Submission No 18

INQUIRY INTO 2020 REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: Construction, Forestry, Maritime, Mining and Energy Union, Construction and General Division, NSW Divisional Branch

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1. INTRODUCTION

The Construction, Forestry, Mining and Energy Union (**CFMEU**) welcomes the opportunity to make submissions to this inquiry.

The CFMEU represents approximately 27,000 members in the building and construction industry. When our members are hurt at work they typically suffer serious physical injuries, which often result in workers having to leave the industry and losing their trade or occupation of many years. Above all, it often results in a worker losing some or all of their ability to earn a living and the dignity this provides him or her in being able to look after themselves and their family.

The CFMEU has made several submissions to this Committee on behalf of its membership, highlighting the complexity, inefficiency and unfairness inherent in the workers compensation system and the lacklustre performance of the workers compensation agencies. Unfortunately despite the outcries from stakeholders and the sensible recommendations of this Committee in the past, not much has changed in NSW. We still have a system infected by inaction with the key bodies either unable or unwilling to work together. We need a system where injured workers can rely on the system to help them without it being plagued with ulterior motives and conflict.

Noting the broad nature of the terms of reference for this inquiry, these submissions do not attempt to address every aspect of the system. We ask the Committee to draw upon findings and submissions made in previous inquiries in particular those regarding the injustice surrounding the impact of s 39 and s 59A of the *Workers Compensation Act 1987* (**WC Act**). The provisions continue to have an undue impact on injured workers in this

State who through no fault of their own cannot return to the workforce. We implore the Committee not to forget these workers.

These submissions will address the following:

1. The continued failure of SIRA and icare to work cooperatively together
2. SIRA as a regulator
3. The necessity of WIRO to be an independent agency
4. The impact if s 151A in jurisdictions outside of workers compensation
5. The failure to ensure that employers are charged and paid the correct premiums

2. COOPERATION BETWEEN SIRA AND ICARE

This Committee has previously heard evidence about the failure of SIRA and icare to work cooperatively.[1] Unfortunately not much has changed. SIRA and icare are spending too much time battling each other to effectively manage the system. In this war of dominance it is the injured workers who are losing out.

Since the Nominal Insurer (**NI**) review, SIRA has engaged in a campaign to demonise and undermine icare at every opportunity. Instead of working with icare to overcome the issues identified in the NI review, SIRA spends its time pointing fingers and calling out past behaviours. Whilst the CFMEU does not dispute the findings or importance of the NI review, we are concerned that the findings are being used for political points scoring. There is no denying that icare could have done better but lets not forget who the regulator was during this period. SIRA cannot avoid the implication that they failed to regulate the system and by failing to do their job, icare was able to drop the ball and do as it pleased.

In order to be an 'active' and successful regulator SIRA must be willing to regulate all

[1] Standing Committee on Law and Justice, Parliament of NSW, *Statutory Review on State Insurance and Care Governance Act 2015* (Final Report December 2017).

participants in the workers compensation system not just icare. We have received very little information about the performance of the Tresury Managed Fund (**TMF**) or self and specialised insurers. SIRA's entire focus has been on icare and nothing else. A cynical person might say this obsession is intended to deflect the attention away from SIRA's own flaws and inaction.

The media have played into this narrative by publishing a number of articles intended to shame icare. On 23 February 2020, the Sydney Morning Herald published an article titled "Injured Workers could be forced to pay gap fees for medical treatment." The article claims that icare's submission to the review Regulatory requirements for health care arrangements in the NSW workers compensation and CTP schemes, proposes a gap fee for treatment model for medical expenses. The icare submissions propose nothing of the sort. They propose a "fee for outcome" approach in which fees are paid based on the outcome of the treatment. At no time does icare call for injured workers to contribute to their medical costs.

There have been similar articles since the completion of the NI review which continue to paint SIRA as the "good regulator" vs icare the "bad nominal insurer."

The area receiving the most attention at the moment is the PIAWE review. It is the perfect example of how the system has lost sight of its purpose. Rather than working together to find quick solutions, the focus has been on throwing around blame. We need solutions and quick ones, not grandstanding.

2.1 PIAWE REVIEW - CASE STUDY ON LACK OF COOPERATION

In or about March 2020, icare discovered discrepancies between its historic PIAWE data and its new data. In response it commenced a review to identify and ultimately rectify the issues. Despite long standing evidence of the complexity of the PIAWE system, SIRA executives told estimates that there was no evidence to suggest the error was affecting

other insurers. Instead SIRA has focussed all its attention on icare blaming them for the issue without considering its own role.

The Committee is aware of the battle to rectify the PIAWE definition that we have endured for the last 8 years.

Unfortunately, despite having finally agreed to a sensible and simple approach to PIAWE, SIRA and icare do not appear to be willing to let go of the past battles. The PIAWE Review, while important, has highlighted and fueled the ongoing conflict between the two agencies.

The PIAWE Review is a testament to what the CFMEU has been saying all along, the definition of PIAWE was until recently unworkable, unnecessarily complicated and not well understood. It is understandable then that mistakes were made and without injured workers seeking a review on every decision it is understandable that there was a delay in rectifying these mistakes.

The CFMEU does not doubt that there are many injured workers who have received the incorrect initial PIAWE calculation. However, the focus now should not be on who is at fault. SIRA and icare should be working together to find a solution to the issue rather than bickering with each other. It is easy for SIRA to blame icare for the error regardless of the truth. To place the blame entirely on icare is a simplistic and mistaken approach. SIRA and this government must take their fair share of the blame.

It is important to understand the context of PIAWE before apportioning blame. The table below represents the PIAWE timeline which highlights SIRA's influence on the current PIAWE problem.

Date	**Event**
April 2012	Issues paper identifies the need for create "a simple measure for pre-

	injury earnings" and stated: *"Changes to weekly benefits would remove the difficult and confusing provisions that currently exist to determine the amount of weekly benefit that an injured worker would receive and therefore reduce disputation over weekly benefits. A new simplified measure more closely aligned to workers actual pre-injury earnings would be welcomed*."[2]
13 June 2012	Joint Select Committee tables report on the proposed workers compensation amendments, supporting *"the simplification of the earnings base from which to calculate weekly income benefits viz a measure of average actual pre-injury earnings over, say, the previous 12 months."*[3]
19 July 2012	*Workers Compensation Legislation Amendment Act 2012* passes introducing a new definition of pre-injury average weekly earnings encompassing 7 provisions plus Schedule 3[4]
30 June 2014	The Centre for International Economics completes Statutory review of the Workers Compensation Legislation Amendment Act 2012 noting *"The PIAWE approach is complex and often difficult to calculate, and yet it is still able to generate 'winners' and 'losers compared to a more simple averaging calculation that was used previously."*[5]
29 May 2015	Parkes Project Statement of Principles identifies PIAWE as a key concern and calls for the calculation to be simplified[6]

[2] NSW Government, Parliament of NSW, *NSW Workers Compensation Scheme* (Issues Paper, April 2012).
[3] Joint Select Committee on the NSW Workers Compensation Scheme, Parliament of NSW, *New South Wales workers compensation scheme* (Final Report, June 2012) 3.126.
[4] *Workers Compensation Act 1987* (NSW), ss 44C-44I and Schedule 3.
[5] Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012,* Report for Office of Finance and Services (2014)16.
[6] Workers Compensation Independent Review Office, *Parkes Project Advisory Committee Statement of Principles* (2015).

28 August 2015	CFMEU Member files Judicial Review of a PIAWE merit review decision with the Supreme Court.
13 August 2015	Parliament passes the *Workers Compensation Amendment Act 2015* which allowed for regulations to vary the method of calculating a workers PIAWE[7]
February 2016	SIRA issues discussion paper requesting submissions on the proposed regulation outlining the limited areas the regulation could alter
May 2016	SIRA publishes a summary of the submissions filed in relation to the PIAWE regulation. Primary theme of the submissions was a simplified definition of PIAWE
August 2016	SIRA enlists the help of Professor Tania Sourdin to conduct further consultation in PIAWE. Professor Sourdin holds preliminary informal discussions with key stakeholders
December 2016	Stakeholders attend a workshop to discuss the PIAWE problem and the form of the regulation. Stakeholders agree that the proposed regulation could not fix the ultimate issue and unanimously agree on the basics for a simplified PIAWE definition
March 2017	Professor Sourdin completes her report noting the consensus of stakeholders on the necessity of legislative change to simplify the definition of PIAWE. Report is not made publicly available.
9 March 2017	First Review of the Workers Compensation Act. Committee notes the evidence of the majority stakeholders describing the calculation as complex and calls on SIRA to expedite consultation on the proposed

[7] *Workers Compensation Amendment Act 2015*, Schedule 2

	regulations and supports the call for a fairer and more transparent calculation method[8]
November 2017	Professor Sourdin report is published on the SIRA website
17 October 2018	Parliament passes the *Workers Compensation Legislation Amendment Bill 2018* providing for a simplified definition of PIAWE with regulations to provide for ancillary matters such as adjustments for unpaid leave. New definition to commence at a later date.
24 October 2018	PIAWE working group meets for the first time to discuss proposed PIAWE regulations. It is agreed the group will meet fortnightly
3 December 2018	SIRA advises working group members all future meetings will be cancelled focusing on targeted consultation instead
February 2019 - June 2019	Consultation recommences both as a group and individually
13 September 2019	SIRA confirms commencement date with working group members
21 October 2019	PIAWE Amendments take effect

Despite WorkCover, later SIRA and the government being on notice about the fundamental issues with the PIAWE definition back in 2014, it took four years for the government to introduce legislative change and then a further 12 months for SIRA to complete the consultation. They were aware of the problem and instead of fixing it chose to drag their feet.

[8] Standing Committee on Law and Justice, Parliament of NSW, *First review of the workers compensation scheme* (Final Report October 2016) 4.94.

Now that the issues have been identified, SIRA and icare should be working together to find resolutions. What the system needs is cooperation and solutions not finger pointing. Could icare have done better? Yes. Should SIRA have recognised these issues prior to the NI review? Yes. They both failed and now they must work together to ensure the matters are rectified and do not occur again. This cannot be achieved from opposite sides of the battlefield.

3. SIRA AS REGULATOR OF THE WHOLE SYSTEM

SIRA's continued obsession with icare detracts from its role as regulator for the whole workers compensation system. It is as if SIRA has forgotten about TMF and self and specialised insurers. There has been little to no discussion about whether a similar inquiry will be conducted into TMF and self and specialised insurers. PIAWE was a systemic issue and was not confined to icare. Who is to say the other issues identified are not system wide? We will not know until SIRA decides to shift its focus, something that does not appear likely any time soon.

We support the submissions of the Teachers Federation calling on SIRA to perform a performance audit on TMF, as well as self and specialised insurers. We recommend that SIRA consider whether the findings and recommendations of the NI review should be applied to those insurers to ensure all injured workers are receiving the best care and support possible.

4. INDEPENDENCE OF WIRO

Given the ongoing battle between SIRA and icare, it is more apparent than ever that the system needs an independent agency to provide oversight. It was always intended that

WIRO would act in that capacity, however its continued lack of independence has made this difficult.

In his Second Reading Speech, the the Treasurer described the intended role of the WIRO:

> *The WorkCover Independent Review Officer will have the dual roles of dealing with individual complaints and overseeing the workers compensation scheme as a whole. It will be an important mechanism for the workers compensation scheme.*

WIRO's functions are outlined in section 27 of the *Workplace Injury Management and Workers Compensation Act 1998*:

27 Functions of Independent Review Officer

The Independent Review Officer has the following functions—

(a) to deal with complaints made to the Independent Review Officer under this Division,

(b) (Repealed)

(c) to inquire into and report to the Minister on such matters arising in connection with the operation of the Workers Compensation Acts as the Independent Review Officer considers appropriate or as may be referred to the Independent Review Officer for inquiry and report by the Minister,

(d) to encourage the establishment by insurers and employers of complaint resolution processes for complaints arising under the Workers Compensation Acts,

(e) such other functions as may be conferred on the Independent Review Officer by or under the Workers Compensation Acts or any other Act.

The ability for WIRO to inquire into and report to the Minister on issues throughout the system could require WIRO to inquire into and report on the activities of icare or even

SIRA. It is axiomatic that WIRO's ability to undertake inquiries may be hampered by the fact that it does not have the financial independence to undertake that function.

WIRO is funded from the Workers Compensation Operational Fund which is maintained by SIRA. The fact that WIRO must ask SIRA for funding to conduct inquiries directly conflicts with its role as overseer and allows for SIRA to have undue influence on WIRO. Should WIRO be inclined to inquire into the regulatory activities of SIRA, as permitted by s 27(c), all SIRA would need to do to shut down the inquiry is cease funding. We have already seen two WIRO inquiries shut down due to the funding being pulled.

In its submissions to the Public Accountability Inquiry, WIRO raised concerns that SIRA and the Department of Customer Service has assumed control of the funding of projects and inquiries proposed by WIRO,[9] pointing to the defunding of the Parkes Project and Effeney Hearing Loss Project as examples.[10] Both projects were commenced with the intention of finding areas of inefficiency and identifying systemic concerns within the system. The CFMEU was involved in the Parkes Project, particularly in relation to weekly benefits, and found the process productive and informative. The fact that it was not completed has lead to delays in securing much needed procedural changes in the workers compensation system. WIRO has not commenced any new inquiries since Parkes and Effeney due to a concern that they too will face the same fate.[11]

This Committee has previously recommended that WIRO be designated a separate public agency[12] on three separate occasions[13] and yet WIRO continues to be subjected to the same

[9] Workers Compensation Independent Review Officer, Submission No 51 to Public Accountability Committee, Parliament of NSW, *Inquiry into the Budget process for independent oversight bodies and the Parliament of New South Wales* (26 November 2019) 7.
[10] Ibid, 8.
[11] Ibid.
[12] Standing Committee on Law and Justice, Parliament of NSW, *First review of the workers compensation scheme* (Final Report October 2016) 3.13
[13] Standing Committee on Law and Justice, Parliament of NSW, *Review into the functions of the WorkCover Autjority* (Final Report 2014) xii; Standing Committee on Law and Justice, Parliament of NSW, *First review of the workers compensation scheme* (Final Report October 2016) 3.13; Standing Committee on Law and Justice, Parliament of NSW, *2018 review of the workers compensation scheme* (Final Report February 2019) 3.48.

funding arrangements. The Committee and stakeholders have continually noted the value of WIRO and its effectiveness. Formally confirming its independence will only assist WIRO in achieving its aims and is clearly in the interests of all scheme participants.

Now that WIRO handles all complaints by injured workers it is in a unique position to act as overseer in an Ombudsman like role to try and bring some peace and clarity to the system. If WIRO had been able to perform its investigative functions free from influence it is likely that the issues raised in the NI review would have been uncovered earlier with a fair and just resolution implemented without delay. WIRO is also in a unique position to identify the areas within TMF and self and specialised insurers which overlap with icare to ensure consistency across the system. It is only sensible that they be given the true independence necessary to bring about systemic reform.

It should be noted that it is not only this Committee who is concerned about WIRO's lack of independence. In a recent inquiry into the budget processes of independent oversight bodies, the Public Accountability Committee expressed concern that the current budgetary processes "have the potential to undermine WIRO's independence and capacity to pursue its statutory role and that recommendations which have been made to address this issue have not been implemented."[14]

We ask this Committee to again recommend that WIRO be designated a separate public agency with control of its own funding arrangements. We also recommend the Committee question SIRA on its intentions for WIRO's funding into the future.

5. SECTION 151A

The CFMEU is concerned about the impact of s 151A of the WCA on jurisdictions not related to workers compensation. It appears as though the current interpretation is

[14] Public Accountability Committee, Parliament of NSW, *Inquiry into the Budget process for independent oversight bodies and the Parliament of New South Wales* (26 November 2019) 5.17.

inconsistent with the original intention and historical context of the provisions. It is affecting how workers exercise their legal rights in other jurisdictions in particular general protection applications under the *Fair Work Act 2009* (**FW Act**) and sexual harassment and discrimination claims in the State and Federal spheres, which could never have been the intention of the provision. We believe that it requires some alteration in order to bring it in line with its original purpose.

Section 151A in its current form was reinstated into the WC Act following the passing of the controversial *Workers Compensation Legislation Further Amendment Act 2001* in December 2001. The provision was intended to replace the election provision which required an injured worker to choose between pursuing a claim through statute or through common law. The current provision, while no longer strictly an election provision, has the effect of encouraging injured workers not to pursue other courses of action if they want to preserve their workers compensation rights. This appears to be having a disproportionate impact on those who also have rights under discrimination law and the general protections provisions of the Fair Work Act 2009, which does not appear to be its intended consequence.

Section 151A in its current form states as follows:

151A Effect of recovery of damages on compensation

(1) If a person recovers damages in respect of an injury from the employer liable to pay compensation under this Act then (except to the extent that subsection (2), (3), (4) or (5) covers the case)—

(a) the person ceases to be entitled to any further compensation under this Act in respect of the injury concerned (including compensation claimed but not yet paid), and

(b) the amount of any weekly payments of compensation already paid in respect of the injury concerned is to be deducted from the damages (awarded or otherwise paid as a lump sum) and is to be paid to the person who paid the compensation, and

(c) the person ceases to be entitled to participate in any injury management program provided for under this Act or the 1998 Act.

Damages are defined by s 149 of the WC Act as any form of monetary compensation, and any amount paid under a compromise or settlement of a claim for damages (whether or not legal proceedings have been instituted). The definition is not limited to work injury damages claims and is broad enough to encompass settlements reached in other jurisdictions so long as there is a connection to the injury.

The current wording of the provision was inserted following the 2001 Sheahan Inquiry into common law. The Inquiry recommended removing repealing the election provision in favour of a provision which effectively performs a similar purpose in preventing further claims for compensation following the recovery of common law damages.[15] Unfortunately, the second reading speech and explanatory note offer little in the way of guidance as to how the provision is to be interpreted. Given the historical changes to the provision and the context it would appear that the provision was intended to change behaviours in the workers compensation system, specifically in relation to common law claims.

Unfortunately, the provision has been interpreted more widely than the apparent intention. Following the Court of Appeal decision in *Adams v Fletcher International eExports Pty Ltd* [2008] NSWCA 238, a number of decisions from the Workers Compensation Commission have used the provision to include settlements in discrimination and unlawful termination matters where there is a nexus to the injury. If you make a legitimate discrimination claim and receive damages for that claim, you could be selling away your workers compensation rights. As far as the CFMEU can tell, this was not the intention of the provision.

If the provision is intended to operate in such a way, it has the effect of undermining the

[15] Rachel Callinan, 'Workers Compensation Common Law Matters: the Sheahan Inquiry' (Briefing Paper no 14, NSW Parliamentary Library Research Service October 2001) 15.

social benefit of employees pursuing discrimination and unlawful termination claims. There is a social benefit in employees being able to bring claims against their employers for abhorrent behaviour. The purpose of discrimination laws in particular is to deter individuals from acting in a discriminatory matter by allowing individuals to bring claims for compensation. Given there is no discrimination regulator, individual claims provide the only basis for deterring employers from acting abhorrently or encouraging them to institute procedures that discourage such behaviour by their employees. If workers are required to give up their workers compensation entitlements to receive compensation for discrimination, the deterrent effect of discrimination laws is reduced. This could never have been the intention of the provision.

The impact of the current interpretation of the provision is compounded by the time limits in other jurisdictions. Dismissal claims under the FW Act must be brought within 21 days of the dismissal taking effect. Where the claim is being pursued under the general protections provisions, an employee only has 14 days to file in the Federal Circuit Court following an unsuccessful conciliation.

Under the *Australian Human Rights Commission Act 1986*, applications under the Federal Discrimination Acts must be brought within 6 months of the conduct occurring. Under the *Anti Discrimination Act 1977* an employee has 12 months to bring an application. In both jurisdictions, the relevant Commission or Board has the power to dismiss applications not brought within the requisite time frames. Workers are foregoing their legitimate claims to preserve their workers compensation claims.

To illustrate the impact of the provisions, we have provided a number of examples by way of a confidential annexure. In each case, the worker was subjected to horrible behaviour that went largely unchecked by the employer. Each worker was required to make a choice between exercise their right to justice under the discrimination laws or preserving their workers compensation entitlements. In each case, the worker felt a sense of loss of control and disempowered knowing they would not get justice for being subjected to prohibited conduct.

It is important to note the differences between an award from compensation for discrimination or unlawful dismissal and an award of damages for work injury damages. The difference between the two was summed up by Reeves J of the Federal Court in considering compensation for a general protections matter:

> *It follows that the District Court award of damages and this award of compensation have different purposes. The purpose of the former is to compensate for a loss of earning capacity caused by physical injury and the purpose of the latter is to compensate for a loss of wages and future income caused by two contraventions of the FWA. Nonetheless, because the assessment of each is founded on M Haylett's earnings or wages, there is a need when calculating the present award to be particularly vigilant to avoid any element of overlap, or double compensation between the two awards.*[16]

The Court in that case was considering whether the work injury damages claim impacted on any compensation available under the Fair Work Act, but the assessment of the purpose of the compensation is important nonetheless. Each award is intended to compensate for a different thing, why then does workers compensation get to infiltrate other areas of the law.

While the CFMEU does not necessarily agree with the policy intention of s 151A, that is not the focus of this submission. The provision needs to be altered to give effect to its true purpose and prevent it from further eroding rights in other jurisdictions.

6. CERTIFICATES OF CURRENCY

The CFMEU is concerned at the ease in which some employers can avoid paying the correct premium when applying for a workers compensation policy. It is not uncommon for

[16] *CFMEU v Hail Creek Coal* [2016] FCA 1032 [53]-[54]

CFMEU officials to uncover inaccurate certificates of currency littered across construction sites in NSW. We are concerned that there are not enough checks and balances in place to ensure the correct premiums are being paid.

Employers pay premiums to finance the operations of the workers compensation scheme. The ongoing financial viability of the scheme is dependent on good management and ensuring that employers pay the correct premiums. The CFMEU does not intend to address the current system for premium setting in NSW but rather shine a light on the need for greater checks and balances to ensure the correct premium is actually paid by the employer when taking out a policy.

Construction is a high risk industry in which serious life altering injuries can take place. Employers in our industry have an incentive to under report payroll and employee numbers to reduce their workers compensation premiums and quite often avail themselves of the opportunity to do so. This is not to say all employers engage in this practice but it is prevalent enough for the CFMEU to have received phone calls from both icare and SIRA to alert them to the issue, of which we were already keenly aware.

The CFMEU has provided some examples of suspect certificates of currency with an explanation of our concerns. We have included them as a confidential annexure out of concern that providing the information in the body of the submissions may identify the particular employer. These examples represent a small cohort and are representative of a much larger problem. Unfortunately, union officials do not have the power or resources to ensure that employers are making accurate declarations to icare. The system relies on its agencies to cross check the information they have been given or at least probe deeper than they currently appear to be.

We raise this matter as a systemic issue which requires attention and care and request that the Committee question icare and SIRA on the prevalence of this problem across the scheme and the steps they are taking to reduce the impact on the scheme.

7. CONCLUSION

The CFMEU thanks the Committee for the opportunity to provide submissions to the current inquiry. The CFMEU would welcome the opportunity to participate in the upcoming hearings to assist the Committee further.