Submission No 5

STATUTORY REVIEW OF THE STATE INSURANCE AND CARE GOVERNANCE ACT 2015

Organisation: Workers Compensation Independent Review Office

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SUBMISSION BY THE WORKERS COMPENSATION INDEPENDENT REVIEW OFFICER TO THE STANDING COMMITTEE ON LAW AND JUSTICE IN RELATION TO THE STATUTORY REVIEW OF THE STATE INSURANCE AND CARE GOVERNANCE ACT 2015

Dated: 31 October 2017

The Workers Compensation Independent Review Office (WIRO) is pleased to provide a submission in relation to the policy objectives of the Act.

Policy and legislative areas of concern identified by WIRO include:

1. ICNSW has no discretionary authority to pay claims which are not in accordance with the legislation providing no pathway for "less adversarial" outcomes.

2. There has not been a decline in "forms" and "bureaucracy" and further, injured workers have not been provided with "more say" in relation to their return to work.

3. There remains a lack of clarity about the parameters of the roles of SIRA and ICNSW.

4. SIRA is failing to deliver effective one-on-one support and to engage directly with injured workers in areas of case management and work placement.

5.1 There is an absence of broad, current and relevant statistical data published as well as a failure to publish all Merit Review Service (MRS) decisions.

5.2 There is a continuing lack of open and meaningful consultation between SIRA and stakeholders.

6. ICNSW plan to move workers from one scheme agent to another, on a temporary basis, has caused emotional distress to workers.

7. Lack of legislation in relation to the method of handling claims means it has not been possible to improve the experience for participants in the system.

8. SIRA's approach to enforcement of the workers compensation legislation has been far from satisfactory to the financial and emotional detriment of injured workers.

9. SIRA remains both the regulator and the manager of the Merit Review Service. This involves an inherent conflict of interest.

Introduction & background

The Workers Compensation Independent Review Officer ("WIRO") is pleased to provide a submission to the statutory review of the *State Insurance and Care Governance Act 2015* ("Act") conducted pursuant to clause 12 of Schedule 4 of the Act. The terms of reference of the review are:

> *"That a committee of the Legislative Council be designated by resolution of the Legislative Council to review the State Insurance and Care Governance Act 2015 (including the amendments made by this Act) to determine whether the policy objectives of the Act or those amendments remain valid and whether the terms of the Act (or of the Acts so amended) remain appropriate for securing those objectives."*

The Act abolished the WorkCover Authority of NSW and the Motor Accidents Authority and established three new organisations to operate and regulate the state's insurance schemes and to regulate workplace safety.

Insurance and Care NSW ("ICNSW") is the single provider of services for NSW insurance schemes. The State Insurance Regulatory Authority (SIRA) is the independent regulator of NSW Government insurance schemes and Safework NSW is the independent work health and safety regulator.

As a result of those changes WIRO is now the only entity dedicated solely to the oversight of the workers compensation scheme.

The structural separation of these functions addressed the findings and recommendations of the Legislative Council Standing Committee on Law and Justice ("Standing Committee"), following its review of the exercise of the functions of the Work Cover Authority in 2014 ("2014 review") and the calls of stakeholders in the workers compensation scheme.

I have assumed for the purposes of this submission that the relevant policies were as stated in the Second Reading Speech delivered by the Minister for Finance, Services and Property on 5 August 2015.

Policy Objectives

1. Insurance and Care NSW will deliver workers compensation that is less adversarial.

The current workers compensation schemes in NSW are delivered by the Nominal Insurer (currently managed by ICNSW) and around sixty other insurers.

The Nominal Insurer (for which entity ICNSW acts) was established by section154A of the 1987 Act. Section 154CA(3) provides:

> ***"(3) When acting for the Nominal Insurer, ICNSW must exercise its functions so as to ensure the efficient exercise of the functions of the Nominal Insurer and the proper collection of premiums for policies of insurance and the payment of claims in accordance with this Act and the 1998 Act."***

It is important to appreciate that ICNSW is only authorised to pay claims "in accordance with this Act and the 1998 Act". ICNSW has no discretionary authority to pay claims which are not in accordance with the legislation. The statute does not confer any discretion to pay monies otherwise. The Nominal Insurer and its manager from time to time is a creature of statute and has no inherent powers.

There are two parties to each claim – worker and employer. In the event of disagreement as to whether the worker has any entitlement to a benefit there is a pathway for the determination of the matters in dispute.

The decision is made on the balance of probabilities after receiving evidence. That process is adversarial. The 2015 Act made no change to the legislation which affected the determination of disagreements.

The Nominal Insurer, being but one (albeit a major one) of many insurers, has no authority to vary the adversarial nature of the workers compensation scheme.

Any legislative reforms to vary that system would be extensive and would involve transformation to a completely different system.

2. There will be fewer forms and less bureaucracy, and injured workers will have more say in their treatment and return-to-work pathway

2.1 "fewer forms"

I have not observed any reduction in forms. There appears to be more forms than at the time of the introduction of ICNSW and SIRA.

If "forms" was intended to include brochures then there is a suite of new brochures issued by both ICNSW, and SIRA.

I anticipate that once ICNSW completes the introduction of the proposed digital claims management system then digital lodgement will be available. There will not be fewer forms.

2.2 "less bureaucracy"

Prior to the 2015 Act the WorkCover Authority managed the claims handling processes of the Scheme Agents which had reduced at that time from seven to five. It also monitored the processes of the self insurers.

This was carried out on a regular meeting basis with Scheme Agents managing their own process.

That has altered and ICNSW has now established Account Managers who require the Scheme Agents to report in a more detailed manner and also to seek approval for a range of decisions before notifying the workers.

I do not have the details of the numbers of employees now within the workers compensation division of ICNSW so as to compare any change in the staff levels since the 2015 Act.

2.3 "more say in treatment and return to work pathway"

WIRO through both its Solutions Group and its ILARS Group do not review every claim but deal only with claims the subject of complaint or funding.

The claims that WIRO reviews do not include the vast majority where the worker returns to work within seven days (some 75% of all claims).

With respect to those claims which WIRO reviews, either through the Solutions Group or through requests for funding, there does not appear to have been any change in the extent to which workers have a say in their treatment.

3. Separation of functions

A main objective of the Act as described in the Second Reading Speech was to "create a clear statutory and operational separation between the functions of providing government insurance services and the regulation of those services".

WIRO's experience suggests that there remains some uncertainty or lack of clarity about the parameters of the roles of SIRA and ICNSW.

The handling of various issues arising from the operation of section 39 of the *Workers Compensation Act 1987*("1987 Act") provides an example.

There are over 6,000 workers likely to be affected by this legislation by June 2018. Section 39 operates to limit payments of weekly compensation to an aggregate period of 260 weeks unless a worker's injury has resulted in permanent impairment of more than 20 per cent.

A program was implemented by ICNSW to determine whether workers would reach the threshold. Scheme agents wrote to affected workers requesting their attendance at a medical assessment appointment so that their whole person impairment and resulting entitlement to continuation of weekly payments, could be assessed.

Unfortunately, many letters sent by insurers were inaccurate and potentially misleading as they suggested that the only method under which a worker was able to be entitled to continue to receive weekly payments is to attend this assessment. The letters did not advise that the opinion of WPI obtained by the insurer was not binding on the worker or that the worker could obtain their own medical assessment.

Most importantly, workers were not advised that they should obtain independent legal advice. ICNSW was responsive to the serious concerns raised by WIRO about these letters and related section 39 issues but SIRA has played no role with respect to the process for the management of these workers and their rights and entitlements..

One of the roles which SIRA advocates on its website is to provide effective supervision of insurers. I have not observed any action by SIRA at all to deal with ICNSW about the misleading of workers facing the loss of their weekly payments.

This is particularly disturbing given that ICNSW has no authority over self-insurers and specialised insurers.

This has the effect that workers are having their rights interpreted differently and explained to them inconsistently with respect to the impact of section 39.

4. Better outcomes for injured workers

The Second Reading Speech promised that "the new structure will.... lead to better outcomes for injured workers". SIRA specifically would "focus on ensuring that the key policy outcomes are being achieved in relation to service delivery to injured people .....".

I provide the following example which suggests that SIRA is not sufficiently focused on these key objectives.

The Standing Committee's Report No 60 following its *First review of the workers compensation scheme* ("2017 review") made the following recommendation 20:

> ***"That SIRA use the data collected from icare and self and specialised insurers concerning the first cohort of workers affected by the operation of s39 of the Workers Compensation Act 1987 to identify workers in need of intensive case management and work placement, and provide these opportunities to eligible workers before the expiration of weekly benefits."***

In the Government's response to the Report dated 27 September 2017, it is stated in response to recommendation 20:

> ***"SUPPORTED - In December 2016, amendments to existing Vocational Programs that are provided for under section 53 of the Workplace Injury Management and Workers Compensation Act 1998 were made to allow the section 39 cohort to access these programs. These include covering costs of training, workplace modification and work trials. SIRA has provided insurer guides, fact sheets and information sessions to ensure insurers are providing timely and appropriate support to workers through the transition process, including providing access to these and other supports to assist with return to work.***
>
> ***Insurers are required to report to SIRA on the management and support mechanisms in place for workers in need of intensive case management and work placement. SIRA has commenced the provision of reports back to insurers on their performance against a range of requirements, relative to other insurers. Additional insurer guidance and forums will be provided where required."***

WIRO has been providing grants of funding to lawyers to enable them to advise workers on their rights and entitlements as a consequence of receiving a notice under section 39 that their weekly payments are likely to cease.

WIRO has received over 1300 applications for s.39 funding. In only a handful of the grants of funding (where the worker has received notice that weekly payments are likely to cease) has the insurer (generally a self-insurer) offered intensive case management and work placement, and provided these opportunities to the worker before the expiration of weekly benefits.

WIRO considers that the provision of "support" extends beyond "fact sheets" and guidance material – it requires actual communication and individual one-on-one support, proactive engagement with workers, not arm's length observation.

It does appear that, rather than ensuring that insurers provide service delivery to injured workers, the main focus of SIRA's attention is the publication of a variety of guidance material.

There have been no amendments to the legislation which governs the potential outcomes for workers. Insurers are bound by the legislation and may not provide different solutions. There has been no variation in direction in the one significant area where parties are prevented by SIRA from negotiating between degrees of whole person impairment.

The WIRO Hearing Loss project developed a new, simpler and cheaper method for workers to obtain hearing aids and, where entitled, cash compensation without the current costs and delay. Funding was not continued to complete this project.

That was unfortunate given the support from all stakeholders in the hearing loss area.

5. Far more transparent and accountable

The then Minister for Finance & Services, Mr Perrottet stated in the Second Reading Speech that the 2015 Act and the resulting new structure would be "far more transparent and accountable".

Transparency and accountability, together with the related issues of consultation and communication, were topics which received much attention in the 2014 review as stakeholders considered WorkCover's performance was deficient in these areas.

5.1 Transparency

In its 2014 review the Standing Committee recommended that WorkCover include more information in the Annual Report and recommence publishing the Statistical Bulletins which had ceased to be published in 2009.

Bulletins contain statistical data with respect to the number and nature of workplace injuries. The 2010-2012 Bulletins were released in February 2015. The most recent Bulletin published is the 2014-2015 edition, published in August 2017.

The report of the 2014 review recommended that the Annual Report include statistical information with respect to such matters as claims processes, injury management and return to work. In the Standing Committee's report on the 2017 review it was noted that SIRA's first Annual Report for 2015-2016 contained some mention of claims processes, injury management and return to work rates but there was an absence of statistical reporting on these issues. Instead SIRA had included some statistical information in the NSW workers compensation system inaugural performance report 2014-2015.This was published in November 2016.

I agree with the views of other stakeholders that the sharing of this statistical information improves the likelihood that scheme problems which need addressing will be identified as soon as possible. It also enables those making and implementing workers compensation policies to be held accountable for the impact on all stakeholders.

It is important that the data is published regularly but also promptly. The current publication timetable for the Statistical Bulletin is seeing data for a particular financial year published two years later, which significantly reduces its usefulness.

With respect to return to work data I note that SIRA in its above mentioned inaugural report records this as the primary measure of the effectiveness of a workers compensation scheme.

The 2017 review heard evidence from a number of stakeholders with respect to deficiencies in the measurement of return to work rates.

The Standing Committee made a recommendation (Recommendation 2) that SIRA and ICNSW collect clearer data regarding the circumstances in which an injured worker returns to work and maintain statistics in relation to that worker and that the data identifiy workers who have returned to work for insignificant periods.

The Government in its response to the report has supported this recommendation and advised that SIRA and ICNSW will change the methodology to "provide more consistent and complete analysis and reporting of return to work outcomes". WIRO considers that it is very important that this data is collected, collated and reported regularly and promptly.

Finally on the issue of transparency I observe that the SIRA Merit Review Service (MRS) has only published what they describe as "notable" merit review decisions. However there have only been 18 decisions published in total and only three to date in 2017.

Publication of all merit review decisions would provide a useful resource for workers, lawyers and insurers when considering the content of a work capacity decision. WIRO has commenced providing redacted merit review decisions on its website.

I see this as important because insurers only receive decisions from the MRS which relate to work capacity decisions which that insurer has made. A wider publication will enable the insurers to be better informed as to the views of the MRS.

5.2 Consultation

The 2014 review report recommended the development of an engagement plan to address the widespread stakeholder dissatisfaction about lack of consultation.

Minister Perrottet responded to this recommendation by advising that WorkCover would in 2015 action "developing and then publishing an engagement plan in consultation with all stakeholders".

WIRO met with consultants Newgate Consulting, engaged by the regulator to consult with stakeholders on the regulator's consultation model, and made recommendations for improvement of the model.

Without further discussion the Better Regulation Division published the document " Better Regulation Stakeholder Engagement Strategy" in June 2016. It includes the engagement principles that will inform consultation which in turn include "aiming to engage early in the process to enable a meaningful contribution" and "reporting back on the outcomes of engagement processes and reasons for our decisions".

Notwithstanding this publication WIRO has not noticed an improvement in meaningful consultation and stakeholder engagement. For example, WIRO was not consulted with respect to formulation of a strategy for responding to section 39 issues. We were certainly not consulted in advance about the contents of the important letters to be sent to affected workers, despite WIRO's legal expertise in workers compensation.

Another example relates to the consultation about the development of a new Regulation designed to address the complexities surrounding the calculation methodology used to determine a workers pre-injury average weekly earnings. It was a recommendation of the 2017 review that SIRA expedite its consultation process on this issue.

Submissions closed in April 2016 with a "workshop" meeting in December 2016.There was consensus reached amongst stakeholders that a simpler definition of PIAWE was required, along the lines of the ACT legislation or the pre-2012 provisions.

I note that WIRO's Parkes Project Advisory Committee had also reached unanimous consensus in relation to a Statement of Principles which included various principles that related to weekly payments and the calculation of PIAWE.

The SIRA website records the consultation with respect to PIAWE as completed but there has been no report on the outcome of the consultation (in breach of the Engagement Strategy) and certainly no draft Regulation has been released.

I am of the view that this issue, which is vital for a quick and efficient determination of a worker's entitlement to weekly payments, requires urgent action.

WIRO submits that the consultation surrounding the introduction of a regulation with respect to recovery of legal costs in reviews of work capacity decisions fell short of the transparency heralded in the Second Reading Speech. WIRO provided a submission during the consultation period between October and November 2015 and SIRA then published a summary of the submissions. In the months that followed, the consultation was selective and WIRO was not consulted with respect to the draft Regulation. As WIRO operates the Independent Legal Assistance and Review Service (ILARS) and has obvious expertise and experience with respect to legal costs issues I would expect to have provided a useful resource.

Finally we note that the Government's response to the 2017 review report mentions a number of initiatives and publications being developed by SIRA and ICNSW. These include development of an Independent Medical Examiners (IME) Handbook for use by scheme agents, surveillance guidelines and a review of the regulatory frameworks governing non-treating health practitioners. WIRO has not been consulted about these.

in the one significant area where parties re prevented by SIRA direction from negotiating between degrees of whole person impairment there has been no variation in that direction.

6. The new organisations will be more customer-centric

WIRO has not observed any change in the behaviour of insurers. The present transition within ICNSW to move workers from one scheme agent to another on a temporary basis is fraught with difficulty and has caused emotional distress to many workers. The WIRO Solutions Group has received more telephone complaints from injured workers about the impact of this transition on the provision of their benefits.

7. This bill will make it easier for participants in the system.

With no change to the method of handling claims in the legislation it has not been possible to make it any different for participants in the system.

8. Enforcement of legislation

The Second Reading Speech recorded that "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".

I consider that SIRA's approach to enforcement of the workers compensation legislation has been far from satisfactory.

WIRO has received a significant number of claims from injured workers where insurers have failed to commence weekly payments within seven days of initial notification of injury as required by section 267 of the 1998 Act. The penalty for failing to comply is a fine of up to 50 penalty units.

An insurer is released from the obligation to commence payments within seven days if they have a reasonable excuse, which must be notified to the worker within seven days of notification – section 268 of the 1998 Act.

Similarly, the penalty for lack of this notification is up to 50 penalty units. WIRO sees many instances where insurers have failed to comply with this requirement.

There have also been a number of breaches by insurers of section 54 of the 1987 Act which provides for notice before termination or reduction of payments of weekly compensation and attract a financial penalty for non-compliance.

WIRO understands that the financial penalties provided in the legislation are not enforced by SIRA and do not form part of its "insurer supervision model", despite numerous complaints and reports from injured workers, often with respect to repeat errors.

If insurers were met with penalties for errors we believe there would be fewer repetitive breaches of legislation.

Finally it is our experience that SIRA has not taken any action over the failure or refusal of certain medical practitioners to comply with the terms of the Workplace injury Management and Workers Compensation (Medical Examinations and Reports) Order 2017.

This Order regulates the basis upon which independent medical examination reports are provided and the maximum fees to be charged.

As WIRO is not able to reimburse the lawyer who has paid for the report in excess of the scheduled fee any additional cost must be met by the injured worker.

9. Conflicts of interest

One of the central issues examined by the 2014 review which led to formulation of the 2015 Act was the conflicts of interest that arose from the multiple roles carried out by the former WorkCover in the regulation, implementation and enforcement of the scheme. One of the major objectives of the Act was to address conflicts of interest and so any current or remaining conflicts should be relevant to this review.

There is one glaring anomaly in the structural separation described by the Minister. SIRA remains both the regulator and the manager of the Merit Review Service. This involves an inherent conflict of interest.

Section 106 of the *Workplace Injury Management and Workers Compensation Act 1998* ("1998 Act") is in the following terms:

> ***"106 Authority may intervene in proceedings***
> ***(cf former s 107A)***
> ***(1) The Authority has a right to be heard in any proceedings before the Commission.***
> ***(2) The Authority may, for that purpose, be represented by a legal practitioner or a member of staff of the Authority or by any other person.***
> ***(3) In any such proceedings the Authority may apply for an order for which any party may apply in those proceedings."***

In addition to the power conferred by section 106, SIRA, as the regulator of the scheme, has an obligation to assist courts and tribunals (more specifically the Supreme Court of NSW and the Workers Compensation Commission, as currently constituted) whenever novel or complex questions of law arise for interpretation for the first time. This is magnified in cases where no contradictor appears because workers are at peril of adverse costs orders in the Supreme Court and the Court of Appeal.

The New South Wales Court of Appeal has criticised the former WorkCover Authority for failing to appear as amicus curiae in just such circumstances. In *Ballantyne v WorkCover Authority of NSW* [2007] NSWCA 239 the former Uninsured Liability and Indemnity Scheme (ULIS) administered by WorkCover was a defendant in Court of Appeal proceedings. A question arose as to the correctness of some former decisions made by the Court, some of which were in conflict. The Authority as the regulator refrained from intervention, drawing the following highlighted comments from the Court [emphasis added]:

> "***14 That said, I agree with the comments of Ipp and Basten JJA in respect of the correctness of Mackley, which I consider to be wrong in principle and which failed to follow existing authority in this Court. I consider that the position taken by the WorkCover Authority in failing to challenge the decision to be unsatisfactory. The result, as I see it, is that this case has been decided on a wrong basis. If this Court had been able to determine the matter in accordance with the previous decisions of the***

Court and by the application of a correct construction of s 145, then I am of the opinion that the appeal should have been dismissed. In this regard, I would adopt as correct the reasoning set out by Basten JA at [78] of his reasons. [per Beazley,JA]"

"The Authority's submission that no error in point of law has been demonstrated in the decision of the Commission under appeal has been upheld: nevertheless, it is surprising that a statutory authority should eschew an opportunity to clarify matters of doubt which caused difficulty for the Commission in the case under appeal and which must cause difficulty for employers, and workers, and possibly insurers and the Authority, in the administration of legislation having social and financial significance for every accident occurring in the course of employment, where the accident occurs within the State. [per Basten, JA]"

More recently the Supreme Court has criticised the lack of appearance by a "contradictor" in judicial review proceedings following both merit review by SIRA and procedural review by WIRO. In *The Trustees of the Sisters of Nazareth v Simpson* [2015] NSWSC 1730 there was no appearance for the injured worker in proceedings brought by the Insurer seeking to challenge the outcome of a procedural review. At paragraph 33 Davies,J made the following remarks:

"33. Unfortunately, all of the Defendants including the injured worker filed Submitting Appearances. Accordingly, there was no contradictor in respect of the submissions made by the Plaintiff. This was especially unfortunate because this appears to be the first time that the provisions governing a review such as that made by the Independent Reviewer have been reviewed in this Court."

WIRO sought intervention in this matter by the Authority, contacting the then Executive Director of Insurance on several occasions. The eventual response was that the Authority could see no reason for intervention.

There have been several cases involving judicial review of merit reviews, including *CSR Ltd v Busbridge* [2015] NSWSC 1268, *Hallman v The National Mutual Life Association of Australia Ltd* [2017] NSWSC 151 and *Bhusal v Catholic Health Care* [2017] NSWSC 838. The latter two cases also involved judicial review of a procedural review performed by WIRO.

In cases involving judicial review of a merit review or both a merit review and a procedural review it is submitted that the intervention of SIRA is required for the reasons set out above by both the Court of Appeal and his Honour Davies,J of the Supreme Court.

The placing of the Merit Review Service within SIRA makes it impossible for SIRA to intervene in relevant cases without seeming to have an interest in protecting its own decision-making process from criticism.

The reluctance of SIRA to intervene in judicial review or appeal matters involving merit reviews might be contrasted with the seeming alacrity with which it and the former WorkCover have intervened in other cases.

Since the criticism from the Court of Appeal in 2007, the regulator has intervened in many cases decided by the Workers Compensation Commission, the Supreme Court, the Court of Appeal and even the High Court of Australia, including but by no means limited to: *Fairfield City Council v Brear & Ors* [2010] NSWSC 480, *Energy Australia v Butler* [2010] NSWSC 487, *QANTAS Airways Ltd v Strong* [2011] NSWWCCPD 40, *Woods v L & R Heritage Roof Restoration Pty Ltd* [2012] NSWWCCPD 12, *Lennon v TNT Australia Pty Ltd* [2012] NSWWCCPD 18, *Di Matteo v RDM Ceramics Pty Ltd* [2013] NSWWCCPD 27, ADCO *Constructions Pty Ltd v Goudappel* [2014] HCA 18 and current litigation in the matter of *Hunter Quarries Pty Ltd v Alexander Mexon as Administrator of the Estate of Ryan Messenger & Anor* (Supreme Court of NSW - 2017/00153929).

31 October 2017

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