

**Submission
No 14**

**STATUTORY REVIEW OF THE STATE INSURANCE AND
CARE GOVERNANCE ACT 2015**

Organisation: Public Service Association

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

Law and Justice Standing Committee

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Recommendations

- *Adopt a tripartite management model for Insurance and Care NSW (iCare) and the State Insurance Regulatory Authority (SIRA) through legislation of committees under the SIRA and iCare Boards.*
- *Publish on the iCare website the annual Statement of Business Intent, which is currently provided to the Minister and the Treasurer only.*
- *It is recommended that in the current absence of these objectives being publicly available that the objectives are included via amendment into the legislation, and the manifestation through the business plan is included in Estimates and the iCare Annual Report.*
- *That SIRA be given targets to investigate fraud, non and under payments of various insurance schemes.*
- *That if SIRA does not have the resources to enforce its insurance coverage that they increase staff to ensure that it occurs.*

Summary

The Public Service Association of NSW (PSA) is an active, member-driven union. Our members have a long and proud tradition of improving the lives of the people of New South Wales through delivering a diverse range of services in the public sector and related entities, state owned corporations, TAFE NSW and universities. We proudly represent 38,000 members spread over almost 5,000 worksites. We welcome the opportunity to participate in this inquiry.

Scope of this Inquiry

The Public Service Association of NSW priorities the health and safety and workers compensation entitlements of its members.

We note that there are limited terms of reference in this inquiry regarding:

“to determine whether the policy objectives of the Act or those amendments remain valid and whether the terms of the Act (or the Acts so amended) remain appropriate for securing those objectives.

This Act was introduced into parliament in the context of dissolving the [Safety, Return to Work and Support Board Act 2012](#), and formally separating the functions of WorkCover Authority and whilst formally uniting the insurance and compensation functions of government including from Treasury.

The Association has focused mainly on the scope that relates to workers rights rather than broader consumer, passenger, or disability rights. Whilst the PSA has members that are affected by these functions we have not focused on these for this inquiry. We have also not focussed on the substantive legislation that these bodies are meant to administer, only to re affirm that the workers compensation system is impoverished and failing to meet the expectations of workers.

The Association have also focused on how the three organisations have worked since their disbanding.

Insurance and Care NSW

The State Insurance and Care Governance Act 2015 itself does not describe the “policy objectives” or “objectives” of Insurance and Care NSW. However, S.11(2) of this Act requires iCare to produce an annual statement of business intent and submit the statement to the Minister and the Treasurer.

Section 11 further obliges iCare to include in its annual business plan *“the objectives of ICNSW and its main undertakings”*. Refer to **Attachment 1**.

The PSA has not had the opportunity to read iCare’s annual business plans as these are not publically available.

The organization claims to have \$32 billion dollars in assets at present and \$180 billion of the state’s assets covered as a self-insurer. It is claimed that this organization is the largest public sector self-

insurer.¹

The cuts to workers compensation in 2012 were a clear example of how policy decisions of Icare can affect the people of NSW in a negative manner. In this example the predecessor Boards for Icare, 2 incarnations prior, the WorkCover Authority changed the actuarial assumptions to make the GFC returns on capital invested more normalized. This created an overnight budgetary issue of an apparent unfunded liability estimated at \$4.1billion².

Changing the assumptions lead to a conflict between two clear policy objectives of returning maximum benefit to workers injured at work and managing a financially sound scheme.

It is the PSA's submission that this organization is too large in size and capital under investment (significant enough to be critical to the continuation of NSW Government) to simply allow for variable objectives without oversight by this Parliament nor the public.

Recommendation

- *Publish on the iCare website the annual Statement of Business Intent, which is currently provided to the Minister and the Treasurer only.*
- *It is recommended that in the current absence of these objectives being publicly available that the objectives are included via amendment into the legislation, and the manifestation through the business plan is included in Estimates and the ICare Annual Report.*

Icare Governance

As demonstrated by the vast capital under management, and the variance in operations under the control of the ICare Board, there is a need for more specialist advisory groups such as occurred previously with the OHS and Workers Compensation Advisory Council.

With the ICare Board currently able to form committees under Section 9 it is surprising that ICare has not formalized committees to undertake the specific work of expertise. For example workers are not represented in any formal expert committee, yet are the primary person of interest for the workers compensation legislation.

Recommendation

- *That due to the failure to form an expert committee under Section 9 that the Parliament legislate for expert committees including workers for workers compensation within Icare.*

ICare Dust Diseases Authority

There appear to be no objects for this Act. The following provision details the functions.

WORKERS' COMPENSATION (DUST DISEASES) ACT 1942 - SECT 5

5 Constitution and [functions](#) of [Authority](#)

(1) There is constituted by this Act a corporation with the corporate name of the [Workers Compensation \(Dust Diseases\) Authority](#).

(2) The [Authority](#) is a NSW Government agency.

Note : See section 13A of the [Interpretation Act 1987](#) .

(3) The [Authority](#) has the following [functions](#):

(a) to determine claims for compensation under this Act,

(b) such other [functions](#) as are conferred or imposed on it by or under this or any other Act.

As the Dust Diseases Authority comes under the iCare Board there is no longer a tripartite committee

¹ ICare NSW, "Our Strategy for 2020",

² Price Waterhouse Coopers, *WorkCover NSW: Actuarial valuation of outstanding claims liability for the NSW Workers Compensation Nominal Insurer as at 31 December 2011*, 12 March 2012

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that deals with the significant issues of this jurisdiction. Issues such as underwriting policy are no longer the focus of a specific dedicated Board but come under the realms of the iCare Board.

The second reading speech referring to an expert committee on dust diseases. Despite this being formed in the form of the titled Dust Diseases Board, the Board has only limited scope since its operation as compared to the previous Dust Diseases Board. There are no policy or underwriting decisions that have been put to the Board.

This has the potential to delay issues such as new medical treatments being offered with the speed as was previously conducted.

Similarly we note that a previous Dust Diseases Board meeting had approved a broader definition of liability for occupational lung cancer. This appears to have been removed since the operation of the iCare administration of the Dust Diseases Authority.

We note that the previous Board was criticized in its alleged delay in approving claims by the Minister at the time of the second reading speech. This appears to be different to the experience of former Board members who regularly approved through circular resolution a number of claims when the claimant was nearing their final days, which were approved within 24 hours.

We also note that despite the intense claimed variability of the workers compensation scheme that the Dust Diseases scheme remained more viable throughout the GFC and recovery period despite not having an expert Board.

State Insurance Regulatory Authority

Unlike iCare, SIRA has objectives clearly described in the Act.

23 Principal objectives of [SIRA](#)

The principal objectives of [SIRA](#) in exercising its [functions](#) are as follows:

- (a) to promote the efficiency and viability of the insurance and compensation schemes established under the [workers compensation and motor accidents legislation](#) and the other Acts under which [SIRA exercises functions](#),*
- (b) to minimise the cost to the community of workplace injuries and injuries arising from motor accidents and to minimise the risks associated with such injuries,*
- (c) to promote workplace injury prevention, effective injury management and return to work measures and programs,*
- (d) to ensure that persons injured in the workplace or in motor accidents have access to treatment that will assist with their recovery,*
- (e) to provide for the effective supervision of claims handling and disputes under the [workers compensation and motor accidents legislation](#),*
- (f) to promote compliance with the [workers compensation and motor accidents legislation](#).*

The Association's position is that the State Insurance Regulatory Authority has not been able to commence meeting these objectives adequately, and therefore the adequacy of the objectives is a difficult proposition to assess.

In reviewing the objectives from a worker's perspective the following issues are noted.

Objective 23 a

23 (a) to promote the efficiency and viability of the insurance and compensation schemes established under the [workers compensation and motor accidents legislation](#) and the other Acts under which [SIRA exercises functions](#),

The Association submits that SIRA is not promoting the efficiency of the workers compensation scheme due to its slowness to act on matters.

The Association's members and its officers have had a number of interactions with SIRA since its inception. Three examples point to inaction by the Regulatory to promote efficiency. These include:

Injury Management Consultants (IMCs)- IMCs play an important role in resolving disputes about return to work issues. Formerly the WorkCover OHS and Workers Compensation Advisory Council ensured that these were kept up to date, through regular reviews of all aspects of workers compensation processes. With the disbanding of the tripartite council, this has fallen to the wayside. As a result only this year, two years after unions first notified the Regulator that there were shortages in various specialties zero, one or only a few effective IMCs, did SIRA state that they were attempting to replenish the ranks of qualified and trained IMCs. An example was psychiatry where Dr Samuel was the only person available for IMC work as the other listed Doctor had retired.

If there are not enough IMCs available then injury management plans can be delayed and return to work can be delayed and costly.

PIAWE- Pre Injury Average Weekly Earnings

A regulation for PIAWE was one of the promised changes in the 2015 reforms that were announced with the formation of SIRA and iCare. PIAWE remains a complicated assessment for workers, employers and insurers with a definition that arises from six potentially conflicting sources in the legislation.

The PIAWE expert panel concluded what the WIRO Parkes Review previously concluded. The conclusion was that there is a need for legislative change in order to clean up the mess that is Pre Injury Average Weekly earnings.

Another year has passed and we are still in a situation where the Association is having to argue with employers and insurers about how much members should get paid in compensation and also for actual work done. This delay is now over two years and there is no Regulation or legislative amendment as is required.

Right to Information for Injured Workers

The WIRO Parkes Inquiry had tri-partite and insurance bodies present to review several large problems with the workers compensation system. It made unanimous recommendations to improve worker access to their information held by the insurer. Currently the legal right to information as applied for government employees is through a GIPA request through Treasury Managed Fund or when there is a dispute as the legislation permits. Access to information is a one sided affair and leads to unnecessary disputation.

Despite hiring a consultant to undertake consultations about how this could work, there has been no change of information sharing requirements from SIRA. Instead what has occurred is that iCare has released a form to allow workers to get access to their information held against their workers compensation file. **Attachment 2**

These examples demonstrate an inefficient application of the workers compensation scheme as usually end up in needless delays and disputation.

(b) to minimise the cost to the community of workplace injuries and injuries arising from motor accidents and to minimise the risks associated with such injuries,

(c) to promote workplace injury prevention, effective injury management and return to work measures and programs,

SIRA Return to Work Programs

The unions had a limited involvement with the Return to Work Program Guidelines. We established a consultative group that met with officers of SIRA. Despite the claim that SIRA wanted to modernise the Guidelines for the new legislation, the exercise was simply one of reducing protections and support for workers in return to work. Part of the reason why this occurred is that the unions were not able to speak to the decision makers, and were only able to speak to two officers who were then to convey the information back to the decision makers. The original package provided at the first meeting is what was ended with.

Examples of how support was lessened included:

Trained Return to Work Coordinators

The requirement for large employers to have trained return to work coordinators was removed. Here SIRA argued that there were large problems with the currency of the training package and that people

often did not keep up to date. The removal of the training package meant that rather than improving the requirements, there is opportunity for poorer return to work outcomes as there is no training requirement.

The Return to Work Hierarchy

The return to work hierarchy has been best practice for over twenty years. The hierarchy is not steadfast but designed to enable maximum opportunity for return to work.

This includes:

- a) Same Job- Same Employer
- b) Different Job- Same Employer
- c) Same Job- Different Employer
- d) Different Job- Different Employer

Despite this remaining international best practice SIRA has adopted an approach that could be summarised as any work is good work, although this approach often leads to unsustainable return to work and exacerbation of injuries.

(d) to ensure that persons injured in the workplace or in motor accidents have access to treatment that will assist with their recovery,

The changes to medical approvals in mid 2016 have assisted in getting some medical diagnostics and treatment earlier. The approach of a number of claims managers has not been as swift. However, the preservation of the 21 days authority that operates under Section 60, operates to the effective return to work and the provisional liability provisions.

(e) to provide for the effective supervision of claims handling and disputes under the [workers compensation and motor accidents legislation](#),

The Association refers to the WIRO work capacity merit review decisions. A number of merit review decisions pointed to poor claims handling practice in breach of the legislation. These were noted and referred to the Regulator. A number had penalty provisions and were strict liability matters.

None of these matters that we are aware of have been prosecuted.

(f) to promote compliance with the [workers compensation and motor accidents legislation](#).

The Association refers to the State Insurance Regulatory Authority Annual Report 2015/16 which details the number of compliance and enforcement actions the agency has conducted in that financial year.

Despite allegations of malingering, possible fraud and victim blaming by Minister Pearce during the 2012 workers compensation debate, and despite 153 fraud related reports received in 2015-2016, there was a single fraud case against a worker reported as prosecuted. This is despite PSA being aware of investigations detailing a number of companies that have organized for larger scale fraud having been undertaken by SIRA.

There were over three hundred investigations where employers did not have workers compensation insurance.

Regulation is a major area where SIRA has not met its objectives. For a majority of compliance measures, a letter has been sent to the company only. This is not satisfactory. The Association is unaware if it is a policy decision or a lack of capacity but formerly WorkCover Inspectors were at the forefront of identifying underpayment and non payment of workers compensation policies.

In 2014 the construction blitz after Lend Lease Barangaroo fire lead to recovery of millions of dollars in lost premiums being recovered. Similarly when Minister Jeff Shaw was responsible for WorkCover, the agency was given targets of numbers of fraud matters to prosecute to set an example on workers compensation fraud, and recovery of unpaid premiums.

A further example but out of workers rights is the proposed 2016 cuts to CTP. These were proposed to deal with a problem that was an organized fraud of the CTP scheme by solicitors, doctors, individuals and other individuals. In this scenario SIRA argued for cuts to benefits when there was a mechanism to reduce this liability by enforcement activity.

Recommendation

- *That SIRA be given enforcement targets to investigate fraud, non and under payments of various insurance schemes.*
- *That if SIRA does not have the resources to enforce its insurance coverage that they increase staff to ensure that it occurs.*

Tripartite Governance

The SIRA Board has very little connection with workers.

SIRA's Board is not a tri-partie Board. There is an absence of effective consultation elsewhere about any other policy or guideline. As part of a labour inspectorate, the Association argues that the ILO Convention 144 applies. The Government argues that this is not the case.

Regardless of whether tripartite consultation is agreed, there is a capacity to form committees of the SIRA Board under Section 22 of the Act. This would be an ideal mechanism for SIRA to commence formal consultation with worker and employer representatives. As SIRA has failed to do so already, it is appropriate that the legislation is altered to ensure that SIRA can more effectively meet its objectives.

Recommendation

- *That due to the failure to form an expert committee under Section 22 that the Parliament legislate for expert committees including workers for workers compensation within SIRA.*

THE END

Attachment 1

Reference to ICare objectives

11 ICNSW to prepare annual statement of business intent

- (1) ICNSW is to prepare a statement of business intent and submit the statement to the Minister and the Treasurer not later than 3 months after the commencement of each financial year of ICNSW.
- (2) A statement of business intent is to set out the business plan of ICNSW over the financial year to which the statement relates and is to include the following:
 - (a) the objectives of ICNSW and its main undertakings,
 - (b) the nature and scope of the activities to be undertaken,
 - (c) the accounting policies to be applied in the financial reports of ICNSW,
 - (d) the performance targets and other measures by which the performance of ICNSW may be judged in relation to its stated objectives,
 - (e) any other matter required by the Minister.
- (3) If the Minister or the Treasurer is not satisfied with a statement submitted under this section, the Minister may direct ICNSW to amend and resubmit the statement in the manner and time specified.

We are required to prepare and submit an annual Statement of Business Intent to the Minister and the Treasurer no later than three months after the start of each financial year. This statement must set out icare's business plan.

Attachment 2

iCare Application for Access to personal and/or health information