Submission No 18

INQUIRY INTO 2018 REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: Construction Forestry Mining and Energy Union (CFMEU)
Construction and General Division NSW Divisional Branch

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24 June 2018

The Director
Standing Committee on Law and Justice
Parliament House
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Sydney NSW 2000

By Email: law@parliament.nsw.gov.au

Dear the Director of the Standing Committee on Law and Justice,

2018 Review of the Workers Compensation System

We refer to the above and **enclose** for your attention, Submissions of the Construction, Forestry, Mining and Energy Union, Construction and General Division (New South Wales Branch).

Yours Faithfully

Rita Mallia
State President

Contents

1 Introduction

The Construction, Forestry, Maritime, Mining and Energy Union, Construction and General Division (**CFMMEU**) welcomes the opportunity to make submissions to the Law and Justice Committee on the issue of dispute resolution across the workers compensation scheme and the compulsory third party (**CTP**) scheme. In addition to these submissions, we support the submissions of Unions NSW and its affiliates.

The CFMMEU represents approximately 17,000 members in the building and construction industry in NSW. 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. Our members rely on the assistance of the union and their legal representatives to navigate and survive the workers compensation system. The CFMMEU has a long history in the area of workers compensation and is able to offer its expertise to assist our members and their families.

Our injured members can often find themselves under both the workers compensation and CTP schemes due to the prevalence of registered plant on construction sites. Additionally, the restrictions on journey claims under workers compensation has naturally led to some members who are injured on a journey making claims under CTP system.

For these reasons, the CFMMEU has an interest in supporting a CTP scheme that is efficient, fair and logical to ensure our members are given the best protection in the unfortunate circumstance that they are injured.

These submissions will primarily argue that the workers compensation and CTP dispute resolution processes should not be consolidated. However, in the event that it is inevitable, we argue that CTP dispute resolution scheme is illogical and tarnished by the inherent conflict of interest issues that exist when the regulator is also a decision-maker. We argue that the flaws in CTP should not infect the workers compensation system, which is finally heading in the right direction. Rather, CTP could do with a process more in line with the newly announced dispute resolution system under the workers compensation system. In

the event that a consolidation is inevitable, we provide a set of principles that should inform the functions of a dispute resolution body while accepting that the WCC is the appropriate forum for dispute resolution.

2 Previous submissions

In addition to these submissions, the CFMMEU relies on the submissions that were filed as part of the DFSI inquiry into 'Improving workers compensation dispute resolution in NSW. The CFMMEU submissions to the DFSI inquiry were extensive and while specifically dealing with the options identified in the discussion paper, also analysed the various processes currently available in the workers compensation system. Our submissions also provided a fifth option for dispute resolution. For the convenience of the Committee, a copy of these submissions are annexed at "A." The CFMMEU hopes that the Committee finds them useful for considering whether a one stop shop is feasible and where it should be located.

3 Background

During the *First Review of the Workers Compensation Scheme,* the Legislative Council Law and Justice Committee, received submissions from multiple stakeholders as to the inadequacy of the dispute resolution process in workers compensation, particularly in relation to work capacity decisions and the bifurcation of the dispute resolution process. In response to the evidence and submissions received by stakeholders, the Committee made a number of recommendations specifically targeted at simplifying the dispute resolution process and removing the bifurcation in the system.

On 20 December 2017, Department of Finance, Services and Innovation (**DFSI**) commenced an inquiry into the dispute resolution system in workers compensation, picking up on the recommendations from the Law and Justice Committee.

On 4 May 2018, the Minister announced a "plan" to reform the NSW workers compensation dispute resolution process. The proposed reforms include:

- All enquiries and complaints by injured workers being directed to WIRO,

- All enquiries and complaints by employers being directed to SIRA,
- All dispute resolution, following an internal review by the insurer, to be undertaken by the Workers Compensation Commission (WCC).[1]

The CFMMEU welcomes the announcement from the Minister. We have spent the last six years calling for the work capacity jurisdiction be given to its natural custodian, the WCC. The CFMMEU considers that while positive, the reforms do not go far enough to remedy the issues in the dispute resolution system, namely the arbitrary distinction between work capacity decisions and liability decisions. We are also concerned at the lack of detail provided as to how this new system will operate, although we acknowledge that it represents a step in the right direction.

4 Prevention v Resolution

The CFMMEU appreciates that this review is intended to focus primarily on the dispute resolution processes in workers compensation and CTP. However, we can not ignore that fact that prevention is often better than the cure. If we fix the issues that lead to disputes the number of disputes is likely to fall lessening the strain on the scheme and allowing for a more strategic use of resources. The most effective way to prevent disputes is to fix the fundamental issues with the legislation.

For workers compensation, the best example is pre-injury average weekly earnings (**PIAWE**). Evidence shows that the vast majority of workers compensation claims are resolved in the first 13 weeks of injury. For straightforward claims, the only dispute likely to occur in that period is in relation to the calculation of PIAWE.

The definition of PIAWE is still complex, confusing and unworkable, 6 years later. The recent review into PIAWE conducted by Professor Tania Sourdin, noted that all stakeholders agree that the definition needs to be simplified to reduce the disputation in

[1] Department of Finance, Services and Innovation, 'New dispute resolution process for workers compensation' (Media Release, 4 May 2018).

the system. As noted in the *Report on NSW Workers Compensation Arrangements in Relation to Pre-Injury Average Weekly Earnings (PIAWE)*:

> The replacement of the seven sections with a single and concise definition of PIAWE that is easy to understand and apply would likely result in a decreased administrative burden and cost for employers and insurer. A simple methodology also has the potential to lead to a reduction in disputes about what benefits should be included when calculating PIAWE, and could reduce delays with the processing of weekly payments.[2]

No matter the dispute resolution model chosen, injured workers will continue to have PIAWE disputes because no one agrees on the interpretation. However, a simple legislative change would remove the disputation around PIAWE thereby reducing costs to the injured worker and the system as a whole. A simplified PIAWE definition would almost eradicate PIAWE disputes.

PIAWE is but one example of where amendments can be made to the legislation to prevent disputes from occurring. Removing the distinction between work capacity decisions and liability decisions, as recommended by the Law and Justice Committee,[3] is yet another example.

The CFMMEU respectfully submits that the Committee should recommend the Government consider the evidence from the various reviews and inquiries and consider rectifying any issues that give rise to disputation, such as the definition of PIAWE, in addition to identifying an appropriate dispute resolution process.

5 Two different schemes

The CFMMEU is concerned about the prospect of consolidating of the workers compensation and CTP dispute resolution processes.. The two schemes may provide

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[2] Professor Tania Sourdin, *Report on NSW Workers Compensation Arrangements in Relation to Pre-Injury Average Weekly Earnings (PIAWE)* (March 2017) 5-6.

[3] Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *First review of the workers compensation scheme* (2017) Recommendation 13.

similar, albeit inadequate, benefits, but the relationships at the heart of the schemes are very different.

Workers compensation is primarily about relationships; the relationship between injured workers and their employers. Both parties have an interest in maintaining civility, trust and respect in their relationship because return to work is the ultimate goal. The relationship needs to be handled carefully so that both parties can continue to work together in the future. There is heart and humanity in the workers compensation scheme.

CTP is completely different. The relevant parties, the injured and the insurer, do not have a continuing relationship. Once the claim comes to a close they do not need to deal with each other again. Everything is dealt with at arm's length and there is no heart.

It is for this reason that we are concerned about the prospect of consolidation. The CFMMEU notes that the workers compensation scheme is focussed on the injured worker, while CTP is focussed on the claim. We do not want to see the CTP sentiment infiltrate the workers compensation scheme. The workers compensation scheme already forgets the worker. We do not want to give the system more incentive.

While the CFMMEU has a fundamental objection to the consolidation of the two scheme, it has become apparent that some form of consolidation may be inevitable. For that reason alone, we make the following submissions in relation to a "one stop shop" for personal injury dispute resolution.

6 Principles to underpin a dispute resolution system

A one stop shop for dispute resolution should provide a simple quick and effective process for resolving disputes across both schemes. The CFMMEU submits that injured workers in NSW need a dispute resolution process that provides access to justice and access to

appropriate legal representation. The dispute resolution process chosen must also give effect to the objects of both schemes as outlined in their respective legislations.[4]

Most importantly, the dispute resolution body needs to be independent from the regulator and not subject to interference from the regulator. Members of the decision making body must, where possible, have tenure or fixed terms and not subject to the political whims of the regulator or the government. The body must be truly independent to inspire confidence among the participants.

Drawing on previous comments by the Law and Justice Committee, injured workers in NSW deserve a dispute resolution system that is simple and easily accessible.[5] The Law and Justice Committee previously concluded that the best means of achieving this outcome was through the creation of a one stop shop for dispute resolution. Recommendation 14 set out the characteristics that should inform the creation of such a body. The one stop shop should:

- Allow disputes to be triaged by appropriately trained personnel
- Allow claimants to access legal advice as currently regulated
- Encourage early conciliation or mediation
- Use properly qualified judicial officers where appropriate
- Facilitates the prompt exchange of relevant information and documentation
- Makes use of technology to support settlement of small claims
- Promotes procedural fairness.

The CFMMEU broadly supports this recommendation, save for the legal costs. Legal costs as currently regulated do not allow injured workers to access legal support for work capacity decisions, except in the case of merit review decisions. Legal costs should be available for work capacity reviews in the same way as liability disputes. The CFMMEU supports the

[4] *Motor Accident Injuries Act 2017* (NSW), s 1.3; *Workplace Injury Management and Workers Compensation Act 1998* (NSW), s 3.
[5] Above n 3, 85.

ILARS system as it operates in workers compensation and submits that legal costs for work capacity decisions should be handled in the same manner.

Bar that one amendment the CFMMEU supports and adopts the recommendations of the Law and Justice Committee.

Features of a One Stop Shop

1. Simple and accessible
2. Give effect to the objects of the workers compensation and CTP schemes
3. Independent decision making body
   a. Free from interference by the regulator and government
   b. Tribunal members should be tenured or employed on fixed terms
   c. Authority to determine its own budget without interference from the regulator
4. Allow disputes to be triaged by appropriately trained personnel
5. Allow claimants to access legal advice as currently regulated
6. Encourage early conciliation or mediation
7. Use properly qualified judicial officers where appropriate
8. Facilitates the prompt exchange of relevant information and documentation
9. Makes use of technology to support settlement of small claims
10. Promotes procedural fairness.

6.1 Separation of regulation and decision making

The CFMMEU's concern about merging the two systems is primarily borne out of its concern about the state of dispute resolution under the CTP system. Such a flawed, unfair and secretive system should not infect the proposed dispute resolution system in workers

compensation. It is infected with conflict of interest issues which following the Minister's announcement on 4 May 2018, have largely been stamped out in workers compensation.

The CFMMEU is concerned at the conflict of interest in SIRA being the regulator and the ultimate decision maker. As overseer of the system, SIRA needs to focus on ensuring that the system functions. As regulator, SIRA has a vested interest in ensuring that disputes are kept to a minimum to justify their position which may ultimately affect their ability to make fair and independent decisions. Certainly the injured workers in the system perceive that there is a conflict of interest.

In order to have confidence in the overall regulation of a system of governance, dispute resolution and regulation must be separated. There is a reason why the police and the courts exercise two distinct functions, one enforces the law while the other interprets the law. This same distinction between roles must occur within the workers compensation and CTP schemes. SIRA cannot be both the police and the courts. It must choose its function to ensure that it fulfils it to an efficient and effective standard.

6.2 SIRA under CTP

Under the *Motor Accident Injuries Act 2017* (**MAI Act**) SIRA is regulator, advisor and decision maker. Performing all these roles undermines SIRA's ability to perform its primary function, regulation.

A quick glance at Schedule 2 of the MAI Act should inspire outrage at the amount of decisions that are made by the regulator. In addition to the 25 merit review matters over which SIRA has jurisdiction, it is also the decision maker for 5 medical assessment matters and 14 miscellaneous claims assessment matters. There is a clear conflict of interest in the regulator and decision maker being the same entity. To demonstrate the full extent of SIRA's decision making power and for the convenience of the Committee, a copy of Schedule 2 of the MAI Act is annexed at "**B**."

In addition to having jurisdiction over 44 different kinds of decisions, the CTP system does little to inspire confidence in the independence of the dispute resolution service, for instance:

- Section 7.2 of the MAI Act allows SIRA to establish a dispute resolution service (DRS) and determine the guidelines to be followed by that service;
- Section 7.4 of the MAI Act gives SIRA complete unfettered authority to appoint people to DRS and allows SIRA to remove those people at any time;
- Section 7.6 of the MAI Act requires the decision maker to follow the directions of the Principal Claims Assessor, who is also an employee of the regulator;
- Section 7.8 of the MAI Act prevents a decision maker from being compelled to give evidence or produce documentation, ensure there is ongoing secrecy in relation to decision making.

The CTP dispute resolution system relies on SIRA creating and maintaining highly sophisticated chinese walls, which may not be possible. Additionally, it mandates a system where all decision making is undertaken behind closed doors, where the process are secretive and not open to constructive criticism or effective review. Decision making should always be open when it concerns the livelihood and recovery of injured people.

During the First Review of the Workers Compensation System, multiple stakeholders called for an independent tribunal, staffed by judicial officers, to have responsibility for all dispute resolution within the system. Not one submission advocated for SIRA to take control of the dispute resolution process. The outcome of the CTP review stands as an example of what can happen if you give the regulator complete power over decision making.

It is not clear to the CFMMEU why the government continues to offer up proposals that have SIRA at the centre of dispute resolution in both workers compensation and CTP. The CFMMEU has mentioned time and again that SIRA is clearly unwilling to exercise its regulatory functions for the betterment of the schemes. It appears that the reason that SIRA

refuses to regulate is that is sees itself as the jack of all trades when it comes to compensation in NSW and rather than performing its core function it wants to perform all functions. This is unacceptable.

There is no suggestion that SIRA should be removed from its role as regulator. It has the expertise and knowledge to continue in that role, all that is missing is the willingness to perform the role. It does not make sense to diversify SIRA when an independent tribunal exists with the necessary level of skills, qualifications, expertise and most importantly, independence to perform the role as arbitrator efficiently and effectively.

The dispute resolution processes that exist in CTP are incompatible with a logical, fair, efficient and independent dispute resolution process. It should be abandoned immediately and should definitely not make its way into workers compensation.

7 One Stop Shop

The CFMMEU has in the past, and continues, to support a one stop shop for workers compensation dispute resolution. The CFMMEU has consistently argued for the WCC to be the appropriate venue and jurisdiction.[6] The WCC has the expertise and resources to perform the functions required and can implement many of the factors outlined in the Committee's recommendations. The arbitrators are appropriately trained and have the knowledge necessary to perform the dispute resolution functions.

On the assumption that a consolidation is inevitable, the CFMMEU submits that the WCC is the appropriate body to handle dispute resolution across the workers compensation and CTP schemes. The WCC could operate a two streamed approach if necessary. Given the

[6] Construction, Forestry, Mining and Energy Union, Submission to Centre for International Economics, *Statutory Review of the NSW Workers Compensation Scheme*, 30 May 2014, 23; Construction, Forestry, Mining and Energy Unions, Submissions to WIRO, *Parkes Project*, 25 February 2015, 5; Construction, Forestry, Mining and Energy Union, Submission No. 28 to Legislative Council Standing Committee on Law and Justice, *Review of the exercise of the functions of the WorkCover Authority*, 31 January 2014, 21.

state of dispute resolution in CTP currently[7], a move to the WCC would be a stark improvement.

The WCC should only have jurisdiction over matters relating to statutory entitlements. The District Court should retain its current jurisdiction over aspect of both schemes. Matters involving questions of negligence and damages need to be determined by a judicial body. There is no justification for removing the District Court from the process.

8 Additional considerations

In addition to the submissions above and annexed, the CFMMEU is taking the opportunity to make submissions about specific aspects of dispute resolution, as proposed in previous inquiries.

8.1 Internal Review of all disputed decisions

The CFMMEU submits that both schemes should dispense with the necessity of internal review mechanisms. The idea that all disputed decisions be subject to internal review is narrow sighted and is in direct contradiction to the findings of the AMR claimant survey.[8] commissioned by DFSI. The AMR claimant survey found the following:

1. Claimants saw the insurers as adversaries with more resources and money than claimants. Claimants hold the *view that insurers hold a great deal of resources which enable them to be effectively unaccountable, where claimants have little to no access to recourse.*[9]
2. Claimants felt relieved and boosted in confidence when a third party had appeared to be invested in their wellbeing[10]
3. On all the markers, work capacity scored lower than the WCC pathway, given that the figures for WCD were a combination of internal review and merit review it is

[7] See pages WHAT above
[8] AMR, *Claimant Experience Study: Qualitative Research Report,* 11 August 2017.
[9] Ibid 10.
[10] Ibid 14.

possible that the lack of satisfaction may be related to the intervention of the insurer since it is not a third party[11]

4. The system was rated poorly in relation to fairness and there was a low level of satisfaction by the claimants.[12]

All of these factors weigh heavily against the insurer being given additional power throughout the process. The overwhelming evidence to date is that injured workers do not trust their insurers. This is supported by surveys conducted by Unions NSW that showed that 36.76% of participants in 2014 and 34.02% of participants in 2015 did not seek a review of their work capacity decision because they felt challenging the insurer would be futile.

The idea of scheme wide internal reviews, also fails to note that many of the decisions made by the insurer are not made in a bubble. They are more often than not checked and affirmed by another person prior to be sent out. This is particularly the case for work capacity decisions which mention that the decision has already been reviewed. Requiring another internal review would be replicating work that has already been done and would be a waste of resources.

Removing the requirement for internal reviews will also assist with streamlining the dispute resolution process. The CFMMEU supports removing the requirement for internal review decisions for all disputed decisions.

8.2 Digitisation

Many of these inquiries have considered whether dispute resolution should incorporate more technology into the process. The CFMMEU has no particular concern with using technology to make the system easier, however our membership base is largely less educated with a high concentration of persons with non english speaking backgrounds and

[11] Ibid.
[12] Ibid 19.

therefore less likely to be comfortable using digital platforms. Our members prefer face to face communication or via the telephone. They need to speak to the person assisting them or making decisions on their behalf. We need to ensure that the system does not go completely digital to allow greater access for all to all aspects of the system.

9 Conclusion

While the CFMMEU is opposed to consolidating the CTP and workers compensation dispute resolution system, we understand that this may be an inevitability and it is for that reason that we argue the WCC is the appropriate forum to undertake dispute resolution under the scheme.

The CFMMEU is available to attend any hearings to clarify these submissions and answer any further questions the Committee may have on this important topic.

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16 February 2018

The Hon Victor Dominello MP
Minister for Finance, Services and Property
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Dear Sir,

Improving workers compensation dispute resolution in NSW

We refer to the above and **enclose** for your attention, Submissions of the Construction, Forestry, Mining and Energy Union (New South Wales Branch).

Yours Faithfully

Rita Mallia
State President

Contents

1. Introduction

The Construction Forestry Mining and Energy Union (**CFMEU**) welcomes the opportunity to make submissions to the Department of Finance, Services and Innovation (**DFSI**) on the issue of 'Improving workers compensation dispute resolution in NSW.' In addition to these submissions, we also support the submissions from Unions NSW and its affiliates.

The CFMEU represents approximately 16,000 members in the building and construction industry. 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. Our members rely on the assistance of the union and their legal representatives to navigate and survive the workers compensation system. The CFMEU has a long history in the area of workers compensation and is able to offer its expertise to assist our members and their families.

These submissions will argue that the four options posited in the discussion paper will be disadvantageous to injured workers and other stakeholders in the workers compensation system, as well as providing a workable model for change. The CFMEU proposal will ensure a more efficient dispute resolution process, which draws on the resources already available in the scheme while simultaneously reducing disputation in the system.

2. Background

In 2012, the then Government introduced the *Workers Compensation Legislation Amendment Act 2012*, which resulted in significant changes to the workers compensation legislation making the system more complex, less user friendly and confusing. Despite the amendments in 2015 and the various reviews that have been undertaken, the level of complexity remains and injured workers continue to find the system unworkable.

During the *First Review of the Workers Compensation Scheme*, the Legislative Council Law and Justice Committee, received submissions from multiple stakeholders as to the inadequacy of the dispute resolution process particularly work capacity decisions and the bifurcation of the dispute resolution process. In response to the evidence and submissions received by stakeholders, the Committee made a number of recommendations specifically

targeted at simplifying the dispute resolution process and removing the bifurcation in the system.

Law and Justice Committee Recommendations

Recommendation 13: That the NSW Government investigate removing the distinction between work capacity decisions and liability decisions in the workers compensation scheme.[1]

Recommendation 14: That the NSW Government establish a 'one stop shop' forum for resolution of all workers compensation disputes, which:

- Allows disputes to be triaged by appropriately trained personnel
- Allows claimants to access legal advice as currently regulated
- Encourages early conciliation or mediation
- Uses properly qualified judicial officers where appropriate
- Facilitates the prompt exchange of relevant information and documentation
- Makes use of technology to support settlement of small claims
- Promotes procedural fairness[2]

Recommendation 15: That the NSW Government introduce a single notice for both work capacity decisions and liability decisions made by insurers[3]

Recommendation 16: That the NSW Government consider the benefits of developing a more comprehensive specialized personal injury jurisdiction in New South Wales.[4]

The *Improving workers compensation dispute resolution in NSW* Discussion Paper (**the Discussion Paper**) is primarily concerned with recommendations 14-16 and fails to address recommendation 13, being the recommendation to remove the distinction between work capacity and liability. The CFMEU submits that in skipping over Recommendation 13, the government is ignoring the intention behind this suite of recommendations. The Law and Justice Committee recommendations are geared towards

[1] Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *First review of the workers compensation scheme* (2017) 72.
[2] Ibid 86.
[3] Ibid.
[4] Ibid.

eliminating the bifurcation of the system, which cannot be fully achieved without removing the distinction between the two pathways.

3. Prevention v Resolution

The Discussion Paper claims that the review is intended to reform the dispute resolution system to ensure it helps parties reach agreement and resolve issues before they escalate, and support claimants throughout the process to aid and encourage, rather than hinder their return to work and good health. However, while its aims are admirable, it fails to recognise that the goal should be the prevention of disputes thereby reducing the resources necessary for dispute resolution. The most effective way to prevent disputes is to fix the fundamental issues with the legislation.

The best example of this is pre-injury average weekly earnings (**PIAWE**). Evidence shows that the vast majority of workers compensation claims are resolved in the first 13 weeks of injury. For straightforward claims, the only dispute likely to occur in that period is in relation to the calculation of PIAWE. The definition of PIAWE is still complex, confusing and unworkable, 6 years later. The recent review into PIAWE conducted by Professor Tania Sourdin, noted that all stakeholders agree that the definition needs to be simplified to reduce the disputation in the system. As noted in the *Report on NSW Workers Compensation Arrangements in Relation to Pre-Injury Average Weekly Earnings (PIAWE)*:

> The replacement of the seven sections with a single and concise definition of PIAWE that is easy to understand and apply would likely result in a decreased administrative burden and cost for employers and insurer. A simple methodology also has the potential to lead to a reduction in disputes about what benefits should be included when calculating PIAWE, and could reduce delays with the processing of weekly payments.[5]

[5] Professor Tania Sourdin, *Report on NSW Workers Compensation Arrangements in Relation to Pre-Injury Average Weekly Earnings (PIAWE)* (March 2017) 5-6.

No matter the dispute resolution model chosen, injured workers will continue to have PIAWE disputes because no one agrees on the interpretation. However, a simple legislative change would remove the disputation around PIAWE thereby reducing costs to the injured worker and the system as a whole. A simplified PIAWE definition would almost eradicate PIAWE disputes.

PIAWE is but one example of where amendments can be made to the legislation to prevent disputes from occurring. The Government should consider the evidence from the various reviews and inquiries, which have occurred since 2012, and consider rectifying any issues that arise, such as the definition of PIAWE.

4. CFMEU Proposal

The CFMEU agrees that the system needs some reform however it cannot endorse any of the four options for reform outlined in the Discussion Paper. The lack of detail provided in the Discussion Paper as to the form of certain proposals makes it difficult to accept that the options are workable and/or reasonable. Additionally, each option either seeks to duplicate processes already being implemented by icare or the options propose dismantling or restricting important aspects of the current system, such as ILARS and WIRO.
The CFMEU proposes a model for reform, an Option 5, that is workable, reasonable, cost effective and which gives effect to the recommendations of the Law and Justice Committee. The CFMEU proposal requires minimal legislative change and will help to prevent and hopefully eliminate costly and unnecessary disputation in the system while utilising the resources that already exist without the needs to create further bureaucracy.

4.1 Option 5: Adapted Status Quo Approach

The CFMEU Proposal notes that different skills are required for claimant support than those required for informal dispute management. For that reason, the CFMEU Proposal separates the two systems and allocates different agencies to perform them based on the skills and resources available within those agencies. The CFMEU Proposal also advocates for a one-stop shop approach to formal dispute resolution, while also providing additional detail in relation to the appropriate process/procedural to resolve Pre-Injury Average

Weekly Earnings (**PIAWE**) disputes and work capacity disputes.

The table below provides an overview of the CFMEU Proposal for ease of reference.

Model	Claimant support	Informal dispute mechanism	Legal support	Dispute management and resolution	System oversight
Adapted status quo approach	icare triage process and claimant support process	Complaints about insurers and employers handled by WIRO	ILARS system administered by WIRO	One stop shop operated for formal disputes operated by the WCC with specific processes for PIAWE and work capacity	SIRA, WIRO and Law and Justice Committee

4.1.1 Claimant Support

The Discussion Paper fails to address or acknowledge the processes that have already been implemented by various institutions to assist claimants, particularly those with complex cases. icare has recently introduced its new 'Claims Service Model' which introduces a triage style system where injured workers with complex claims or sensitive claims can receive additional support throughout the system. icare has engaged a triage specialist who will talk to the worker within days of the claim being lodged. They will also notify the injured worker that they can contact the support centre if they have any issues. The triage specialist will then identify whether the injured workers needs additional support through the life of the claim.

icare: New Claims Services Model

The new system triages claims through the use of risk factor identifiers. These include:

- The type of injury
- Concerns about how the injury occurred
- Language and literacy factors
- Availability of suitable duties
- Employer or work environment concerns
- Length of time between injury and lodgement date.

The claim is assessed against these factors and categorised to determine the level of additional care required. Claims that rate high on the risk factors will be categorised as Specialised Claims, which require detailed emotional and claimant support. These claims include but are not limited to:

- Fatalities
- Medically complex claims
- Primary psychological injuries
- Sensitive claims

icare has already allocated resources to this process and has engaged in consultation about its functions. It would be premature to consider giving this process to another agency before allowing icare time to illustrate the worth of this process. The CFMEU strongly believes that icare's triage system should remain in place.

4.1.2 Informal Dispute Resolution

Informal Dispute Resolution refers to the process whereby injured workers and employers can raise complaints about various matters within the workers compensation system and have them resolved without the necessity for litigation or formal dispute notifications. It is envisioned that this would involve negotiation, cooperation and intervention.

The CFMEU nominates WIRO as the appropriate agency to undertake this role. Section 27(a) of the *Workplace Injury Management and Workers Compensation Act 1998*, provides

that WIRO has the power to deal with complaints made to the Independent Review Officer. WIRO has a well-staffed, educated and knowledgeable team dedicated to resolving complaints quickly.

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 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 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. SIRA does not utilise its regulatory functions enough to justify the delay in achieving results. Complaints are best left in the hands of WIRO.

4.1.3 Legal Support

The CFMEU submits that the ILARS system is the appropriate mechanism through which legal costs can be claimed and paid in relation to workers compensation disputes. ILARS should remain in its current form and should continue to be operated by WIRO. The ILARS system was created by WIRO to assist with managing legal costs within the workers compensation system and it would be illogical to have another agency step in and take over.

The CFMEU is concerned that those outside the legal profession do not understand or appreciate the value of ILARS or the quality control systems that WIRO has implemented to ensure that injured workers receive competent, qualified and useful legal services. It is important to appreciate the policies and procedures implemented by WIRO to ensure that only meritorious claims proceed to the Workers Compensation Commission (**WCC**).

ILARS Processes and Policies

Approved Legal Services Provider

To be eligible to apply for grants for legal costs, a legal practitioner must first apply to WIRO to become an approved legal services providers (**ALSP**). Only those legal practitioners who hold a current unrestricted practicing certificate are eligible to apply. Legal practitioners are required to provide WIRO with details as to their qualifications and experience and to agree to the terms of conditions of being an ALSP as outlined in the ILARS agreement.[6] Coupled with the ILARS auditing process, this ensures that only competent, qualified and skilled legal practitioners become ALSPs.

WIRO audit process

WIRO has adopted a strategy for undertaking audits on ALSPs to ensure injured workers are receiving competent and thorough legal services. WIRO publishes the audit strategy on its website.[7] The first step is determining whether an ALSP is low, medium or high priority based on the following:

1. Amounts paid to the practitioner in a financial years by WIRO
2. Number of grants made during a financial year
3. Percentage increase in fees over two consecutive years
4. Number of complaints over a two year period.

[6] WIRO, *Application and Agreement to be an approved legal services provider*, (31 March 2017), WIRO <http://wiro.nsw.gov.au/sites/default/files/Agreement%20and%20Application%20to%20be%20ALSP.pdf>. See also WIRO, *ALSP Approval and Practice Standards*, (1 June 2015), WIRO <http://wiro.nsw.gov.au/system/files/ALSP%20Approval%20and%20Practice%20Standards_v2.pdf>

[7] WIRO, *Audit Information for Practitioners*, <http://wiro.nsw.gov.au/system/files/4.%20Audit%20Information.pdf>

Depending on level of priority, an ALSP will be asked to forward some files to WIRO for auditing with ILARS completing an audit report. Where there are allegations of non-compliance WIRO will assist with identifying whether further training should be provided or whether corrective action should be taken.

ALSP must be legal practitioners with a current practicing certificate therefore in addition to the policies and procedures underlying the ILARS process they are also bound by the relevant laws and rules that govern the profession and may still be investigated by the Legal Services Commissioner if complaints are raised or if irregularities are identified.

The CFMEU has experience with the ILARS audit system. A CFMEU legal officer is an ALSP for the express purpose of assisting members with return to work disputes. As the legal officer has not had cause to apply for an ILARS grant, an audit was conducted to ascertain whether the legal officer should remain on the list.

4.1.3.1 ILARS in practice

ILARS is more than simply an administrative process for accessing legal costs. The principal lawyers can also help to resolve liability disputes before they escalate to the WCC. The experience, skills and knowledge of the ILARS principal lawyers has also helped reduce the need for disputation, particularly in relation to the provision of hearing aids. The ILARS team will act as an intermediary between the injured worker's lawyer and the insurance company to attempt to resolve a matter. The ILARS has been quite successful in reducing the disputation in the system through this process.

Additionally, the ILARS policy also requires ALSPs to engage in pre-litigation negotiations and to take all reasonable steps to resolve the dispute prior to escalating the matter to the WCC.

Given that ILARS functions effectively, efficiently and successfully and is instrumental in helping to resolve disputes and managing the effectiveness of legal practitioners in the

workers compensation system, it would be illogical to replace them as the custodian of ILARS. The CFMEU queries whether SIRA has the appropriate personnel, processes and knowledge of the obligations on the legal profession in order to manage the ILARS system appropriately.

ILARS should remain in its current form and should remain in the hands of the only agency appropriately qualified to manage it, WIRO.

4.1.4 Dispute Management and Resolution

The CFMEU agrees that there should be a one stop for formal disputes and has consistently argued for the WCC to be the appropriate venue and jurisdiction.[8] The separate dispute pathways for work capacity reviews and liability disputes has created significant issues in the past[9] and the bifurcation of the system was one of the reasons for the Law and Justice Committee's recommendation that a one stop shop be created.[10] In the CFMEU's view, the combination of recommendations 13 - 17 advocate for the dissolution of the work capacity process, a position that the CFMEU strongly supports. Dissolving the work capacity process is the only logical option for resolving the conflict between the dual dispute pathways. Merely placing both into the one body will not resolve the arbitrary distinction between the two very different disputes particularly when this review does not seem concerned to implement the Law and Justice Committee's recommendation for one notice.[11]

Assuming the government is not minded to dissolve the work capacity process entirely, changes still need to be made to the work capacity process in order to refer the jurisdiction

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[8] Construction, Forestry, Mining and Energy Union, Submission to Centre for International Economics, *Statutory Review of the NSW Workers Compensation Scheme*, 30 May 2014, 23; Construction, Forestry, Mining and Energy Unions, Submissions to WIRO, *Parkes Project*, 25 February 2015, 5; Construction, Forestry, Mining and Energy Union, Submission No. 28 to Legislative Council Standing Committee on Law and Justice, *Review of the exercise of the functions of the WorkCover Authority*, 31 January 2014, 21.

[9] See *Sabanayagam v St George Bank Ltd* [2016] NSWWCCPD 3 (21 January 2016) and *Sabanayagam v St George Bank Limited* [2016] NSWCA 145.

[10] Above n 1, 86.

[11] Above n 1, 86.

to the proposed one stop shop. The following are practical solutions about the best way to imbed the work capacity process into the WCC.

4.1.4.1 PIAWE

The recent consultation into the PIAWE provisions highlighted the complexity and inefficiency of the PIAWE definition and noted that it was an administrative burden for all stakeholders in the process.[12] If the government is intent on delaying legislative reform in this area, the process for resolving PIAWE disputes must be streamlined.

PIAWE may be defined as a work capacity decision but it has no bearing on an injured workers capacity for work. It should be a straight forward calculation. At present, it is a complicated interpretation exercise and a calculation. Defining PIAWE as a work capacity decision has the effect of not allowing an informal resolution to the dispute. A person cannot contract out of legislation and therefore must resolve their PIAWE dispute through the review mechanism outlined in s 44BB of the *Workers Compensation Act 1987* **(the 1987 Act)**.

At present, the secret and confidential review processes have resulted in different PIAWE decisions from different insurers and even different case managers. There is no consistency across the system. Additionally, the CFMEU is seeing a pattern whereby one interpretation is being implemented in the original, but the review decision implements a different interpretation where the CFMEU has made representations on behalf of its members. In order to resolve this inconsistency and to provide the different stakeholders with appropriate guidance, formal determinations need to be made and published.

Referring PIAWE decisions to the WCC will help to develop a binding set of principles about how the different PIAWE sections interact and how they should be interpreted. Once a body of case law has been developed, disputation in this area should reduce hopefully.

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[12] Above n 5, 7.

However, we reiterate a more appropriate way to reduce disputation over PIAWE is to simplify the definition.

Proposed PIAWE resolution process

Because it is important to get a PIAWE decision correct early in a claim to ensure that the injured worker is not being disadvantaged and to reduce the necessary of large back payments, the usual WCC processes may not appropriate. We recommend the following process be implemented:

1. Where there is a dispute about the initial calculation of PIAWE, the injured worker may refer the matter to the WCC for determination.
2. The WCC will resolve the matter in an expedited manner
3. Once the application for determination has been lodged, the insurer/employer has 5 days to provide the WCC with payroll records for the relevant period, and reasoning as to the original calculation;
4. Once the application for determination has been lodged, the injured worker has 5 days to provide the WCC with any information on which they intend to rely (i.e payslips, back statements) and provide any submissions in advance of their case.
5. The WCC considers the material and calculates the PIAWE.
6. The WCC to make its decision within 5 days of receiving all the materials.
7. The decision is to be published as a public determination.
8. The insurer has 3 days to implement any determination of the WCC including any backpay that may be payable.
9. The parties are at liberty to seek an appeal in accordance with the rules of the WCC.

PIAWE is fundamentally about a person's livelihood. If the calculation is incorrect it can have a disastrous impact causing some workers to default on their mortgage or miss rent payments. The current review processes can draw out the process and deprive the injured worker of their correct weekly benefit entitlement for months. There is no reason for a PIAWE decision to take more than a couple of weeks. The decision can be made on the papers with little fuss and there is no need to convene a hearing. Injured workers are

already being deprived of their full wage, it is inhumane to make them wait for a resolution on the correct calculation of their PIAWE.

Publishing the decisions will also allow for a set of principles to be developed that all stakeholders can rely upon when calculating their PIAWE.

4.1.4.2 Work Capacity Processes

The Law and Justice Committee looked at the administrative review process that is work capacity reviews and acknowledged the complexity of system while agreeing with stakeholders that a simplified and more accessible dispute resolution process was needed.[13] Ultimately, the Law and Justice Committee recommended the government investigate removing the distinction between work capacity decisions and liability decisions.[14] The logical inference is that the only way to remove the distinction is to dissolve the work capacity review process. It is unclear whether this is a consideration in this current review. The CFMEU supports the removal of the work capacity process and has advocated for its removal on multiple occasions.[15]

The Law and Justice Committee heard evidence that the three tiered review process was stressful for injured workers[16], complex[17], one sided[18] and was underpinned by conflict of interest issues.[19] Currently, the first two review mechanisms have significant conflict of interest issues:

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[13] Above n 1, 69.

[14] Above n 1, 72.

[15] Construction, Forestry, Mining and Energy Union, Submission to Centre for International Economics, *Statutory Review of the NSW Workers Compensation Scheme*, 30 May 2014; Construction, Forestry, Mining and Energy Unions, Submissions 61 to Legislative Council Standing Committee on Law and Justice, *First review of the workers compensation scheme,* 10 October 2016; Construction, Forestry, Mining and Energy Union, Submission No. 28 to Legislative Council Standing Committee on Law and Justice, *Review of the exercise of the functions of the WorkCover Authority*, 31 January 2014.

[16] Above n 1, 70.

[17] Above n 1, 70.

[18] Above n 1, 73-74.

[19] Above n 1, 73.

1. Internal review - this review is conducted by the same organisation that made the initial decision. Essentially, the organisation responsible for the internal review will issue a decision to tell itself how much to pay the injured worker;
2. Merit review - the regulator is responsible for ensuring that the regulator abide by the appropriate guidelines when making decisions.

In order to ensure fair outcomes, neither the insurer nor the regulator should be involved in making decisions in the work capacity review process.

In relation to procedural review, we note WIRO's comments to the Law and Justice Committee about relevance of the procedural review process.[20] The changes to the Guidelines have reduced the strict obligations on insurers in terms of the content of the work capacity notice, and given that WIRO is only permitted to review the original decision the necessity for procedural review has lessened. A lay worker is unlikely to pursue this review and be successful now that insurers have six years practice at writing work capacity decisions. A comprehensive understanding of administrative law may assist, but given that legal costs are not payable for a procedural review, the knowledge needed is not available.

The above analysis supports the position that work capacity decisions should be the purview of the WCC and the WCC alone. The Claimant Experience Survey[21]shows that claimants prefer the WCC to the work capacity process. Despite the small pool of participants in the study, there is a significant difference between the two systems particularly when rating fairness.[22] This accords with research undertaken by Unions NSW in 2014 and 2015. When participants were asked why they had not sought a review of a work capacity decision, the three most common responses were "too difficult/stressed," felt challenging the insurer would be futile and did not know a review was available. The below table shows the percentage of those who answered in those categories.

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[20] Above n 1, 77.
[21] AMR, *Claimant Experience Study: Qualitative Research Report*, 11 August 2017.
[22] Ibid, 20.

Year	Participants	Reason	Percentage
2014	185	Too difficult/stressed	35.14
		Felt challenging the insurer would be futile	36.76
		Didn't know a review was available	28.11
2015	194	Too difficult/stressed	29.9
		Felt challenging the insurer would be futile	34.02
		Didn't know review was available	34.02

The Unions NSW survey supports the Law and Justice Committee finding that injured workers find the work capacity process complex and supports the AMR Claimant Survey report which shows that injured workers feel the work capacity process is unfair.

If the government does not want to remove the work capacity process in its entirety, the best solution is to instill the WCC with the jurisdiction to review the original decision and remove the internal, merit and procedural review mechanism that currently exist. This approach was supported by the Law and Justice Committee.[23]

The CFMEU submits that the WCC should resolve a work capacity review in the same manner as a medical dispute. Funding should be given for the injured worker to get their own vocational assessment report. This funding should be managed through the current ILARS processes. Once the report is received, ILARS can determine funding in line with the usual model: if the case is arguable and cannot be resolved informally then the matter will proceed to arbitration whereby the arbitrator will make a determination. There may be scope for the WCC to develop a panel of trained and appropriately qualified clinicians to provide independent reports. It is important to note that a work capacity decision is

[23] Above n 1, 85.

fundamentally a medical decision and should not be treated any differently than a normal medical decision.

4.1.5 Legislative Amendments

While it is acknowledged that the government is seeking to minimise the legislative changes necessary to reform the dispute resolution system, any option is going to require some form of legislative change in order for it to apply to all injured workers and to ensure that the model is implemented appropriately.

The advantage of the CFMEU's proposal is that it requires limited legislative changes. The most significant change will require references to review decision under ss 44BA - 44BF of the 1987 Act to be removed and replaced with references to WCC determinations and also for s 43(3) of the 1987 Act to be removed. These proposed changes are necessary to ensure that the one stop shop operates appropriately. Annexure A illustrates the changes that will need to occur to implement the CFMEU's proposal.

The CFMEU strongly believes that its proposal will achieve the aims of the current inquiry while keeping legislative amendments to a minimum. The CFMEU Proposal relies on established and useful resources to provide stakeholders with a workable and reasonable and achievable dispute resolution system.

5. The Discussion Paper Models

The CFMEU submits that the four models proposed in the Discussion Paper do not adequately address the problems raised in the various Law and Justice Committee reviews, nor do they provide workable models on which a new system should be based. The biggest problem is that the Discussion Paper does not provide enough information about what the models are actually proposing and what the implications will be. Specifically there is no discussion about how each of the models incorporates the work capacity process. We are also concerned that the Discussion Paper seems to imply that this review has a secondary purpose being the dissolution of WIRO. The CFMEU supports WIRO and submits that the

review should concern itself only with Law and Justice Committee's recommendations regarding a one stop shop.

These submissions will address each model in turn to explain why the CFMEU believes they are inappropriate and unworkable.

5.1 Option 1: One Stop Shop

Fundamentally, there is nothing wrong with Option 1, however the Discussion Paper provides no information about how it will resolve the work capacity decision v liability decision dichotomy. It is not sufficient to say, we will create a one stop shop without providing detail about how it will function. The purpose of the Law and Justice Committee's one stop shop recommendation was to overcome some of the problems with the work capacity process, specifically the difficulty raised by the *Sabanayagam v St George Bank Limited [2016] NSWCA 145* and the complexity of the work capacity review process. Without knowing how the one stop shop will deal with the work capacity decision, the CFMEU cannot say whether the proposal is workable or reasonable.

This is what differentiates the CFMEU's proposal.

While we acknowledge that the government does not want to institute excessive legislative change, and option one will require limited change (although much will depend on what this model means for work capacity reviews) a simple bare bones change will not result in meaningful change. Something needs to change and this proposal does offer enough of a change to give effect to the purpose of the review.

5.1.1 Claimant Support

The CFMEU questions the utility in having WIRO and SIRA double up on claimant support, particularly when icare is operating a triage process. The icare triage process will provide additional support to those injured workers with complex and sensitive claims thereby removing the need to have another agency perform these services.

The CFMEU has already made submissions on the difference between WIRO and SIRA in achieving outcomes for injured workers.[24] WIRO's interventionist strategy delivers results faster than SIRA. The tiered complaints 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 result in action against insurers either. At the end of the day, injured workers are more concerned with getting results in a timely manner which only WIRO provides.

Rather than having both SIRA and WIRO provide claimant support, WIRO should be the agency responsible while SIRA sticks to regulating.

For the reasons outlined, option 1 should not be implemented.

5.2 Option 2: one stop shop, with more focused claimant and legal support

5.2.1 Claimant Support

The purpose of option two is admirable, however the proposal itself is not desirable. As noted in the discussion of the CFMEU Proposal,[25] icare already has a process whereby they provide more proactive and hands on claimant support. The new model is in its infancy and should be given time to show its worth. Giving a similar and almost identical process to WIRO is an inefficient use of resources and largely unnecessary. WIRO should continue to provide the services it already provides efficiently and competently.

5.2.2 Legal Support

The CFMEU is concerned about the use of the terms "targeted." Again, there is a lack of information about the consequences of the model particularly in relation to the "targeted" ILARS. If it means a reduction in legal costs, the CFMEU strongly opposes this approach.

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[24] Construction, Forestry, Mining and Energy Union, Submission No. 2 to Legislative Council Standing Committee on Law and Justice, *Statutory review of the State Insurance and Care Governance Act 2015*, 13 October 2017, 11.
[25] See above at 6-18.

The 2012 amendments have already restricted legal costs and the ILARS policies already exclude certain claims from getting funding grants, not to mention the restriction on legal costs for work capacity reviews. Any further attempt to restrict legal costs will disadvantage injured workers even further in circumstances were injured workers already feel *"that they have to pursue disputes with companies which have far more resources and money than they do"*[26] as noted in the government's own claimant survey,

We note that any restrictions on legal costs as proposed by this model will only affect injured workers, since insurers cannot avail themselves of the ILARS system. Therefore, the only purpose of a targeted ILARS system must be to punish injured workers for seeking legal advice in relation to their workers compensation claim.

These submissions have already discussed the value of the ILARS system that is operated by WIRO and the fact that WIRO should remain in control of ILARS.[27] ILARS in its current form operates effectively, efficiently and successfully. There is no justification for replacing WIRO as the custodian of the ILARS system.

Should SIRA be charged with operating the ILARS system, inevitably a conflict of interest will arise. Currently, grantees are required to justify why their case will be successful and then ILARS assesses the merit of the case. The regulator cannot regulate the participants in the system while simultaneously deciding whether there is merit in a particular claim. It raises many of the same arguments that have already been made about the inappropriateness of the Merit Review Service being operated by the regulator. SIRA's regulatory role requires it to minimise the cost to the community of workplace injuries. It is difficult to see how it can fairly determine whether to issue grants while still achieving its regulatory purpose. Putting ILARS in SIRA's hands will just create more of the issues that resulting in the separation of WorkCover in 2015. ILARS should stay with WIRO where it belongs.

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[26] Above n 21, 3.
[27] See above at 9-12.

There is a secondary concern in relation to legal professional privilege. Injured workers need to be certain that the information they provide is privileged. ILARS is currently administered by a team of legal practitioners who are bound by their professional rules and must ensure that the information they receive is kept privileged. Since there is limited detail as to how SIRA might administer ILARS, there is no guarantee that SIRA's ILARS team will be staffed by legal practitioners. This is yet another reason why WIRO should remain as the custodian of ILARS.

The same criticism can be levied at option 2, as option 1; it suffers from a lack of detail. Again, it fails to identify how it will resolve the work capacity v liability problem, a key reason for the recommendation which led to this inquiry.

For the reasons outlined, option 2 should not be implemented.

5.3 Option 3: one stop shop, with increased CTP consistency

The three main criticism of this model is the apparent removal of WIRO from the workers compensation system; the move towards consistency with CTP and; the lack of detail provided for such an extreme change to the workers compensation system.

5.3.1 General concerns

5.3.1.1 Move towards consistency with CTP

The CFMEU disagrees with any attempts to merge workers compensation and CTP. The two systems are too different to be merged. Workers compensation operates a no fault system while CTP is dependent on somebody being found to be at fault. In a CTP claim, it is much easier to identify whether an incident has occurred, whereas in workers compensation there may not even be one incident which caused the injury. The new CTP dispute resolution system is in its infancy and until we can be sure that it operates effectively it would be illogical to also throw in workers compensation. Check something works before adding to the workload.

5.3.1.2 Dismantling WIRO

WIRO performs an invaluable service to injured workers and their representatives. WIRO assists injured workers to resolve complaints and disputes quickly, helping to reduce some of the conflict in the system. Given the restrictions placed on legal costs and the fact that legal costs for work capacity reviews are a fairly new, albeit restricted addition, which has seen many injured workers forced to fend for themselves, WIRO has done a great job filling that hole and doing its best to ensure injured workers get access to workers compensation. The CFMEU works with WIRO regularly and appreciates the knowledge and care exhibited by WIRO in assisting injured workers.

WIRO achieves results where SIRA will not. It is quick efficient and useful. Injured workers who contact WIRO for assistance feel supported and are generally happy with the outcome. The same cannot be said for those who contact SIRA.

WIRO has also administers a functioning legal costs regime in ILARS, which ensures that injured workers with legitimate claims are still given access to legal costs. A more thorough discussion of ILARS can be found earlier in these submissions[28], but suffice to say WIRO operates an efficient and successful legal costs regime which allows injured workers to feel like they are on a somewhat equal footing with the insurer.

Injured workers like WIRO and appreciate the services it provides. They have greater trust in WIRO than in SIRA and as the representative of approximately 16,000 members across NSW, so does the CFMEU. There is no justification for removing WIRO.

5.3.2 The Model

5.3.2.1 Claimant Support

As noted in the discussion of the CFMEU Proposal,[29] icare already has a process whereby they provide more proactive and hands on claimant support. The new model is in its infancy and should be given time to show its worth. Giving a similar and almost identical

[28] Se above at 9-12.

[29] See above at 6-18.

process to SIRA is an inefficient use of resources and largely unnecessary. It is irrational and inefficient to replicate this process with SIRA. Coupled with WIRO's current informal dispute resolution and complaint process, the icare program is already an improvement on the current system. icare should continue to provide more targeted claimant support with WIRO continuing to provide informal dispute resolution services.

5.3.2.2 Legal Support

The CFMEU is concerned about the use of the terms "targeted." Again, there is a lack of information about the consequences of the model particularly in relation to the "targeted" ILARS. If it means a reduction in legal costs, the CFMEU strongly disapproves of this approach. These submissions have already discussed the value of the ILARS system that is operated by WIRO and the fact that WIRO should remain in control of ILARS.[30] ILARS in its current form operates effectively, efficiently and successfully. There is no justification for replacing WIRO as the custodian of the ILARS system.

There is no justification for giving SIRA control over the ILARS process in fact there are significant conflict of interest concerns, as outlined above,[31] which need to be addressed and considered. SIRA's role as regulator is incompatible with determining whether a particular claim has merit and should be funded. WIRO should remain as custodian of ILARS, in its current form.

There is a secondary concern in relation to legal professional privilege. Injured workers need to be certain that the information they provide is privileged. ILARS is currently administered by a team of legal practitioners who are bound by their professional rules and must ensure that the information they receive is kept privileged. Since there is limited detail as to how SIRA might administer ILARS, there is no guarantee that SIRA's ILARS team will be staffed by legal practitioners. This is yet another reason why WIRO should remain as the custodian of ILARS.

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[30] See above at 9-12.
[31] See above at 21.

For the reasons outlined, option 3 should not be implemented.

5.4 Option 4: consolidated personal injury dispute resolution model

The three main criticism of this model is the apparent removal of WIRO from the workers compensation system; the move towards consistency with CTP and; the lack of detail provided for such an extreme change to the workers compensation system. These are the same matters addressed in our critique of Option 3.

5.4.1 General concerns

5.4.1.1 Move towards consistency with CTP

The CFMEU strongly believes that CTP and workers compensation dispute resolution should remain separate. As noted above the differences,[32] in the scheme outweigh the similarities. Additionally the new CTP system is in its infancy and until it has been significantly tested it is premature to join the two schemes. The discussion paper provides no detail as how the CTP process operates nor the principles and practices that underpin the new dispute resolution process. The lack of detail means that responders are unable to provide an informed opinion about whether a combined CTP system is workable or desirable. We reiterate our earlier comments about the differences between the schemes and the fact that the CTP system is in its infancy. We also note that combining the CTP and workers compensation regimes will require comprehensive legislative change which is beyond the scope of the discussion paper.[33]

5.4.1.2 Dismantling WIRO

There are benefits to retaining WIRO in the system as outlined above.[34] WIRO performs an invaluable service to injured workers and their representatives. WIRO assists injured workers to resolve complaints and disputes quickly, helping to reduce some of the conflict

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[32] See above at 23.

[33] Department of Finance, Services and Innovation, *Improving workers compensation dispute resolution in NSW: A discussion paper on potential reforms to the NSW workers compensation dispute resolution system,* 20 December 2018, 24.

[34] See above 9-12 and 23-24.

in the system. WIRO operates an efficient and successful legal costs regime which allows injured workers to feel like they are on a somewhat equal footing with the insurer.

Injured workers like WIRO and appreciate the services it provides. They have greater trust in WIRO than in SIRA and as the representative of approximately 16,000 members across NSW, so does the CFMEU. There is no justification for removing WIRO.

5.4.2 The Model

5.4.2.1 Claimant Support

The CFMEU strongly disagrees with SIRA being the body responsible for claimant support. Option 4 nominates SIRA as being in control of claimant support and potentially also dispute resolution. This is contrary to the views expressed earlier in the discussion paper:

> Any realignment of roles and/or consolidation of dispute resolution should preserve the separation of functions brought about in the 2015 reforms. For example, claimant support and dispute resolution need to be provided by separate bodies because it could be a conflict of interest in both advise a claimant of their dispute resolution options, and later make a decision on the dispute.[35]

The Discussion Paper itself identifies that having SIRA operate in both roles is a conflict of interest. For that reason alone Option 4 must be dismissed.

The CFMEU echoes this concern. An injured worker will be hesitant to discuss their claim with the same agency that will ultimately determine the outcome of their case. SIRA would need to create strong and advanced chinese walls in order to pull it off but even with the chinese walls the perception that the decision maker is not independent will still exist. There will be no confidence in the system.

[35] Above n 33, 26.

As noted in the discussion of the CFMEU Proposal,[36] icare already has a process whereby they provide more proactive and hands on claimant support. The new model is in its infancy and should be given time to show its worth. Giving a similar and almost identical process to SIRA is an inefficient use of resources and largely unnecessary. It is irrational and inefficient to replicate this process with SIRA. Coupled with WIRO's current informal dispute resolution and complaint process, the icare program is already an improvement on the current system. icare should continue to provide more targeted claimant support with WIRO continuing to provide informal dispute resolution services.

5.4.2.2 Legal Support

The CFMEU strongly disagrees with the suggestion that ILARS should be dismantled in favour of a costs follow the event legal costs regime. The Law and Justice Committee has consistently mentioned the appropriateness of injured workers having access to legal representation. Removing ILARS has the effect of further restricting legal access. This is particularly the case with threshold disputes. It is difficult to imagine a situation where a lawyer will be willing to take on a case where the injured worker, having been on a reduced wage, does not have the income to pay the costs and the outcome is not certain. Were it easy to gauge an injured workers impairment just by looking at them this may not be such an issue, however a multitude of factors go into determining impairment and lawyers are not doctors.

This change would have the effect of seeing some injured workers, who are on the precipice of failing into a different impairment category, being denied legal representation simply because the outcome is uncertain. There is already a high bar for accessing certain benefits, this proposed change will just see more and more people not seeking to access their entitlements because their case was too close to call. These are the people who need access the most because they are the ones least likely to get agreement with the insurer as to their level of impairment. The proposal is inherently unfair and unduly punishes injured workers even further.

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[36] See above at 6-18.

It should be noted that the discussion paper proves that it is insurers, not injured workers, who have the highest legal costs in the system. Figure 5 in the Discussion paper[37] clearly shows that in 2014/2015 insurer legal costs were significantly higher than ILARS and claimant costs combined. In 2015/16 insurer legal costs are still higher. There have been very few amendments that target the legal costs incurred by insurers, while the scheme and the various ILARS policies make it more difficult for injured workers to get access to legal costs without first proving their claim has merit. This proposed change is just going to make things worse for injured workers while insurers can continue to spend on legal costs without worry.

5.4.2.3 Dispute management and resolution

The CFMEU is concerned that there is a potential conflict of interest in SIRA being the regulator and the ultimate decision maker. As overseer of the system, SIRA needs to focus on ensuring that the system functions. As regulator, SIRA has a vested interest in ensuring that disputes are kept to a minimum to justify their position which may ultimately affect their ability to make fair and independent decisions. Certainly the injured workers in the system will perceive that there is a conflict of interest.

In order to have confidence in the overall regulation of a system of governance, the agencies must be separated. There is a reason why the police and the courts exercise two distinct functions, one enforces the law while the other interprets the law. This same distinction between roles must occur within the workers compensation system. SIRA cannot be both the police and the courts it must choose its function to ensure that it fulfils it to an efficient and effective standard.

There is no suggestion that SIRA should be removed from its role as regulator. It has the expertise and knowledge to continue in that role, all that is missing is the willingness to perform the role. It does not make sense to diversify SIRA when the WCC exists and has

[37] Above n 33, 22.

performed the role as arbitrator efficiently and effectively with the necessary level of skills, qualifications, expertise and most importantly, independence.

During the First Review of the Workers Compensation System, multiple stakeholders called for an independent tribunal, staffed by judicial officers, to have responsibility for all dispute resolution within the system. Not one submission advocated for SIRA to take control of the dispute resolution process. It would be contrary to the recommendations of the Law and Justice Committee to invest the jurisdiction in SIRA which is a largely administrative agency without the appropriate qualification, expertise or resources to perform the role of arbitrator. The system must make use of the resources it already possesses without duplicating those resources. The WCC is the most appropriate agency to oversee the dispute resolution system.

For the reasons outlined, option 4 should not be implemented.

5.5 Concluding comments on proposed reform options

The limited information provided does not support adopting any of the four options outlined in the Discussion Paper. The four options fail to mention the work already being undertaken by icare in the claimant support area which will impact the necessity of some of the changes proposed. Additionally, investing more power in SIRA will raise conflict of interest issues which had largely been rectified, apart from merit review, with the WorkCover split. Most importantly, the options identified further restrict the injured workers access to assistance and legal representation and removes one of the most effective agencies in the workers compensation system in WIRO.

We submit that the CFMEU's proposal has greater merit than the four options outlined in the discussion paper. The CFMEU proposal works because it gives effect to the Law and Justice Committee recommendations; it solves some of the immediate problems with the system and; it does not require extensive legislative change. If PIAWE disputes are resolved expeditiously through an arbitrated outcome, the number of disputes in the first 13 weeks will decline. That would result in a significant costs saving to the scheme. If the work

capacity process is streamlined to a one review option that is decided as per the current medical disputes process, then the costs associated with internal, merit and procedural review will decrease. It will take the stress out of the process for the injured worker and would save on resources the insurer allocates to dealing with work capacity reviews. It will also ensure that injured workers have more confidence in the system and the outcome.

6. Miscellaneous comments and issues

Despite being focused on creating a new dispute resolution process, the Discussion Paper also raises a number of ancillary options for reform. We are also concerned about comments raised by representatives of DFSI during our consultation meetings. We intend to address these matters briefly to dispel any myths and to provide commentary on the ancillary proposals.

6.1 Comments regarding legal services

The CFMEU is concerned about various comments from DFSI representatives regarding the competency and quality of legal services offered to injured workers. As outlined earlier,[38] lawyers who apply to be an ALSP must provide details of their skills and experience in workers compensation, as well as signing an agreement which sets out the requirements and obligations. ALSP's are also subject to auditing procedures in addition to oversight by the Law Society and Legal Services Commissioner. The CFMEU understands that the amount of ALSPs has also decreased making it easier for WIRO to assess their success.

6.2 Digitisation

The CFMEU has no particular concern with using technology to make the system easier, however our membership base is largely less educated with a high concentration of persons with non english speaking backgrounds and therefore less likely to be comfortable using digital platforms. Our members prefer face to face communication or via the telephone. They need to speak to the person assisting them or making decisions on their

[38] See above at 9-12.

behalf. We need to ensure that the system does not go completely digital to allow greater access for all to all aspects of the system.

6.3 Insurers conducting internal reviews

The proposal that insurers conduct internal reviews of all disputed decisions, not just in relation to work capacity decisions is narrow sighted and is in direct contradiction to the findings of the AMR claimant survey. The AMR claimant survey found the following:

1. Claimants saw the insurers as adversaries with more resources and money than claimants. Claimants hold the *view that insurers hold a great deal of resources which enable them to be effectively unaccountable, where claimants have little to no access to recourse*[39].
2. Claimants felt relieved and boosted in confidence when a third party had appeared to be invested in their wellbeing[40]
3. On all the markers, work capacity scored lower than the WCC pathway, given that the figures for WCD were a combination of internal review and merit review it is possible that the lack of satisfaction may be related to the intervention of the insurer since it is not a third party[41]
4. The system was rated poorly in relation to fairness and there was a low level of satisfaction by the claimants.[42]

All of these factors weigh heavily against the insurer being given additional power throughout the process. The overwhelming evidence to date is that injured workers do not trust their insurers. This is supported by the Unions NSW surveys that showed that 36.76% of participants in 2014 and 34.02% of participants in 2015 did not seek a review of their work capacity decision because they felt challenging the insurer would be futile.

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[39] Above n 21, 10.
[40] Above n 21, 14.
[41] Above n 21, 14.
[42] Above n 33, 19.

This suggestion also fails to note that many of the decisions made by the insurer are not made in a bubble. They are more often than not checked and affirmed by another person prior to be sent out. This is particularly the case for work capacity decisions which mention that the decision has already been reviewed. Requiring another internal review would be replicating work that has already been done and would be a waste of resources.

6.4 Commutations

The CFMEU supports the use of commutations, with the agreement of injured workers, for those workers who want to exit the scheme. This should only be done upon workers receiving independent legal advice and pay outs being reflective of a worker's loss of earning capacity and ongoing medical costs as a result of the injury. In principle, we support lifting some of the restrictions on commutation and relaxing access to commutations with appropriate safeguards.

The Discussion Paper provides very little detail on what restrictions would be relaxed or what suggestions are being considered in relation to commutations. It would be inappropriate for the CFMEU to respond fully to this consideration. It is a special area that is complex and final.

The CFMEU submits that it is not appropriate to make any changes to commutations until further detail can be provided. We strongly believe that more targeted and detailed consultation needs to occur with all stakeholders prior to any amendments in this area. We would welcome the opportunity to discuss commutations more fully in the future.

6.5 Consultation Process

The CFMEU is concerned about the consultation process that has occurred during this review. The Discussion Paper was released just before Christmas with responses required in early February 2018. This time frame left little time for the CFMEU to consult with its membership about their views on the proposals.

The unreasonableness of the tights timeframe is expounded by the amount of ideas expressed in the Discussion Paper and the lack of detail provided in support of these ideas. The potential consequences of the outcome calls for a concise and detailed discussion paper on the most important and relevant details. IN particular we note, not enough detail was provided to assess the adequacy of the CTP scheme, the meaning of targeted ILARS and what is happening with work capacity decisions. The Discussion Paper was far from adequate to allow a proper responses.

We are also concerned about the secrecy of the process. Through consultation with DFSI, unions were told that it was unlikely that submissions would be published or publically available and that given the tight time frame no exposure draft will be circulated. The correct model for the dispute resolution process is vital to the success of the scheme and not allowing the stakeholders who actually use the system to provide consultation on the model chosen is irresponsible and irrational. Consultation means discussing outcomes with people before they eventuate and not waiting for the inevitable negative feedback. It is too hard to fix a system once it has been implemented.

7. Conclusion

The CFMEU does not support any of the options outlined in the discussion paper. It is clear that there is a failure to appreciate the purpose and intention of the Law and Justice Committee recommendations. We are also concerned that the Discussion Paper appears to be advocating for the removal of WIRO which we note is outside the scope of the Law and Justice recommendations, considering that the Committee had previously suggested expanding WIRO's area of responsibility.

In recognition of the Law and Justice Committee's recommendations and the need for reform, the CFMEU has provided a proposal which will give effect to the recommendations while requiring limited legislative change. The CFMEU proposal will ensure a more efficient dispute resolution process which draws on the resources already available in the scheme while simultaneously reducing disputation in the system. The CFMEU would welcome the opportunity to discuss its Proposal with DFSI or the government should further

information be required.

We submit that the government should take into account our proposal when decided on a final model to implement.

Annexure A

Proposed Legislative Amendments

Subdivision 3 – Work capacity

43 Work capacity decisions by insurers

(1) The following decisions of an insurer (referred to in this Division as work capacity decisions) are final and binding on the parties and not subject to appeal or review except review under section 44BB or judicial review by the Supreme Court:

(a) a decision about a worker's current work capacity,

(b) a decision about what constitutes suitable employment for a worker,

(c) a decision about the amount an injured worker is able to earn in suitable employment,

(d) a decision about the amount of an injured worker's pre-injury average weekly earnings or current weekly earnings,

(e) a decision about whether a worker is, as a result of injury, unable without substantial risk of further injury to engage in employment of a certain kind because of the nature of that employment,

(f) any other decision of an insurer that affects a worker's entitlement to weekly payments of compensation, including a decision to suspend, discontinue or reduce the amount of the weekly payments of compensation payable to a worker on the basis of any decision referred to in paragraphs (a)-(e).

(2) The following decisions are not work capacity decisions:

(a) a decision to dispute liability for weekly payments of compensation,

(b) a decision that can be the subject of a medical dispute under Part 7 of Chapter 7 of the 1998 Act.

~~(3) The Commission does not have jurisdiction to determine any dispute about a work capacity decision of an insurer and is not to make a decision in respect of a dispute before the Commission that is inconsistent with a work capacity decision of an insurer.~~

Subdivision 3A – Review of work capacity decisions

44BA Definitions

In this Subdivision:

~~**"internal review"** means a review by an insurer under section 44BB.~~

"**determination**" means a decision of the Workers Compensation Commission in relation to a work capacity decision.

"original decision" means a work capacity decision that is the subject to an application ~~of a review~~ under section 44BB.

"required period of notice", in relation to the discontinuation of payment of compensation to a worker, or the reduction of the amount of compensation payable to the worker, means the required period of notice for the purposes of section 54 with respect to the discontinuation or reduction.

~~**"review decision"** means a work capacity decision made by an insurer as a result of a review under section 44BB.~~

44BB Review of work capacity decisions

(1) An injured worker may refer a work capacity decision of an insurer for ~~review~~ determination by the Workers Compensation Commission.

~~(a) by the insurer in accordance with the Workers Compensation Guidelines within 30 days after an application for internal review is made by the worker, or~~

~~(b) by the Authority (as a merit review of the decision), but not until the dispute has been the subject of internal review by the insurer, or~~

~~(c) to the Independent Review Officer (as a review only of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision), but not until the dispute has been the subject of internal review by the insurer and merit review by the Authority.~~

(2) An application for determination ~~review~~ of a work capacity decision must be made in the form approved by the Authority and specify the grounds on which the determination ~~review~~ is sought. The worker must notify the insurer in a form approved by the Authority of an application made by the worker for determination by the Workers Compensation Commission. ~~review by the Authority or the Independent Review Officer~~.

(3) The Workers Compensation Commission is to resolve disputes about pre-injury average weekly earnings in accordance with Part 5, Division 2 of the *Workplace Injury Management and Workers Compensation Act 1998*.

(4) ~~(2A) The insurer is to notify the worker of the decision on an internal review as soon as practicable after the review is conducted.~~

~~(3) The following provisions apply to the review of a work capacity decision when the reviewer is the Authority or the Independent Review Officer:~~

~~(a) an application for review must be made within 30 days after the worker receives notice in the form approved by the Authority of the insurer's decision on internal review of the decision (when the application is for review by the Authority) or the Authority's decision on a review (when the application is for review by the Independent Review Officer),~~

~~(b) an application for review by the Authority may be made without an internal review by the insurer if the insurer has failed to conduct an internal review and notify the worker of the decision on the internal review within 30 days after the application for internal review is made,~~

~~(c) the reviewer may decline to review a decision because the application for review is frivolous or vexatious or because the worker has failed to provide information requested by the reviewer,~~

~~(d) the worker and the insurer must provide such information as the reviewer may reasonably require and request for the purposes of the review,~~

~~(e) the reviewer is to notify the insurer and the worker of the findings of the review and may make recommendations to the insurer based on those findings (giving reasons for any such recommendation),~~

~~(f) the Independent Review Officer must also notify the Authority of the findings of a review and the Authority may make recommendations (giving reasons for any such recommendations) to the insurer based on those findings,~~

~~(g) recommendations made by the Authority are binding on the insurer and must be given effect to by the insurer,~~

~~(h) recommendations made by the Independent Review Officer are binding on the insurer and the Authority.~~

(4) (Repealed)

~~(5) The Commission is not to make a decision in proceedings concerning a dispute about weekly payments of compensation payable to a worker while a work capacity decision by an insurer about those weekly payments is stayed.~~

(6) (Repealed)

44BC Stay of work capacity decisions

(1) A review of a work capacity decision in respect of a worker operates to stay the decision that is the subject of ~~the review~~ an application for determination and prevents the taking of action by an insurer based on the decision while the decision is stayed.

(2) However, a review operates to stay the decision that is the subject of the review only if the application for review is made by the worker within 30 days after the day on which the worker is notified ~~(or required under section 44BB to be notified)~~ of the work capacity decision:

~~(a) the work capacity decision to be reviewed (in the case of an application for internal review), or~~

~~(b) the decision on the internal review (in the case of an application for review by the Authority), or~~

~~(c) the findings of the merit review (in the case of an application for review by the Independent Review Officer).~~

(3) A stay operates from the time the application for ~~review~~ determination is made until the worker is notified of the determination ~~findings of the review~~ (or the application for ~~review~~ determination is withdrawn). After a stay is lifted, weekly payments of compensation must not be discontinued or reduced in accordance with the original decision (or any decision resulting from the ~~review~~ determination ~~of that decision~~) until the required period of notice under section 54 has expired. See sections 44BD and 44BE for the effect of a review on that notice period.

(4) A stay of an original decision to discontinue, or reduce an amount of, compensation does not operate to extend the required period of notice with respect to the discontinuation or reduction. In some circumstances, a new period of notice will commence when a worker is notified of a discontinuation or reduction resulting from a ~~review~~ determination. See section 44BD.

44BD Effect of ~~review decision~~ the determination on notice period

(1) In the application of section 54 to a discontinuation, or reduction of the amount, of payments of compensation as a result of a determination ~~review decision~~ (whether or not the ~~review decision~~ determination is less favourable to the worker than the original decision):

(a) no regard is to be had to any period of notice given to the worker in respect of any discontinuation or reduction before the date on which the worker is notified of the determination ~~review decision~~, and

(b) the required period of notice commences on that date.

(2) This section does not apply to a discontinuation or reduction as a result of a determination ~~review decision~~ that affirms an original decision with respect to the discontinuation or reduction. See section 44BE for the effect of the affirmation of an original decision on the required period of notice.

44BE Effect of affirmation or withdrawal on notice period

(1) The required period of notice with respect to a discontinuation or reduction of compensation is not affected by:

(a) a determination ~~review decision~~ that affirms an original decision with respect to the discontinuation or reduction, or

(b) the withdrawal of an application for determination ~~review~~ under section 44BB of the original decision with respect to the discontinuation or reduction.

(2) Accordingly, the original decision (and any affirming determination ~~review decision~~) takes effect on the later of:

(a) the date on which the worker is notified of the determination ~~review decision~~, or withdraws the application for determination ~~review~~, or

(b) the date on which the required period of notice in respect of the discontinuation or reduction to which the original decision relates expires.

44BF Legal costs

(1) A legal practitioner is ~~not~~ entitled to be paid or recover any amount for a legal service provided to a worker or an insurer in connection with a ~~review~~ determination as determined by the Workers Compensation Independent Review Office in its capacity as administrator of the Independent Legal Assistance and Review Service. In ~~if:~~

~~(a) the review is of a prescribed class, or~~

~~(b) the regulations do not fix any maximum costs for providing the legal service to the worker or insurer in connection with the review.~~

~~(2) Despite section 341 of the 1998 Act, the regulations may provide that, in prescribed circumstances, a party to a review under this Subdivision (other than an internal review) is to bear the other party's costs in connection with the review.~~

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Schedule 2

Schedule 2 Jurisdiction of Dispute Resolution Service

(Section 7.1)

Note. This Schedule sets out the jurisdiction of the Dispute Resolution Service with respect to merit review matters, medical assessment matters and miscellaneous claims assessment matters. Jurisdiction with respect to the assessment of claims is conferred by Division 7.6.

See section 7.2 for the exercise of other miscellaneous functions not included in this Schedule by decision-makers designated by the Dispute Resolution Service.

1 Merit review matters

The following matters are declared to be merit review matters for the purposes of Part 7:

(a) the amount of statutory benefits that is payable under section 3.4 (Statutory benefits for funeral expenses) or under Division 3.3 (Weekly payments of statutory benefits to injured persons),

(b) whether for the purposes of section 3.12 (Cessation of weekly payments to other injured persons after maximum weekly payments period) an injured person's injury is the subject of a pending claim for damages,

(c) whether for the purposes of section 3.13 (Termination of weekly payments on retiring age) a motor accident that has caused a person's injury has happened before the person has reached retirement age,

(d) the suspension of weekly payments of statutory benefits under section 3.14 (Obligations to provide authorisations and medical evidence), 3.15 (Requirements for evidence as to fitness for work) or 3.17 (Treatment, rehabilitation and vocational training),

(e) whether the insurer has given the required period of notice under section 3.19 (Notice required before discontinuing or reducing weekly payments) before discontinuing or reducing weekly payments of statutory benefits,

(f) whether an amount of statutory benefits is recoverable by the injured person under section 3.19 (3) (Notice required before discontinuing or reducing weekly payments), and the amount of statutory benefits so recoverable,

(g) whether for the purposes of section 3.21 (Weekly statutory benefits to persons residing outside Australia) an injured person is or has been residing outside Australia,

(h) whether the insurer is required to vary an amount of a weekly payment of statutory benefits in accordance with section 3.22 (Indexation of weekly statutory benefits),

(i) whether the cost of treatment and care provided to the claimant is reasonable for the purposes of section 3.24 (1) (a) (Entitlement to statutory benefits for treatment and care),

(j) whether statutory benefits are payable under section 3.26 (Statutory benefits for loss of capacity to provide gratuitous domestic services), and the amount of statutory benefits so payable,

(k) whether expenses have been properly verified for the purposes of section 3.27 (Verification of expenses),

(l) whether for the purposes of section 3.28 (Cessation of statutory benefits after 26 weeks to injured adult persons most at fault or to injured persons with minor injuries) treatment and care expenses have been incurred after the expiration of the period during which statutory benefits are payable,

(m) whether for the purposes of section 3.28 (Cessation of statutory benefits after 26 weeks to injured adult persons most at fault or to injured persons with minor injuries) treatment or care is authorised by the Motor Accident Guidelines (except in circumstances referred to in clause 2 (c)),

(n) whether treatment and care expenses have been paid or recovered for the purposes of section 3.29 (No statutory benefits for expenses already compensated),

(o) (Repealed)

(p) whether the cost of treatment and care exceeds any limit imposed by the Motor Accident Guidelines for the purposes of section 3.31 (Limits under Guidelines on statutory benefits for particular treatment and care),

(q) whether treatment and care provided to the injured person is treatment and care needs or excluded treatment and care needs to which section 3.32 (No treatment and care statutory benefits for treatment and care needs covered by Lifetime Care and Support Scheme) applies,

(r) whether for the purposes of section 3.33 (Treatment and care provided while persons residing outside Australia) treatment and care provided to an injured person has been provided while the person is residing outside Australia,

(s) whether the insurer is entitled to refuse payment of statutory benefits in accordance with section 3.34 (Effect of death on entitlement to statutory benefits), 3.35 (No statutory benefits if workers compensation payable) or 3.36 (No statutory benefits for at-fault driver or owner if vehicle uninsured) the vehicle was an uninsured vehicle at the time of the motor accident,

(t) whether the insurer is entitled to refuse payment of statutory benefits in accordance with Part 3 of the *Civil Liability Act 2002* (as applied by section 3.39 (Limitation on statutory benefits in relation to certain mental harm)) or 3.40 (Effect of recovery of damages on statutory benefits),

(u), (v) (Repealed)

(w) whether the insurer is entitled to delay the making of an offer of settlement under section 6.22 (Duty of insurer to make offer of settlement on claim for damages),

(x) whether for the purposes of section 6.24 (Duty of claimant to co-operate with other party) a request made of the claimant is reasonable or whether the claimant has a reasonable excuse for failing to comply,

(y) whether the claimant has provided the insurer with all relevant particulars about a claim in accordance with section 6.25 (Duty of claimant to provide relevant particulars of claim for damages),

(z) whether the insurer is entitled to give a direction to the claimant under section 6.26 (Consequences of failure to provide relevant particulars of claim for damages),

(za) whether the insurer is entitled to suspend weekly payments of statutory benefits under section 6.5 (Duty of claimants to minimise loss) of the Act,

(aa) whether for the purposes of section 8.10 (Recovery of costs and expenses in relation to claims for statutory benefits) the costs and expenses incurred by the claimant are reasonable and necessary.

2 Medical assessment matters

The following matters are declared to be medical assessment matters for the purposes of Part 7:

(a) the degree of permanent impairment of an injured person that has resulted from an injury caused by a motor accident (including whether the degree of permanent impairment is greater than a particular percentage),

(b) whether any treatment and care provided to an injured person is reasonable and necessary in the circumstances or relates to an injury caused by a motor accident for the purposes of section 3.24 (Entitlement to statutory benefits for treatment and care),

(c) whether for the purposes of section 3.28 (Cessation of statutory benefits after 26 weeks to injured adult persons most at fault or to injured persons with minor injuries) treatment or care provided to an injured person will improve the recovery of the injured person,

(d) the degree of impairment of the earning capacity of an injured person that has resulted from an injury caused by a motor accident,

(e) whether an injury is a minor injury for the purposes of the Act.

3 Miscellaneous claims assessment matters

The following matters are declared to be miscellaneous claims assessment matters for the purposes of Part 7:

(a) whether for the purposes of section 2.30 (Claim against Nominal Defendant where vehicle not identified) there has been due inquiry and search to establish the identity of a motor vehicle,

(aa) whether the Nominal Defendant has lost the right to reject a claim under section 2.31 (Rejection of claim for failure to make due inquiry and search to establish identity of vehicle) of the Act for failure to make due inquiry and search to establish the identity of a vehicle,

(b) whether for the purposes of section 3.1 (Statutory benefits payable in respect of death or injury resulting from motor accident) the death of or injury to a person has resulted from a motor accident in this State,

(c) which insurer is the insurer of the at-fault motor vehicle for the purposes of section 3.3 (Determination of relevant insurer),

(d) whether for the purposes of section 3.11 (Cessation of weekly payments to injured persons most at fault or with minor injuries after 26 weeks) the motor accident concerned was caused by the fault of another person,

(e) whether for the purposes of section 3.28 (Cessation of statutory benefits after 26 weeks to injured adult persons most at fault or to injured persons with minor injuries) or 3.36 (No statutory benefits for at-fault driver or owner if vehicle uninsured) the motor accident was caused mostly by the fault of the injured person,

(f) whether the insurer is entitled to refuse payment of statutory benefits in accordance with section 3.37 (No statutory benefits payable to injured person who commits serious driving offence),

(g) whether the insurer is entitled to reduce the statutory benefits payable in respect of the motor accident in accordance with section 3.38 (Reduction of weekly statutory benefits after 6 months

for contributory negligence),

(h) whether for the purposes of Part 6 (Motor accident claims) the claimant has given a full and satisfactory explanation for non-compliance with a duty or for delay,

(i) whether for the purposes of section 6.9 (Compliance with verification requirements—claim for statutory benefits) or 6.10 (Compliance with verification requirements—claim for damages) the motor accident verification requirements have been complied with,

(j) whether notice of a claim has been given in accordance with section 6.12 (Notice of claims for statutory benefits or damages),

(k) whether the insurer is entitled to refuse payment of weekly payments of statutory benefits in accordance with section 6.13 (Time for making of claims for statutory benefits),

(l) whether a late claim may be made in accordance with section 6.14 (Time for making of claims for damages),

(m) whether a claim may be rejected for non-compliance with section 6.15 (How notice of claims given).