it by or under this or any other Act or law.

In addition, under section 6 of that Act, the Minister may give the ICNSW Board a written direction in relation to ICNSW if the Minister is satisfied that it is necessary to do so in the public interest. In the case of icare, the Minister in question has at all times been the Treasurer.'

Resolved, on the motion of Mr Shoebridge: That a new paragraph, drafted by the committee secretariat, be inserted after paragraph 3.141 in relation to the number of icare employees who receive or were entitled to bonuses.

Mr Shoebridge moved: That paragraph 3.142 be amended by inserting at the end: 'and that the funding for it came from money set aside to assist injured workers'.

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Donnelly, Mr Roberts, Mr Shoebridge.

Noes: Mr Fang, Mr Farlow, Mr Mallard, Mr Martin.

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

Resolved, on the motion of Mr Farlow: That Finding 5 be amended by omitting 'systemically' and inserting instead 'too often'.

Resolved, on the motion of Mr Shoebridge: That the following new committee comment be inserted after paragraph 4.65:

'We note that concerns regarding the implementation of PIAWE in the Nominal Insurer extend to the Treasury Managed Fund. Remediation efforts relating to PIAWE need to be addressed by icare in both the Nominal Insurer and Treasury Managed Fund as a matter of priority'.

Resolved, on the motion of Mr Donnelly: 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, tabled documents, answers to questions on notice and supplementary questions, summary report of the online questionnaire 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, responses to the online questionnaire and summary report of these responses tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry, be kept confidential by 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;
- h) The report be tabled on Friday, 30 April 2021.

7. Inquiry into Mandatory Disease Testing Bill 2020

7.1 Answers to questions on notice

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

- Mr Alastair Lawrie, Senior Policy Officer, Public Interest Advocacy Centre, received on 25 February 2021
- Ms Gabrielle Bashir SC, Senior Vice-President and Co-Chair of Criminal Law Committee, NSW Bar Association, received on 2 March 2021
- Dr Michelle Cretikos, Executive Director, COVID-19 Response, Population and Public Health, NSW Health, received on 3 March 2021
- Dr Mary Ellen Harrod, Chief Executive Officer, NSW Users and AIDS Association (NUAA), received on 4 March 2021
- Deputy Commissioner Malcolm Lanyon APM, Deputy Commissioner for Corporate Services, NSW Police, received on 4 March 2021
- Ms Gayle Robson, Chief of Staff, Office of the Commissioner, Corrective Services NSW, Department of Communities and Justice, received on 4 March 2021
- Mr Paul Miller, Acting NSW Ombudsman, received on 4 March 2021
- Mr Stewart Little, General Secretary, Public Service Association of NSW, received on 5 March 2021
- Dr Danielle McMullen, President, Australian Medical Association (NSW), received on 8 March 2021
- Ms Natalie Lang, Branch Secretary, Australian Services Union NSW and ACT (Services) Branch, received on 10 March 2021.

7.2 Consideration of the Chair's draft report

The Chair submitted his draft report entitled 'Mandatory Disease Testing Bill 2020', which, having been previously circulated, was taken as being read.

Chapter 2

Mr Shoebridge moved: That the following new paragraph be inserted after 2.44:

"The position of Mr Little, that the Bill would be useful to ensure there are consequences for inappropriate conduct, is at odds with the stated position of the Government, the NSW Police Force and the Police Association that this Bill is intended as a protective measure for frontline workers rather than a punitive measure to be used against third parties."

Question put.

The committee divided.

Ayes: Mr Shoebridge.

Noes: Mr D'Adam, Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That the following new paragraph be inserted after 2.64:

'Mandatory testing is in breach of the Australian National HIV, Hepatitis B or Hepatitis C Testing Policies, which state that "testing is conducted ethically, is voluntary and performed with the informed consent of, and is beneficial to, the person being tested". These policies state Australian clinical standards and ethical practice; therefore, a person taking blood from a third party under a mandatory testing order can only make a decision about whether their actions will be in breach of these standards if they are aware of their obligations under the Act, and whether a person has consented to be tested.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraph be inserted after 2.64: 'Medical practitioners and other allied health professionals involved in taking blood for the purposes of carrying out a mandatory testing order under the Act may be open to civil and/or criminal liability as a result of their actions. The current version of the Bill does not specifically name medical practitioners, nurses and blood collectors (phlebotomists) as exempt from civil and/or criminal liability'.
- the following new recommendation be inserted after paragraph 2.67: 'Sections 31(1) and 31(3) of the Bill should be amended to specifically include and name medical practitioners, nurses and blood collectors (phlebotomists).'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new recommendation be inserted after paragraph 2.67: 'Section 19 of the Bill should be amended to explicitly state that no obligations under the Act are placed on the medical practitioner or pathologist. Health workers who may be asked to conduct a mandatory test should be provided with specific education and training about their professional rights to refuse.'
- the following new recommendation be inserted after paragraph 2.67: 'Section 19(2) of the Bill should be amended to require that the person taking blood from a third party under a mandatory testing order be informed that no obligations under the Act are placed on them, and informed of whether or not the person has consented to be tested.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraph be inserted after paragraph 2.87: 'Given the unambiguous evidence from the medical profession that saliva cannot transmit a BBV there is no valid reason to retain saliva in the bodily fluids listed in the bill. If there is evidence of blood being mixed with saliva then the presence of the blood itself would satisfy an amended definition of bodily fluids that included blood and excluded saliva. The bill should therefore be amended to remove saliva from the list of bodily fluids in the dictionary. Even putting aside the medical evidence regarding the absence of risk of transmission the inclusion of saliva perpetuates the myth around sources of transmission for HIV and so exacerbates stress for frontline workers who may have occupational exposure to saliva.'
- the following new recommendation be inserted after the new paragraph: 'That the Bill be amended to remove saliva from the definition of bodily fluid in the Act.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Mallard, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraphs be inserted after paragraph 2.93:

"The decision to make a mandatory testing order is clearly a medical decision, with the whole purpose of the Bill being to assist in the medical response to an incident rather than be a form of punishment of the third party. Therefore the decision should be made in a health context by the most appropriately qualified and informed medical practitioner. The experience of dealing with Covid-19 has shown how capable and competent NSW Health is in dealing with medical crises and the social response to them.

Expertise in blood-borne diseases is a highly specialised area, and a decision maker without this specific experience will not be able to accurately assess transmission risk associated with a specific exposure to bodily fluids. In light of the evidence we have received the Bill should therefore be amended to provide that any decision to make a mandatory testing order is made by the Chief Medical Officer or their delegate. To achieve this Part 3, sections 10-12 of the Bill should be amended so that any decision to impose a mandatory blood test is made by the Chief Health Officer, in consultation with a BBV/HIV specialist medical officer rather than police, regardless of seniority.'

- the following new recommendation be inserted after the new paragraphs:

"That the Bill be amended so that all decisions to make a mandatory testing order are made by the Chief Medical Officer and this includes any appropriately qualified medical professional acting as delegate of the CMO.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Mallard, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following new recommendation be inserted in the committee comments section at the end of the report:

"The Bill should be amended to require a mandatory disease testing order to be made by the Chief Health Officer, or an independent arbiter delegated by the Chief Health Officer who has relevant medical expertise, including the ability to assess complex information about transmission risk.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Mallard, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraph be inserted after paragraph 2.101: 'There are real privacy concerns raised where a third party who is proposed for testing comes from a small community, especially country towns with only one GP and a very small community. Any consideration of a mandatory disease test in these circumstances would need to include consideration of the privacy impacts before a testing order is made.'

- The following new recommendation be inserted after the new paragraph: 'Amend Part 3, sections 10 (5) of the Bill so that in determining an application, the decision maker should consider the impacts of carrying a test on the third party's privacy and be fully compliant with privacy legislation.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraph be inserted after paragraph 2.101: 'The lack of clarity surrounding the criteria under which a mandatory disease testing order can be made under the Bill is of concern. There are strong reasons for putting in place a more detailed legislative structure that guides a decision make and produced greater certainty. The Victorian Public Health legislation sets out a useful example in this regard and requires the decision maker to consider the clinical management of the affected worker and the third party while also creating safeguards to ensure alternative, less intrusive measures are considered. Similar provisions should be included in this Bill.'
- the following new recommendation be inserted:
 "That Section 10(7) be amended so that any decision maker must also be satisfied that:
 1. The worker came into contact with the bodily fluid of the third party as a result of a deliberate action of the third party; and
 2. In considering the medical evidence, the making of the order is necessary in the interest of rapid diagnosis and clinical management and, where appropriate, treatment for any of those involved; and
 3. In considering the medical evidence, there are no alternative measures available which would be less restrictive of the rights of the third party and equally effective in ensuring the rapid diagnoses and clinical management for any person effected.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following new recommendations be inserted in the committee comments section at the end of the report:

- 'The Bill should be amended to provide that, if alternative measures that are equally effective for the rapid diagnosis and clinical management of a worker are available, the measure that is least restrictive of the rights of the third party should be chosen.'
- 'The Bill should be amended to require that a decision to issue an order can only be made when it is necessary for rapid diagnosis, clinical management or treatment of the worker.'
- 'The Bill should be amended to require that evidence of a deliberate action is required to issue an order'.

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- a new heading 'Issuing of orders' be inserted after paragraph 2.101
- the following new paragraph be inserted after paragraph 2.101: 'Third parties mandatorily getting tested for blood borne viruses under this scheme, such as viral hepatitis and HIV should have the same rights as any other patient getting tested. This should include provision of accurate information and access to support services where these are required.'
- the following new recommendation be inserted: 'Section 18 of the Bill should be amended to require the third party to be provided with information about blood borne viruses, a referral to a medical practitioner with specific expertise in these, and a referral to counselling. This should be done at the same time the third party is personally served the mandatory testing order.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following recommendations be inserted in the committee comments section at the end of the report:

- 'The Bill should be amended to provide that third parties are informed of the decision making and review process, relevant timeframes, and where to seek medical and legal advice.'
- 'The Bill should be amended to ensure detained people will have information to appeal a mandatory testing order.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraph be inserted after 2.101: 'Mandatory disease testing should not be used as punishment. Using mandatory disease testing as extra-judicial detention contradicts civil rights protections and is contrary to the objects of this Bill.'
- the following new recommendation be inserted: 'Amend Part 6, section 20 (1) so that there is no unreasonable detention in order to transport the person for a mandatory test – particularly where the test is not consented to and an appeal is made.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraph be inserted after 2.117: 'The legislation should comply with principals of natural justice including provisions to provide the person subject to mandatory testing with an effective appeal mechanism. This matches the Victorian, Queensland, Northern Territory and Western Australian provisions.'
- the following new recommendation be inserted: 'Part 7, section 22 of the Bill should be amended so that appeals against a mandatory blood testing order of the Chief Health Officer are conducted by the Local Court to be heard de novo.'
- the following new paragraph be inserted after 2.117: 'The current drafting of the legislation would allow an order to continue irrespective of any review process being undertaken and regardless of the fact procedural fairness may not have been provided to the third party under the legislation. This is contrary to the provisions in similar legislation in other jurisdictions and contrary to natural justice principles. In effect it makes the appeal rights contained in the Bill of no value.'
- the following new recommendation be inserted: 'Part 7 Section 23(1-3) be amended so that appeals held by the local Court, or any other appeal body, are to be held in a timely manner and power is given to the appeal body to put a stay on the order while the appeal is determined.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following recommendations be inserted in the committee comments section at the end of the report:

- 'The Bill should be amended to provide that no mandatory blood tests should be required during the period in which a review application is being considered.'
- 'The Bill should be amended to provide an appeals mechanism for a mandatory testing order on a 'vulnerable third party', as a de novo hearing in the District Court.'
- 'The Bill should be amended to provide an appeals mechanism for a mandatory testing order on a third party, as a de novo hearing in the Local Court.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraph be inserted after 2.117: 'The Bill should be amended so that an order must be sought by the Chief Health Office from the Local Court if reasonable force for the purpose of enforcing the order on people in detention is required. A similar provision is found within the *Victorian Public Health and Wellbeing Act* 2008 (Section 134 (4)). The Court should be satisfied that the circumstances are so compelling that the making of the order to use reasonable force is justified.'

- the following new recommendation be inserted: 'The Bill should be amended so that an order must be sought by the Chief Health Officer from the Local Court if reasonable force for the purpose of enforcing the order on people in detention is required.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following new recommendation be inserted in the committee comment section at the end of the report:

'The Bill should be amended to remove provisions allowing the use of 'reasonable force' on detained third parties'.

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraph be inserted after 2.127: 'There are strong policy reasons to have additional protective measures in place for minors. This, together with the very low prevalence of HIV and blood-borne viruses in minors does not justify the conduct of mandatory disease testing on persons under the age of 18.'
- the following recommendation be inserted: 'Amend part 2, section 7 so that no person under the age of eighteen (18) years is subject to mandatory disease testing.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following new recommendation be inserted in the committee comment section at the end of the report:

'The Bill should be amended to ensure that mandatory tests for blood-borne diseases cannot be conducted on any person under the age of 18.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- the following new paragraph be inserted after 2.127: 'The legislation in its current form gives little opportunity to children and vulnerable people to seek support from their parent or guardian. For many children this is likely to be their first time learning of BBV's and the protections that they should take to minimise risk of transmission. A safe environment that offers support systems for the child would assist encouraging the child to engage with healthcare facilities in the future. *The Crimes (Forensic Procedures) Act 2000* has safeguards in place which this legislation should look to as a guide including providing the right to representation by a legal representative and an interview friend during proceedings and during the procedure.'
- The following new recommendation be inserted: 'The Bill must include a requirement for the meaningful involvement of parents/guardians or a support person in all aspects of the legislation involving people under the age of eighteen (18) years.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That the following new recommendation be inserted after 2.130:

"To assist appeals by persons with literacy, language mental health or cognitive disability, assistance from a qualified support person must be provided to enable them to make an informed decision, understand their rights and submit an appeal.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following new recommendation be inserted in the committee comment section at the end of the report:

"The Bill should make provision for support to be provided to vulnerable third parties who lodge an appeal'.

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That the following new paragraph be inserted after 2.145:

"The best way to continuing preventing occupational transmissions and to reduce fear and anxiety about HIV and BBVs is to provide people with adequate health information. This includes information on levels of risks – including the fact that HIV, hepatitis B and hepatitis C does not get passed on through saliva – and on how to prevent transmissions and stay safe.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That:

- a new heading 'Treatment of the test results and medical information' be inserted after 2.134.
- the following new paragraphs be inserted after 2.134: '

'HIV and blood borne virus test results are highly sensitive personal information, the disclosure of which can have serious consequences for those living with such diseases. Inadequate privacy protections may lead to increased stigma and discrimination, which will hinder public health responses to HIV and BBVs.'

'Data obtained through mandatory disease testing should only be used to satisfy the objects of the Bill, in accordance with public health objectives. Allowing police to utilise mandatory disease testing results for other purposes may lead to an unjustified increase in mandatory disease testing orders.'
- the following new recommendation be inserted: '

'Section 28 should be amended so that any and all information and data collected or utilised, including any test results and/or any medical information must be managed by the Chief Health Officer, observing all public health procedures and protocols.'
- the following new recommendation be inserted: '

'Section 28 should be amended so that any information or data collected or utilised, including any test results and/or any medical information cannot be used by police or in any other criminal matter.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following new recommendation be inserted in the committee comment section at the end of the report:

'The Bill should require that all blood samples are compulsorily destroyed after completion of testing and there should be an absolute prohibition on the use of samples in any other type of testing (including DNA testing).'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That the following new recommendation be inserted after paragraph 2.150:

'All frontline workers, including those specified in the legislation should be provided with access and education on Hepatitis B vaccination and must participate in regular education on blood borne viruses including HIV with specialist organisations, including ASHM, Positive Life, ACON and Hepatitis NSW. This information and supporting education sessions should be mandatory.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

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

'The high rate of Hepatitis C in prisons should result in the expansion of the Hepatitis in Prisons Elimination program to reduce the identified risks to inmates and prison officers. Given the success of these programs to date this is the most effective way to meaningfully address this problem at the source.'

Mr Shoebridge moved: That the following new paragraph be inserted after 2.154:

'There is a real risk that a Mandatory Disease Testing scheme will cause frontline workers to overestimate the risk of transmission of blood-borne diseases from those they deal with, this will have significant mental health impacts. Any new scheme must be accompanied by myth-busting to ensure saliva for instance is not considered a likely vector for such infections.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That recommendation 1 be omitted and the following recommendation inserted instead:

'That the Legislative Council not support the Mandatory Disease Testing Bill 2020 in light of the significant concerns identified by stakeholders including the fact that the diseases in question have very low prevalence in the community and are extremely unlikely to be transmitted in interactions with police and emergency service workers.'

Question put.

The committee divided.

Ayes: Mr Shoebridge.

Noes: Mr D'Adam, Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That a new recommendation 2 be inserted as follows:

'That the NSW Government should continue to review the expert evidence about measures to protect front line workers from blood-borne disease including changes to protective equipment, workplace setup, access to post-exposure prophylaxis and general procedure and policies.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That a new recommendation 3 be inserted as follows:

'That respect and dignity of people with blood-borne diseases is a central concern in any policies and procedures relating to blood-borne diseases.

If the Bill proceeds then any amendments to the legislation should be made to ensure it reflects current NSW public health procedures in relation to HIV and Blood Borne Viruses (BBVs). Testing should only occur where there is an actual risk of transmission, which should be assessed by medical/public health professionals.

Decisions to carry out Mandatory Disease Testing orders should sit with the NSW Chief Health Officer and adequate appeals and safeguards must be in place to avoid adverse impacts, particularly on the most vulnerable community members.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following new recommendation be inserted in the committee comment section at the end of the report:

'The Bill should be amended to ensure that testing orders can only be made when an actual risk of transmission occurs (taking account of the bodily fluid and type of contact).'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following new recommendation be inserted in the committee comment section at the end of the report:

'The Bill should be amended to expand the definition of 'vulnerable third party' to include those who identify as Aboriginal or Torres Strait Islander people'.

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Shoebridge moved: That the following new paragraph be inserted after 2.54:

'The concern of stakeholders other than the Police Association of NSW is not the conduct of marginalised communities, but the use of police discretion.'

Question put.

The committee divided.

Ayes: Mr Shoebridge.

Noes: Mr D'Adam, Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following new recommendations be inserted in the committee comment section at the end of the report:

- 'The Bill should be amended to clarify what is meant by 'deliberate action' by having a specific definition in the bill.'
- 'The Bill should be amended to insert clear criteria that should guide decisions on whether or not to issue an order including requiring that medical opinion must be taken into account in a decision to issue a mandatory disease testing order.'
- 'The Bill should be amended to clarify the standard of proof required to make an order.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr D'Adam moved: That the following recommendation be inserted in the committee comment section at the end of the report:

'The Bill should be amended to lengthen the time frame to make a review application.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Shoebridge.

Noes: Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Question resolved in the negative.

Mr Donnelly moved: 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 supplementary questions 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, responses to the online questionnaire and summary report of these responses tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry, be kept confidential by the committee;
- The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;
- Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;
- The report be tabled on Friday, 30 April 2021.

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Donnelly, Mr Fang, Mr Farlow, Mr Mallard, Mr Martin, Mr Roberts.

Noes: Mr Shoebridge.

Question resolved in the affirmative.

8. Adjournment

The committee adjourned at 11.34 am, until 25 May 2021 (*public hearing for the 2020 reviews of the Compulsory Third Party insurance and Lifetime Care and Support Schemes*).

Tina Higgins and Peta Leemen
Committee Clerks

