Submission No 5

INQUIRY INTO 2020 REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: Business NSW (formerly NSW Business Chamber)

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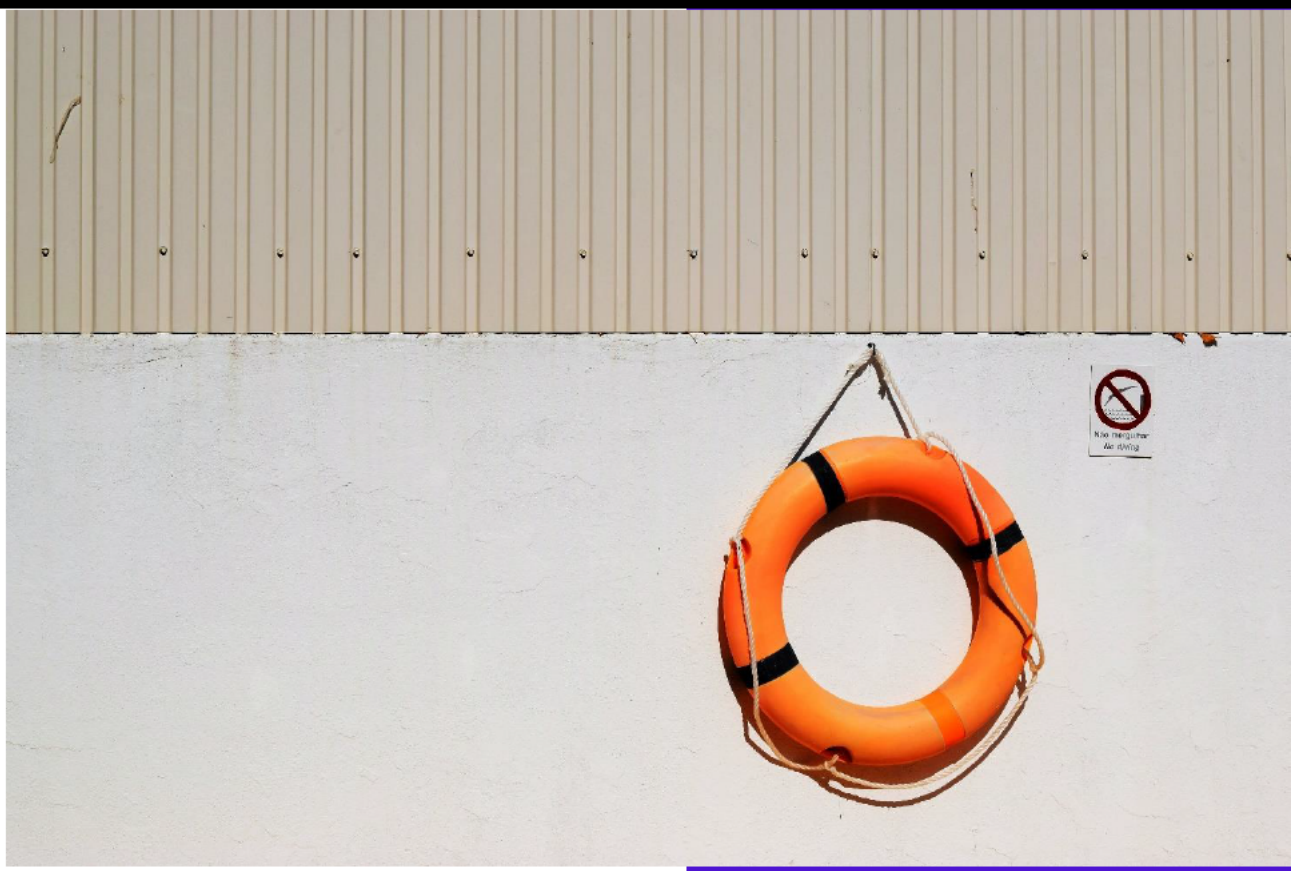
REVIEW OF THE WORKERS' COMPENSATION SCHEME

MAY 2020

BUSINESS NSW



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Introduction

Business NSW welcomes the opportunity to provide a submission to the *2020 Review of the Workers' Compensation Scheme*.

Formerly the NSW Business Chamber, Business NSW is the peak policy and advocacy body which has been representing businesses in NSW since 1826. Business NSW is one of Australia's largest business support groups with a direct membership of 20,000 businesses. Business NSW works with government, industry groups, as well as business and community leaders to provide a voice for our members. Operating throughout a network in metropolitan and regional NSW, Business NSW represents the needs of business at a local, state and federal level.

Over the past few years, the NSW workers' compensation scheme has been in decline, both from a financial perspective and, more importantly, in terms of return to work outcomes. As observed in findings from the *Independent reviewer report on the Nominal Insurer of the NSW workers' compensation scheme* (the Dore Report) and supported by three reports prepared by EY, much of that decline is attributable to the changes made to the scheme in 2015.

Increasing employer premiums and/or decreasing injured workers' benefits will not address the underlying issues with the effectiveness and efficiency of the scheme.

To address the deteriorating underwriting result of the scheme, measures are needed to counteract the:

- poor design of the new claims' management model developed by the Nominal Insurer (NI)
- lack of transparency surrounding the premium-setting system
- lack of regulatory oversight of the scheme.

The original 1987 statute contained a number of checks and balances which, over time, have been removed (see Box 1 below). The absence of some of these checks and balances has weakened accountability and incentives to drive efficient and transparent outcomes. The costs of inefficient practices are ultimately borne by employers (through increased premiums) and workers (through decreased benefits). The interests of employers and injured workers (as beneficiaries of the scheme) are no longer adequately protected by the current legislative framework.

The scheme's decline can only be reversed if many of those checks and balances are brought back into the system. This will require legislative change.

The Dore Report's Terms of Reference did not explicitly require consideration of potential legislative changes. Although Business NSW supports the findings of the Dore Report, it believes deeper consideration of legislative changes are also needed to address the underlying drivers of the scheme's deteriorating performance. This submission sets out the legislative changes needed to ensure the scheme is meeting its intended purpose.

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Photo by Matthew Waring on Unsplash.

Box 1 – Some context from 1987

Business NSW's recommendations need to be viewed in light of the measures that were developed in 1987 and now no longer exist.

They included:

- the State Compensation Board (the members of which had to include an employer representative and an employee representative) had extensive powers over the scheme's insurers
- an Insurance Premiums Committee which, once determined, published the resultant formula (which had to be verified by a qualified accountant) in an Insurance Premiums Order by way of gazette
- the Workers' Compensation Review Committee (the members of which included a person nominated by the Labor Council of NSW and an employer representative, nominated by a group of employer associations) was formed to review the operation of the Act and provide a report to the Minister. It also had the power to convene subject matter specific sub-committees to assist it
- licences conditions which could be imposed for purposes such as:
  - ensuring compliance with statutory obligations
  - preserving premiums paid
  - the efficiency of the workers' compensation system.
- directors of insurance companies held the same liability as a trustee (where the policy holders were the beneficiaries)
- questions of liability (in relation to whether the injury is compensable under the Act) could be referred to review officers whose role included conducting a conciliation between the parties, if required. The matter could be escalated to the Commissioner and then, if required, to the Compensation Court
- queries about the nature and extent of the injured worker's injury could be referred to medical referees who would then issue a certificate concerning the worker's condition or fitness for employment
- the 'odd lot' rule, which recognised (and provided for) the situation where an injured worker was fit for employment of a kind "not commonly available for a person in the workers circumstances".

Part 1 — The new claims' management model

Business NSW maintains that the two most significant issues with the new claims' management model relate to:

- liability decisions
- poor claims' management practices.

Liability decisions

Recommendation 1: Liability decisions – the decision-making process

The NI be required to introduce administrative processes to ensure that:

- when a claim is being made, all relevant information required by the 1987 Act is collected and considered by an experienced claims manager
- when a liability decision is made, the Notice of Decision should set out the reasons for the decision, with reference to the legislative requirements and the evidence received so workers and employers can better understand the basis for the decision.

Recommendation 2: Liability decisions – an external review process

That SIRA be empowered to:

- conduct an external review of any decision by the NI in relation to liability, including a decision in relation to the conduct of the employer or the injured worker
- replace the insurer's original decision with its own decision.

Under the new claims' management model, we are aware of many instances where the NI has made liability decisions in a manner that does not properly protect employers' interest. This includes where the NI has:

- failed to inquire into the circumstances of the injury (which, in some cases, have been clearly dubious)
- ignored evidence to the contrary being offered and/or provided (both by the employer and co-workers)
- refused to conduct a factual investigate or refer the matter for an independent medical examination
- approved a factual investigation and accepting its findings despite the investigation having clearly been conducted in an improper and/or inadequate manner
- failed to 'reasonably excuse' section 11A (injury resulting from 'reasonable management action) claims, despite no corresponding changes having been made to the statutory provision (which is still prefaced with the words 'no compensation is payable')
- exceeded the statutory time-frame for making such decisions.

Once made, the avenues available to employers to challenge the NI's decisions or actions are inadequate.

Claims' management practices

Recommendation 3: Return to work outcomes

The NSW Government should consult with stakeholders to investigate how the statutory framework can be strengthened to ensure timely and appropriate return to work measures are implemented.

This consultation should consider:

- how insurers can be held accountable for producing poor return to work outcomes
- the design of incentives within the premium formula to drive desired behaviour
- the development of programs that enable injured workers to 'return to work' in circumstances where suitable duties may not be available with the pre-injury employer
- how return to work outcomes can be improved by competition being re-introduced into the system
- SIRA's power to review the terms of arrangements between the NI and its agents to ensure they are consistent with the underlying objectives of the scheme.

Prior to the 2015 amendments, employers could choose from five scheme agents. Choice ensured the interests of both employers and their injured workers were better protected as competitive tension resulted in a level of service far greater than what is currently available from today's system. Regardless of which scheme agent was chosen, an employer had access to a dedicated claims manager who:

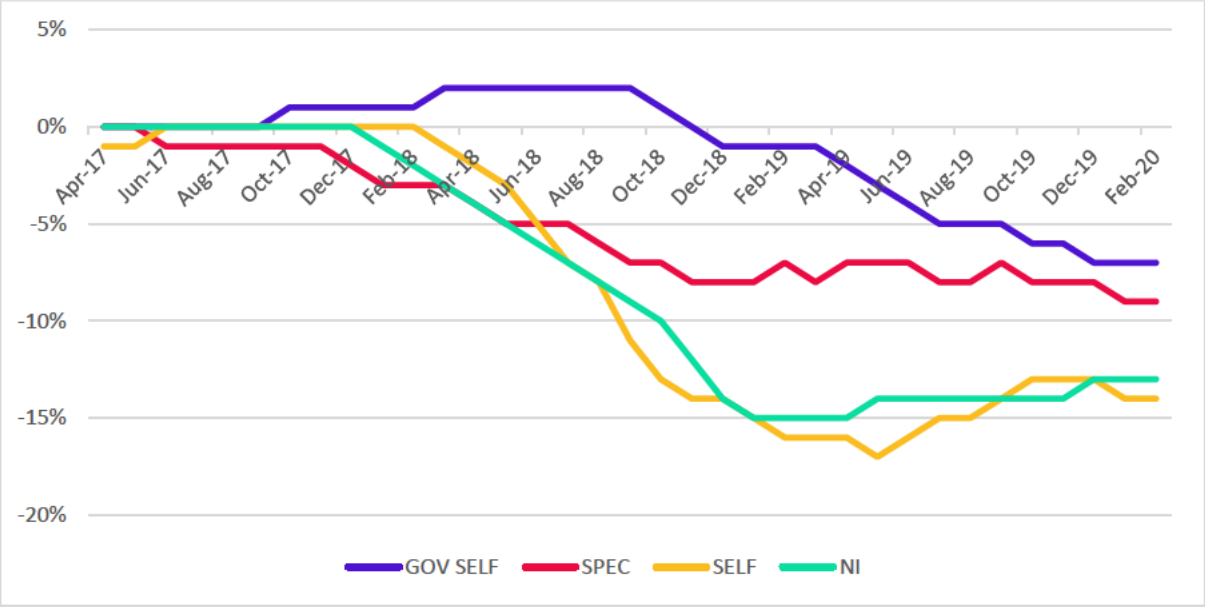
- over time, became familiar with the employer's business operations and the type of suitable duties available to the injured worker, given the nature of the injury
- possessed the necessary skills and experience to actively manage their portfolio of claims
- were able to make decisions to conduct a factual investigation, refer the matter to an independent medical expert for review, and work with stakeholders to resolve any issues between employers and injured workers and achieve successful medical and return to work outcomes
- was appropriately incentivised to actively manage their portfolio and be appropriately awarded for achieving successful return to work outcomes
- communicated well with the employer and provided regular updates (including copies of reports from any factual investigation or medical examination) and reviews.

This system was replaced by the new claims' management model which has not retained these features precipitating a decline in return to work outcomes. There are a number of observable problems with the new model, the most notable being:

- the triaging of claims according to an algorithm which takes a 'cookie cutter' approach and fails to take into account the nature of the workplace and the ability of the employer to offer suitable duties
- replacing skilled and experienced claims managers with unskilled and inexperienced customer service officers in an attempt to make the system less 'adversarial' (instead of upskilling the claims managers to handle conflict and manage difficult conversations which, given the purpose of the scheme, often need to be had)
- establishing a call centre where an employer typically has to speak to a different customer service operator each time they need a progress update on the status of the claim and having to repeat the same information on multiple occasions.

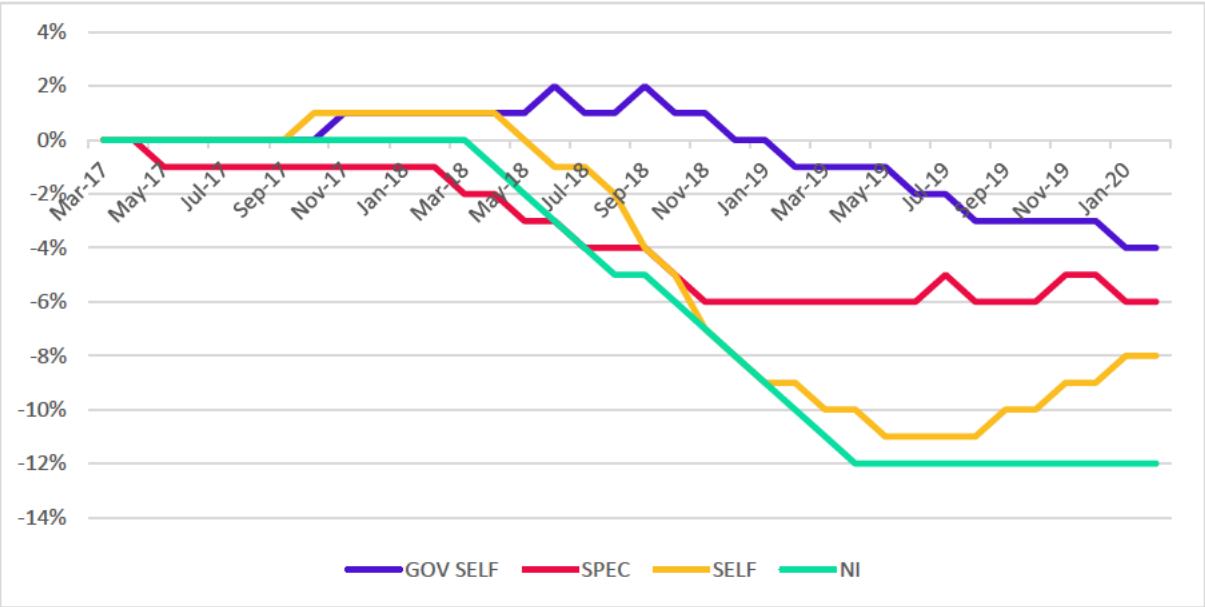
Business NSW continues to receive reports of poor claims' management practices. This feedback is supported by the most recent data published by the State Insurance Regulatory Authority (SIRA). Return to work performance has deteriorated at both the four-week and thirteen-week benchmarks (see Charts 1 and 2 below).

Chart 1 - Change in RTW rates at 4 weeks



Source: SIRA

Chart 2 - Change in RTW rates at 13 weeks



Source: SIRA

Part 2 — The premium formula

Recommendation 4: The premium formula

Volatility and lack of transparency around the premium formula should be addressed as a matter of priority.

The NSW Government should consult with stakeholders to investigate how to reduce the current level of volatility and lack of transparency surrounding the current premium-setting system. Consultation should consider the ability of the NI to claim 'commercial-in-confidence' in relation to a compulsory statutory scheme, where the premium is intended to be one of the key drivers of employer behaviour.

The effect of the 2015 changes

Prior to the 2015 changes, the premium formula was designed with input from employer and worker representatives and was published in full by the NSW Government in its Insurance Premiums Order.

Stakeholders were able to consider any proposed changes to the formula (made easier by having access to and the ability to question the scheme's actuaries) and provide feedback in relation to those proposed changes.

Once published, employers were able to examine and seek help in understanding the formula being applied each premium year. They were able to find out what the formula was, how it worked and what they could do to take advantage of the incentives being offered.

Under the new 'file-and-write' system introduced in 2015, those features no longer exist.

Lacks transparency

The proposed formula is contained in the filing submitted to SIRA (the contents of which are confidential) and the NI is permitted to claim 'commercial in confidence' over the resultant formula.

Guidance on the formula is overly simplified, opaque and offers limited support for employers in understanding how they can mitigate the risk of excessive premium increases or even reduce their premiums (particularly for experience-rated larger employers).

Volatile, unaffordable and often unfair

For larger employers charged an additional loading on their premium, the way the loading is calculated has resulted in employers being charged premiums which are:

- highly volatile
- unaffordable
- seen as unfair given weak visibility and understanding of how the loading is calculated
- unverifiable given employers have no basis to determine whether it is truly representative of the employers' risk profile.

One reason the loading is seen as unfair is because it is calculated by reference to the length of time an injured worker is in receipt of weekly benefits without any adjustment to accommodate the presence of factors contributing to the delay which lie well outside the employer's control.

In many instances, especially since the new claims' management model was introduced, this delay is often caused by the NI's failure to properly scrutinise the circumstances of the injury prior to making a liability decision or actively manage the claim.

Given the volatility of the premium formula, especially in the current economic climate, insufficient time is given to enable employers to manage their cashflow.

Poorly designed incentives

The incentives contained in the premium formula are poorly designed because they fail to drive safe or 'desirable' behaviour, for example, by applying a standard 10 per cent discount to all policy holders, regardless of their behaviour or safety record.

Further, by relying on a claim as a trigger of 'poor performance' it does not recognise steps taken by employers to actively promote and engage in good safety practices even though an injury has occurred despite their best efforts.

Lack of consultation

There is no formal consultation process in relation to the premium formula and/or the introduction of measures in response to a change in performance of the scheme. The premium-setting process (and resultant formula) is confidential and inaccessible to everyone except the NI and SIRA.

Matters relating to consultation are not limited to the premium-setting process. In addition, the NI has been able to 'rationalise' WIC codes without consultation.

Instead of being based on individual ANZSIC Codes, the WIC codes have been rationalised such that employers with different risk profiles are now grouped together under the same classification. This has benefited some employers at the expense of others and means the formula is less responsive to changes in the underlying risk profile of industries.

Part 3 — Regulatory oversight

Recommendation 5: Regulatory oversight

That the NSW Government consult with stakeholders to investigate how the statutory framework can be strengthened to ensure the scheme performs effectively and efficiently. This consultation should consider the scheme's legislative history since 1987 and include a review of:

- the role of a statutory trustee of the statutory fund and the rights of the beneficiaries vis-à-vis the trustee
- the regulator's ability to place conditions on the NI's licence
- reinstating the Workers Compensation Review Committee (or a version of it)
- a new governance model for the NI, with better representation of key stakeholders.

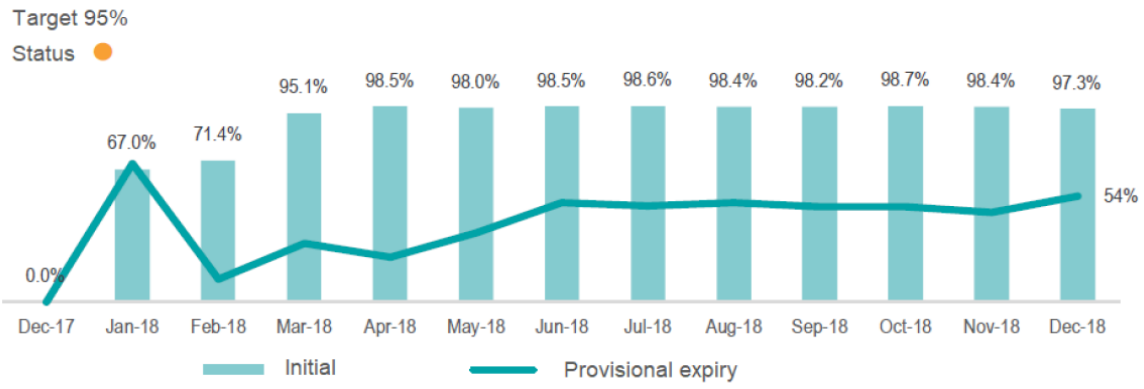
Under the current legislation, the NI's licence is unconditional. In addition, the regulator's powers are limited. This has created a system where, as observed in the Dore Report, the NI and SIRA have a "*strained relationship*" and "*poor relationship*", with the NI having a "*low regard for SIRA as the regulator*" (3.3.5).

One example given is the use of different return to work measures, with the NI's measure "*resulting in a potentially distorted picture*" (5.9.2).

The Dore Report provides evidence of the NI's non-compliance with the legislation. The report found the NI had failed to make a liability decision within the required timeframe (see Chart 3 below) and observed that, in this respect, its "*approach to compliance seems to indicate an absence of concern with regulatory matters*" (3.3.6).

Without legislative change, this situation will be permitted to continue.

Chart 3 - Liability decision timeliness



Source: Dore Report