Legislative Council Standing Committee on Law and Justice
2018 Review of the Workers Compensation Scheme
Questions taken on notice by Carmel Donnelly on 25 July 2018

QUESTION 1

Mr DAVID SHOEBRIDGE: I will just go through your submission. It deals with the recommendations that were adopted by Government—not just recommendations of this Committee, but recommendations that have been adopted by Government.
Ms DONNELLY: Yes.
Mr DAVID SHOEBRIDGE: On page six of your submission, you deal with recommendation 2, and the description you have there is that "SIRA is working on" it—not implemented, but working on it. That is recommendation 2 about data.
Ms DONNELLY: Yes.
Mr DAVID SHOEBRIDGE: Recommendations 3, 5, 9 and 18, which are about guidelines, the comment is "SIRA is reviewing … and developing"—not implemented, but reviewing and developing. Recommendation 10 is about expediting stakeholder consultation and the comment is "SIRA … will develop"—not even developing, but will develop. Recommendation 11 is about a guidance note and the comment on that is that there are "plans to reform". Recommendation 15, which is about a single notice for both work capacity decisions and liability decisions, has the comment "will develop" again. How is it that not a single one of the recommendations has been implemented? Can you understand the frustration? The comments are "will develop", and not "will announce", "is considering", "will review", "working on". How cannot one of them have been implemented?
Ms DONNELLY: I will acknowledge that your perspective, in terms of there being work in progress, for some of these there is a requirement for some legislative reform. For some of them we are undertaking extensive consultation in order to address them through a claims administration manual.
The Hon. DANIEL MOOKHEY: In addition to the ones that my colleague—
Mr DAVID SHOEBRIDGE: I am sorry, I do not think Ms Donnelly had finished her answer
Ms DONNELLY: That is fine.
Mr DAVID SHOEBRIDGE: I would not want to cut you off if you have any other explanation about how not a single one of them has actually been implemented.
The Hon. TREVOR KHAN: Before you answer that, are you able, on notice, to identify those that require legislative change compared to those that are the subject of some internal work?
Ms DONNELLY: Of consultation? Yes, I would be happy to.

ANSWER:

Implementation of recommendations 10, 11, and 15 require legislative amendment.

Implementation of recommendations 2, 3, 5, 9 and 18 do not require legislative amendment, and have been subject to extensive consultation. A substantial program of work has been undertaken by SIRA to review and streamline existing workers compensation Guidelines, together with the development of a Claims Administration Manual, which will address these recommendations. On 29 March 2018, SIRA

published a discussion paper on the planned Claims Administration Manual and directly engaged with a range of stakeholders through forums and meetings. SIRA received 34 written submissions in response to the discussion paper. SIRA published a summary of the consultation feedback in August 2018 along with the non-confidential submissions.

Further consultation is currently being undertaken, with the amendment Guidelines and the Claims Administration Manual planned to be issued in December 2018.

Additional information about the implementation status of each of the recommendations is provided below.

Recommendation 2: That SIRA and icare collect clearer data regarding the circumstances in which an injured worker returns to work, and that the return to work data specifically identify workers who have returned to work for insignificant periods or have had their benefits terminated for a reason other than return to work.

Does not require legislative amendment – scheduled for completion through inclusion in the 2017/18 Workers Compensation System Performance Report planned for publication in December 2018.

SIRA has improved insurer reporting on return to work to ensure that those workers who have their benefits terminated for other reasons are not reported as returned to work.

SIRA has improved the quality and timeliness of data reported by insurers to SIRA, with a specific focus on providing correctly coded data about return to work. This has resulted in measurable improvements in the timeliness and quality of data.

SIRA's 2016/17 Workers Compensation System Performance Report provides commentary and analysis on performance of the NSW workers compensation system, using the three Return to Work (RTW) methodologies including off benefit measures, at work measurers and survey measures from the national return to work data published by Safe Work Australia.

SIRA has increased funding for the Safe Work Australia return to work survey to secure a larger sample of NSW workers than in previous years, to enable more accurate and informative analysis of the experience of those workers who do and do not return to work – whether it is durable return to work or return to work for brief periods. These enhanced measures will be reported on as part of the 2017/18 workers compensation system performance report.

Also for the 2017/18 Workers Compensation System Performance Report, SIRA will report on analysis of whether workers who returned to work at any time during 2016/17 had returned to receiving workers compensation over the following 12 months. The analysis is expected to identify the proportion of workers returning to work to pre-injury duties and analysis of the proportion of return to work that is sustained for over three months and over 12 months. It is

also expected to include an analysis of the number of attempts to return to work, the movement of workers between work and not working, pre-injury work, new employer work, part-time and full-time work.

Recommendation 3: That SIRA develop a guideline for use by scheme agents which outlines how rehabilitation services should be utilised during the case management process.

Does not require legislative amendment – scheduled for completion as an inclusion in the Claims Administration Manual planned to be issued in December 2018*.*

There has been a significant increase in workplace rehabilitation provider (WRP) spend over the past three years. To understand the reasons for this increase SIRA initiated evaluations of the top 13 workplace rehabilitation providers who earn 75 percent of the workplace rehabilitation spend and deliver services to the highest number of claims. The evaluations were completed in July 2018.

The evaluation included analysis of costs, the insurer's purpose of referral for workplace rehabilitation, and if the provider was delivering insurer case management activities. The findings and draft reports have been provided to the workplace rehabilitation providers. Industry briefings for providers and insurers are planned for September 2018 to clarify their legislative obligations and SIRA expectations.

In addition to the evaluation noted above, a review of the Nationally Consistent Approval Framework for Workplace Rehabilitation Providers is being undertaken by the Heads of Workers Compensation Authorities in partnership with all jurisdictions, which will also inform the development of guidance material as to how rehabilitation services should be utilised. This review is due for completion in the fourth quarter of 2018.

The guidance material as to how rehabilitation services should be utilised will be included in the Claims Administration Manual, planned to be issued in December 2018.

Recommendation 5: That SIRA issue a guidance note explaining how the new Guidelines for claiming workers compensation operate with respect to s60(2A) of the Workers Compensation Act 1987.

Does not require legislative amendment - scheduled for completion as part of the revised Guidelines planned to be issued in December 2018.

When the new 2016 *Guidelines for Claiming Workers Compensation* (GCWC) were implemented, stakeholders were notified that an annual post-implementation review of the GCWC would be conducted in 2017.

The scheduled post-implementation review commenced in July 2017 and included reviewing how the new Guidelines operate with respect to s60(2A) of the *Workers Compensation Act 1987*. The review included a public call for

submissions, an online survey and meetings with stakeholders which commenced in September 2017.

The review concluded in October 2017 and the findings were published in December 2017. The findings from the review informed the broader program of work to review and streamline the existing workers compensation Guidelines, together with the development of a Claims Administration Manual. The revised Guidelines and the Claims Administration Manual are planned to be issued in December 2018.

Recommendation 9: That SIRA amend the Guidelines for claiming workers compensation so that injured workers are provided with any supporting documents relevant to a work capacity decision in real time or at pre-determined stages throughout the life of a claim, rather than only as attachments to a work capacity notice.

Does not require legislative amendment - scheduled for completion as an inclusion in the Claims Administration Manual planned to be issued in December 2018.

In October 2016, SIRA commissioned a report on *Improving worker access to information in the NSW Workers Compensation System (Roshana May, 2017).* The report examined the policy and legal considerations for worker access to records held by insurers and recommended inclusions into a Claims Administration Manual that relate to workers accessing their information, including access to supporting documents relevant to a work capacity decision.

The report was provided to SIRA in May 2017. SIRA undertook analysis of this report, in parallel with the review of the *Guidelines for Claiming Compensation* (as noted in the above response). The analysis further informed the broader program of work to review and streamline the existing workers compensation Guidelines, together with the development of a Claims Administration Manual.

As noted in SIRA's submission, SIRA will include in the Claims Administration Manual a standard of practice relating to workers accessing their information, including access to supporting documents relevant to a work capacity decision. The revised Guidelines and the Claims Administration Manual are planned to be issued in December 2018.

Recommendation 10: That SIRA expedite its stakeholder consultation process regarding the calculation of pre-injury average weekly earnings and develop a regulation on this issue as a matter of priority.

Requires legislative amendment.

The *Workers Compensation Amendment Act 2015* provided for regulations to amend the method by which pre-injury average weekly earnings (PIAWE) is calculated. In February 2016, SIRA undertook public consultation on a proposed regulation and published a submissions summary paper in May 2016.

Analysis following the consultation identified that amending regulations may not meet the required outcomes to simplify the process regarding the calculation of PIAWE and legislative amendment may be required. Therefore, further detailed and targeted consultation was identified as necessary to progress.

In August 2016, SIRA engaged Professor Tania Sourdin, Dean of the University of Newcastle Law School to undertake the detailed and targeted engagement. Professor Sourdin conducted individual consultation with key stakeholders throughout September and November 2016, and convened a roundtable comprising key stakeholders in December 2016.

Professor Sourdin submitted the final draft report to SIRA in March 2017, which identified options for potential legislative amendment. Upon receipt of the report SIRA undertook analysis of the options presented and, consistent with Government policy development processes involving legislative amendment, advice was provided to the Government.

In October 2017, the Government responded to the recommendations of the first review of the workers compensation scheme. This response indicated support of the recommendation regarding simplification of PIAWE.

In November 2017, SIRA published Professor Sourdin's report, after appropriate approvals were obtained.

Between November 2017 and March 2018, the Central Policy Office of the Department of Finance, Services and Innovation undertook a review of the workers compensation dispute resolution system. This review included a public consultation process including calls for submissions. During this review, it was raised that PIAWE was a cause of disputes.

Following this review and advice to Government, on 4 May 2018 the Minister for Finance, Services and Property announced proposed legislative reforms to workers compensation dispute resolution. In the week before this announcement, SIRA was advised in confidence that the Government had decided the announced legislative reforms would also include legislative proposals to simplify PIAWE. In SIRA's submission to the Committee, SIRA had obtained appropriate approvals and was able to advise that the Government had decided the announced legislative reforms would also include legislative proposals to simplify PIAWE.

In August 2018, SIRA reconvened the PIAWE roundtable stakeholder group to consult on the drafting of the proposed legislative amendments. The group agreed to continue to meet to assist in the development and implementation of the supporting regulations and guidelines, subject to legislation amendment.

Recommendation 11: That SIRA issue a guidance note explaining the appropriate operation of s 44BC of the Workers Compensation Act 1987.

Requires legislative amendment.

Section 44BC of the *Workers Compensation Act 1987* defines how the 'stay' operates between each work capacity review stage.

The NSW Government announced proposed reforms to the workers compensation dispute resolution system on 4 May 2018. The proposed reforms will remove Merit and Procedural reviews of Work Capacity Decisions. Work Capacity Decision disputes will be moved to the jurisdiction of the Workers Compensation Commission (WCC).

As section 44BC defines how the 'stay' operates between each work capacity review stage, it is expected that, pending legislation being passed by the Parliament, this provision would change with the change of jurisdiction to the WCC. As noted in SIRA's submission, SIRA will provide appropriate guidance to insurers and other participants regarding the operation of the 'stay' in conjunction with commencement of the proposed reforms.

Recommendation 15: That the NSW Government introduce a single notice for both work capacity decisions and liability decisions made by insurers.

Requires legislative amendment.

The NSW Government announced proposed legislative reforms to the workers compensation dispute resolution system on 4 May 2018.

As advised in the SIRA submission to the Committee, the Government's proposed reforms will include amendments to provide for an insurer to issue a 'single decision notice'. If the proposed amendments are passed by the Parliament, SIRA will work with insurers, lawyers, the Workers Compensation Independent Review Office (WIRO), WCC and unions to design and develop the 'single decision notice' and any supporting Guidelines.

Recommendation 18: That SIRA amend the Guidelines for claiming workers compensation concerning s 38 of the Workers Compensation Act 1987 to set out an objective test for insurers to adhere to when determining the requirements for continuation of weekly payments after the second entitlement.

Does not require legislative amendment - scheduled for completion as an inclusion in the Claims Administration Manual planned to be issued in December 2018.

The Claims Administration Manual will include practice notes with guidance on consistent insurer decision requirements regarding injured workers' entitlements. The Claims Administration Manual is planned to be issued in December 2018.

The NSW Government announced proposed legislative reforms to the workers compensation dispute resolution system on 4 May 2018.

If the proposed legislative amendments are passed by the Parliament, SIRA will provide guidance regarding insurer decision-making under section 38 if required.

QUESTION 2

The Hon. DANIEL MOOKHEY: In addition to the recommendations that my colleague just mentioned, we made another recommendation, No. 22, to which your submission to this review provides no insight as to what SIRA has done. It was recommended that icare and SIRA expedite work on mandatory surveillance guidelines for scheme agents, which set objective standards for when surveillance should be used. If you recall the first review, this Committee made that recommendation after hearing extensive evidence from traumatised workers, particularly those in emergency services and the NSW Police Force about being under surveillance and how that was compounding their trauma. Indeed, at the time, SIRA came and said that it was undertaking that work, and that is why this Committee called for that work to be expedited. I am alarmed that your submission to this review provides no update as to what work has been done in that respect. Can you tell the Committee what SIRA has done in respect to its call for it to expedite the surveillance guidelines for scheme agents?
Ms DONNELLY: We are working on that in the context of the claims administration manual. I will give you some detail on notice about that too.
The Hon. DANIEL MOOKHEY: Have you issued any guidance to scheme agents? Have they been undertaking them? Has SIRA been monitoring their use of surveillance in the past two years?
Ms DONNELLY: I will take that on notice.
The Hon. TREVOR KHAN: As with some other members, we have been on so many committees that our eyes are sort of rolling in our heads. My recollection is that there seemed to be unanimous agreement from virtually everybody who appeared, I thought including SIRA, that this was a problem requiring address.
The Hon. DANIEL MOOKHEY: We were told it was quite urgent address, in my recollection.
The Hon. TREVOR KHAN: Is that your recollection?
Ms DONNELLY: My recollection is, yes, that it is an important matter, absolutely. There are other guidelines from other jurisdictions that bind insurers. Part of our exploration was considering to what degree we need to have additional guidelines. I am happy to take it on notice and give you some more information about that.
The Hon. DANIEL MOOKHEY: Do scheme agents still use surveillance?
Ms DONNELLY: I understand that it has significantly reduced. That is probably a question to ask icare as well.
The Hon. DANIEL MOOKHEY: But you regulate them.
Ms DONNELLY: Yes.
The Hon. DANIEL MOOKHEY: Does icare report to you as to its use of surveillance? Is icare required to report to you as to its use of it?
Ms DONNELLY: I am happy to double-check that. We ask them to report on a large range of measures. My understanding is that they would be reporting it because we are aware that the usage has been reduced.

ANSWER:

Recommendation 22 from the Committee's first review of the workers compensation scheme was for icare and SIRA to expedite work on a mandatory surveillance guideline for scheme agents which sets objective standards for when surveillance should be used. The Government supported this recommendation in principle and noted that *"icare has drafted guidelines for consultation with its key stakeholders. icare notes that while a guideline is useful in setting standards, it is the responsibility of each insurer to specify how surveillance providers operate when undertaking work on their behalf.*

SIRA, in consultation with insurers, will develop a Claims Administration Manual that will apply to all insurers in the Workers Compensation System. The manual will establish clear and consistent expectations of all workers compensation insurers in the management of their claims, disputes and litigation processes and their conduct in dealing with workers to foster a more supportive relationship and environment. SIRA will also include objective standards for the use of surveillance in the manual."

In July 2017, icare published *Surveillance and Desktop Investigation Guidelines for icare Agents* which came into effect on 31 August 2017 and are still applicable. This document provides oversight and control over the use of surveillance and desktop investigation by Scheme Agents of the Workers Compensation Nominal Insurer and Claims Agents of the NSW Self Insurance Corporation, acting on behalf of icare as part of the management of a claim for workers compensation.

These Guidelines provide that prior to undertaking surveillance, Agents must make an application to either the Nominal Insurer or icare Self Insurance Corporation for approval as appropriate. This application includes details such as duration, scope and method of surveillance proposed. icare monitors the use of Surveillance and Desktop Investigations by Agents, and audits claims where surveillance or desktop investigations have been undertaken.

icare provides monthly investigation cost data to SIRA, which SIRA uses as insight into the utilisation of surveillance.

Information received from icare indicates that practices have changed. This is supported by trend analysis which confirms investigation costs across the scheme have decreased by 50 percent from June 2016 to June 2018.

All insurers, including scheme agents, are required to comply with relevant laws governing surveillance, such as the *Workplace Surveillance Act 2005* and the *Surveillance Devices Act 2007* which regulates the installation, use, maintenance and retrieval of listening devices, optical recording devices and tracking devices. All parties within the NSW workers compensation system are also subject to NSW and/or Commonwealth privacy legislation.

Guidance regarding the use of surveillance by insurers will also be included in the Claims Administration Manual, planned to be issued in December 2018.

QUESTION 3

Mr DAVID SHOEBRIDGE: Ms Donnelly, can you understand how it looks to this Committee when a March 2017 report identifies unanimity amongst all stakeholders about redesigning PIAWE, and the invitation to those same stakeholders to come to a meeting to actually implement it, is issued the day before this hearing?
Ms DONNELLY: I certainly can but it is not correct for you to assume that SIRA sat on its hands or not given advice.
Mr DAVID SHOEBRIDGE: This is your opportunity to dissuade me from that objective assessment.
The Hon. LYNDA VOLTZ: Can I ask a different question?
The CHAIR: One member at a time. Mr Shoebridge can finish his question. There is plenty of time.
Mr DAVID SHOEBRIDGE: I am giving you the opportunity now to dissuade me from the conclusion I have come to based upon the material I have put to you.
Ms DONNELLY: I have told you that I received the report, I gave advice to government and it was Cabinet-in-confidence.
The Hon. TREVOR KHAN: You released it in November.
Ms DONNELLY: I released it when I was satisfied that it was no longer Cabinet-in-confidence. You can see that I have given advice to government. You can see that it is a government policy decision.
Mr DAVID SHOEBRIDGE: You released it at the end of last year?
Ms DONNELLY: That is right.
Mr DAVID SHOEBRIDGE: I am assuming the confidential Cabinet process to which it was subject—and I could be wrong—is not what has caused the delay in the last six months, and the email went out yesterday. Again, I give you the opportunity—
Ms DONNELLY: I am in a difficult situation because I am not at liberty—
Mr DAVID SHOEBRIDGE: I am happy for you to take it on notice.
Ms DONNELLY: I will take it on notice but I am not at liberty to talk about Cabinet and government policy development processes.
The CHAIR: I think the question was directed to your role but I am happy for you to take the question on notice if Mr Shoebridge has nothing further.
Mr DAVID SHOEBRIDGE: Obviously it is about her role.

ANSWER:

The *Workers Compensation Amendment Act 2015* provided for regulations to amend the method by which pre-injury average weekly earnings (PIAWE) is calculated. In February 2016, SIRA undertook public consultation on a proposed regulation and published a submissions summary paper in May 2016.

Analysis following the consultation identified that amending regulations may not meet the required outcomes to simplify the process regarding the calculation of PIAWE and legislative amendment may be required. Therefore, further detailed and targeted consultation was identified as necessary to progress.

In August 2016, SIRA engaged Professor Tania Sourdin, Dean of the University of Newcastle Law School to undertake the detailed and targeted engagement.

Professor Sourdin conducted individual consultation with key stakeholders throughout September and November 2016, and convened a roundtable comprising key stakeholders in December 2016.

Professor Sourdin submitted the final draft report to SIRA in March 2017, which identified options for potential legislative amendment. Upon receipt of the report SIRA undertook analysis of the options presented and, consistent with Government policy development processes involving legislative amendment, advice was provided to the Government.

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Following this review and advice to Government, on 4 May 2018 the Minister for Finance, Services and Property announced proposed legislative reforms to workers compensation dispute resolution. In the week before this announcement, SIRA was advised in confidence that the Government had decided the announced legislative reforms would also include legislative proposals to simplify PIAWE. In SIRA's submission to the Committee, SIRA had obtained appropriate approvals and was able to advise that the Government had decided the announced legislative reforms would also include legislative proposals to simplify PIAWE.

In August 2018, SIRA reconvened the PIAWE roundtable stakeholder group to consult on the drafting of the proposed legislative amendments. The group agreed to continue to meet to assist in the development and implementation of the supporting regulations and guidelines, subject to legislation amendment.

QUESTION 4

Mr DAVID SHOEBRIDGE: I have seen a list of approved dispute resolution services decision-makers, including the Medical Assessment Service, et cetera, on your website?
Ms DONNELLY: On our website there is a list, yes.
Mr DAVID SHOEBRIDGE: Some of them are employees of SIRA.
Ms DONNELLY: Yes.
Mr DAVID SHOEBRIDGE: Some of them are solicitors and some of them are barristers. Who determines who gets allocated matters?
Ms DONNELLY: The determination of the matters depends on whether they are the claims assessors or the medical assessors. In terms of claims assessors, the principal claims assessor is the person who is responsible for the general control and direction of the claims assessors and the systems for allocating their work. For the

medical assessors, there is a proper officer who would be involved in that allocation. I am happy to take the question on notice if you would like some more detail.
The Hon. TREVOR KHAN: What is a proper officer?
Ms DONNELLY: It is a statutory office. There are a couple of other statutory offices—the principal claims assessor and the proper officer—who have roles in allocating.
Mr DAVID SHOEBRIDGE: On what basis is a dispute allocated, let us say, for statutory benefits and motor accidents—let us limit it to the new class of statutory benefits under motor accidents? On what basis is that allocated to a SIRA employee, a solicitor or a barrister?
Ms DONNELLY: My understanding is that it would depend on the complexity of the matter and the expertise of the independent decision-maker.
Mr DAVID SHOEBRIDGE: Where do we find out whether it is going to be decided by an employee of your office or an independent contractor of your office?
Ms DONNELLY: I am happy to take the question on notice and give you some information. I certainly acknowledge that under the 99 scheme we have a claims assessor manual that is available. It is a work in progress to have a similar manual that would outline the procedures for the new scheme.

ANSWER:

The Authority allocates matters to its decision-makers in the following way:

i. *Motor Accident Injuries Act 2017* ('2017 Act')

The Dispute Resolution Service arranges for the dispute to be dealt with by an appropriate decision-maker, being a Claims Assessor, Medical Assessor or Merit Reviewer. (see s.7.32(2), s.7.20(3) and 7.12(2))

A claims assessor is, in the exercise of his or her functions, subject to the general control and direction of the Principal Claims Assessor (s7.6) and the Principal Claims Assessor provides guidance about allocation of matters to claims assessors.

The Guidelines at cl 7.163.4 provides that the Dispute Resolution Officer allocates matters to an appropriate decision maker.

For reviews of Merit Review Decisions (s7.15), further Medical Assessments (s7.24) and Medical Review Panels (s7.26), the Proper Officer is to arrange referral of a matter.

ii. *Motor Accident Compensation Act 1999* ('1999 Act')

For Claims Assessments, the Principal Claims Assessor (PCA) is responsible for making arrangements as to the claims assessor who is to assess any particular claim or class of claims that are not exempt from assessment. The PCA shall determine the way in which a matter is to be allocated for assessment.

For Medical Assessments, the Authority is to arrange for the dispute to be referred to one or more medical assessors. When a dispute is considered ready to be allocated for assessment, an officer of Merit Assessment Service shall determine the way in which an assessment is to proceed.

Further Medical Assessment and Medical Review Panels, the Proper Officer is to arrange referral of a matter. When the Proper Officer decides to refer a matter for further assessment or a medical review, the Proper Officer shall determine an appropriate Medical Assessor or Assessors to conduct the further medical assessment or review.

iii. Both the 1999 and 2017 Acts

SIRA appoints a multidisciplinary panel of Decision Makers, with a range of different skills and expertise, to resolve disputes relevant to the specific compensation scheme. Decision Makers come from medical, legal, allied health and expert administrative law decision-making backgrounds and are selected through a robust recruitment process. Selection panels are comprised of former Decision Makers, external recruitment specialists and senior SIRA staff.

In both the 1999 and 2017 Motor Accident schemes, all Decision Makers appointed have statutory independence (refer to s7.6(2) of the 2017 Act, s65 (3) and s105 (2 and 3) of the 1999 Act).

A Decision Maker's decision in respect to any such assessment or review cannot be overruled or interfered with.

For all dispute types in all schemes, allocations are based on the following criteria:

- Decision Maker appointment and delegation to determine the dispute type
- Completion of relevant training including the completion of specific assessment modules for Medical Assessors
- The complexity of the dispute
- Assessor specialty, current industry experience and expertise
- Availability of the Decision Maker
- Location of the Decision Maker and the Claimant
- Conflicts of Interest (insurers/legal representatives)
- Decision Maker workload
- Special circumstances.

Assessment of the above criteria identifies a list of eligible Decision Makers. Disputes are allocated to the next available suitable Decision Maker unless special circumstances require otherwise.

There is workload reporting for each Decision Maker which provides current volume of work and any potential conflicts. These reports are relevant to the allocation of a matter to a Decision Maker. These reports assist in providing a fair range of allocations to Decision Makers, ensuring that workload can be spread as fairly as possible when taking in to account the above outlined criteria.

QUESTION 5

The Hon. DANIEL MOOKHEY: During the last inquiry we had a lot of attention focused on the independent medical examiners [IMEs] and the perceptions of independence from insurer direction. What have you done in that respect?
Ms DONNELLY: That was canvassed in the discussion paper that we were talking about earlier that was issued by—
The Hon. DANIEL MOOKHEY: Did that qualify for any one of the audits that you have undertaken?
Ms DONNELLY: I am not sure. I can take the question on notice, if you like.
The Hon. DANIEL MOOKHEY: Were there any implications at the time that there would be something that would resemble a special focus or special enforcement action task force by SIRA? Did that lead to anything?
Ms DONNELLY: I am sorry, I will have to take that on notice.
The Hon. DANIEL MOOKHEY: Have you adopted any changes to how the insurers have to report to you on this? Have you established any procedures that would allow people—the IMEs themselves—who feel that they were subject to the undue pressure of insurers to produce outcomes that the insurer wanted to come forward? Have any such whistleblower actions or other forms of actions been established by SIRA?
Ms DONNELLY: I am happy to take that on notice as well.

ANSWER:

A range of issues relating to Independent Medical Examiners (IMEs) were raised during the last inquiry, including the role of IMEs, regional access to IMEs, the extent of insurer influence over the content of IME reports, and the independence of IMEs. Several allegations were also made regarding the alleged practice of insurers 'doctor shopping' to obtain favourable IME reports, and deliberate delay by IMEs. Additionally, concerns were raised regarding uncertainty about how complaints about IMEs might be made and responded to, and also how an IMEs might complain about an insurer.

SIRA has investigated and addressed many of these issues. For example, SIRA has amended the Guidelines for claiming workers compensation to limit the number of IME appointments that an insurer can require a worker to attend. SIRA has undertaken extensive education with insurers to ensure they understand that the new Guideline restricts the use of 'doctor shopping'.

Following the findings of the last inquiry, SIRA has implemented a new data collection process to enable more detailed information on all enquires and complaints. including those raised by and about IMEs. SIRA's new data collection process in place since January 2018 has identified that there were 122 enquiries and 31 complaints about IMEs. For the same period, there were nine enquiries made by IMEs and no complaints made by IMEs. IMEs can make complaints about the workers compensation system, including insurer practices, to SIRA on 13 10 50 or via contact@sira.nsw.gov.au.

SIRA is currently reviewing the *WorkCover Guidelines on Independent Medical Examinations and Reports.* The Guidelines will be amended in conjunction with the Claims Administration Manual, planned to be issued in December 2018.

SIRA has implemented a nationally consistent training program for IMEs who are permanent impairment assessors, aimed at achieving consistency in assessment outcomes. SIRA monitors IME activity and costs and is working with the Workers Compensation Commission to identify outlier assessors of permanent impairment.

SIRA will continue to monitor the implementation of icare's medical panel. Key areas of focus include: effectiveness of outcomes for injured workers; efficiency and timeliness of the processes; perceptions and impacts of bias or pressure that may result from an approved panel; and compliance with legislation and Guidelines. During the IME Guideline review process, SIRA will consider if and how the panel concept can be utilised across the workers compensation system.

QUESTION 6

The Hon. TREVOR KHAN: Both Mr Shoebridge and Mr Mookhey asked various questions with regard to the recommendations, which is where we started this hearing off. I asked you to identify the recommendations that required some legislative action. Do you remember that area of the evidence?
Ms DONNELLY: Yes.
The Hon. TREVOR KHAN: With regard to the other recommendations that are not the subject of a requirement for legislative action, will you look at those recommendations and come back to us with some indication as to when this Committee could expect a concluded position with regard to each of those recommendations?
Ms DONNELLY: Of course.

ANSWER:

The below table provides a summary of the implementation status of each of the recommendations that do not require legislative amendment. Further detail is provided in response to Question 1.

Rec. No.	**Regarding**	**Current implementation status (August 2018)**
2	Collection of clearer RTW data	In progress - scheduled for completion as part of the 2017/18 Workers Compensation System Performance Report planned for publication in December 2018.
3	Guidance for use of rehabilitation services	In progress - scheduled for completion as an inclusion in the Claims Administration Manual planned to be issued in December 2018.

5	Guidance on pre-approval (s60(2A))	In progress - scheduled for completion as part of the revised Guidelines planned to be issued in December 2018.
9	Provision of work capacity documents	In progress - scheduled for completion as an inclusion in the Claims Administration Manual planned to be issued in December 2018. .
18	Amend the Guidelines for claiming workers compensation concerning s 38 of the Workers Compensation Act 1987 to set out an objective test for insurers to adhere to when determining the requirements for continuation of weekly payments after the second entitlement.	In progress - scheduled for completion as an inclusion in the Claims Administration Manual planned to be issued in December 2018.

QUESTION 7

The Hon. DANIEL MOOKHEY: Yesterday, did you hear the criticism about SIRA delaying the premium? There was a perception that the interface between icare and SIRA broke down such that the premiums could not be issued and that there were adjustments being made the week before 30 June, which created great uncertainty in the marketplace and created a problem with renewals.
Ms DONNELLY: I did not hear that evidence, I am sorry.
The Hon. TREVOR KHAN: Have you heard that complaint or that concern being raised with regard to delay?
Ms DONNELLY: With regard to workers compensation?
Mr DAVID SHOEBRIDGE: With regard to the pricing of premiums for workers compensation policies—they did not know what the price was.
The Hon. DANIEL MOOKHEY: Late this year is the general summary of it.
Ms DONNELLY: What I can say is that SIRA strengthened the guidelines to require icare to provide that information about premiums and policies to employers much faster than had happened in previous years.
The Hon. DANIEL MOOKHEY: Were any changes made to the premium guidelines in the week prior to the end of financial year this year that you are aware of?
Ms DONNELLY: No. There was a change in which the board decided to allow that there could be an exemption from a cap that is imposed in the amount of increase an employer can experience. We had a discussion and members of the icare board and executive came to the SIRA board to present. We had a discussion after that. There was a small change. I do not believe it would have driven a substantial delay. I would be happy to have a look at what that complaint was and give you an explanation.
The Hon. TREVOR KHAN: I want to deal with a couple of procedural matters. I anticipate there will be some questions on notice.
Ms DONNELLY: Yes.

The Hon. TREVOR KHAN: You have taken questions on notice. Subject to receipt of those would you be happy to appear before the Committee once we have had the opportunity to look at your answers?
Ms DONNELLY: Of course.
The Hon. TREVOR KHAN: I anticipate you might be invited back.
Ms DONNELLY: All right.
The Hon. DANIEL MOOKHEY: In addition to that perhaps you can look at the evidence of the National Insurance Brokers Association.
Ms DONNELLY: Yes.
The CHAIR: The secretariat will provide you with the information on specific issues.
Ms DONNELLY: Yes. Thank you.
Ms DONNELLY: Yes. Thank you.
Mr DAVID SHOEBRIDGE: I have a simple question to get a sense of your knowledge about the environment you are working in. Were you aware of any complaints about the late notice of the actual premium prices?
Ms DONNELLY: I have been aware for some years, going back for several years, of complaints from employers finding out in August, September, October, November what their premium would be. There has been an ongoing problem with that and hence tightening the premium guidelines.
Mr DAVID SHOEBRIDGE: I will be specific. This was a concern about premium pricing at the end of the financial year this year and the brokers were expressing very real concern that none of their clients knew what the cost of the premium would be and they could not tell them because of the delay in premium setting. That was the evidence we had yesterday. Were you aware of that?
The Hon. DANIEL MOOKHEY: They tell us that they are currently advising their clients to continue paying the premiums and "we will tell you as soon as we know".
Ms DONNELLY: I would need to look at that complaint. I am not sure where that would be coming from.
The CHAIR: It is a specific example. We will do you the courtesy of providing you with that example and ask you to come back to us.
Ms DONNELLY: Thank you.

ANSWER:

The *Workers Compensation Market Practice and Premium Guidelines* (MPPGs) require licenced insurers to lodge their next year premium filings to SIRA by 31 March each year. The MPPGs require SIRA to complete an assessment of a licensed insurer`s premium filing within eight weeks of lodgement. This timeframe allows for a minimum six-week period for renewal of policies with a 30 June renewal date.

SIRA published revised MPPGs on 1 March 2018. The revised MPPGs included a requirement for a 30 percent rate cap on employer premiums to address premium volatility.

All licenced insurers, except icare, submitted their 2018/19 premium filing to SIRA by 31 March 2018. icare requested extensions and submitted its premium filing on 9 April 2018. On 14 May 2018, icare submitted a variation to its premium filing. SIRA completed the assessment of the amended icare premium filing on 4 June 2018 – eight weeks from the time of icare's original filing date.

Following publication of the revised MPPGs, receipt of insurer premium filings, and stakeholder feedback, SIRA issued a variation to the 2018 MPPGs on 21 May 2018, in consultation with icare, which included an additional provision for a cap exemption. No insurer resubmitted their premium filing following this variation.

QUESTION 8

Ms DONNELLY: I am certainly aware that having two Acts does create ambiguities. I ask you to point me to the particular issue that you are talking about?
Mr DAVID SHOEBRIDGE: For example, if a worker has had a work capacity determination made and payments have stopped and they then have it reversed, there is a question whether or not back pay can be made. Are you aware of that concern?
Ms DONNELLY: Yes, I am.
Mr DAVID SHOEBRIDGE: Can you tell us about it?
Ms DONNELLY: I do not have notes on that in front of me. I believe there is a matter that is being considered at the moment and we are expecting it will give some clarity of interpretation.
Mr DAVID SHOEBRIDGE: I am happy for you to give us the answer on notice that identifies what the issue is. "Clarity of interpretation" sounds to me like there is a neutral stance from the regulator about which way it should fall. Either the worker is able to get the back pay or the worker is not able to get the back pay. Is it true the regulator is neutral about this?
Ms DONNELLY: No. We would tend to think that the person should—I will take it on notice.
The Hon. TREVOR KHAN: When taking it on notice can you identify whether WIRO, Mr Garling, has made any recommendations to you regarding that matter and, if so, what was that recommendation and when?
Ms DONNELLY: Yes, I am happy to do that.

ANSWER:

Below are responses to the two issues regarding back pay raised by the Workers Compensation Independent Review Office (WIRO) in evidence to the Committee; i.e. back pay for Work Capacity Decisions and back pay for a certain class of workers in the section 39 cohort.

Back pay entitlements – Work Capacity Decisions

The situation discussed is where a worker has had a work capacity determination made whereby their payments have stopped, and they then have this determination reversed.

In SIRA's view, a worker should be provided 'back pay' for whatever period the worker is found to have been entitled to receive weekly payments. This approach is consistent with the decision in *Rawson v Coastal Management Group Pty Ltd [2015] NSWWCCPD* at para 66 and 75-76, available on the Australasian Legal Information Institute site.

An example of a SIRA merit review decision is provided on the SIRA website.

SIRA is not aware of any specific recommendations raised with SIRA by the WIRO regarding its position on back pay following a work capacity decision.

Back pay entitlements - workers affected by section 39

SIRA undertook to provide guidance to insurers and stakeholders of its policy position through publication of insurer guidance, education material and content specific to section 39 on the SIRA website. In relation to re-eligibility to weekly payments after 260 weeks, SIRA published guidance provides that:

> *Where a worker has ceased entitlement to weekly payments as a result of the effect of section 39(1), there may be some very limited circumstances where they may again become eligible to weekly payments.*
>
> *This may occur (for example) where after a worker ceases to receive weekly payments as a result of section 39(1), a worker's degree of permanent impairment is subsequently assessed at more than 20 percent for the first time, or by way of a subsequent assessment for an 'existing recipient'.*
>
> *In such a situation, a worker's entitlement to weekly payments would commence from the date that the worker was first assessed as having permanent impairment of more than 20 percent.*

SIRA convenes monthly meetings inviting the Worker Compensation Independent Review Office (WIRO), Workers Compensation Commission (WCC) and icare to discuss matters relating to section 39. In April 2018, icare advised SIRA that the matter of back pay for certain workers within the section 39 cohort was being raised as a potential issue.

The matter of back pay entitlements was tabled at one of the regular meetings with the group (i.e. SIRA, WIRO, WCC, icare) in May 2018, concluding that further discussion was required.

In June 2018, the WIRO advised SIRA that it had provided funding through ILARS for two matters to be heard in the WCC regarding whether a worker who had become re-entitled to weekly payments after 260 weeks was entitled to 'back pay'.

On 28 June 2018, prior to the Dispute Resolution Steering Committee (chaired by SIRA) on 29 June 2018, the WIRO raised these ambiguities, which the WIRO suggested may possibly require legislative amendment. This issue is currently under consideration by SIRA, noting that the outcomes of the two matters before the WCC (details provided below) may provide the required clarification.

The two matters currently before the WCC address whether a worker has an entitlement to back pay in circumstances where their entitlement to weekly payments ceased as a result of the operation of section 39. One of the matters deals with the circumstances where a worker has not yet reached Maximum Medical Improvement (MMI) and the Medical Assessment Certificate (MAC) issued by the Approved Medical Specialist (AMS) certifies this. Submissions have now been received from both parties (in the week ending 17 August 2018) and the matter is with an Arbitrator for determination.

The second matter deals with the circumstances where a worker's entitlement to weekly payments ceased as a result of the operation of section 39. The matter was scheduled for teleconference before an Arbitrator on 20 August 2018.

QUESTION 9

Mr DAVID SHOEBRIDGE: The next one I will take you to is a worker who suffers a significant psychological injury but had the misfortune of suffering it sometime between 1 July 1987 and 31 December 2001. Even if they are assessed with a whole person impairment assessment, that would on the face of it satisfy the section 39 threshold. There is substantial ambiguity as to whether or not they are able to rely upon that to overcome the section 39 threshold. Are you aware of that issue?
Ms DONNELLY: I am aware of that issue and I am happy to give advice on that. I will take that on notice.
The Hon. TREVOR KHAN: Would you be prepared to indicate whether WIRO, Mr Garling, has given advice to you, SIRA, on that and, if so, when?
Ms DONNELLY: Sure.

ANSWER:

SIRA was advised by icare on 6 June 2018 that there are two cases before the Workers Compensation Commission (WCC) which are considering whether these workers, who had a psychological injury prior to 1 January 2002, are able to be assessed for permanent impairment for the purposes of exemption under section 39(2). The WCC confirmed it was considering the two cases. SIRA is considering this matter and awaiting the WCC determination on these cases.

SIRA records indicate SIRA has not received any specific advice or recommendations from the WIRO in relation to this issue.

QUESTION 10

Mr DAVID SHOEBRIDGE: The other issue I ask you to consider is when a worker has suffered a series of discrete injuries, not one accident with multiple injuries, but an injury in June, an injury in December and an injury in the following year, and the end result of those multiple injuries is that the worker has a whole person impairment that satisfies the section 39 threshold because they are utterly unable to work. There is ambiguity about whether or not they can be accumulated in that fashion to meet the section 39 threshold or whether or not they have to be seen as three separate accidents, none of which meet the threshold. Are you aware of that ambiguity in the system?
Ms DONNELLY: I am quite happy likewise to give you some advice on that.
Mr DAVID SHOEBRIDGE: My first question is whether you are aware of it?
Ms DONNELLY: I am aware of it. I am also aware that some of the people impacted by section 39 have had injuries in other jurisdictions as well—for instance, in motor accidents—and then had another accident in workers compensation and those are a bit more clear-cut.
Mr DAVID SHOEBRIDGE: I am asking about the ones who have had a series of workers compensation injuries because that is a clearer issue. Could you provide us with the advice including dealing with Mr Khan's addendum question on it?
Ms DONNELLY: Yes, of course.

ANSWER:

A worker is generally not able to combine multiple injuries arising out of separate incidents for the purposes of an assessment of permanent impairment, or in order to meet other legislated thresholds for workers compensation benefits. This applies to all workers, not only those within the section 39 cohort.
Where a worker sustains more than one injury arising out of the same incident, then those injuries are to be treated as one injury for the purposes of an assessment of permanent impairment (see section 65(2) of the *Workers Compensation 1987 Act*).

The NSW workers compensation guidelines for the evaluation of permanent impairment issued by SIRA and published in April 2015 set out the requirements for assessing multiple injuries. Section 1.17-1.20 provides instructions for the assessment of multiple injuries. Sections 1.27-1.28 provide instructions for the deduction for pre-existing injuries and conditions that are not related to the compensable injury being assessed.

However, there may be limited circumstances which may permit where a worker suffers the “same injury” (pathology) as a result of several independent incidents or injurious events. This may allow impairment resulting from the “same injury” to be assessed together however the pathology (injury) resulting from each incident must be identical.

Whether or not multiple injuries may be combined requires consideration of the legislation, relevant case law and the individual facts and circumstances of each case. For workers likely to be impacted by section 39, SIRA provided guidance to insurers so that workers had an assessment of permanent impairment to ascertain whether they would receive weekly payments beyond 260 weeks. SIRA recommended that workers seek independent legal advice to understand their rights and the impact of the assessment on entitlements. Impacted workers were also encouraged to contact the WIRO for information regarding legal funding available through Independent Legal Assistance and Review Service (ILARS).

QUESTION 11

Mr DAVID SHOEBRIDGE: I have raised with you three of a series of ambiguities. Why is it that none of them are resolved? Why are workers still facing this extraordinary uncertainty about whether or not they are going to get something as basic as their workers compensation premiums? Why have none of these ambiguities been resolved and why were none of them addressed in your submission to the Committee? They are two very real questions for me: Why have they not been resolved and why were you not telling the Committee about them?
Ms DONNELLY: I have agreed to take on notice information about those particular matters. I said in my opening statement I am happy to take questions and provide additional information.
Mr DAVID SHOEBRIDGE: Do you not think it is your job to not only give us the happy tales and "working on reviewing", "considering", "working towards", but also tell us what is going on? If not you, then who? Do you not have an obligation to tell us what is going on so we can work to fix it? You have not told the Committee what is going on. I think it is a failure of the regulator. What do you say to that?
Ms DONNELLY: What I would say to that is that the submission to the Committee, with the greatest respect, and I understand the perspective you are expressing, is

not the only publicly available information that we produce. We do have scheme performance reports and annual reports in which we highlight significant matters. I am happy to point you to those as well.
Mr DAVID SHOEBRIDGE: In addressing any of the questions I have put to you, or any questions put to you by other Committee members, I give you the opportunity to assist by lifting the veil from our eyes by pointing to those other reports and where they are addressed in those other reports.
Ms DONNELLY: Of course.

ANSWER:
SIRA's submission to the committee was prepared in consideration of the Committee's Terms of Reference for the 2018 review, which outlined the focus of the review as:

- *the feasibility of a consolidated personal injury tribunal for Compulsory Third Party and workers compensation dispute resolution, as per recommendation 16 of the committee's first review of the workers compensation scheme, including where such a tribunal should be located and what legislative changes are required*
- *recommending a preferred model to the NSW Government.*

The submission was prepared in the context of this review being undertaken concurrent with the 2018 review of the Compulsory Third Party (CTP) insurance scheme. The submission provides a high-level update on recommendations made to SIRA following the 2016 Law and Justice Committee first reviews of the workers compensation scheme and the Compulsory Third Party (CTP) insurance scheme, together with an update on the 2017 CTP scheme and workers compensation dispute resolution activities.

Key SIRA reports related to this question are as follows:

- Workers compensation system performance reports, the latest of which is for the 2016/17 year
- Workers compensation statistical bulletins available
- Workers compensation monthly dashboards available.

These reports are available on the workers compensation reports page on the SIRA website and provide information on the performance of the system including effectiveness, efficiency, viability, affordability, customer experience and equity.