Submission No 80

FIRST REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: Australian Federation of Employers and Industries

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AFEI
Australian Federation of Employers & Industries

Australian Federation of Employers and Industries

Submission to the Legislative Council Standing Committee on Law and Justice in relation to the Committee's first review of the workers compensation scheme

October 2016

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AFEI
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The Hon. Shayne Mallard MLC
Chair
Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr. Mallard,

First Review of the Workers Compensation Scheme

Thank you for the opportunity to make this submission to the Committee on Law and Justice.

The Australian Federation of Employers and Industries (AFEI) is an independent peak employers' group - one of the oldest and most respected business advisory organisations in Australia. For over 100 years AFEI has been representing and advising employers and conveying their views to government and the public. As a peak employers' group, AFEI is a major contributor to the formulation of employer policy and is actively involved in all major workplace relations issues affecting Australian businesses.

AFEI's interest in the NSW workers compensation scheme stems from the high cost burden imposed on our members. According to the most recent WorkCover Annual Report (2014/15) over $2 billion in premiums were collected in that year and an accumulated surplus of nearly $4 billion resulted from the operation of the scheme. These figures demonstrate without doubt that NSW employers are paying too much in premiums which blunts their competitive edge and restricts their employment options thereby costing jobs. The NSW average premium rate remains higher than in Victoria and Queensland, two States with which we compete most vigorously for business. The workers compensation system remains complex and confusing and is ridden with risk for employers, all of which adds to the costs of running a business.

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The terms of reference for this first review of the scheme are that, in accordance with section 27 of the State Insurance and Care Governance Act 2015, the Standing Committee on Law and Justice be designated as the Legislative Council committee to supervise the operation of the insurance and compensation schemes established under New South Wales workers compensation legislation.

The definition of supervise includes *"to keep watch over (someone) in the interest of their or others' security"* [1] and we have addressed our submission in this vein, assuming that the Committee is interested in hearing of issues which affect the operations of the scheme.

We have divided our submission into three broad areas: structural, administrative and legal.

Yours sincerely

Garry Brack
Chief Executive

[1] New Oxford Dictionary of English

Structural Issues

Scheme Governance

The *State Insurance and Care Governance Act 2015* abolished the WorkCover Authority and established Insurance and Care NSW (ICNSW) which has since renamed itself "iCare". Also established by this Act is the State Insurance Regulatory Authority (SIRA). The previous responsibility of WorkCover to regulate work, health and safety has been allocated to the Secretary of the Department of Finance, Services and Innovation.

These structural changes are broadly supported. There are, however, issues which need to be dealt with and performance outcomes yet to materialise.

Both SIRA and ICNSW have been constituted with Boards of directors appointed by their respective Ministers. Appointed members of ICNSW are to be persons who, in the opinion of the Minister, together have skills and experience relevant to the administration of State insurance and care schemes.

None of the appointed Board directors appears to have any in-depth experience in managing a ***workers compensation insurance*** company and especially the effective management of claims; nor do any of the appointed directors represent employers who are actually responsible for assets and liabilities of the workers compensation scheme.

This oversight by the bureaucracy in recommending people for appointment as ICNSW directors needs to be addressed as a matter of urgency. A director who represents employers must be appointed, and the ICNSW board needs to be strengthened with members who have experience in managing workers compensation insurance, and particularly claims management.

ICNSW, the nominal insurer, is one of the largest insurers in Australia with over $17 billion in assets under its management in the workers compensation scheme, with more than $2.2 billion in workers compensation income collected in premiums in 2014-15.[2] The scheme is funded not by government, but by NSW employers who are entitled, theoretically, to participate in the distribution of any surplus but are solely responsible for meeting any deficit.[3]

Larger employers pay compulsory levies, not insurance premiums in the conventional sense, to fund both the ICNSW compensation scheme and all employers pay for the costs of SafeWork NSW. Accordingly, premiums are structured to accommodate a wider range of factors than the employer's own workers compensation performance.

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[2] WorkCover Annual Report 2014-15. Unlike the 2013-14 Annual Report, no data was presented on the scheme's funding ratio or return to work rate.

[3] Section 154D (6) The Workers Compensation Act 1987

ICNSW or SIRA websites or their publications do not acknowledge, let alone promote, the fact that employers fund the scheme and SafeWork NSW. Instead a *"customer"* and *"community"* focus is promoted, conveying the notion that this is an insurance scheme which protects business through *"workers"* insurance:

> *It is not only the 276,000 businesses and 3.3 million workers protected by icare Insurance that benefit from a strong and responsive Workers Compensation Insurance Scheme, but also the NSW community in general.*[4]

The scheme is portrayed as a simple and affordable insurance scheme for employers. ICNSW, a monopoly provider in the compulsory scheme for employers, has taken to producing glossy advertisements to promote its services as an insurer. These advertisements ultimately are paid for by employers. So too are the multiplicity of SafeWork NSW operations, including its grants to community and business organisations, academic research (including Sporting Injuries Research) and social justice initiatives such as co-ordinating International Women's Day celebrations and participation in indigenous programs. Employer premiums also fund the activities of the WIRO which include undertaking the Parkes Project, educating lawyers and those in the ILARS in the intricacies of the scheme's dispute resolution processes.

As any experience-rated employer knows, premiums are not insurance against the cost of a claim but a levy system in which the employer will (along with all other employers in the scheme) pay claim costs for the first three years of the claim, plus arbitrary additional loadings for any other scheme shortfalls the nominal insurer thinks should be recouped under the variable premium calculation formula. ICNSW has to collect enough premium to pay for all types of claims costs and fund the scheme's operations and those of SafeWork NSW. The premium calculation formula has inbuilt mechanisms which enable the nominal insurer to alter the weightings of the formula's elements – this is discussed further below.

The original premium levy will be hefty enough, but for experience rated employers (premium greater than $30,000; around 14,000 NSW employers) the formula can go into mathematical overdrive where a worker is off for an extended period or has a costly claim. The formula includes the impact of each claim's cost for three years which is built into the employer's Claims Performance Measure, which is then divided by another measure, the Scheme Performance Measure, to give a Claims Performance Rate. This is then adjusted in accordance with an ICNSW table to produce the employer's Claims Performance Adjustment. Data has not been published about the impact of the Claims Performance Adjustment on experience rated premium payers, which ICNSW has capped at 30% before it will undertake a premium review. Increases up to 30% are regarded as very substantial

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[4] https://www.icare.nsw.gov.au/our-services/workers-insurance

by employers and who consider they have done what is within their ability to *"have a good record of managing worker safety and recovery at work"*:

> *Your claims performance rate (CPR) rewards you with a lower premium if you have a good record of managing worker safety and recovery at work. Your CPR is calculated by comparing your claims performance with other NSW businesses. If your claims performance is better than the Scheme average then your premium will be lower than your average performance premium.*[5]

This assumes employers actually have control over claims costs and return to work, and that all claims result from failure in an employer's safety management system. As is submitted below under the heading *Claims Costs and Premiums*, employers are frequently consigned to the role of a bit player in this process with the worker, nominating treating doctor and claims agent (acting in accordance with iCare directives) being the prime determinants of claims costs and the length of time off work.

Transparency

Since the advent of the 2012 changes, the transparency of much of the scheme's operations has not improved. This is very concerning to AFEI. Members of this committee may be aware of AFEI's previous submissions in 2012 and again in 2014 in which we pointed to the need to remedy this lack of transparency.

The CEO of ICNSW is a Statutory Office and the incumbent is required to enter into a performance agreement with the Board of ICNSW.[6] This performance agreement without monetary amounts must be open to scrutiny by the Standing Committee on Law and Justice which is responsible for supervision of the scheme and to employer representative organisations.

The performance of the CEO against the agreement should be reported on by way of regular Board communiqués. It is noted that, unlike ICNSW, SIRA's Board publishes regular communiqués on its web site, although these provide no information on the scheme's operation or performance.

ICNSW is required to prepare a statement of business intent no later than three months after the commencement of each financial year.[7] These statements must be provided to the Minister and Treasurer and be the subject of serious consultation with employer representatives such as AFEI. A business plan must also be filed with SIRA by 30 September

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[5] *https://www.workcover.nsw.gov.au/insurance/workers-compensation-insurance-for-your-business/who-to-insure/insurance-for-experience-rated-employers*

[6] State Insurance and Care Governance Act 2015 Schedule 2 Section 2 (3).

[7] State Insurance and Care Governance Act 2015 Section 11.

(this filing can be satisfied by providing the same statement of business intent together with a scheme valuation).

The statement of business intent must address:

a) the objectives of ICNSW and its main undertakings,

b) the nature and scope of the activities to be undertaken,

c) the accounting policies to be applied in the financial reports of ICNSW,

d) the performance targets and other measures by which the performance of ICNSW may be judged in relation to its stated objectives,

e) any other matter required by the Minister.[8]

As the statement is likely to deal with issues such as premium collection, claims and injury management matters it is essential that it is publicly available or that employer representative bodies be free to provide it to their members so that employers can assess with some certainty their position relative to any change in the management of workers compensation.

There is still no timely data about workers compensation claims. The last published Statistical Bulletin was for policy year 2013/14. There is no longer published any agent performance data as was once the case and still remains the case in Victoria. There is no information available about contracts with the scheme agents so we can see what they are required to do and the time frames, etc to enable any assessment of performance.

There is nothing published by ICNSW about the costs and efficacy of treatments or actual return to work rates. These are vital determinants of WorkCover Industry Classification (WIC) rates, the Scheme Performance Measure and an employer's Claims Performance Adjustment in a scheme where premiums are said to reflect an employer's performance.

These and similar data are key to understanding and controlling the costs of workers compensation but are not automatically available to employers who fund the scheme nor their representative organisations.

ICNSW or SIRA need to develop systems capable of comprehensively reporting meaningful and timely claims data; ICNSW must publish agent performance statistics. We note that the WIRO is able to regularly report statistics on agent and insurer disputes, we see no reason why ICNSW is unable to report on performance.

The scheme independent actuarial valuation used to be published on the WorkCover web site. This practice has ceased and there is now no way of routinely knowing what the true financial and operational position of the scheme really is. Scheme valuations must be

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[8] Id 11 (2)

published quarterly (at least) so that employers who fund the scheme can assess its performance and track developments as they occur.

The absence of data which tells employers how much the scheme is spending on claims management, medical, rehabilitation, legal and the like can only lead to the conclusion that the removal of these expenses for all employers and especially experience rated premium payers, is a reflection of ill-disciplined expenditure within the scheme on these items. It also suggests a desire to disguise costs which are intended to be recouped via the mathematical black boxes in the premium formula. Data from the Comparative Performance Monitoring Report 2013/14 indicates that at a time while claims numbers are falling, agents' operations, dispute resolution and other administration costs have increased. [9] The reasons for this need to be transparently clear in quarterly published data.

There have been occasions in the past when Government has been falsely confident that they could significantly increase benefits and yet retain an efficient scheme. Within a relatively short timeframe however, scheme performance was seen to deteriorate significantly. An important factor in these downturns was the absence of meaningful and transparent publicly available data on scheme performance.

We believe that it is critical to the success of the scheme that employers are kept informed about scheme operations, costs and premium collection income. The scheme was set up on the basis that employer premiums were meant to fund claims costs and at an appropriate level to cover reasonable risk. Premiums were not meant to enable the scheme to build up large surpluses and presumably continue to run significantly ahead of the break even rate, all the while expanding benefits.

Dispute Resolution

There are many avenues open to an injured worker to resolve disputes. These are internal reviews by an insurer; merit reviews by SIRA; procedural reviews by the Workers Compensation Independent Review Officer and determinations in the Workers Compensation Commission.

There are no such avenues available for an employer which is inequitable, not least because the employers of NSW fund all of the operations of the dispute resolution mechanisms available to workers.

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[9] Safe Work Australia Comparative Performance Monitoring Report 17th Edition pages 30 -31

As we have previously submitted to this Committee:

> *Employers have very limited ability to challenge any aspect of WorkCover's operations. WorkCover confines its investigatory role to matters of premium calculation only (s 170 of the Workers Compensation Act 1987). This entails only a limited investigation of the actual calculation and not the assumptions that were made in the assessment of the claims costs.*
>
> *Similarly, while bearing the onus for providing suitable duties and participating in return to work plans, employers have no control or influence over the agent's management of the claim and the worker's return to work. Nor do they have any avenue of redress to challenge claims acceptance decisions or poorly managed claims. The role of WIRO in resolving employer disputes with agents has been, in our experience, completely ineffectual and unsatisfactory. This is unsurprising given that its statutory function is confined to encouraging "the establishment by insurers and employers of complaint resolution processes for complaints arising under the Workers Compensation Act".[10] Even a cursory glance at the WIRO's website and annual report demonstrates that this aspect of the WIRO's functions is, at best, marginal.[11]*

There needs to be a designated officer with requisite well trained staff in SIRA with the duty and authority to expeditiously resolve problems employers have with agents and ICNSW about the approval and/or administration of claims under the legislation. A Workers Compensation Ombudsman needs to be appointed who is empowered to make binding decisions to resolve employer disputes within the scheme.

While employers have no means of redress, greater litigation within the scheme has continued. The WIRO reports that its budget for ILARS lawyers is now $60 million, having paid out $121 million since its inception. WIRO reports a near universal approval of requests for ILARS (less than 6% rejected). The danger for employers is that the already inflated premium rate will be maintained at an unnecessarily high level to sustain ever increasing legal costs. The 2012 reforms were intended to provide internal administrative review without such attendant legal costs.

In the 2014 First Review of the WorkCover Authority this Committee recommended that the NSW Government consider amending section 44(6) of the *Workers Compensation Act 1987* to allow legal practitioners acting for a worker to be paid or recover fair and reasonable fees for the work undertaken in connection with a review of a work capacity decision of an insurer, subject to analysis of its financial impact. (Recommendation 10). The legislative prohibition on legal practitioners being paid or recovering costs for work capacity decisions was subsequently removed.

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[10] *Workplace Injury Management & Workers Compensation Act 1998* No. 86 s.27

[11] AFEI Further submission to the Review of the Exercise of the Functions of the WorkCover Authority 31 March 2014

The 2015 *Workers Compensation Amendment Act* gives SIRA regulation making powers to:

- Prescribe the type of review for which legal costs can be recovered
- Set maximum costs payable for those legal costs.

While a SIRA Discussion Paper *Regulation of legal costs for work capacity decision reviews* was released for consultation purposes, a decision has not yet been announced. AFEI remains opposed to any extension of opportunities for litigation and increased legal costs within the scheme and have attached our submission to SIRA.

Workers Compensation Regulation 2016

The *Workers Compensation Regulation 2016* remade the 2010 Regulation with some significant changes, one of which was the abandonment of the Gazetted Insurance Premiums Order (IPO) which had been in place since the commencement of the NSW workers compensation scheme in 1987. The IPO has been replaced with the Workers Compensation Market Practice and Premium Guidelines (MPPGs).

The MPPG (reflecting the previous IPO) excluded from an employer's experience premium calculation, claims costs other than:

- weekly compensation payments
- provisional weekly compensation payments
- permanent impairment payments
- death benefit value
- commutation payments
- common law payments.

The MPPG provides that:

7.1.1 The Nominal Insurer must file a premium filing based on the 2015/16 Insurance Premiums Order including the Retro Paid Loss Method Insurance Premiums Order subject to the conditions listed in sections 7.1.2 through 7.1.6.

7.1.2 No variation to the underlying formulae of the rating structure specified in the current 2015/16 Insurance Premiums Order including the Retro Paid Loss Method Insurance Premiums Order will be considered.

7.1.3 The individual tariff rates applicable to each WIC in the current 2015/16 Insurance Premiums Order including the Retro Paid Loss Method Insurance Premiums Order may be varied minimally.

These provisions currently protect employers against the inclusion of additional claims costs in their premium calculations. However, going forward, employers must now work in a premium regime with no certainty as to what will be included in the future cost of claims for premium calculation purposes. The definition in the Regulation permits any cost to be included (other than journey or recess claims) should the nominal insurer so decide with SIRA approval. The premium formula also enables costs to be recouped by transposing the average of those costs for all employers in an industry or across the whole scheme.

Under this regulatory regime employers have been placed in a situation of double jeopardy. Firstly, the nominal insurer can continue to alter what is included in the cost of a claim for premium purposes without explanation, justification or oversight other than from SIRA.

Secondly, the premium calculation formula has inbuilt mechanisms (in effect "black boxes" in the formula) which enable the nominal insurer to alter the weightings of the formula's elements. As there continues to be no transparency in this process employers have no way of knowing how, or even if, the premium formula is doing what the ICNSW claims it does – rewarding "good" performers and penalising those performing poorly. And this is in a substantially monopoly scheme.

Additionally, there is no way of assessing how much premium is being unnecessarily over-collected and being redistributed in the form of additional benefits, rather than premium reductions. The lack of published complete scheme details valuation means there is no information provided as to the differential in the target premium rate, the breakeven premium rate and the collected rate.

This lack of transparency for employers who fund the scheme provides no indication of whether or not the Premium Principles are being met. Further, the true effect of the much proclaimed incentives and discounts to encourage poorly performing employers into improving claims performance remains hidden, as does the extent of cross subsidisation.

If changes to the manner in which premiums are to be calculated are contemplated in the future, such as re-including medical and rehabilitation costs, then these need to be communicated well in advance. It has been ICNSW's practice in the past to ambush employers with delayed premium assessments. For example, last year's premium notifications were in most cases delayed until September and many as late as December. ICNSW also instructed its agents not to provide premium projections to employers, which meant that employers who closed their books on 30 June were unable to include any allowance for the adjustment premiums or make a budget estimate for this year until well after the first quarter.

Administrative Issues

Claims Costs and Premiums

From AFEI members' perspective, most larger employers' premiums increased in 2015/16. We remain unconvinced that the ability to reduce the number of claims, their costs and duration rests solely with employers. The convenient presumption is that every workers compensation claim reflects a WHS failure by the employer. This is embedded in the premium formula for experience rated employers who are subject to the effect of the claims performance rate and adjustment formulas and the three year cost impact of any claims.

We have repeatedly challenged those elements of scheme design which are intended to penalise employers for their claims performance. In no fault schemes, the most tenuous of connections between work and injury is accepted, yet this causal link is fundamental to the legitimacy of any scheme, as is the quality of claims management. We have long been concerned with a scheme which enables the near automatic acceptance of all incapacity or injury as work related and penalises the employer through increased premiums as a consequence of claims management procedures and costs over which they have no control.

Professional standards of investigation and verification of the legitimacy of claims are almost non-existent. ICNSW does not demand proper standards, instead much is made of the reduced investigation costs without any analysis of the deleterious effects on the whole scheme of this comprehensively undisciplined process and inadequately trained and supervised staff. While always part of the compensation landscape, members have reported an increase in claims materialising in performance management situations or where there is an impending redundancy with the 2012 and 2015 scheme reforms.

Further, in reality, there are many claims which arise regardless of WHS standards in the workplace. These include age related deafness and wearing out and psychological injury. Employers have no influence in preventing these types of injury or deterioration or controlling claims costs other than to exclude prospective employees identified with a condition from the workforce.

We believe that consideration should be given to ICNSW supporting certain claims types rather than individual employer support. It is inequitable that an employer should be responsible for a deafness claim which has taken 30 years to develop in several employments, with no account made for non work and age related contributory causes simply because it is the last, ostensibly noisy, employer. It is equally inequitable that degenerative conditions can be regarded as exacerbated by work and result in a claim.

In a properly disciplined scheme, claims in these circumstances would generally not be permissible. After rigorous examination, the small proportion of such claims that would pass a test of genuine work-relatedness with multiple employers, should be scheme funded

as is the case for recess claims. The costs of such claims should be excluded from an individual employer's claims costs. It should be noted that approximately 86 % of NSW employers are not experience rated and all of their claims are scheme funded.

The costs of these types of genuinely work-related claims should be included in the exposure rating process and not form part of experience rating, i.e. they should be incorporated into the industry premium rates. However, the risk here remains that with the almost automatic acceptance of claims and the numerous avenues of worker redress, once benefits are subsequently either denied or reduced, along with the continual expansion of worker benefits (re-education, RTW expenditure, etc), industry premium rates will escalate beyond a sustainable level and as a de facto substitute for Medicare.

Employers are forced to carry the burden in their premiums of not returning injured workers to work but little assistance or information is given to them through the claims management processes, even in situations where weeks or months go by without the nominated treating doctor and employee refusing to agree to a return to work plan.

ICNSW and SIRA determine how claims are managed through the issuance of Guidelines and administration of the Acts and Regulation through the agents. The 2016 Guidelines for Claiming Workers Compensation are an example of how SIRA, together with ICNSW, sets the standards and thus controls the ultimate costs of the scheme. The employers who fund the scheme are not party to and have very little input to the development of how the scheme operates and how claims are accepted.

We understand there has been extensive training of claims agents in the aftermath of the restructuring of WorkCover. We are unaware of any employer input into what that entailed nor any observable change in agent responses to employer concerns, or the general effectiveness of claims management.

Medical Care Providers and RTW

Treating doctors/health professionals, with a prime concern for their patient relationship, are not focussed on workers compensation cases or return to work. From our members' experience, we assume there are thousands of certificates of capacity issued by treating doctors which are incomplete or incorrect. Most of these certificates go through to the keeper with the agents ignoring the legal requirements of S.44(b) of the 1987 Act. These legal provisions require that the medical practitioner issuing the certificate considers activities of daily living when declaring that the worker has no capacity for work.

There is a section of the approved certificate which refers to the worker's capacity to bend, lift and do other activities associated with daily living. Obviously if something can be done at home, even though there is no capacity for normal work duties, there may be something an employer can provide as alternative duties.

Many doctors fail to complete this section and consequently an employer's options to develop a suitable return to work plan. It is then regarded that the employer is the problem in not rehabilitating injured workers.

SIRA and ICNSW must be more assertive with medical practitioners and implement the provisions of S.235(c) of the 1989 Act which states that a person must not make a statement knowing that it is false or misleading in a material particular:

a) in a claim made by the person, or

b) in a medical certificate or other document that relates to a claim, or

c) when furnishing information to any person concerning a claim or likely claim (whether the information is furnished by the person who makes or is entitled to make the claim or not).

Maximum penalty: 500 penalty units ($55,000) or imprisonment for 2 years, or both.

There should be workers compensation accredited practitioners who are specifically trained in the health benefits of work and returning workers there who can certify work capacity. Often it is asking too much of the family doctor to require an objective opinion of the patient's capacity in the face of patient resistance. Even without patient resistance, some doctors are well known for volunteering excessively generous timeframes for convalescence and rehabilitation.

Medical practitioners are the gatekeepers of the scheme and who, some observers believe, aid and abet fraud on the scheme by certifying workers as having no work capacity when quite plainly there is relevant capacity. If an injured worker can drive to the doctor, walk into the surgery, sit for an hour, dress and feed themselves, then they have some capacity.

Agent Management

Employers should know quite specifically what the agents are being asked to do and importantly how they are being remunerated. What are the price points to which they must respond and what are those price points are expected to achieve? For example, if they are not remunerated to talk to employers, or to adequately undertake investigations, these things simply will not be done. Broadly we do not support a centrally managed fund which eliminates competition and effectively removes the possibility of employers being able to shift their business to a different supplier with a reputation for providing better service. There is a strongly held belief by the agents and other workers compensation industry observers whom we talk to, that ICNSW intends to take back all of the operations of the scheme and not contract out any functions to agents. This would exacerbate the current

situation of no actual competition in what is already, in effect, a monopoly centrally managed fund.

It is simply not possible for such a structure to be effective without leadership strategies, staffing training and the political will of the kind recently experience in South Australia. Fundamentally, key players need to be in place and be committed. This is nowhere in sight presently in NSW.

A statutory monopoly is likely to be no more efficient and cost effective than any other monopoly and all the short-comings identified in this submission are only the start of the impediments to acceptable scheme performance.

Legal Issues

Law Making by Decree

In the remake of the 2010 Regulation in 2016 the reality of the non-transparent, unfettered, rule making ability of SIRA and ICNSW was fully exposed. The Governing Legislation and the Regulations are drafted to enable the Regulator to administer the scheme at the operational level with minimum interference and minimum exposure to those who fund the scheme and own its liabilities, i.e. NSW employers. This unfettered ability to change how the laws and regulations operate is not subject to the oversight or control of the Parliament (the Committee on Law and Justice reports to Parliament once every two years) and in some instances may not comply with either the wishes of the Parliament or the law itself.

For instance, on 29 July SIRA published Orders related to fees for Psychology and Counselling Services relying on the provisions of S.61(2) of the 1987 Act for its powers to do so. We have no objection to placing appropriate constraints on payments to these service providers. The difficulty with SIRA issuing such orders lies with S.59 of the Act which defines medical or related treatment. Another example is a letter dated 29 June 2015 from WorkCover to its agents containing a "direction" that when a referral to an Independent Medical Examiner (IME) is to be made in future, an injured worker must be afforded the opportunity to select their own IME.

The right of an employer to refer a worker who has made a claim to an IME is enshrined in Section 119 of the 1998 *Workers Compensation and Injury Management Act*, but was originally contained in the very first *NSW Workmens' Compensation Act of 1910.* Schedule 8 of the 1910 Act provided that: *"Where a workman has given notice of an accident he shall, if so required by the employer, submit himself for an examination by a duly qualified medical practitioner provided and paid by the employer; and if he refuses to submit himself to such*

examination, or in any way obstructs the same, his right to compensation shall be suspended until such examination takes place."

By directing its agents to ignore the provisions of the current Workers Compensation Act thereby overturning an historical precedent that has been the right of an employer for more than 100 years, WorkCover has acted ultra vires and may possibly have given an unlawful direction.

In issuing the direction to its agents, WorkCover seems to have embraced the idea of the worker being given a choice of IME on the basis that it will reduce disputation. This demonstrates a fundamental misunderstanding of the wishes of Parliament when it drafted the Section 119 provision which is for the benefit of the employer to assist them get back to work.

Directives to agents are not public and claims decision making remains opaque. AFEI members continue to report high levels of acceptance of claims even where there is evidence they are not work-related or inadequately investigated. Factual investigations often find that work is not a significant contributing factor but the claim is still approved.

SIRA needs to take a much more assertive role in the regulation of the workers compensation scheme and, in particular, with ICNSW. ICNSW is an insurer responsible for administering claims and collecting premiums in accordance with the provisions of the laws and regulations. It is not a function of an insurer to make policy or change the way that an act or regulation operates; this is the role of Government. One of the principal duties of an insurer is to determine liability for a claim on behalf of the employer; since the introduction of provisional liability the ICNSW has presided over a system whereby agents are encouraged to pay claims. According to ICNSW Executive General Manager, one agent automatically paid claims under $2,000 to encourage a return to work thereby completely bypassing the claims liability decision process.[12] This was cited by the General Manager as a good thing, an example of effective problem resolution.

However it adds greatly to the indiscipline of the scheme and claims management with corners increasingly being cut ostensibly to save money. When it is known that every player wins a prize, there will inevitably be more players and they will be searching for every new strategy where the insurer just pays instead of having rigorous methodologies.

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[12] John Nagle *icare's Perspective 2012 Reforms – Success Or Failure?* WIRO Seminar Sydney 30 September 2016

Worker Protection

Section 247 of the 1987 Act states that an employer who, within 2 years after dismissing an injured worker, employs a person to replace the dismissed worker is guilty of an offence unless the employer first informs the person that the dismissed worker may be entitled under this Part to be reinstated to carry out the work for which the person is to be employed. Maximum penalty: 50 penalty units ($5,500). The provision of the 1987 Act seems to be superfluous in light of the provisions of the Fair Work Act and should be repealed.

Conclusion

Without the benefit of transparency and meaningful data, it is hard to assess the extent to which the NSW workers compensation system is meeting its objectives. The absence of this data gives rise to the likelihood that NSW employers are being overcharged for premiums leading to a considerable surplus. This surplus should be returned to employers by way of lowering premium rates rather than further increasing benefits.

According to ICNSW 83% of claimants reported that their expectations were either met or exceeded.[13] Most claimants have been significantly advantaged since 2012, compared to the previous scheme where awards and statutory rates governed income support benefits.

There is considerable confusion both amongst employers and in the workers compensation industry because of the high numbers of changes being made by the Government, ICNSW, SIRA and the Courts.

We believe that this Committee should advise the Government that any more changes that increase claim numbers, claims costs and increase the potential for dispute risk further destabilisation of the scheme and thereby its viability.

The incidence of injuries across Australia is in decline, which translates into fewer claims and is in the main due to better safety performance by employers. This is certainly the case in NSW although it goes largely unrecognised.

[13] John Nagle op cit

ATTACHMENT