Submission No 11

STATUTORY REVIEW OF THE STATE INSURANCE AND CARE GOVERNANCE ACT 2015

Organisation: NSW Business Chamber

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Committee Chair
Standing Committee on Law and Justice
By email: lawandjustice@parliament.nsw.gov.au

Statutory review of the *State Insurance and Care Governance Act 2015*

The NSW Business Chamber (the Chamber) welcomes the opportunity to provide a submission to the Statutory Review of the *State Insurance and Care Governance Act 2015*.

The Chamber is one of Australia's largest business support groups, with a direct membership of more than 20,000 businesses, providing services to over 30,000 businesses each year. Tracing its heritage back to the Sydney Chamber of Commerce, established in 1825, the Chamber works with thousands of businesses ranging in size from owner operators to large corporations, and spanning all industry sectors from product-based manufacturers to service provider enterprises.

The Chamber is a leading business solutions provider and advocacy group with strengths in workplace management, work health and safety, industrial relations, human resources, international trade and business performance consulting.

Operating throughout a network of offices in metropolitan and regional NSW, the Chamber represents the needs of business at a local, regional, state and federal level, advocating on behalf of its members to create a better environment for industry.

The Chamber strongly supported the reforms enacted in *the Workers Compensation Act 2012*, believing they were necessary to address a number of problems with the scheme and to ensure that the scheme was focussed on facilitating the return of injured workers back into the workplace.

At the time, the Chamber was of the view that more needed to be done at a system level to ensure that there is a free and regular exchange of information on scheme performance, that employers are able to better understand their premium notices and that service provision by the insurer is improved to assist employers through the process of managing a workplace injury.

After having recently conducted a survey of members in relation to these and other topics, the Chamber can confirm that its view has not changed.

PART A: WHETHER THE POLICY OBJECTIVES OF THE ACT OR THOSE AMENDMENTS REMAIN VALID

The policy objectives (as described in the second reading speeches delivered to the Legislative Assembly on 5th August 2015 and the Legislative Council on 12th August 2015) that underpin the decision to conduct a structural separation of the regulatory and insurance activities formerly conducted by the WorkCover Authority of New South Wales are said to make the insurance structures in New South Wales easier to understand; address the findings of the statutory review of workers compensation in New South Wales of the Legislative Council Standing Committee on Law and Justice; and respond to the calls of stakeholders in the system, by creating a new structure that "*will be far more transparent and accountable and most importantly, lead to better outcomes for injured workers*."

In addition, it is stated that the "*new organisations will be more customer-centric, streamlined and efficient, building economies of scale and focusing on clear objectives*" and the bill "*will create a clear statutory and operational separation between the functions of providing government insurance services and the regulation of those services*."

Those three agencies are Insurance and Care NSW ("ICNSW"), a single provider of services for New South wales insurance and care schemes; the State Insurance Regulatory Authority ("SIRA"), a new, independent regulator of New South Wales government insurance schemes and SafeWork NSW, which will be an independent work, health and safety regulator.

The focus of each of those agencies is described as follows:

- ICNSW – to be "*a centre of excellence for long-term care needs, combining claim cohorts with similar care needs to focus on return to work and quality of life outcomes*".
- SIRA – to ensure "*that key public policy outcomes are being achieved in relation to service delivery to injured people, affordability, and the effective management an sustainability of the insurance schemes*".
- SafeWork NSW - to "*focus on harm prevention and improving safety culture in New South Wales workplaces*"

While, at the time of their formulation, the Chamber did not actively call for the establishment of these three new agencies, it nevertheless believes that these policy objectives remain valid.

PART B WHETHER THE TERMS OF THE ACT (OR OF THE ACTS SO AMENDED) REMAIN APPROPRIATE FOR SECURING THOSE OBJECTIVES

Given that the workers compensation system is funded by employers, it is concerning to the Chamber that from both our own direct interactions and feedback from our members "a far more transparent and accountable" and "customer centric" workers compensation system is yet to emerge. Based on the informal feedback obtained from members, together with comments provided in a recent member survey, the Chamber's assessment is that this lack of transparency and accountability has contributed to a deteriorating level of trust held by employers in New South Wales towards the workers compensation system.

The Chamber also submits that, unlike the objective set out in the second reading speeches, the terms of the Act have not yet resulted in "*a clear statutory and operational separation between the functions of providing government insurance services and the regulation of those services*".

In this submission, the Chamber addresses each of the above policy objectives in turn. These submissions are underpinned by feedback obtained directly from members, both anecdotally (from those individual members who have sought out the Chamber's assistance from time to time) and from the responses provided in a member-wide survey conducted by the Chamber in June 2017. **Appendix A** contains a sample of this feedback to illustrate the practical effect that the below issues are having on businesses in NSW.

"Far More Transparent and Accountable"

Issues Relating to the Premium Formula

Replacing the Insurance Premiums Order with the Market Practice and Premium Guidelines

As the Committee would be aware, the introduction of the 2015 Act led to the formerly gazetted Insurance Premiums Order being replaced with Market Practice and Premium Guidelines. The reasons for undertaking this change is not however immediately apparent from the second reading speech. As a consequence, the Chamber cannot comment on whether or not this policy objective was in fact achieved.

While the Chamber accepts that, even though the premium formula as gazetted was highly complex (setting out the calculation for a premium), the mere fact of its publication provided a degree of transparency that no longer exists under the new arrangements. This is a clear example of where the terms of this Act has made the workers compensation system far less transparent. In comparison, the only information

published under the Workers Compensation Market Practice and Premium Guidelines are the guidelines themselves.

The Chamber notes that the current guidelines, being those for premium filings on or after 1 March 2017, pursuant to clause 6.14.1, require licensed insurers "*to make available to an employer, or their representative, information used in the calculation of the premiums for that employer*" and pursuant to clause 6.14.2, requires the insurer to include claims costs information, remuneration used, industry classification, industry classification rate and any penalties, rebates or discounts applied (including capping provisions) in that information.

The Chamber submits that the way in which this obligation has been described clearly places the onus on employers to actively seek out the information from ICNSW instead of requiring ICNSW to provide each employer with that information as a matter of course.

The Chamber submits that each and every employer has a right to know and understand what premium formula has been used in order to calculate their premium and, if there has been a change in the amount of premium charged, the underlying reasons for that change.

In addition, the Chamber submits that should the premium change by an amount that exceeds 110 per cent of the premium previously charged, the employer should be given at least 6 months' notice of such a change to enable it to budget for the increase.

Other Issues Relating to the Premium Formula

In addition to the above, the Chamber submits that there needs to be an increased level of transparency and accountability in relation to the premium formula because:

- The formula used to calculate an employer's premium is not adequately explained either in the Notice of Premium or elsewhere (please refer to **Appendix B** for an example).
- The process for appealing the premium is not adequately explained either in the Notice of Premium or elsewhere.
- The guidelines allow for an employer to make a complaint to SIRA if it relates to the premium having been written in a way that is not compliant with the guidelines; however, as the guidelines do not allow for the publication of any part of the premium filings (including the "explanation and supporting evidence for their premium calculation formula"), an employer is unable {unless it successfully obtains information from an application made under the *Government Information (Public Access) Act 2009 No 52}* of knowing whether it is compliant.

- A statement by SIRA in its *Review of June 2016 Nominal Insurer Valuation: Report to the Minister for Finance, Services and Property dated April 2017* that "*the NSW Government does not commit to changes to benefit and premium settings at this time*" and by ICNSW on its website that the formula "*has not changed*" since the 2015-16 IPO is not a sufficiently transparent way in which to describe the formula being used to charge a workers compensation premium to employers.

The Ability to Navigate the System

Presently, there is an insufficient level of accessible information and guidance being offered to employers who encounter the NSW workers compensation system.

In relation to the information that is available, the Chamber submits that the information is difficult to retrieve as it is published on three static websites which are difficult to navigate.

The Statutory Power to Charge the Scheme for Excessive Costs

The conversion from scheme agents to claims agents has, in the Chamber's opinion, been poorly managed. This has led to a high level of disengaged staff employed by those companies that will no longer be involved in the NSW workers compensation system. This, in turn, has led to employers complaining of an increase in claims costs due to claims not being actively managed and a perceived lack of rigour around decisions to incur costs.

To exacerbate this issue, the powers of the Nominal Insurer under the *Workers Compensation Act 1987* to incur costs and charge them to the scheme are very wide. This enables ICNSW to charge the costs of arguably mismanaged claims to the scheme. Ultimately, these increased costs will be borne by the employers, whether it be through increased premiums or via a contribution.

The Chamber submits that the terms of this Act (or the Act as amended) in allowing these changes has lessened the high levels of transparency or accountability reasonably expected from the system.

The new organisations being "*more streamlined and efficient*"

After having made repeated requests towards ICNSW over the past 12 months for more detailed information about the premium formula, it is only in the past few weeks that the Chamber has been able to obtain a basic explanation of how it works.

The organisations "*focusing on clear objectives*".

The Chamber notes that, of the three agencies, SafeWork NSW is the only agency that has published a roadmap (to 2022), its underpinning strategies and action areas and submits that consideration should be given to SIRA being required to do the same.

SIRA's focus is described as being "*on ensuring that key public policy outcomes are being achieved in relation to service delivery to injured people, affordability, and the effective management an sustainability of the insurance schemes*".

However, employer feedback obtained by the Chamber is overwhelmingly that the premiums being charged are too volatile and unaffordable, with some querying how it can be described as being an insurance product, given that the insurance is being taken out to cover the costs of having an injured worker yet some employers are being required to pay the insurer up to three times the costs of those claims.

The Chamber submits that more needs to be done on the part of SIRA to ensure that the key public policy outcomes are being achieved.

A "*clear statutory and operational separation between the functions of providing government insurance services and the regulation of those services*".

The Chamber submits that this objective has not been achieved in practice as the three government agencies appear to have overlapping roles. For example:

Harm Prevention

The underlying policy objective for the creation of SafeWork NSW was to "*focus on harm prevention and improving safety culture in New South Wales workplaces*", yet ICNSW is aggressively promoting its harm prevention activities in the field (see, for example, https://www.icare.nsw.gov.au/news-and-stories/turning-the-bus-around and https://www.icare.nsw.gov.au/news-and-stories/prevention-before-cure).

Return to Work

The underlying policy objective for ICNSW is "*to be a centre of excellence for long term care needs, combining claim cohorts with similar care needs to focus on return to work and quality of life outcomes*", yet there seems to be little being done by ICNSW to help employers with their efforts to facilitate an early return to work for those of their injured workers who are able to return to work.

To date, the only assistance being provided to employers in this respect has been on the part of SIRA which has included a pro-forma Return to Work Program in its explanatory guide.

Employers have been reporting a lack of consultation and communication on the part of the insurer (formerly the scheme agents) and medical practitioners resulting in those parties having little or no understanding of the nature of the injured worker's pre-injury role and duties or whether there are any "suitable duties" available for those injured workers.

The premium formula in effect penalises an employer for failing to ensure that the injured worker returns to work (and is no longer reliant on the receipt of weekly benefits) and adopts a "one-size fits all" approach without having any regard to the nature of the illness or injury or whether any of the delays were outside the employer's control.

The Chamber submits that ICNSW's focus should be on helping employers achieve an early return to work, especially where different types of injuries require a different approach and where an early return to work is outside the employer's control or sphere of influence.

Conclusion

The terms of reference for this review refer to a consideration whether the terms of the Act (or of the Acts so amended) remain appropriate for securing those objectives.

The Chamber submits that rather than looking to amending the terms of this Act, consideration should be given to consolidating the *Workers Compensation Act 1987 No 70*, the *Workplace Injury Management and Workers Compensation Act 1998 No 86* and the *State Insurance and Care Governance Act 2015 No 19*) as they all share common policy objectives and cover the same subject matter.

For more information regarding the Chamber's submission, please contact Policy Manager, Workers Compensation, WHS and Regulation

Yours sincerely

Paul Orton

Director, Policy and Advocacy

Case Study 1: An email from a member of the Chamber dated 1 September 2017

I phoned icare several weeks ago to ask questions about how our premium was calculated. I was told by the operator that it was too complicated to explain over the phone and was told to google, "icare insurance premium order 2015-2016". When I found the document I saw that it was 326 pages long. I asked the operator what page the formula was on and was told page three. I thought to myself, I'm good at maths I should be able to work this out. Looking more closely, the formula runs over two pages and refers to nine schedules within the 326 page document. I gave up!

While I am sending you this e-mail I thought I would give you some background on our situation.

One of our labourers rolled his ankle while walking along the road and was required to have surgery on his ankle. Our claim for his wages was $22,500.00. We are told that our premium will increase by a total of $97,000.00 over a three year period as a result of this claim. As you can see this is extremely unfair.

From what I can determine the reason we have to pay this enormous premium is because our wages now exceed the APP threshold of $30,000 (for us in 2016 it was $35,000) and that makes us a large employer and that means our claims history is taken into account. If our wages are under the $30,000 threshold then we are considered a small employer and our claims history is not taken into account. Why is there a threshold? Why can't the risk be evenly distributed and all employers be accountable? We are being punished for being a bit too big and therefore subsidising the smaller employers.

We have been in business for 20 years and during this time our claims have been nominal and our premiums unaffected by our claims history. The first time we have a significant claim our premium skyrockets. We can understand that we be asked to pay a higher premium to cover the claim over a reasonable period but to pay an amount that far exceeds the claim is unfair.

On another issue and interestingly enough it was mentioned on Tuesday night that 15 weeks is the standard time off for a broken ankle as determined by icare. Our labourer had 26 weeks off. He spent more than half this time on waiting lists to get into a specialist surgeon and then the hospital. As we live in a regional area where medical waiting lists are far longer than capital cities it is unrealistic to have a 15 week recovery period when our worker had to spend that time or more on a waiting list. There should be discounts for regional areas in this regard.

The end result for us, as this Workers Compensation scheme now presently stands, is that we have to reduce our wages bill otherwise we will go out of business. In 2015 we made a small profit, in 2016 and 2017 we made small losses. We estimate that our workers compensation premium for 2017 will be $57k an increase of $32K. This increase along with payroll tax will make our business with its present workforce no longer viable. If we cut staff and overtime we will keep our heads above water. We have some very difficult decisions to make.I have attached our 2016 Actual Wages Premium Adjustment which shows a total premium for the year of $25K. The second attachment is the original (and incorrect) 2016 Actual Wages Premium Adjustment showing a premium of $57K.

The original Premium Adjustment incorrectly included our claim of $22k in the 2014/2015 year when it should have been recorded in the 2015/2016 year. I contacted GIO and they re-issued the Premium Adjustment with the correct details. This error however gave us an insight into our future premiums which we would not have known about had the error not been made. It has allowed us to plan how we manage our business in order to minimise this huge increase in premiums over the following years.

So you can see the difference in premium is $32k and this will be our extra obligation for three years (for a total of $96K) if our wages remain the same and we have no further claims. We are however too late for the 2017 year as our wages were similar to the 2016 year so the first year of the extra $32k premium will be payable.

Most businesses like ours would have no idea of their forthcoming obligations and it has the potential to place businesses under extreme financial distress.

Case Study 2: An email from a member dated 29 August 2017[1]

I wish to make a formal complaint about the unconscionable conduct of the government's "iCare Workers Insurance".

This business has done everything within is power to pre-pay its workers compensation insurance premium for the 2017/2018 year, and yet we have received a "Letter of Demand" for an amount which is not owing. The "scam artist" behaviour I have been receiving from iCare Workers Insurance is disgusting.

Despite every effort to communicate with iCare Workers Insurance, I have been frustrated by their lack of conscience, lack of transparency and the unreasonableness of their demands. Is iCare doing this to every other small business which has not yet made any payments for the 2017/2018 year? There would be many businesses in Lismore who were affected by the floods and would be having difficulty paying. However, this business paid its workers compensation premium upfront!

I would appreciate you including this business in any NSW Business Chamber representations made regarding this matter.

I enclose the chronology of events:

- *12 July 2016 Obscure email from "Customer Monitor" – just found by me on 29 August 2017 when researching this issue, titled "New insurance organisation cares about your experience" requesting feedback. This email meant nothing to me at the time because we had our insurance with QBE Workers Comp. I didn't use "iCare" anyway.*
- *20 July 2016 Another email from "Customer Monitor" requesting feedback on my "policy renewal experience" with iCare. Again, I ignored this email because our workers compensation insurance was held with QBE.*
- *13 June 2017 Letter to QBE requesting Tax Invoice for renewal premium 2017/2018.*
- *19 June 2017 Letter received from QBE advising our Workers Compensation Policy will be transferred to iCare. This is the first time I became aware iCare was taking over our policy.*
- *21 June 2017 Email from QBE Insurance advising that iCare will be taking care of our workers compensation renewal for 2017/2018.*
- *21 June 2017 Information pack received from iCare Workers Insurance with premium calculated at $12,967.17. No mention of how the premium was calculated, or if it includes GST. (NB: this Tax Invoice included a pay on time discount of 5% reducing the premium payable to $12,318.81)*
- *23 June 2017 Email to iCare questioning how premium of $12,967.17 was calculated, sent with "high importance"*
- *23 June 2017 Read receipt from iCare. No reply received.*
- *25 June 2017 Due to zero communication from iCare, I decided to pre-pay an amount that would be close to my 2017/2017 premium. Pre-payment of $10,000.00 was made to iCare Workers Insurance by BPay. It is necessary for this business to pre-pay its Workers Compensation premium in order to obtain the 5% "pay on time discount" and to claim 100% of the cost on our tax upfront.*
- *11 July 2017 Email to iCare sent with "high importance" again questioning the calculation of the premium and submitting actual wages figures and my own calculations, so I could obtain the balance payable before 31 July 2017.*
- *11 July 2017 Read receipt from iCare. No reply received.*
- *12 July 2017 Letter received from iCare with a breakdown of the premium calculation but this time not including the "pay on time discount". This letter also refers to the information pack and premium notification being issued to us on 3 June 2017. It definitely was not!*
- *3 August 2017 Telephone call to Michelle at iCare to try to resolve the matter. Michelle said she would issue an Adjustment Premium Notice.*
- *3 August 2017 Email from iCare with Premium Adjustment Notice attached. Again no explanation of how the new premium was calculated and no mention of the "pay on time discount".*
- *3 August 2017 I calculated the balance owing on my premium to be $240.09 and paid this amount to iCare by BPay on the same day.*
- *3 August 2017 Letter to iCare explaining what the correct premium should be taking into account the 5% "pay on time discount.*

- *17 August 2017 Email from iCare with reminder to pay balance they say is owing of $538.95.*
- *23 August 2017 Letter to iCare disputing balance owing.*
- *25 August 2017 Email from iCare with a "Final Demand" on the $538.95 giving me seven (7) days to pay (only a week after their "Reminder" email!)*
- *25 August 2017 Email to iCare Workers Insurance questioning why they would send a "Final Demand" from a "no reply" email for an amount I do not owe, attaching a copy of my letter dated 23 August.*
- *25 August 2017 Read receipt from iCare. No reply received.*
- *25 August 2017 Letter of complaint to The Hon Thomas George MP, State Member for Lismore about iCare Workers Insurance.*
- *28 August 2017 Telephone call to NSW Business Chamber with complaint about iCare.*

Case Study 3: Member comments re: return to work (from survey)

"Employee was non compliant and we were powerless and unsupported in getting the worker to return when they had a cleared medical certificate. hence they were in breach, but no action or penalty for this was applied, but our premiums were certainly affected."

"Insurer didn't communicate with the employee at all, dragged out the approval process for return to work and rehabilitation. Employee became disengaged and hostile towards employer requiring a great deal of time for this claim & support for the employee."

"I was given almost no opportunity to be involved. All decisions were made by (name of scheme agent)."

"Rehabilitation contractor provides excellent communication with both parties to ensure a suitable RTW plan for all involved"

"Even my employees can notice the over the top approach taken when workers comp is involved - a lesser employee is encourage (sic) to have time off and do the rounds of consultants."

"This could be improved if Doctors allowed us in for a meeting to discuss suitable duties rather than dismissing us as the evil employer."

"Doctors are too casual about writing no capacity, when duties are available or when an injured worker goes home sick from suitable duties."

"Seems to be all out of my hands - theres (sic) really nothing I can do but wait and hope - have made numerous return to work suggestions and offer flexibility yet still no employee after 5 weeks"

The **icare** Workers Insurance reforms aim to provide better, safer workplaces, minimise accidents and increase profitability, productivity and staff morale.

Genuine risk-rating factors have been introduced and are now considered when determining premiums. This ensures all employers do not pay the same premiums and creates a much fairer system.

what factors influence pricing?

The nature and the size of a business as well as the risk to employee safety are key factors taken into consideration when arriving at the base tariff Workers Insurance premium. For example, an office in a sprinklered concrete building will have a lower annual premium for fire insurance than an unsprinklered fireworks factory constructed from highly combustible panelling.

Also, if an employer takes measures to reduce losses and improve safety, the employer is now rewarded for their efforts. Just as a good driver with a proven driving record is rewarded with a No Claim Bonus, employers with excellent claims records are rewarded with reduced premiums.

More specifically to Workers Insurance, if employers can actively do more to prevent injuries, their premiums will be lower. Additionally, employers can influence their premium costs if an injury was to occur, by encouraging and contributing to early recovery at work, and supporting the best medical support for the injury. Unlike most schemes, medical costs do not impact or increase an employer's premium in NSW.

icare rewarding safety at work

icare Workers Insurance rewards customers that demonstrate good practice in workplace safety, support injured worker recovery and provide safe recovery at work:

- Initially only available to small employers, the Employer Safety Incentive (ESI) has been widened to all NSW employers, making it advantageous for employers to create safer work places
- Employers who provide a safe workplace for four consecutive years are eligible for the Employer Safety Reward (ESR). Notification of medical claims do not count
- Employers are allocated a Claims Performance Rate which determines the percentage discount or loading applied to the base tariff premium. By supporting injured workers and providing safe recovery at work, employers can positively influence future premiums. This extends to employers who provide safe recovery at work even at 52 weeks
- Maximum Premium Protection has been introduced to remove volatility and unforeseen financial stress on employers. It has the dual benefit of providing clarity around an employer's obligation and certainty when forecasting premiums
- In addition, a three month instalment option is now available to adjustment premiums greater than $1,000
- A Scheme Performance Adjustment allows for excess funds to be returned to employers. Importantly, the scheme's overall performance is managed independently of the premium collection rate.

A fairer system which offers incentives to employers who give personal attention to workplace safety and worker recovery are simply better - better for employers, better for employees and better for NSW.

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The Loop August 2017 edition