Submission No 2

STATUTORY REVIEW OF THE STATE INSURANCE AND CARE GOVERNANCE ACT 2015

Organisation: Construction, Forestry, Mining and Energy Union (New South Wales Branch)

Date received: 13 October 2017

1. Introduction

The Construction, Forestry, Mining and Energy Union (**CFMEU**) welcomes the opportunity to make submissions to this inquiry. In addition to these submissions, the CFMEU supports the submissions filed by Unions NSW.

The CFMEU represents approximately 16,000 members in the building and construction industry. The industry is characterised by heavy manual work, with workers working long hours, generally six days per week and in some cases far from home or in difficult environments. The safety and wellbeing of our members is our primary concern. The CFMEU is extremely committed to ensuring, where possible, our members are working in safe environments.

A large proportion of our members are workers who come from non-English speaking backgrounds with little or no education beyond the age of 15. A significant proportion of our members have very few transferrable skills and qualifications outside their industry, more often than not with limited literacy skills. Our members often find themselves at the mercy of system and rely on the assistance of a family member and the union in order to navigate the complexity and adversarial nature of workers compensation in NSW.

The CFMEU plays an important role in promoting safety standards throughout the industry and in supporting our membership both on site as well as in the event that they become injured.

In the last 5 years in particular, the CFMEU has made several submissions to this Honourable Committee on behalf of its membership, highlighting the complexity, inefficiency and unfairness inherent in the workers compensation system and the lacklustre performance of the workers compensation agencies and the safety regulator. Unfortunately, despite the outcries from stakeholders and the sensible recommendations of the Honourable Committee in the past, not much has changed in NSW.

In addition to drawing on submissions made to this Committee during the *First Review of the workers compensation scheme* these submissions will address the following:

1. Case management under icare;
2. SIRA's role as regulator;
3. Failure to work cooperatively
4. Transparency
5. SafeWork NSW as WHS regulator.

We ask this Honourable Committee to consider the submissions of key stakeholders which were submitted during the *First Review of the workers compensation scheme* and to draw on some of the conclusions in its report from that review regarding the functions of both icare and SIRA as part of its Review of the *State Insurance and Care Governance Act 2015* (**SICG Act**).

2. Background

On 17 September 2014, the Standing Committee on Law and Justice published its report in its *Review of the exercise of the functions of the WorkCover Authority*.[1] The Committee had received a number of submissions from a range of stakeholders focussed on the conflict of interest in WorkCover's role as both Nominal Insurer and regulator.[2] The submissions also raised concerns about the work health and safety division's combined role as WHS advisor and regulator.[3]

In recognition of the stakeholders' views, the Committee made the following recommendation:

> That the Minister for Finance and Services, in consultation with the WorkCover Independent Review Office and other stakeholders, consider establishing a separate agency or other administrative arrangements to clearly separate the

[1] Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Review into the functions of the WorkCover Authority* (2014).
[2] Ibid 22 [3.6].
[3] Ibid 29 [3.39].

> roles of regulator and nominal insurer in the workers compensation system, and implement that model as soon as possible.[4]

Following the release of the report, the then Chief Executive of Safety, Return to Work and Support, Vivek Bhatia announced an operational separation of the regulatory and commercial functions with the Workers Compensation Division.

On 4 August 2015, the government introduced the *State Insurance Care and Governance Bill 2015* into parliament. The Bill was intended to abolish WorkCover and the Motor Accidents Authority and create three new entities, Insurance and Care NSW, State Insurance Regulatory Authority and SafeWork NSW. In his Second Reading speech, the Minister for Finance Services and Property claimed that:

> The new structure will be far more transparent and accountable and, most importantly, lead to better outcomes for injured workers. The new organisations will become more customer-centric, streamlined and efficient, building economies of scale and focusing on clear objectives.[5]

Injured workers were promised more transparency and more accountability and what they received was much of the same.

3. Case Management under icare

Insurance and Care NSW, known as icare, was created to take on the functions of the Workers Compensation Nominal Insurer, Lifetime Care and Support Authority and the NSW Self-Insurance Corporation. icare was also given responsibility for providing services to the Dust Diseases Authority and the Sporting Injuries Compensation Authority. Section 10 of the SICG Act defines the functions of icare:

> 10 Functions of ICNSW

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[4] ibid 26 [3.23].
[5] New South Wales, *Legislative Assembly Hansard*, 5 August 2015, (Dominic Perrottet).

(1) ICNSW has the following functions:

(a) to act for the Nominal Insurer in accordance with section 154C of the Workers Compensation Act 1987,

(b) to provide services (including staff and facilities) for any relevant authority, or for any other person or body, in relation to any insurance or compensation scheme administered or provided by the relevant authority or that other person or body,

(c) to enter into agreements or arrangements with any person or body for the purposes of providing services of any kind or for the purposes of exercising the functions of the Nominal Insurer,

(d) to monitor the performance of the insurance or compensation schemes in respect of which it provides services,

(e) such other functions as are conferred or imposed on it by or under this or any other Act.

In his second reading speech, the Minister expressed high hopes for this new agency:

> Insurance and Care NSW will deliver workers compensation that is less adversarial. There will be fewer forms and less bureaucracy, and injured workers will have more say in their treatment and return to work pathway.[6]

The experience of injured workers does not reflect the government's expectations of icare. Injured workers find themselves stuck in the same situation they were experiencing prior to the changes. In its submissions to the *First Review of the workers compensation scheme,* the CFMEU noted that injured workers had experienced increased aggression, incompetence and antipathy from insurers since the 2015 reforms and provided a number of examples.[7] A copy of these examples are extracted at Annexure A for the Committee's convenience.

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[6] Ibid.

[7] Construction, Forestry, Mining and Energy Union, Submission No 61 to Legislative Council Standing Committee on Law and Justice, *First review of the workers compensation scheme,* 10 October 2016, 10-18.

Injured workers continue to face hostility and a lack of basic understanding from their case managers, a trend that has intensified since icare announced a change to the funding arrangements. The majority of complaints received from members relate to issues concerning provisional liability.

In August 2017, Paul sought the assistance of the union with a psychological injury after his employer failed to lodge his workers compensation claim. The union helped Paul lodge a workers compensation claim. The insurer chose not to commence provisional liability for Paul and chose not to send a reasonable excuse letter. When Paul contacted his insurer he was told that the legislation did not require the insurer to commence payments. The union advised Paul to request the insurer said the information in writing and in the meantime lodged a query with WIRO on Paul's behalf. The insurer later retracted their comments and back paid Paul for the period of his incapacity.

The insurer sent Will an email detailing their calculation of PIAWE. The union assisted Will in lodging an internal review of the work capacity decision regarding his PIAWE. The insurer refused to conduct an internal review because they claimed the email was not a work capacity decision, despite falling within the definition in the Act. The insurer failed to recalculate the PIAWE despite receiving detailed submissions as to the correct calculation. The matter was only resolved with the intervention of WIRO with the insurer recalculating Will's PIAWE and paying him backpay for the period he was paid the incorrect amount.

In August 2017, Ryan suffered an injury to his back whilst working. His employer arranged to take him to their preferred doctor and he was issued a certificate claiming he was fit for some form of employment. That evening Ryan attended his own GP who certified him as having no capacity. The insurer raised a concern about the conflicting medical evidence for that day only. They refused to commence provisional liability and failed to send a reasonable excuse letter. The union intervened on Ryan's behalf and the insurer was required to commence

provisional liability and back pay Ryan for the period they were informally disputing the claim.

> In May 2017, Tony contacting the union for assistance in lodging a workers compensation claim. The union assisted Tony with completing the forms and lodged them on his behalf. After two weeks on no contact from the insurer, Tony again contacted the union for assistance.. Attempts to contact the insurer were unsuccessful and the union sought the assistance of WIRO who intervened. The insurer ultimately accepted provisional liability and had to back pay Tony.

The government has stated that there will be changes to the service provider deed including provisions allowing for penalties where scheme agents exert undue pressure on general practitioners.[8] There has been no indication that these penalties will also apply where scheme agents exert undue pressure on injured workers. The examples provided to this Committee during the *First Review of the workers compensation scheme,* highlight the need for the service provider deed to protect injured workers as well as treatment providers. The changes proposed do not go far enough.

4. SIRA's Role as Regulator

The State Insurance Regulatory Authority, known as SIRA, was created to take on the role of regulator in NSW. It has responsibility for regulating workers compensation, compulsory third party insurance and home building insurance. Section 24 of the SICG Act defines SIRA functions:

> 24 Functions of SIRA
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> (1) SIRA has such functions as are conferred or imposed on it by or under this or any other Act (including under the workers compensation and motor accidents legislation).
>
> (2) The functions of SIRA also include the following:

[8] Minister for Finance, Services and Property, Government response to Legislative Council Standing Committee on Law and Justice, *First review of the workers compensation scheme,* 27 September 2017, 3.

(a) to collect and analyse information on prudential matters in relation to insurers under the workers compensation and motor accidents legislation,

(b) to encourage and promote the carrying out of sound prudential practices by insurers under that legislation,

(c) to evaluate the effectiveness and carrying out of those practices.

Section 23 of the SICG Act also defines the principal objectives of SIRA:

23 Principal objectives of SIRA

The principal objectives of SIRA in exercising its functions are as follows:

(a) to promote the efficiency and viability of the insurance and compensation schemes established under the workers compensation and motor accidents legislation and the other Acts under which SIRA exercises functions,

(b) to minimise the cost to the community of workplace injuries and injuries arising from motor accidents and to minimise the risks associated with such injuries,

(c) to promote workplace injury prevention, effective injury management and return to work measures and programs,

(d) to ensure that persons injured in the workplace or in motor accidents have access to treatment that will assist with their recovery,

(e) to provide for the effective supervision of claims handling and disputes under the workers compensation and motor accidents legislation,

(f) to promote compliance with the workers compensation and motor accidents legislation.

In his second reading Speech, the Minister described his expectations of SIRA:

SIRA will focus on ensuring that key public policy outcomes are being achieved in relation to service delivery to injured people, affordability, and the effective management and sustainability of the insurance schemes. Consolidating regulatory responsibility for State insurance into one regulator will enable a consistent and robust approach to the monitoring and enforcement of insurance

and compensation legislation in this State.[9]

SIRA has shown an unwillingness to engage with employers when legitimate complaints are raised by injured workers or their representatives. SIRA's focus is primarily on insurers which is evident from their appearance before this Committee during the First Review of the workers compensation scheme.[10] SIRA needs to recognise that employers also have a role to play in the workers compensation system and should ensure they too are regulated accordingly.

In November 2016, Jack suffered a ruptured hamstring and a large haematoma in his right thigh whilst concrete patching on site. In December 2016, Jack had surgery to remove the haematoma and repair the area. The claim was lodged with the insurer without the employer providing the required PIAWE information.

Two days before Christmas, Jack contacted the union because he had not been receiving his weekly benefits. The insurer confirmed that the money had been forwarded to the employer and it appeared that the employer had not passed the money on to Jack. The union also raised concerned about the calculation of Jack's PIAWE and were told that the employer had failed to pass on the PIAWE information so the insurer was working off the applicable Award. Jack had only been with his employer a few weeks and had not received any payslips.

The union and the insurer attempted to get the employer to provide the PIAWE information, payslips, payroll records and/or comparable information. The employer continued to refuse to provide the documentation claiming privacy reasons. The insurer issued the employer a non-compliance letter with no success.

[9] Above n 5.
[10] See Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *First review of the workers compensation scheme* (2017) 2-5 [1.13] – [1.29].

The union contacted SIRA on the customer service line and explained that the employer was being recalcitrant and that the insurer had gone above and beyond to assist in getting the required information. The union representative was told that the insurer would have to continue to pursue the employer, SIRA would liaise with the insurer. When the union questioned why SIRA would not contact the employer they were told it was the insurers responsibility.

The union reported the issue to Compliance team in the hopes of getting assistance. The union was notified that the matter would be referred to the Review Panel. The union received no further information as to whether SIRA would take any action against the employer.

In February 2017, the employer terminated Jack's employment and notified its remaining employees that the company would be changing names. The union notified SIRA that the employer was attempting to phoenix and asked SIRA to take action before the employer had the chance to follow through. In March the company phoenixed. The union is not aware whether any action was taken against the employer for non-compliance and no updates have been received.

The response in this matter was inadequate and the failure of SIRA to intervene allowed the employer to phoenix before any action could be taken against them. It should be noted that the Standing Committee on Law and Justice had recommended that WorkCover NSW take steps to investigate the impact of phoenixing in its *Review of the exercise of the functions of the WorkCover Authority*.

In order to be an 'active' and successful regulator SIRA must be willing to regulate all participants in the workers compensation system and not merely farm that responsibility out to insurers. Where complaints are raised and matters are being investigated, SIRA should notify the persons involved of the progress of the investigation and whether any action will be taken. Complaints should not be sent out into the ether with no report back.

The reality is that most injured workers and unions would rather seek the assistance of WIRO than SIRA. WIRO's interventionist strategy delivers results faster than SIRA. The triage process at SIRA allows for matters to drag out for up to a week whereas WIRO has a tendency to get results within 48 hours of lodging a query with the insurer. The WIRO process is easier for injured workers and results in better outcomes in most areas. While complaints to WIRO do not result in sanctions against insurers, it is not apparent that complaints to SIRA do not result in action against insurers either. At the end of the day, injured workers are more concerned with getting results in a timely manner a process that SIRA cannot guarantee.

Over the last few months, CFMEU members have been experiencing issues with insurers failing to provide provisional liability without issuing a reasonable excuse. Case managers have been telling injured workers that they don't need to commence payments before they make a definitive decision on liability making flippant comments such as "that's what the legislation says" despite that being an entirely incorrect statement. In each case the member has been without payments for a up to a month while they dutifully wait for the IME. The CFMEU has raised these matters with WIRO on behalf of its members and the matter has been resolved within the 48 hours time frame.

The CFMEU's experience is that WIRO is a more effective means of achieving the right outcome for injured workers than progressing the complaint through SIRA. The issue with SIRA is willingness. They are not willing to be a robust regulator.

5. Failure to work cooperatively

The separation of the agencies has the effect of reducing the conflict of interest that was inherent within the WorkCover Authority playing both Nominal Insurer and Regulator however it has spawned a new relationship based issue between the two agencies. It has become apparent that SIRA does not know what icare is doing.

5.1 PIAWE Form

This was evident when icare made the unilateral decision to change the PIAWE form completed by employers.

In September 2016, the CFMEU became aware that a new PIAWE form had come into existence after a member had complained to their insurer about the calculation of their PIAWE and the member was sent a copy of the form to complete. A search of the SIRA website at the time produced no such document and it later became apparent that the form was available from the icare website. The CFMEU raised a query with SIRA as to how the new form came into existence given that injured workers and unions had not be notified of the form. It came to light that SIRA had been sent some drafts of the form but since the form was not required to be authorised no action was taken. Stakeholders were not informed that the form had been changed. SIRA escalated the CFMEU's query to icare who later provided a response to the issues raised by the CFMEU. SIRA chose not to pass that response on to the CFMEU. After following up, icare sent the response to the CFMEU directly.

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

5.2 Section 39

This year marks five years since the introduction of the *Workers Compensation Amendment Act 2012* and marks the first time injured workers will be subject to section 39 of the *Workers Compensation Act 1987* (**the 1987 Act**). Section 39 of the 1987 Act provides that a worker has no entitlement to weekly payments after a period of 260 weeks unless that worker has more than 20% WPI.

In December 2017 alone, approximately 2400 injured workers will lose their entitlement to weekly benefits simply because they will not reach that magic

number, despite still suffering some form of incapacity. The greatest proportion of those being unceremoniously removed from the system are existing recipients whose injuries pre-date the workers compensation amendments and who are dependent on the scheme to survive the harsh reality of being injured. It is understood that the majority of those 2400 will lose their entitlement on or around Boxing Day this year.

The CFMEU is concerned about the psychological impact that this change in particular will have on injured workers who have already suffered at the hands of the workers compensation system. The CFMEU is concerned that SIRA in particular is not adequately prepared to deal with the impact that these changes will have on the vulnerable members of our community.

Over the last 12 months, unions have met with both icare and SIRA to receive updates on the impact of section 39 and to discuss what measures they have in place to help manage and lessen the psychological trauma. The consultation on this matter with SIRA has been scant at best with most of the information coming from icare.

SIRA met with the CFMEU in April to discuss their strategy for transitioning injured workers under section 39 of the 1987 Act. The CFMEU raised concerns about the implementation of some of icare's programs and were told that SIRA would not interfere, a curious response given their role as Regulator. It also became apparent that SIRA did not have a strategy to lessen the emotional impact of losing access to your weekly entitlements on Boxing Day and were unaware that icare was looking at strategies to manage that impact.

While the CFMEU was provided with limited preliminary data at that meeting, SIRA has not been particularly forthcoming since. It is important for SIRA to communicate the results of their data collection so that unions and employers can allocate appropriate resources to assist their members and employees with the transition. It is vitally important to know the profile of the kind of worker likely to be subject to section 39; are they more likely to be white collar or blue

collar? What kind of injuries? What is the age profile? That kind of information can be useful for identifying persons who are at higher risk of suffering psychological trauma.

The unions meet with icare on a regular basis, usually every 4-6 weeks, and regularly receive updates on icare's strategies and programs. Despite repeated requests for data, icare has been unable to provide the necessary data because it apparently belongs to SIRA, but SIRA is not releasing that information either. It has become apparent throughout this process that SIRA has merely left icare to manage the impact of section 39 and has relegated itself to the role of issuing fact sheets and paperwork.

6. Lack of Transparency

Since the split, SIRA has shown itself to be a regulator who claims to consult with stakeholders whilst important conversations and actions take place behind closed doors. There is no transparency in the system despite the Minister's pronouncement that the split would result in more transparency.

6.1 PIAWE Regulation

On 12 August 2015, the government introduced the *Workers Compensation Amendment Act 2015* (assented to on 21 August 2015) which contained a provision allowing for the creation of a regulation in relation to PIAWE, albeit a very limited regulation.

On 24 February 2016, SIRA released the '*Regulation of pre-injury average weekly earnings (PIAWE) – Discussion Paper*' calling for submissions on the highly complex PIAWE system. On 5 April 2016, submissions closed and on 5 May 2016 SIRA published a summary of the submissions.

In December 2016, the CFMEU was invited to a 'workshop' on PIAWE, as one of the only union representatives, to be facilitated by Dr Tania Sourdin. The workshop was attended by stakeholders from all sides, insurers, employers, lawyers and self insurers were all present. A consensus was reached amongst all

stakeholders that a simpler definition of PIAWE was required along the same lines as the ACT legislation or even a return to the pre-2012 provisions. The room was united in its view about PIAWE.

The CFMEU understands that Dr Sourdin completed a report on PIAWE in approximately February 2017 and SIRA and the Minister are considering the report. Stakeholders have not been given the respect of seeing the report or the findings of the report. No summary has been provided even to those who were involved in the selective workshop. This lack of transparency is problematic particularly given the government's response to the recommendations from the *First review of the workers compensation scheme*, where it is claimed that there are competing stakeholders views.

If SIRA and the government are committed to transparency, the report would be released to the public.

6.2 Legal Costs Regulation

On 12 August 2015, the government introduced the *Workers Compensation Amendment Act 2015* (assented to on 21 August 2015) which contained a provision allowing for the creation of a regulation in relation to legal costs for work capacity reviews.

On 29 October 2015, SIRA released the *'Regulation for legal costs for work capacity reviews– Discussion Paper'* calling for submissions. On 26 November submissions closed and in December 2016 SIRA published a summary of the submissions.

From there the process became secretive and continued consultation was very selective. In late July 2016, SIRA provided a copy of a draft regulation to selective stakeholders and prohibited those chosen from discussing the details with anyone else. The regulation was provided to Unions NSW for comment however, they were prohibited from seeking the views of their affiliated unions, those people who would actually use the regulation. Following limited feedback,

a second draft was provided to selective stakeholders who were again sworn to secrecy before it was gazetted.

The processes undertaken in relation to PIAWE and legal costs are devoid of any transparency effectively denying those most likely to use the regulation an opportunity to provide constructive feedback. This way of operating is contrary to the views expressed in the Minister's second reading speech.

6.3 Merit review User guide

The creation of the Merit Review User Guide coincided with SIRA's consolidation of a number of key guidelines. During this process, the WorkCover Work Capacity Guidelines and the Guidelines for Work Capacity Decision Internal Reviews by Insurers and Merit Reviews by the Authority were condensed and inserted into the new *Guidelines for claiming workers compensation* (**Claims Guide**). The section relating to merit review decisions was not included in the new Claims Guide. SIRA conducted a number of meetings regarding the creation of the new Claims Guide and at each meeting the unions requested an update on the merit review user guide and requested to be consulted on the creation of the merit review guide. Unions have significant experience in navigating the work capacity process and have experience with the Merit Review Service, not to call on that expertise was a lost opportunity.

Without consultation, the merit review user guide was created and published. The Merit Review User Guide is not a gazetted guide and it is unclear how and whether injured workers can enforce the guide in the event that the merit review service fails to adhere to its own rules. The Merit Review User Guide is flawed and is not user friendly. The guide appears to be written by lawyers for lawyers.

The CFMEU provided feedback to SIRA about the content of the user guide and questioned why SIRA did not consult on its content despite several offers and requests from the unions.

Nine months after feedback was provided, the CFMEU was finally invited to meet

with the Merit Review Service to discuss the issues raised. The CFMEU has since been notified that the Guide was updated to account for the new online portal and the name will be changed from User Guide since the Merit review Service accepts that the guide is not user friendly.

Had SIRA consulted on the creation of the Merit Review User Guide many of the matters raised would have been resolved prior to publishing the User Guide. Instead, SIRA opted for a feedback approach.

6.4 Review into the release of information

SIRA engaged a consultant to undertake a review into whether insurers should release medical information to the injured worker throughout the life of a claim. The CFMEU understands that a report has been provided to SIRA. Like the PIAWE regulation the report has not be publicly released to stakeholders. There is no indication as to the findings of the report or whether it calls for SIRA to take action.

6.5 Additional Projects

The government's response to the *First review of the workers compensation scheme* hints at a number of projects being conducted by either icare or SIRA. These projects include:

1. Review of workers compensation certificate of capacity – SIRA;
2. Guidelines for stakeholder engagement – icare;
3. Draft surveillance guidelines – icare;
4. Independent Medical Examiners Handbook – icare;
5. Review of the regulatory frameworks governing non-treating health practitioners - SIRA

Unions as representatives for injured workers, and as regular users and advisors within the workers compensation system, have been largely excluded from each of the above projects. Each of these projects go to significant matters which affect injured workers and as such unions as their representatives should be consulted in the creation of these handbooks and guidelines.

The exclusion of unions and the fact that many of these projects only came to light in the government's response to the *First review of the workers compensation scheme* is further evidence of the lack of transparency in the system.

7. SafeWork NSW

As the third agency to emerge from the SICG Act, SafeWork NSW assumed the role of the WHS regulator in NSW. SafeWork NSW describes its key roles as follows:

1. Provide advice on improving health and safety
2. Provide licences and registration for potentially dangerous work
3. Investigate workplace incidents
4. Enforce work health and safety laws.[11]

During the second reading speech, the Minister claimed that under the new regime:

> SafeWork NSW will focus on harm prevention and improving safety culture in New South Wales workplaces. It will also include the establishment of a centre of excellence for work, health and safety in New South Wales. The new structure ill be more transparent and accountable and, most, importantly, lead to better outcome for injured workers.[12]

The government claimed that the separation would lead to a *"focused risk-based regulator for work health and safety in Safe Work NSW."*[13]

The new structure has done little to change the culture within SafeWork. During the *Review into the functions of the WorkCover Authority* participants raised concerns about the conflicting roles within the WHS division. The Committee noted that stakeholders expressed concern that they could not be confident which part they were dealing with, whether it be the regulator or the advisor. The Committee

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[11] Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *First review of the workers compensation scheme* (2017) 7 [1.40].
[12] Above n 5.
[13] New South Wales, *Legislative Council Hansard*, 5 August 2015, (Niall Blair).

noted that the combined role raised concerns about whether WorkCover was satisfactorily fulfilling its role as regulator.[14]

SafeWork NSW appears to value is educational and advisory role more than its regulator role. Since 2015, much time has been spent discussing the organisation's Roadmap through multiple workshops with external facilitators, at the expense of actual regulating.

Union organisers in Northern NSW have expressed concern about the willingness of inspectors to intervene in safety matters. Recently, organisers were dealing with a large employer on the North Coast who had threatened to terminate employees if they reported safety issues to the union. The organisation was attempting to prevent union organisers from exercising their lawful rights under the legislation. In conversation with the inspector, the organisers were told that they were aware of safety issues, the CEO did not believe in safety and there were ongoing issues with the safety at the premises. To the best of the union's knowledge no action has been taken against the company despite the regulator being aware of the poor safety culture and the ongoing safety issues.

In June 2017, CFMEU organisers attended a large worksite after receiving complaints from workers on the site. The organisers immediately noticed a number of safety issues including:

1. workers using ladders to access higher levels while carrying a number of objects;
2. workers using ladders while carrying large pieces of timber;
3. no stretcher access for emergency services to enter or exit the site safely in the event of an accident;

[14] Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Review into the functions of the WorkCover Authority* (2014) 29-32 [3.38] - [3.56]

An inspector attended the site at the request of the union and declined to issue an improvement notice for the safety hazards despite acknowledging the legitimacy of the complaints raised by the union.

The organisers attended the same site over a number of days identifying the same or similar hazardous behaviour.

In June 2017, CFMEU organisers attended a large site following a telephone call reporting a serious safety issue. When the organiser attended the site he noticed a steel frame weighing in excess of 20kg has fallen some distance endangering the safety of everyone in the vicinity. Further investigation showed that a worker had fallen 2-3 metres and was taken to hospital for assessment.

Despite being a dangerous incident, SafeWork NSW did not send an inspector to the site. SafeWork later notified the principal contractor that it would not be investigating the incident and allowed the site to be disturbed

In a time where falls from heights account for a large proportion of workplace fatalities and serious injuries, the unwillingness of SafeWork NSW to conduct any investigation into this matter is troubling. Not only did it involve a worker falling 2-3 metres but it also involved a heavy steel frame falling to the ground from height. It is just further evidence of the regulators failure to regulate.

In November 2014, WorkCover engaged in a "safety blitz" throughout the construction industry following a number of serious incidents regarding crane fires. The flaw in the blitz was that WorkCover inspectors would opt to check all the paperwork was in order rather than engaging in thorough audits of the sites themselves.

The CFMEU is concerned that this paperwork auditing process has become the norm in NSW rather than robust auditing. This lacklustre version of regulation has

done little to improve the safety in NSW. NSW consistently records the most work related fatalities when compared to other states.[15] From 1 January 2017 to 30 June 2017, there have been 21 work related fatalities in NSW[16] compare to 22 in 2016.[17] Fatalities in the construction industry are significantly higher in NSW than in other states.

The failure of SafeWork NSW to fulfil its regulatory functions is best illustrated by its response to the crane safety in NSW.

In the last 12 months, NSW has seen a number of serious crane incidents:

1. In September 2016, three workers were left dangling when the tower crane they were working in North Sydney collapsed. They were left hanging in the air for a number of hours and all suffered serious injuries.
2. In November 2016, a crane collapsed at Barangaroo whilst moving another crane. The incident left a crane dangling precariously above the street.
3. In May 2017, an unstable mobile crane at Manning Base Hospital in Taree, collapsed causing its operator to fall 4 metres. The crane operator suffered a broken leg.
4. In late June 2017, a crane operator was injured after falling onto steel reinforcing in Cronulla;
5. In June 2017, a crane rolled over on the M4 spilling approximately 80 litres of diesel, luckily no one was hurt in the incident;
6. In July 2017, a crane toppled over on to its side while tree lopping in Narooma. Luckily no one was hurt in the incident.
7. In early August 2017, a 30 metre crane toppled into an apartment block at Wolli Creek endangering the residents. Two people were injured as a result and approximately 160 residents were forced to find alternate accommodation.

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[15] Safe Work Australia, *Fatality Statistics*, http://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics.
[16] Safe Work Australia, *Notifiable fatalities June 2017 Monthly Report,* Table 2
[17] Safe Work Australia, *Notifiable fatalities December 2016 Monthly Report*, Table 2

8. In late August 2017, a 220 tonne crane collapsed into Sydney Harbour causing a cable to fly into the iconic face at Luna Park endangering members of the public;
9. In September 2017, a worker suffered several leg injuries after a crane dropped its load on top of him at a site in Ryde.

Over the last 5 years, NSW has been squarely focused on the workers compensation system and the failure of the system to adequately protect and support injured workers. That focus has allowed SafeWork NSW to largely escape any critical assessment resulting in an expansion of its education role at the expense of its regulatory functions. In order to ensure better outcomes for injured workers, the workers compensation regulator and the WHS regulator must both be held to account for their actions or in this case inaction.

ANNEXURE A

John – Case Study 1

John is 30 and a single father who suffered an injury to his lower back. After a successful PIAWE review application John reported increased scrutiny and pressure from his employer and insurer to return to work in his substantive role. John agreed to a trial return to work however the work he was required to perform aggravated his lower back and he struggled to walk as a result. John notified his employer that he was going to see his nominated treating doctor about his increased pain. The employer reported this to the insurer who cancelled John's doctor's appointment without cause. When John contacted the insurer to find out why he was told by his case manager that he couldn't see the doctor inside the period of his certificate and that John was required to provide 24 hours' notice before seeing his doctor and he would not be paid benefits for attending the doctor without permission.

John contacted the union for assistance. When the union rang the insurer, the case manager confirmed the advice that was given to John. The union asked the case manager which section of the Acts or Guidelines he was relying upon and he could not answer. The union pointed the insurer to the Guidelines which specifically stated that visits to the nominated treating doctor were exempt from the pre-approval requirements.

John was then informed by his case manager, that he was not permitted to attend a doctor's appointment without his rehabilitation provider and employer being present. The insurer organised a case conference with the nominated treating doctor with 24 hours' notice and without providing John with written confirmation of the appointment, a copy of the proposed injury management plan or a case conference agenda. The matter was reported to WIRO for assistance and the insurer failed to return WIRO phone calls.

John complained to the union that he felt like the rehabilitation provider, insurer and employer were "ganging up" on him and his doctor and nobody was paying attention to the pain in his back. He was receiving constant text messages from

his employer and emails from his insurer accusing John of doing the wrong thing. John had been trying to email his case manager for information but his case manager did not respond to any correspondence from John. The Union contacted the case manager on John's behalf. During the conversation the case manager admitted he hadn't spoken to John, admitted that he had based his decisions on information provided by the employer only, told John that he was not permitted to seek gainful employment elsewhere whilst still employed by his employer and that the rehabilitation provider was a representative of the employer rather than a representative for the injured worker. Meanwhile, the case manager was refusing to approve a change of rehabilitation provider.

The union complained to the team leader and was given a commitment that the matter would be "looked into." The team leader tried to negotiate an outcome whereby the case manager was retained but a new rehabilitation provider was approved. The union noted that the case manager was providing incorrect information to John and that some of the information was inconsistent with the legislation and guidelines. The union received no further feedback from the team leader. The union escalated the complaint to SIRA who assisted in getting the new rehabilitation provider approved and getting a change in case manager. The process of resolution took approximately 5 weeks from the initial complaint.

Greg - Case Study 2

Greg is a 33 construction worker who suffered a back injury. Due to the intervention of an IMC, Greg's nominated treating doctor certified Greg fit for suitable employment despite Greg being on strong narcotic patches. Greg was unable to drive due to his injury and was forced to catch public transport to site. Greg complained to his doctor that the pain in his back was so severe that he was forced to lie on the floor of the train carriage to get some relief. Greg's doctor would not alter the certificate of capacity because "the insurer's doctor said he had to go to work." During this time the employer notified Greg that there was no suitable employment available on site and he would have to work at the employer's compound. This would have increased Greg's travel time by an hour

and a half. The long travel was already having a negative impact on Greg's back and recovery.

Greg chose to change his nominated treating doctor to someone he believed would have his best interests at heart. The new doctor saw the danger in sending a heavily medicated worker into a high risk workplace. The doctor was concerned about Greg travelling long distances while on narcotics patches. A new certificate of capacity was issued stating Greg had no capacity for work.

The insurer decided to withdraw provisional liability, and consequently weekly benefits, while "investigating" the downgrade in capacity. The workers compensation acts and guidelines do not provide a basis for withdrawing provisional liability once payments have commenced unless the insurer chooses to deny liability. Relevantly there is no option to reasonably excuse payments once they have commenced.

The insurer did not provide any documentation to support the withdrawal of provisional liability and weekly benefits. The insurer did not send a letter announcing its intention rather it relied upon a telephone call to Greg.

The union contacted the insurer on Greg's behalf. The legal officer asked the case manager what part of the Acts or Guidelines the insurer was relying upon to withdraw provisional liability. The insurer put the legal officer on hold for 10 minutes while she looked into it. When the case manager returned she could not provide an answer and stated that a more senior officer would contact the union the following day with an answer. The following day the union received a letter which stated the insurer was exercising its right to take 21 days to determine liability. The union made extensive submissions regarding provisional liability and the fact that the scheme does not allow it to be withdrawn. In the meantime Greg was not receiving any weekly benefits. The insurer failed to respond to the union's email so the matter was referred to WIRO for intervention.

Greg was without weekly benefits for a period of three weeks while the union and WIRO made submissions to the insurer on Greg's behalf. Eventually the insurer agreed to accept the downgrade and back paid Greg for the missing payments.

Sam - Case Study 3

Sam, 56, has managed to find alternate employment following his injuries for which he is paid on a fortnightly basis. Sam dutifully forwards his payslips to his insurer as they are received. Recently the insurer has failed to pass on the full benefit owed to Sam stating that Sam had worked "fulltime" and was not entitled to a benefit for that period. Sam's partner contacted the insurer about the missing payments and reminded the insurer that the payslips provided reflect a fortnight's work. The insurer refused to make the missing payments relying on their misreading of the payslips.

Sam contacted the union who made a complaint to WIRO on Sam's behalf. After three days the insurer agreed to pay the missing payment claiming it was "an oversight." The insurer had only made payment for one of the missing weeks. The union notified WIRO that another week was missing. After another three days the insurer confirmed it would make the missing payment.
Sam has been providing fortnightly payslips for a period of approximately 2 years. There is no excuse for the insurer suddenly reading the payslips as weekly. The issue could have been resolved had the insurer paid attention to the information provided by Sam's partner. Instead the injured worker was forced to rely upon WIRO and the union to rectify a situation that should not have occurred in the first place.

Richard - Case Study 4

Richard asked his employer what would happen to his weekly benefits during the two week Christmas shutdown period and whether he would be paid or need to take annual leave. Richard received a letter from the insurer reducing his weekly benefits on the basis that he was capable of earning a certain amount in

suitable employment. The letter did not purport to be a work capacity decision despite fitting the definition of work capacity decision in s 43 of the 1987 Act. The insurer and employer also advised that Richard would not be permitted to be paid annual leave and weekly benefits over the shutdown period.

The union contacted the insurer and advised that despite not being called a work capacity decision, in practice a work capacity decision had been made and the required notice period had not been met. The insurer denied it had made a work capacity decision and asserted they were just giving effect to the certificate of capacity. The union also advised the insurer that by virtue of s 49 of the 1987 Act, Richard was permitted to be paid weekly benefits and annual leave simultaneously. The insurer disputed that fact.

The union filed an application for internal review of a work capacity decision and made submissions concerning s 49 of the 1987 Act. The insurer responded that no work capacity decision had been made and that it would not be conducting an internal review. It maintained its position on s 49 of the 1987 Act.

The union filed an application for merit review of a work capacity decision and again raised the s 49 arguments. The merit review service conducted a merit review and found that the insurer was required to pay weekly benefits for some of the shutdown period and confirmed the correct interpretation of s 49 being that annual leave and weekly benefits could be paid simultaneously.

Aiden - Case Study 5

Aiden had been trying to contact his case manager to update his telephone number. The insurer then issued a notice stating that they had not been able to get in contact with Aiden and were going to close his file. Aiden contacted the union for advice. The union rang the case manager on Aiden's behalf. The case manager was hostile during the conversation and kept repeating that they did not have authority to speak to the union and would contact Aiden directly. The union reiterated that the case manager would not be able to get hold of Aiden on the number on their file and just wanted to provide the new phone number. The

union was not seeking any information was just trying to update Aiden's details. The case manager then rang Aiden and questioned him for a period of approximately 10 minutes about why he got the union involved.

Brian - Case Study 6

Brian is 55 who injured his right wrist and right shoulder. In September the insurer made a work capacity decision calculating Brian's PIAWE. In October the insurer made another work capacity decision increasing Brian's PIAWE by approximately $15 per week. Brian asked for his PIAWE to be recalculated and asked for the documentation relied upon by the insurer to reach its PIAWE figure. Brian repeated his request for documentation on a monthly basis. Over time Brian noticed a reduction in his weekly benefits and contacted his payroll and insurer to find out what was happening. Brian told his insurer that he believed he was being paid the initial PIAWE figure not the October PIAWE figure. He was told that his PIAWE was being recalculated and the insurer would advise him of the outcome in due course. Brian asked about indexation and was told that after indexation his weekly benefits would decrease.

Due to the insurers continued failure to provide the requested documentation Brian sought assistance from the union. The union identified a number of problems with Brian's payments. The union struggled to get information from the insurer and reported the matter to WIRO for assistance. The insurer asserted that Brian had requested a recalculation of his PIAWE which had resulted in a reduction in his PIAWE calculation. The insurer had not provided a work capacity decision confirming the new calculation and as such the decision to reduce the PIAWE was not valid and the October decision was the current PIAWE decision. The insurer then tried to issue a letter accepting liability and backdated the change in PIAWE to a period 5 months prior to the complaint to WIRO. After further intervention from WIRO the insurer agreed to reimburse Brian in accordance with the previous PIAWE decision.

During this time Brian and the union complained to WIRO about the employer underpaying Brian by approximately $200 a week for a period of approximately 5 weeks. The insurer insisted that the employer had received full reimbursement and it was then up to Brian to recover that underpayment from the employer directly. By the time Brian received this advice his employment had ceased. WIRO asked the insurer to raise the underpayment with the employer directly. After several weeks the insurer agreed to pay the shortfall.

After resolving the two underpayment issues it became apparent that the insurer had failed to apply indexation and after two weeks of waiting Brian was still waiting for his back pay from the insurer. The matter has again been referred to WIRO for assistance in resolving these matters.

Ray - Case Study 7

Ray's son is acting as his father's day to day representative in relation to his workers compensation claim. He is the person who contacts the insurer when information is not provided. Michael is still seeking documentation from the insurer. He has raised concerns about the rehabilitation provider and the fact that the rehabilitation report relied upon by the insurer actually applies to another injured worker. In response to that complaint Michael was told he would need to lodge a formal written complaint before any action can be taken. Due to the complacency and lack of communication from the insurer, Ray's nominated treating doctor suggested referring Ray to a Spanish speaking psychologist for a secondary psychological injury. Before the referral has even occurred the insurer has notified Michael that it will be declined. Michael describes his interactions with the insurer as a full time job which is interfering with his own life.

Ben - Case Study 8

Ben was an adult apprentice with limited English language skills who relied on his partner to make representations on his behalf. After a long period of intensive work Ben suffered an injury to his shoulder and a psychological injury. In declining liability for both injuries the insurer made a finding that Ben had not

been overworked or underpaid despite having no documentation to that effect nor knowledge of the relevant industrial award of industry. Further proof of the insurer's failure to fully investigate the matter, Ben has since been reimbursed his underpayments from his previous employer.

Fred - Case Study 9

Fred was originally injured in 2011. After a graduated return to work he was given permanently modified duties at his employer. Those duties comprised mostly office work but given his experience he was often instructed to work outside of his restrictions in the factory. Fred was worried that if he refused he would be sacked and because he had a workers compensation injury he knew he would struggle to find alternate employment.

His employer increased the frequency in which Fred would be required to work outside of his physical restrictions and eventually Fred suffered a secondary injury to his shoulder. Fred's nominated treating doctor believed that the injury was as a result of the employer's requirement that Fred work outside of his restrictions. The employer seemed to run interference between Fred and the insurer. Fred could not get information from the insurer and he was entirely reliant on the employer to provide him all the information. The employer told Fred he was not allowed to "re-open" his claim because the time frame had expired, despite the doctor stating it was a new injury.

This back and forth through the employer to the insurer lasted for approximately 3 months before the insurer finally granted approval for surgery under the secondary surgery provisions. The matter could have been resolved earlier had the insurer spoken to Fred directly instead of the employer interfering at every step of the process. The employer's interference delayed the process and caused Fred to suffer unnecessary pain as a result.

Tony - Case Study 10

Tony 38 suffered an injury to his back. His employer has an internal workers compensation manager who liaises with the worker and the insurer as a de facto

rehabilitation officer. The workers compensation manager decided that Tony had not suffered a work-related injury and diagnosed Tony with scoliosis despite no medical training, and reported this to the insurer who decided to investigate the claim on that basis.

The union contacted the insurer on Tony's behalf to enquire into the delay for approving an MRI. The case manager admitted to the union that she was taking her cues from the employer and admitted that the insurer was waiting on the employer to tell them whether they could approve the MRI. The nominated treating doctor told the union that he had been contacted by the employers doctor, was told to change a certificate of capacity and withdraw the referral for the MRI. The nominated treating doctor complained that he felt intimidated. When the union raised this issue with the insurer, the union was told that the employer had engaged an IMC and the insurer was relying on the information from the employers IMC.