



Minister for Innovation and Better Regulation
The Hon Victor Dominello MP

Ref: 01624/16
Your ref: D16/15465

Hon Shayne Mallard MLC
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cc: Ms Sharon Ohnesorge, Committee Director, law@parliament.nsw.gov.au

Dear Mr Mallard

Review of the workers compensation scheme – Pre hearing Questions on Notice

I refer to your recent letter regarding the Legislative Council Standing Committee on Law and Justice's first review of the workers compensation scheme and attaching the pre-hearing Questions on Notice.

I am pleased to enclose the State Insurance Regulatory Authority's (SIRA) responses to the Questions on Notice.

Any enquiries about the responses may be directed to Carmel Donnelly, Executive Director, SIRA Workers and Home Building Compensation Regulation, on _____ or by email

Yours sincerely

The Hon Victor Dominello MP
Minister for Innovation and Better Regulation

Encl:

27-10-16

STANDING COMMITTEE ON LAW AND JUSTICE
REVIEW OF THE WORKERS COMPENSATION SCHEME
PRE-HEARING QUESTIONS ON NOTICE- SIRA

Update on the implementation of recommendations from the 2014 Review of the exercise of the functions of the WorkCover Authority

1. Please provide an update on the government response to the recommendations relevant to SIRA's functions from the Standing Committee on Law and Justice's report on the 2014 Review of the exercise of the functions of the WorkCover Authority.

Structural and governance reforms

The State Insurance and Care Governance Act 2015 reformed the governance and regulatory arrangements for statutory insurance and compensation schemes in NSW. The legislative reforms created three new agencies which replaced the functions of WorkCover NSW and enabled the structural separation of its insurance and regulatory functions.

From 1 September 2015, the reforms created the:

- *The State Insurance Regulatory Authority (SIRA) – an independent insurance regulator*
- *Insurance and Care NSW (icare) – a single insurance service provider*
- *SafeWork NSW – an independent work, health and safety regulator*

SIRA has assumed the regulatory functions of WorkCover NSW in relation to workers compensation insurance, of the Motor Accidents Authority in relation to Compulsory Third Party (CTP) insurance and the regulatory functions relating to home building compensation.

SIRA is overseen by a Board whose responsibilities include:

- *determining SIRA's general policies and strategic directions,*
- *overseeing SIRA's performance of its activities, and*
- *keeping the Minister informed of the general conduct of SIRA's activities and provision of relevant information.*

SIRA and SafeWork NSW are within the Better Regulation Division (BRD) of the NSW Department of Finance, Services and Innovation (DFSI). The Deputy Secretary of Better Regulation Division is also the Chief Executive of SIRA.

Workers compensation benefit reforms

On 3 September 2014, changes to the Workers Compensation Regulation 2010 enhanced certain benefits to workers who had made a claim prior to 1 October 2012.

The enhancements provided continued access to:

- *hearing aids, prostheses, home and vehicle modifications and related treatment until retiring age*
- *medical and related expenses for workers with permanent impairment of 21 per cent to 30 per cent until retiring age*
- *weekly payments for up to one year after retiring age*
- *that workers may receive weekly payments while a work capacity decision is being reviewed, and*

- secondary surgery for eligible workers.

The introduction of the Workers Compensation Amendment Act 2015 extended the enhancements that came into effect on 3 September 2014 to claims made on or after 1 October 2012. The 2015 reforms provide:

- increased maximum lump sum compensation for permanent impairment up to \$577,050
- increased death benefit lump sum amount up to \$750,000
- increased maximum for funeral expenses up to \$15,000
- weekly benefits extended for 12 months beyond retiring age
- minimum weekly compensation payments for workers with highest needs
- extended medical entitlements for all claims
- lifetime medical benefits for injured workers with high needs (more than 20 per cent permanent impairment)
- minimum working hours removed for workers with high needs
- lifetime compensation for artificial aids, and home and vehicle modifications
- secondary surgery now available for all eligible workers
- suspension of a work capacity decision pending the result of the review
- new employment assistance of up to \$1,000 for injured workers who accept work with new employers
- education or training assistance of up to \$8,000 for workers assessed with greater than 20 per cent permanent impairment, who have received weekly payments for more than 78 weeks, and
- for regulations to be made concerning:
 - legal costs for the review of a work capacity decision, and
 - pre-injury average weekly earnings.

On 13 November 2015, the Workers Compensation Regulation 2010 was amended to enable workers who made a claim for lump sum compensation before 19 June 2012, to make one further claim if their condition significantly deteriorates.

Changes to pre-approval process for some medical treatment and interventions

The Guidelines for Claiming Workers Compensation came into effect on 1 August 2016. The new Guidelines remove the requirement for pre-approval for a number of medical interventions in the acute stage of the injury. This includes increased access to:

- services provided in a public hospital
- consultation with medical specialists
- diagnostic investigations, including x-rays, MRI, CT Scan and Ultrasound, and
- pharmaceutical items.

Negotiation of permanent impairment

SIRA has commenced preliminary discussions with key stakeholders regarding the negotiation of permanent impairment between a worker and insurer. A policy position will be established which addresses the fairness and equity of outcomes for stakeholders, as well as the system wide impact. Implementation is expected in early 2017.

Legal costs for work capacity decision reviews

The 2015 workers compensation reforms included a provision to provide limited payment of legal costs in connection with work capacity decision reviews, to be prescribed by regulation.

SIRA consulted with key stakeholders and the public on the how the new provision and regulation should operate and published a discussion paper on 29 October 2015. Public consultation closed on 26 November 2015. This was followed by careful analysis and review of all stakeholder submissions, with a submissions summary being published on 18 December 2015.

SIRA carefully considered all stakeholder submissions, which included further targeted consultation with key stakeholders, to inform advice to Government on the regulatory framework.

Further targeted consultation has been undertaken to ensure that the regulatory framework which is proposed and implemented is appropriately balanced. SIRA will continue to consult and engage with stakeholders through the implementation phase, and will be providing guidance material to support reform implementation, which is anticipated to occur the first quarter of 2017.

Compliance with return to work (RTW) obligations

SIRA as the regulator of workers compensation in NSW has reviewed the mechanisms used in regard to RTW compliance. RTW incentives are built into workers compensation insurance premiums issued by the Nominal Insurer. These incentives apply a discount where an employer meets set RTW criteria. The Market Practice and Premiums Guidelines issued by SIRA expand on this. A key principle for all licensed insurers' premium methodologies is that they must provide incentives for risk management and good claims outcomes.

The RTW inspectorate can provide assistance to employers in understanding their obligations and can issue improvement notices for non-compliance.

Education program – Employer and worker rights and obligations

New guides have been developed to educate employers and medical practitioners on their RTW obligations, and are available via the SIRA website. SIRA has also released a short video which explores the importance of and opportunities for communication between an employer and a nominated treating doctor, during the recover at work / injury management process. These resources, together with the Injured at Work: a Recovery at Work Guide for Workers and Quick Guide to Workers Compensation brochure for workers demonstrates SIRA's commitment to utilising varying modes to deliver the recover at work message to stakeholders.

The SafeWork NSW RTW Inspectorate assists with informing employers and workers of their rights and obligations regarding recovery at work on behalf of SIRA. SIRA continues to support SafeWork NSW in the development of their RTW expertise.

RTW achievements are recognised as part of the SafeWork NSW Awards, with finalists and winners showcased through social media.

A 'regional forum' awareness campaign focusing on educating employers about RTW commenced in 2015, with forums held in Port Macquarie, Tamworth and Ballina.

The RTW Inspectorate is working to identify and proactively engage with workplaces at higher risk of poor RTW outcomes. This pilot project involved RTW Inspector engagement at over 240 workplaces. Results have been highly positive with customised advice provided to improve employer RTW systems for 91 per cent of these employers. It is proposed to expand these proactive RTW employer engagements across the Inspectorate.

As part of core business, all inspectors incorporate a RTW discussion / compliance check with employers whilst undertaking general in-field activities.

Stakeholder engagement

Following consultation with stakeholders in 2015, the Better Regulation Stakeholder Engagement Strategy has been published on the SafeWork NSW and SIRA websites. SIRA is committed to responsive, transparent, inclusive, innovative and objective engagement with our stakeholders.

SIRA participates in tripartite arrangements at the national level through Safe Work Australia.

Disability industry action plan

SIRA initiated a disability industry stakeholder engagement project and hosted a 'Disability Industry Think Tank' in late 2015 at which participants discussed options for engaging disability industry stakeholders and people with a disability. A key outcome was the development of an Action Plan, which outlines that a range of fit for purpose engagement methods would be used alongside development of partnerships with key carer and family group stakeholders. The Action Plan was distributed to participants for their feedback.

SIRA will work closely with the disability industry including the Disability Council of NSW on the key issues and initiatives identified through the Think Tank and within the Action Plan.

In addition, SIRA attended and presented at the National Disability Services Work Health and Safety Sub-Committee in June 2016.

Information and reporting

The 2014-15 WorkCover Annual Report contained information about workers compensation claims strategies, injury prevention, preventing workers compensation fraud, employer and self-insurer audits, and improving return to work rates.

The first SIRA Annual Report for 2015/16 is scheduled to be tabled in Parliament in November 2016. SIRA will soon release its first Workers Compensation System Performance Report to provide a baseline snapshot of system performance. SIRA will invite stakeholders to provide both feedback on the current measures and suggestions for system performance monitoring by SIRA in future.

Statistical Bulletins for the years 2009/10, 2010/11, 2011/12, 2012/13 and 2013/14 have been published and are available on the open.gov website at www.opengov.nsw.gov.au and the SIRA website. The 2014/15 Statistical Bulletin is currently being prepared.

A new website for SIRA is scheduled for launch shortly. This new website will incorporate information related to the regulatory functions for workers compensation insurance, motor accidents CTP insurance and home building compensation.

The 'Contact us' webpage on the SIRA website and automated Customer Service Centre on-hold phone messages for workers have been updated to include information about the Workers Compensation Independent Review Office (WIRO).

Guidelines review

SIRA has reviewed the:

- Guidelines for claiming compensation benefits
- Guidelines for the provision of domestic assistance
- Work capacity guidelines
- Guidelines for work capacity decision internal reviews by insurers and merit reviews by the authority.

Following stakeholder consultation, these four guidelines have been consolidated into one document, the Guidelines for Claiming Workers Compensation, which came into effect on 1 August 2016.

The 4th edition NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment was updated to address technical issues and reflect current legislation and came into effect on 1 April 2016. The Guidelines have been endorsed by Safe Work Australia and adopted as the national template for evaluating permanent impairment.

The updated Guidelines for the Approval of Treating Allied Health Practitioners commenced on 1 August 2016. The Guidelines provide a platform for approving allied health practitioners providing services under the workers compensation system and for setting service standard expectations. The document was developed in consultation with the Allied Health Working Party, which included insurer and industry representation.

SIRA is also reviewing the Guidelines for Workplace Return to Work Programs, in collaboration with a stakeholder working party. SIRA released the draft guidelines for public consultation from 6 October 2016 to 15 November 2016.

The Workers Compensation Market Practice and Premiums Guidelines commenced on 6 May 2016. These Guidelines form part of a suite of regulatory instruments available to SIRA when regulating insurers' financial and prudential arrangements.

The Workers Compensation Licensed Insurer Business Plan Guidelines commenced on 30 June 2016 and specify the minimum requirements for licensed insurers to provide business plans to SIRA and how SIRA will assess the business plans.

A review of the Guidelines on Independent Medical Examinations and reports will commence in late 2016.

Auditor's report – WorkCover's investigation decision-making process

Auditing firm Fellows, Medlock and Associates, were engaged to review WorkCover's investigation decision making process, which is used to decide whether or not to progress matters to full investigation with the view of commencing legal proceedings.

A report containing a number of recommendations was provided and published on the WorkCover website and the NSW Government 'Have Your Say' website. Stakeholder feedback was invited. Only one substantive comment was received, from the Office of the Small Business Commissioner, which supported the approach taken when considering the investigation of matters involving small business.

In response to the recommendations and based on the consultation, an action plan was implemented and a number of changes to the investigation decision making process and supporting documents were implemented and commenced in September 2015.

Phoenix activity

To address phoenixing activity, the Federal Government has convened an interagency phoenix taskforce, on which NSW is represented by the Office of State Revenue (OSR). The progress and activities of the taskforce are reported at SWA Members' meetings, where SIRA participates.

Related compliance focus has been on sham contracting and the avoidance of premiums. Where these activities have uncovered a risk of phoenixing, SIRA works with OSR to provide data to assist its operations.

Rather than duplicate existing roundtables, SIRA continues to liaise with key stakeholders working to address phoenix activity.

SIRA will continue to work with key stakeholders such as Fair Trading, OSR and the Australian Tax Office to improve compliance and the development of approaches to safeguard against phoenix activity. In addition, SIRA is currently developing a model to identify companies with risk factors that indicate possible phoenix activity.

Self-insurer licensing framework

SIRA is currently reviewing its self-insurance licensing framework. The first round of consultation commenced in the latter half of 2015. PricewaterhouseCoopers (PwC) was engaged to assist with the review following the first round of consultation.

On the basis of feedback arising from the 2015 round of consultation, PwC made recommendations that form the basis of the proposed licensing framework.

SIRA is currently undertaking public consultation on the proposed licensing framework. The closing date for submissions is 11 November 2016.

Comcare scheme

In 2014, the Australian Government introduced proposed legislation to change self-insurer license and benefits arrangements under the Comcare Scheme. The proposed changes would have had some impacts on NSW, but the impacts were assessed as manageable.

The proposed legislation lapsed with the prorogation of the 44th Australian Parliament in April 2016 and it is unknown if the current Australian Government will seek to introduce the same or similar legislation. SIRA will continue to monitor any new legislation introduced.

Financial Position

2. Please provide an update of the financial position of the workers compensation scheme.

As advised in the Budget Estimates hearing of 31 August 2016 by the CEO of icare NSW, the Nominal Insurer was, as at December 2015, operating at a 120 per cent solvency ratio.

The SIRA Board will provide the Minister for Innovation and Better Regulation, the Hon Victor Dominello MP, and the Government, advice on the Nominal Insurer solvency ratio for June 2016⁴ after the June 2016 Nominal Insurer liability valuation has been reviewed by the SIRA Board.

SIRA, as the regulator of the NSW workers compensation system, aims to promote the efficiency and viability of the insurance and compensation system established under the workers compensation legislation.

This is achieved through active regulation and prudential supervision of the 63 insurers¹ that participate in the NSW workers compensation system.

On 4 October 2016, SIRA published a discussion paper and opened consultation on the Financial and Premium Supervision of NSW workers compensation insurers. The consultation will further inform SIRA about the policy settings and regulatory actions required to promote the efficiency and viability of the system.

2015 Reforms

3. Please provide an update on the 2015 reforms to the workers compensation scheme.

SIRA's 2015 benefit reform program implemented the legislative amendments passed by the NSW Parliament in August 2015 in three phases.

The first phase commenced in October 2015 and included amendments which extended entitlement of weekly payments to 12 months after retiring age, increased death benefit and funeral expenses and increased lump sum compensation. Also, in November 2015, a new regulation was commenced to enable workers who made a claim for lump sum compensation before 19 June 2012, to make one further deterioration claim.

SIRA implemented the second phase in December 2015, with the commencement of reforms including an extension to the medical entitlement period for all workers; secondary surgery for all eligible workers; artificial aids; home and vehicle modifications for life for all workers; lifetime medical entitlements for workers with high needs; removal of the minimum working hours for workers with high needs; minimum weekly payments for workers with highest needs; and the stay of a work capacity decision under review.

SIRA commenced phase three with the introduction of two new RTW assistance benefits effective from 29 April 2016 following a public consultation process. SIRA continues to consult with key stakeholders regarding the regulatory frameworks for both legal costs for the review of a work capacity decision, and pre-injury average weekly earnings.

Phases one and two required insurers to implement the reforms that would apply retrospectively. SIRA identified cohorts of claims to be reviewed by each insurer to determine eligibility. SIRA also provided insurer guidance and education material which outlined the minimum standards to be applied and reporting requirements. SIRA continues to monitor insurers' progress with implementation and payment of any retrospective entitlements.

4. The *Insurance & Regulation Reform Package 2015* website states that the benefit enhancements introduced in 2015 will be an ongoing part of the system and will not be removed if the scheme goes into deficit.² What safeguards are in place to ensure the viability of this commitment?

¹ 55 self-insurers, 6 specialised insurers, Nominal Insurer, SiCorp.

² NSW Government, *Questions and Answers*, [http://insurancereforms.nsw.gov.au/questions-answers/#structuralreform\(2015\)](http://insurancereforms.nsw.gov.au/questions-answers/#structuralreform(2015)).

The benefit reforms introduced by the NSW Government were passed by Parliament in August 2015. Any further changes to these workers compensation benefits would also be required to be presented to Parliament, debated and passed by both Houses.

5. Please provide a brief update of SIRA's key actions in relation to the workers compensation scheme since the establishment of the organisation.

Key actions include:

- *supervising the implementation of the 2015 Benefit Reform package as outlined above*
- *implementation of the Market Practice and Premiums Guidelines providing for licensed insurers to submit premium filings for review and assessment by SIRA. This is a significant change to the regulatory supervision of workers compensation premiums in NSW.*
- *implementation of the Licensed Insurer Business Plan Guidelines. This requires Licensed Insurers to provide SIRA with business plans on an annual basis which set out how they manage their workers compensation business, claims and premium management, risk management and governance. Business plans have been received by SIRA and are currently being assessed against the Guidelines and the legislation.*
- *review of the Self-Insurer licensing framework, with a view to providing SIRA and self-insurers greater clarity on performance, modernisation of the licensing framework and improving regulatory supervision*
- *development of a workers compensation system performance framework and an initial system performance report. The framework and report will provide SIRA and system stakeholders with a view of the performance of the system and key participants. This will allow appropriate action to be taken where issues are identified.*
- *managing the remake of the Workers Compensation Regulation 2010. This provided interested stakeholders an opportunity to raise issues with the operation of the Regulation. The Workers Compensation Regulation 2016 was updated to reflect amendments in the legislation and operation of the NSW workers compensation system and commenced 1 September 2016. The feedback provided by stakeholders identified outstanding issues including deemed diseases and access to medical reports which SIRA will continue to work on with stakeholders to propose further amendment to the regulation for consideration by Government.*
- *review of a number of guidelines, as outlined in the response to Question 1, and*
- *regular, transparent stakeholder engagement.*

Since its establishment, SIRA has prioritised engaging and consulting with stakeholders across all of its initiatives. SIRA has undertaken formal consultation on a number of major policy areas throughout 2015/16.

Additionally SIRA has established a strategic engagement framework which provides direct access and regular contact between senior SIRA executives and our stakeholders. These engagements have encompassed unions, insurers, business groups, health provider representatives and legal representatives and provide valuable insight into the current and strategic issues that are impacting workers compensation, as well as the successes that can be learnt from.

6. **The Shop, Distributive and Allied Employees' Association, Newcastle and Northern Branch stated it was 'grossly unfair' to cut payments to injured workers as part of the 2012 reforms, and that rather than providing an incentive to return to work, workers are penalised for their injury.³ What is your response to this concern?**

The latest independent report published by Safe Work Australia indicates RTW rates in NSW have improved (90%) and are now second highest in Australia after Tasmania (92%). The NSW rate is higher than the national rate of 87%.

The workers compensation laws are a matter for Government policy and ultimately the Parliament.

SIRA's focus is on administering the legislation and supervising the workers compensation system.

It should be noted that workers who receive weekly benefits for over six months generally receive higher weekly payments since 2012 compared to before the 2012 legislative amendments.

Workers with high needs (assessed at more than 20 per cent permanent impairment) may continue to be entitled to weekly payments after five years and receive reasonably necessary medical benefits related to their workplace injury for life.

In 2015 the NSW Government introduced a minimum weekly benefit amount for those workers with highest needs (assessed at more than 30 per cent permanent impairment).

These workers are provided with a legislated minimum of \$796 per week effective 1 October 2016 (indexed twice yearly) and receive reasonably necessary medical benefits related to their workplace injury for life.

System review

7. **The Australian Services Union stated that despite the workers compensation scheme having a predicted surplus of up to \$5 billion by 2019, injured workers continue to feel the effects of the 2012 changes, and submit that there must be a 'root and branch' evaluation of the current scheme and its inability to meet the practical needs of injured workers.⁴ What is your response to this statement?**

As noted at the Budget Estimates hearing on 1 September 2016, Minister Dominello committed SIRA to undertaking a review based on the Workers Compensation Insurance Fund (Nominal Insurer) solvency ratio and valuation as at 30 June 2016. This review will be provided to the Government in late 2016.

Division of tasks between SIRA and icare

8. **EML expressed concern that icare is developing policy positions on matters it believes SIRA was designed to take the lead on, that is – positions on issues affecting the entire workers' compensation system, not just those insured within the scheme. For example, icare developed the Calculating Pre-injury Average Earnings form.⁵ What is your response to this concern?**

³ Also see Submission 4, Shop, Distributive and Allied Employees' Association, Newcastle and Northern Branch, p 38.

⁴ Submission 5, Australian Services Union and the United Services Union, p 1. Also see Submission 4, Shop, Distributive and Allied Employees' Association, Newcastle and Northern Branch, p 4.

⁵ Submission 9, EML, p 2.

SIRA as the regulator of the workers compensation system has direct responsibility for the development of policy issues affecting the entire system. SIRA provides policy direction and guidance to all insurers, and welcomes insurers undertaking innovation and continuous improvement activities.

In some circumstances, insurers may provide information in a branded form to their contracted claims management agents and / or Scheme agents, including the Pre-injury Average Weekly Earnings (PIAWE) form. SIRA notes however, that the PIAWE form is not a form that is required to be approved by the Authority as per the legislation.

SIRA notes that the EML submission does suggest there appears to be some confusion about whether guidance material issued by icare as an insurer to its contracted service providers is equivalent to guidance from the regulator.

SIRA will work with icare to clarify to icare scheme agents that, even though icare is a NSW Government entity, it is the operator of the scheme, not the regulator.

SIRA will be amending the form previously issued by WorkCover for all system participants upon completion of the current PIAWE consultation on the regulatory framework. SIRA will be guided by stakeholder feedback received in relation to the use and accessibility of this form.

Red tape between SIRA, icare and Safe Work NSW

9. **EML expressed concern about red tape between SIRA, icare and Safe Work NSW with respect to the health and safety and return to work inspectorates, noting that historically, EML had had regular communication with both inspectorates, however since the reform, there has been limited contact with either.⁶ What is your response to this concern?**

SIRA as the regulator of workers compensation in NSW maintains direct and frequent contact with all insurers. This includes communication at a policy and operational level as well as the operation of the Work Health and Safety and Return to Work Inspectorates. Both regulatory bodies are open to broader communication with contracted claims management agents and Scheme Agents.

Merit review system

10. **It has been suggested that the merit review service is inherently flawed as there is a conflict of interest between SIRA's responsibility for managing the statutory funds created by workers compensation premiums, and its responsibility for deciding whether workers should be paid weekly compensation from those funds.⁷ What is your response to this concern?**

SIRA as the regulator of workers compensation in NSW is not responsible for the management of statutory funds created by workers compensation premiums. As such, there is no conflict of interest with regard to the Merit Review Service. The creation of SIRA, SafeWork NSW and icare NSW through the State Insurance and Care Governance Act 2015 removed any perceived conflict between insurance regulator and delivery functions.

11. **It has been suggested that the Workers Compensation Commission should be given jurisdiction to review work capacity decisions as the current merit review service is unnecessary.⁸ What is your view of this suggestion?**

⁶ Submission 9, EML, p 2.

⁷ Submission 6, NSW Bar Association, p 12. Also see Submission 7, Australian Workers' Union – NSW Branch, p 3.

⁸ Submission 6, NSW Bar Association, p 13. Also see Submission 5 Australian Services Union and United Services Union, p 4; Submission 7, Australian Workers' Union – NSW Branch, p 3.

The workers compensation dispute resolution system is determined by the legislation and any legislative amendments are a matter for Government policy and ultimately the Parliament.

- 12. The Insurance & Regulation Reform Package 2015 website states that ‘The regulatory framework for legal costs for work capacity decision reviews is in development.’⁹ Please provide an update of the progress of this initiative.**

SIRA has undertaken significant stakeholder consultation with regard to the application of legal costs within the work capacity decision review process. The initial open consultation received 24 submissions which contained a wide range of views on the amounts, stages, frameworks and general application of legal costs.

Further targeted consultation has been undertaken and continues to ensure that the regulatory framework which is proposed and implemented is appropriately balanced. Further information will be available upon completion of this process.

Medical expenses

- 13. It has been suggested that the 2012 and 2015 reforms which placed restrictions on medical expenses for injured workers prevent the scheme from achieving its system objectives, specifically to pay for reasonable medical treatment and other related expenses.¹⁰ What is your response to this concern?**

The NSW workers compensation system provides medical and rehabilitation support to all workers to assist them to return to work and where possible, recover at work. Workers with high and highest needs (assessed with permanent impairment of more than 20 per cent) receive reasonably necessary medical and related treatment for life.

Additionally all workers are entitled to receive aids, appropriate home and vehicle modifications as well as hearing aids for life. Workers with 20 per cent or less permanent impairment are provided with medical and related treatment for between two and five years after weekly benefits cease. This provides workers with 10 per cent or less permanent impairment up to seven years of treatment and those between 11-20 per cent up to 10 years of treatment.

Workers are also entitled to claim for secondary surgery undertaken up to two years after these limits have been reached. More than 90 per cent of injured workers return to work within six months.

Cost shifting

- 14. It has been suggested that medical costs that used to be covered by the WorkCover Authority are now being funded by the public health system, and that the waiting lists for surgery in public hospitals have been unduly burdened by injured workers who were previously able to receive treatment in private hospitals.¹¹ It has further been argued that costs for injured workers are being shifted to the Commonwealth Government through the payment of Medicare costs and Centrelink payments.¹² What is your response to these suggestions?**

⁹ NSW Government, *Benefits for workers*, <http://insurancereforms.nsw.gov.au/benefits-for-workers/> (2015).

¹⁰ Submission 6, NSW Bar Association, p 7, quoting section 5 of the *Workplace Injury Management and Workers Compensation Act 1998*

¹¹ Submission 6, NSW Bar Association, p 7. Also see Submission 4, Shop, Distributive and Allied Employees' Association, Newcastle and Northern Branch, p 5.

¹² Submission 6, NSW Bar Association, p 19.

The NSW workers compensation system aims to provide support to workers to maintain contact with the workforce through recovery at work or successful return to work. It is widely recognised that there are major health benefits associated with work. Workers are provided with weekly payments, medical and related treatment and specific rehabilitation and return to work support.

Workers who meet the definition of a worker with high needs are provided with medical and related treatment for life. Workers who do not meet this are provided with medical and related treatment for between two and five years after weekly payments cease. This provides workers with 10 per cent or less permanent impairment up to seven years of treatment and those between 11-20 per cent permanent impairment up to 10 years of treatment. Workers are also entitled to claim for secondary surgery undertaken up to two years after these limits have been reached.

More than 90 per cent of injured workers return to work within six months and historically more than 98 per cent are no longer receiving weekly benefits within three years. Injured workers who have been assessed at more than 20 per cent permanent impairment are provided weekly payment support until 12 months after the Commonwealth retiring age.

Dispute resolution processes

- 15. It has been suggested that it is 'absurd' to have three different dispute resolution systems for workers compensation complaints: the Workers Compensation Commission; Approved Medical Specialists; and Work Capacity Decisions.¹³ What is your response to this concern?**

The workers compensation dispute resolution system is determined by the legislation and any legislative amendments are a matter for Government policy and ultimately the Parliament.

SIRA has also received feedback from a range of stakeholders raising concerns about the complexity and effectiveness of the current dispute resolution system.

Work capacity decisions

- 16. It has been suggested that it is 'utterly impracticable' and 'probably impossible' for an injured worker to prosecute their rights through the five stages of a work capacity decision.¹⁴**
- a. What support is provided to injured workers during the work capacity decision process?**
 - b. What action, if any, is taken to ensure that scheme agents are not treating injured workers unfairly during this process?**

With regard to work capacity decisions a worker is provided with information and support from their claims manager in the first instance.

The SIRA 'Guidelines for claiming compensation benefits' support, inform and guide all participants in the process of claiming workers compensation in NSW. SIRA recently reviewed the guidelines with an emphasis placed on plain English to ensure accessibility for all readers. The new guidelines commenced on 1 August 2016.

¹³ Submission 6, NSW Bar Association, pp 9-11

¹⁴ Submission 6, NSW Bar Association, p 12. Also see Submission 5 Australian Services Union and United Services Union, pp 3-4; Submission 7, Australian Workers' Union – NSW Branch, p 2.

The guidelines stipulate the activities an insurer should undertake and the information it should provide to a worker when making a work capacity decision, this includes the process for requesting a review and copies of the appropriate forms to educate the worker and facilitate the application for further review.

Should the worker wish to apply for a merit review, SIRA provide further information in the 'Merit Review User Guide', which explains the merit review process.

The process described above ensures that the worker is fully informed of the work capacity decision and the options available for review of the decision at each stage.

The SIRA website provides all of the above information to the worker and as well as details of our customer service centre and the WIRO Solutions team should further information be required.

SIRA has undertaken and continues to undertake stakeholder consultation with regard to the application of legal costs within the work capacity decision review process.

SIRA monitors the performance of all licensed insurers including the application of the work capacity decision and review process. Where an individual complaint or emerging trend indicates appropriate action may be taken under the Insurer Supervision Model.

Suitable employment

17. The definition of 'suitable employment' has been described as 'unrealistic and grossly unfair'¹⁵ and has instead been used to reduce or cut off a worker's benefits.

- a. Please briefly outline the considerations that are undertaken when determining 'suitable employment.'**
- b. How can this system be made fairer?**

The workers compensation laws are a matter for Government policy and ultimately the Parliament.

Suitable employment is defined in section 32A of the Workers Compensation Act 1987. Considerations under this definition include the workers work capacity, age, education, skills and work experience, as well as details of the worker's return to work and injury management plans and rehabilitation support.

The definition of suitable employment does not take into account where the worker resides or the availability of work, which are external factors out of the control of employers. Rather the workers compensation benefits provide for a worker to receive training, education and rehabilitation to support their return to work in suitable employment.

Calculation of weekly payments

18. It has been suggested that the 2012 amendments to the *Workers Compensation Act 1987* concerning the calculation of weekly payments to injured workers are unnecessarily complex and unfair. The NSW Bar Association suggested that the new provisions should be replaced by the pre-2012 provisions previously provided in section 43 of the Act.¹⁶ What actions, if any, are being taken to simplify the calculation of weekly payments for injured workers?

The workers compensation laws are a matter for Government policy and ultimately the Parliament.

¹⁵ Submission 6, NSW Bar Association, p 12. Also see Submission 7, Australian Workers' Union – NSW Branch, p 2.

¹⁶ Submission 6, NSW Bar Association, pp 16-17.

Prior to 2012, weekly payments were generally payable as a percentage of the applicable award rate for the first 26 weeks of a claim, and thereafter at the applicable statutory rate. Pre-Injury Average Weekly Earnings (PIAWE) more adequately reflects an individual's circumstances, as it more accurately reflects complex pay and conditions inherent in modern industrial arrangements. Since PIAWE was introduced, a worker's average weekly payments have increased as the rate takes into account the workers total average earnings, rather than the base award rate for their occupation.

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

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

19. Can you please provide an update of your consultation concerning the regulation of pre-injury average weekly earnings?¹⁷

SIRA, as regulator of the workers compensation system, invited stakeholders to provide written submissions as to how the new PIAWE Regulation should operate. A submissions summary paper was published in May 2016 following analysis of stakeholder views outlined in their submissions.

Changes made to PIAWE will be designed to provide fair, equitable and appropriate access to weekly payments. To assist SIRA to develop a regulatory framework for PIAWE, an independent legal adviser has been engaged to lead further stakeholder consultation, which is underway.

Section 38 of the Workers Compensation Act 1987

20. The NSW Bar Association suggested section 38 of the *Workers Compensation Act 1987*, concerning special requirements for the continuation of an injured worker's weekly payments after 130 weeks, has been poorly drafted thus leaving the potential entitlement of an injured worker 'completely contingent on the administrative whims of the insurer.'¹⁸ How could section 38 of the Act be re-drafted to ensure greater fairness for injured workers?

Section 38 of the 1987 Act provides for a worker to continue to receive benefits after 130 weeks of weekly entitlements have been paid. A worker assessed by an insurer as having no current work capacity is entitled to continue to receive weekly payments.

Section 38(3) of the 1987 Act contains three distinct tests for workers assessed with current work capacity which must be met. These tests include application in writing; working not less than 15 hours per week; and assessed as likely to be incapable of undertaking further additional employment.

¹⁷ NSW Government, *Benefits for workers*, <http://insurancereforms.nsw.gov.au/benefits-for-workers/>, (2015).

¹⁸ Submission 6, NSW Bar Association, p 17.

In 2015, section 38(3A) was introduced and provides that workers with high needs only need to apply in writing. Any assessment of work capacity is considered to be a work capacity decision under Section 43(1)(a) of the 1987 Act. Work capacity decisions are subject to the review process through internal, merit and procedural review as per section 44BB of the 1987 Act. As such, the current legislation provides an assessment and review process.

Sharing information

21. How is the data collated in the statistical bulletins being used to prevent workplace injury and occupational disease?

In the past 12 months Statistical Bulletin information has been used to support SafeWork NSW in identifying industries, occupations and trends where interventions may assist in preventing injuries and diseases. The Statistical Bulletin also assists employers to compare their injury/disease incidence and frequency against their industry to determine their performance around injury/disease prevention and was used to assist in the development of the SafeWork NSW Work Health and Safety Roadmap 2022.

SIRA has responded to over 170 specific requests for data and information received from organisations and individuals including SafeWork NSW, other government agencies, insurers, Safe Work Australia, media, students, researchers and actuaries. Uses of the requested information include return to work analysis, comparative performance reporting, fall prevention, research into mental health issues, research into spinal injuries, analysing fatalities in the forestry industry, predicting demand for whole person assessments and setting community safety priorities.

22. The NSW Business Chamber suggested that there has been a reduced flow of information on scheme performance, including actuarial reports, when compared to earlier years, and that the absence of up to date information hinders debate, increases the risk of adverse trends within the scheme becoming embedded and as a consequence raises the prospect of future major interventions to restore scheme viability.¹⁹ What is your response to this concern?

SIRA as regulator of the workers compensation system is developing a System Performance Framework. This framework will include key metrics covering the performance of all insurers, insurer segments and the performance of providers within the Scheme. The initial version of the Workers Compensation System Performance Report will be published shortly. SIRA will work with insurers and other key stakeholders to ensure that relevant and timely information is provided in the reports.

SIRA considers it appropriate that icare share information concerning the performance of the Nominal Insurer scheme with employers and employer representatives.

Journey claims

23. The Australian Workers' Union – NSW Branch stated that the introduction of the 'real and substantial connection' test for journey claims, as part of the 2012 amendments to the scheme, unjustly removed coverage for employees that are injured on their way to and from work, and proposed that journey claims be reinstated.²⁰ What is your response to this suggestion?

¹⁹ Submission 11, NSW Business Chamber, p 6.

²⁰ Submission 7, Australian Workers' Union – NSW Branch, pp 3-4. Also see Submission 4, Shop, Distributive and Allied Employees' Association, Newcastle and Northern Branch, p 5.

The NSW workers compensation system continues to provide coverage for workers where they are injured on a journey to or from work in instances where there is a real and substantial connection to the worker's employment.

These workers compensation arrangements bring NSW in line with other states, such as Victoria and South Australia.

Police

24. The NSW Police Association stated that there is a 'clear lack of drive' to encourage return to work outcomes from employers and insurers. The association supported encouraging the insurer to have greater input in the determination of suitable duties for injured workers.²¹ What is your response to this suggestion?

SIRA has reviewed the submission from the NSW Police Association and would be keen to work with NSW Police and the NSW Police Association as well as other Government agencies and the Treasury Managed Fund to improve access to suitable employment for injured police officers.

The workers compensation system objectives are described in the Workplace Injury Management and Workers Compensation Act 1998, which clearly places obligations on the employer and insurer in relation to return to work.

The State Insurance and Care Governance Act 2015 states one of the principal objectives of SIRA is to promote workplace injury prevention, effective injury management and return to work (RTW) measures and programs.

In meeting these objectives SIRA:

- *works in partnership with SafeWork NSW to educate employers on their obligations and undertake appropriate compliance activities when required*
- *developed the Guidelines for claiming workers compensation to promote the proactive and effective management of claims to support return to work*
- *is currently reviewing the Guidelines for workplace RTW programs. This guideline is currently in public consultation and when published will educate and support employers on how they fulfill their legislated obligations*
- *has published a range of guidance material for employers, workers and medical practitioners. These include Workers Compensation Guide for medical practitioners, workers compensation guide for employers and an injured at work guide for workers. These publications give clear advice on the recovery at work process and how providers within the workers compensation system can positively influence return to work*
- *administers a range of vocational rehabilitation programs to support employers and workers to achieve positive RTW outcomes.*

SIRA actively encourages all insurers, employers and workers to contribute to and fully explore opportunities for suitable employment.

25. The NSW Police Association expressed concern about the number of injured officers who are unable to find suitable duties and are forced to medically discharge against their will. The association suggested that injured officers should be deployed to other public sector agencies.²² What is your response to this suggestion?

²¹ Submission 8, NSW Police Association, p 3.

²² Submission 8, NSW Police Association, p 3.

All employers are obliged to provide suitable employment to workers with a work related injury, where reasonably practicable. In the first instance, this is usually the most appropriate and direct pathway back to health and employment. Where this is not reasonably practicable or not the most appropriate pathway, then alternatives should be explored by the employer, insurer and worker. This may include the use of the vocational rehabilitation programs administered and funded by SIRA. Employee transfer provisions provided by employers, including government employers, can also support this process.

SIRA would be keen to work with NSW Police and the NSW Police Association as well as other Government agencies and the Treasury Managed Fund to improve access to suitable employment for injured police officers.

- 26. The NSW Police Association was concerned about the use of surveillance on injured officers, and its impact on the officers' psychological wellbeing. The association stated that it wants a 'clear commitment and statement' from the government in relation to a code of conduct and policy position in respect to workers compensation surveillance for all insurers.²³ What is your response to this suggestion?**

In July 2015, WorkCover published a document titled Covert Optical Surveillance Guidelines. These guidelines explicitly note that they are of an advisory nature only, and that they are not statutory guidelines made under section 376(1) of the Workplace Injury Management and Workers Compensation Act 1998. The guidelines state that their purpose is to assist workers compensation insurers to comply with the Australian Privacy Principles and relevant State legislation when undertaking covert surveillance in the management of claims for workers compensation under the Workers Compensation Act 1987 and the Workplace Injury Management and Workers Compensation Act 1998. The guidelines are based on the conceptual framework in Part Two of the Covert Surveillance in Commonwealth Administration: Guidelines published by the Office of the Australian Information Commissioner (OAIC).

SIRA is currently reviewing the need and authority for it to issue guidance on insurer surveillance.

- 27. The NSW Police Association noted that over 20 per cent of all workers compensation claims submitted by police officers are psychological claims. The association proposes that workers compensation legislation should adopt a presumption that psychological injuries are work related for all emergency/first responder workers to avoid the additional stress that is place upon members having to relive and retell their stories at the point of submitting a workers compensation claim.²⁴ What is your response to this suggestion?**

Any proposed changes to introduce presumptive legislation for emergency workers regarding psychological injuries would be a matter for Government policy and ultimately the Parliament.

SIRA would provide Cabinet in Confidence advice to inform policy development and would undertake stakeholder consultation and actuarial costings for consideration by the Government.

SIRA is establishing a new team to lead injury prevention and rehabilitation which will have an increased focus on psychological injury.

²³ Submission 8, NSW Police Association, p 3.

²⁴ Submission 8, NSW Police Association, p 3.

SIRA would be keen to work with NSW Police and the NSW Police Association as well as the Treasury Managed Fund (TMF) to improve the outcomes for Police and Emergency Service workers affected by psychological injury.

On 1 August 2016, SIRA gazetted Fees Orders which specifically allow emergency services workers access to extended treatment sessions and increased coverage and cost for the treatment of Post Traumatic Stress Disorder (PTSD).

SIRA has removed the cap on fees for specialised psychological services available to emergency services workers who have been diagnosed with PTSD to ensure they have access to appropriate support. This change has occurred as a result of research and the publishing of clinical guidelines Expert Guidelines: Diagnosis and treatment of post-traumatic stress disorder in emergency service workers endorsed by the Black Dog Institute, University of NSW and National Health and Medical Research Council.

SIRA supports the use of these guidelines by the SICorp TMF claims agent EML.

Employers attending injured workers' medical appointments

28. The Shop, Distributive and Allied Employees' Association, Newcastle and Northern Branch expressed concern that injured workers are commonly told that employers are required to attend their medical appointments.²⁵ What is your response to this concern?

The workers compensation legislation makes no provision for employers to either attend or abstain from a workers medical appointment. SIRA has issued guidance on this issue to medical practitioners and employers through the Workers Compensation Guide for Medical Practitioners and the Workers Compensation Guide for Employers. SIRA advises employers that they cannot insist on attending a medical appointment but may make themselves available at the time of consultation should the doctor / worker feel it appropriate. Alternatively, the employer may participate in a scheduled case conference with the worker and other relevant parties to identify the most appropriate injury management and return to work activities.

Regulation and oversight of insurers

29. The Shop, Distributive and Allied Employees' Association, Newcastle and Northern Branch stated that there is a need for greater regulation and oversight of the behaviour of insurers, their case managers and employers around the conduct and treatment of injured workers.²⁶ What is your response to this concern?

SIRA is implementing a proactive, evidence-informed, outcome focussed and risk-based insurer supervision model. SIRA aims to drive improved performance and outcomes over time, not only to police non-compliance.

SIRA's Insurer Supervision Model is a risk based approach to manage all insurers. Insurer risk will be assessed under two categories: compliance and performance. Each category is broken further into three components for assessment and benchmarking purposes:

- *Financial management*
- *Claims management*
- *Conduct*

²⁵ Submission 4, Shop, Distributive and Allied Employees' Association, Newcastle and Northern Branch, p 49.

²⁶ Submission 4, Shop, Distributive and Allied Employees' Association, Newcastle and Northern Branch, pp 49-50.

Conduct relates to acceptable insurer behaviour that is to be expected to effectively regulate the workers compensation system. This component includes various risk indicators which directly relate to the experience of the injured worker, such as customer experience surveys, adherence to legislation and looking for continual improvement in implementing best practice standards for injured workers. SIRA will continually assess their risk criteria with changing market needs. SIRA will gather, analyse and report a range of information to inform its assessment of insurer and system performance.

Ministerial advisory council

30. The NSW Business Chamber proposed that the ministerial advisory council for workers compensation be re-established. What is your response to this suggestion?

Appointment of a Ministerial Advisory Council would be a decision for the Minister and Government rather than SIRA.

SIRA has implemented an active program of broad stakeholder engagement and is committed to continue to listen and improve the quality of engagement with stakeholders.

As noted in Question 1, the Better Regulation Division's Stakeholder Engagement Strategy outlines SIRA's approach to engaging with stakeholders. The Strategy outlines SIRA's commitment to using a flexible approach and tailoring the method of engagement according to the issue to be addressed and the stakeholders involved.

ENDS

**Anthony Lean
Chief Executive
State Insurance Regulatory Authority**