Australian Industry Group

The icare and State Insurance and Care Governance Act 2015 Independent Review

Submission to the Independent Reviewer

OCTOBER 2020

ICARE AND STATE INSURANCE AND CARE GOVERNANCE ACT 2015 – INDEPENDENT REVIEW

SUBMISSION TO THE INDEPENDENT REVIEWER

INTRODUCTION

The Australian Industry Group (Ai Group) is a peak industry association and has been acting for business for more than 140 years. Along with our affiliates, we represent the interests of businesses employing more than one million staff. Our longstanding involvement with diverse industry sectors including manufacturing, construction, transport, labour hire, mining services, defence, airlines and ICT means we are genuinely representative of Australian industry.

Our vision is for ***thriving industry and a prosperous community*****.**

We have ongoing contact and engagement with employers across Australia on the broad range of issues related to the operation of their businesses, informing them of regulatory changes, discussing proposed regulatory change, discussing industry experiences and practices and providing advice, consulting and training services.

We also interact with and provide regulators and scheme managers across all Australian jurisdictions with employer views and experience on WHS/OHS and workers' compensation.

Our membership is diverse, operating across a broad spectrum of industries. We have a significant number of large organisations within our membership. However, around three quarters of our members employ fewer than 50 employees and half employ fewer than 20 employees.

CONTRIBUTING TO THIS REVIEW

Ai Group welcomes the opportunity to provide feedback to the independent review of *icare and State Insurance and Care Governance Act 2015* (the SICG Act).

The information we are providing is largely based on feedback received from employers during the provision of training and consulting services and when member companies contact our Workplace Advice Line, or our specialist workers' compensation advisers, to discuss difficulties they are experiencing within the scheme.

We acknowledge that a review of this type, and indeed the nature of our interactions with members, means that the feedback we receive is mostly from those who have had a negative experience with the scheme. Employers do not generally contact us when they have a satisfactory experience with the scheme, because that is what they believe should happen.

In July 2019 Ai Group made a submission to the *Compliance and Performance Review of the NSW Workers Compensation Nominal Insurer (the Dore Review).* Most of the issues raised in that submission continue to be valid. For this reason, we have provided of that submission for your additional information.

ADDRESSSING THE TERMS OF REFERENCE FOR THIS REVIEW

In the absence of a Discussion Paper, we have structured our submission around the Terms of Reference for the Review.

1) Comprehensive organisational review of icare, having regard to issues recently raised in the media and in Parliament

a. Operations, including claims management, the claims agent model and incentive structures, return to work performance, and the service provided to injured workers

Ai Group made a detailed submission to the Dore Review. A copy of that submission is attached for your information. A brief summary is provided below, including areas of change that we have identified since that time.

Premium

The application of the Claims Performance Adjustment (CPA) at increments of 10% creates a situation where small changes in premium can have a significant impact on the premium payable as an employer moves from one CPA level to the next.

The increased penalty that applies for a second year with CPR at 400+% is not appropriate in situations where an employer is unable to influence the cost of claims in the subsequent year. We have provided an example of a small employer with one large claim who has an initial penalty applied in the subsequent premium year and then is subject to increasing penalties in the following three years, due to a closed claim that they cannot influence, in spite of not further claims.

We acknowledged that icare had provided better information about the premium calculation in 2019/20. We note that the information available to employers since that time has improve further with the full premium formula now available on the icare website.

We highlighted the importance of the 30% cap that is applied to protect employers from volatile changes to their premium from year to year.

Claims Lodgement, determination and management

Key issues raised on this topic relate to employers feeling shut out of the process; that their views are either ignored or not sought; and that the system prioritises the needs of works to the exclusion of employers.

We have not seen any significant change in the issues raised with us. However, we must put this into the context that employers generally only contact us when they are dissatisfied with the scheme, not when they have a positive outcome.

Employers continue to be concerned about the manner in which claims for psychological injury are determined, especially when it relates to a situation which the employer believes should lead to an exclusion on the basis of *reasonable management action taken in a reasonable manner.*

b. Delivery of the recommendations of the 2019 Compliance and Performance Review of the Nominal Insurer (NI) (the Dore Review)

The Dore Report presented 13 findings: 12 were recommendations for SIRA and icare; one was a recommendation that the legislative powers available to SIRA should be reviewed and strengthened to enable proper oversight of the NI (nominal insurer).

SIRA accepted the 12 recommendations that were directed at the role of SIRA and/or icare, acknowledging that the legislative review was a matter for government.

SIRA responded to the findings with a 21-point plan in December 2019. In its summary, SIRA identified six opportunities for improvement:

- improving early and safe return to work outcomes, including for people with psychological injury
- claims management, early intervention and treatment
- premium transparency and volatility in alignment with SIRA guidelines
- engagement with employers
- data quality
- escalating medical costs due to leakage and increases in utilisation

icare also accepted the findings, but stated in their 44 page response to the report in December 2019 (page 3):

> *…icare does not consider that the Report presents a true reflection of the NI's overall performance … While icare understand it is the prerogative of the Review to craft an outcome narrative based on its interpretation of the information supplied, it is disappointing to note the level of assumption and conflation of complex, specific issues into simplistic commentary.*

Further it was stated by icare, *"the report provides extensive coverage of employer feedback on the NI, but largely ignores the voice of critical stakeholders – injured workers"*.

As a representative of employers these introductory comments illustrated two concerning things to us - that icare was accepting the recommendations without believing they were necessary; and that icare did not accept employer views on their merits independent of injured worker views.

It is widely viewed, and acknowledged to Ai Group by then senior management of icare in 2019, that icare had wrongly focused almost solely on the interests and perspectives of injured workers at the expense of those of employers. This is entirely consistent with what employers told us they felt in dealing with icare in relation to claims.

SIRA published an update on the 21 point action plan on 3 August 2020. The update advised that seven actions are completed or completed and ongoing, with 14 actions in progress.

2020 has been a difficult year for all Australians and many business as usual activities have suffered due to the focus on COVID-19. We acknowledge that this has most likely impacted the implementation of the 21 point action plan.

Our comments on progress are focused on return to work outcomes and medical costs

Return to work outcomes

The update identified that SIRA had two key concerns in relation to Return to Work:

- the icare Business Plan performance targets for Return to Work rates were too low: 39% at 4 weeks; 75% at 13 weeks; and 80% at 26 weeks; and

- icare using cessation of weekly benefits to measure Return to Work, rather than the work status measure (which is based on advice that the injured worker has actually returned to work).

A related action was to amend the Return to Work performance measure for remuneration incentives for scheme agents and relevant icare employees to the work status of a worker, rather than the cessation of benefits. Ai Group is pleased to see this progressing as it is a much clearer measure performance that focuses on real support for return to work.

We note also that there has been significant work done in relation to the RTW measurement framework and look forward to seeing the impact of these changes.

Medical expenses

An issue that was not considered by the Dore Report, and not included in our submission to that review, was the potential unintended consequence of not including medical expenses in the employer premium calculation.

We recall discussions at the time this change was made to the premium in 2015/16 that it was a deliberate decision of icare to remove these costs from the premium calculation so that employers would be less resistant to medical and allied expenses being incurred on claims. The belief was that earlier and easier access to medical treatment would improve recovery and therefore enhance return to work outcomes.

The intended improved return to work outcomes associated with this change has clearly not been achieved.

However, what has been achieved is a lack of individual employers' focus on medical costs. Informed employers know that the medical costs are not included in the premium calculation and therefore are less likely to focus on them as a claim cost or as part of the injured worker's treatment and recovery trajectory.

In addition, historically, the Premium Renewal Packs have not provided visibility of these costs at the time the employer is paying the premium. The 2019/20 premium notice only showed "included costs". The 2020/21 premium does include a "total claims costs" column, but there is no further explanation of the difference between these and the "premium impacting claims costs".

As a result, medical costs have increased and go into the pooled costs that all employers are collectively responsible for, at the same time as individual focus and sense of responsibility has been weakened.

An employer may have valuable information that could assist in the management of medical costs. For example, if they are aware that a worker is not getting any relief from treatment being provided, or if there are concerns about over-servicing. Consideration should be given to identifying ways to engage more closely with employers, especially large employers with a number of claims, to include them in the management of medical costs through regular reporting and ongoing discussion about medical treatment during the life of the claim.

Observation on timing

With NSW having settled into a new COVID normal, it is hoped that the outstanding actions are prioritised for completion.

Realisation of the benefits that it [icare] was established to achieve

The establishment of icare and SIRA as separate entities arose from the *Review of the exercise of the functions of the WorkCover Authority* undertaken by the Standing Committee on Law and Justice. The September 2014 Report (page xii) identified that there was potential conflict between its role as both the nominal insurer and the regulator:

> *As a regulator WorkCover is responsible for ensuring compliance with the relevant workers compensation legislation through education, engagement and enforcement, while as the nominal insurer it is responsible for the commercial roles of management of funds and appointing and overseeing scheme agents that issue insurance policies and manage claims.*

Subsequently, Recommendation 1 (page 26) was provided as:

> *That the minister for Finance and Services, in consultation with the WorkCover Independent Review office and other stakeholders, consider establishing a separate agency or other administrative arrangements to clearly separate the roles of regulator and nominal insurer in the workers compensation scheme, and implement that model as soon as practicable.*

SIRA and icare (and SafeWork NSW) were subsequently established by the *State Insurance and Care Governance Act 2015*. In his second reading speech on 5 August 2015, The Hon. Dominic Perrottet, then Minister for Finance, Services and Property stated:

> *The new structure will be far more transparent and accountable and, most importantly, lead to better outcomes for injured workers. The new organisations will be more customer-centric, streamlined and efficient, building economies of scale and focusing on clear objectives.*

The bill will create a clear statutory and operational separation between the functions of providing government insurance services and the regulation of those services.

Insurance and Care NSW [icare] will be a centre of excellence for long-term care needs, combining claim cohorts with similar care needs to focus on return to work and quality of life outcomes. Insurance and Care NSW will deliver workers compensation that is less adversarial. There will be fewer forms and less bureaucracy, and injured workers will have more say in their treatment and return-to-work pathway.

SIRA will focus on ensuring that key public policy outcomes are being achieved in relation to service delivery to injured people, affordability, and the effective management and sustainability of the insurance schemes. Consolidating regulatory responsibility for State insurance into one regulator will enable a consistent and robust approach to the monitoring and enforcement of insurance and compensation legislation in this State.

The legislation did create a clear statutory and operational separation between the organisations. However, where there was once a perception of conflict between the two roles of regulator and nominal insurer being *within* WorkCover, there is now a perception of conflict *between* icare and SIRA. The two do not interact well and there appear to be insufficient levers available to SIRA in exercising its role as regulator.

Subsequently, the expected benefits of this separation have not been achieved.

It is Ai Group's view, supported by feedback from our members and the findings of the Dore Report that the implementation of icare and SIRA has not achieved "better outcomes for workers" as measured by improved return to work (RTW) outcomes. In fact, as illustrated and discussed in part 5.5 of the Dore Report, RTW outcomes have deteriorated significantly, when measured at 4, 13, 26 and 52 weeks.

In addition, the Comparative performance monitoring report 21st edition, published by Safe Work Australia in February 2020 (page 33) indicates that, in 2018, the current return to work rate for NSW at 81% was below the national average of 82%. This compares to 2012 when NSW was above the national average of 77%, with a rate of 80%.

It is also noted that, utilising this comparative data, NSW peaked in 2016 with a current return to work rate of 87%, before is subsequent significant decline in performance to 81% in 2018.

Employers would acknowledge that the NSW workers compensation scheme has become less adversarial, but not necessarily in a fully positive way. Feedback from our members indicates that there is a significant increase in the acceptance of claims without taking into account the views of employers.

This is particularly concerning in relation to psychological injury claims that are lodged during, or shortly after, performance management or disciplinary action; employer input is crucial in these circumstances, both to elicit the full facts and to establish an approach that employers believe is fair and reasonable.

Employers are crucial to the successful return to work or injured workers; their willingness to genuinely participate in the provision of suitable duties is influenced by their perception of the fairness of the scheme as a whole and the decisions made about the claims that are made against them.

Over recent months SIRA has engaged with Ai Group and other stakeholders as part of developing their new Return to Work Strategy. In a recent consultative forum of employer organisations SIRA presented on the strategy.

In this presentation, it was identified that the 26-week return to work rate (at 11 September 2020) has seen some improvement since May 2019, when it dipped to a low of less than 81%. This is a promising sign, that needs to be closely monitored over coming months and years.

The proposed Recovery at work scorecard presented shows a good mix of measures across the first 104 weeks of a claim, taking into account three key outcome measures to commence in phase one (October 2020 to February 2021): stay at work; return to work; and working rate. In addition, lead indicators are being introduced from October 2020 through to July 2021.

We will continue to engage with SIRA, and icare, as these measures are rolled out and will be particularly interested in any links that can clearly be established between the lead indicators and movement in sustainable return to work outcomes.

Elsewhere in this submission we refer to the standard letters that are sent to employers in relation to claims decisions. We note that the standard letters sent to an employer do not have any reference to the employer obligation to provide duties, stating only that:

> *Your case management specialist helps your employee access the right treatment whilst they recover. They will also help you and your employee get the right support to recover.*

Further the detail of the Injury Management Plan (IMP) is focused on treatment with no mention of working with the employer to achieve a return to work. In one recent example it identifies the injured worker as the person to take action, with no reference to anyone within the workplace.

It seems to be a missed opportunity not to include important information about the employer obligation to consult with the worker to identify opportunities to return to suitable duties.

This is particularly so in the context of a provisional liability letter that is establishing an entitlement to weekly compensation, without any specific reference to an expectation that they will most likely return to work before the expiry of the provisional period.

c. Culture

Ai Group comments in this section relate to our observations during our direct contact with icare and the feedback from our members in relation to their interactions with the agents engaged by icare to manage claims on behalf of the scheme.

When we have engaged with icare on specific issues of concern on behalf of our members, we have found them to be responsive and considerate of our views. However, the need for us to initiate these discussions is generally because an employer has had an unhelpful experience with their agent, predominantly EML.

Employer feedback often relates to issues associated with - high turnover of case management specialists leading to a feeling that the claim is not understood; poor communication by the agent, including not returning calls or responding to requests for information; and acceptance of claims without considering, and sometimes not even seeking, employer input.

These behaviours of the agent(s) appear to be driven either by the specific directions of icare or a failure to establish protocols that would enhance the relationship between agents and employers.

d. Governance
e. Board effectiveness and accountability

We note that s.154B of the *Workers Compensation Act 1987* (*the WC Act*) that:

> *5) The liabilities of the Nominal Insurer as insurer under a policy of insurance can only be satisfied from the Insurance Fund and are not liabilities of the State, ICNSW or any authority of the State.*

Further, s.154D states:

> ***154D Establishment and operation of Insurance Fund***
>
> *(1) There is established a fund to be known as the "Workers Compensation Insurance Fund".*
>
> *(2) The assets of the Insurance Fund are subject to a statutory trust to be* ***held on trust*** *for the purposes to which assets of the Insurance Fund are authorised or required to be applied by or under this Act and* ***for the benefit of workers and employers*** *as provided by this Act.* [emphasis added]

(3) The Nominal Insurer is responsible for managing the operation of the Insurance Fund, including the investment of the assets of the Insurance Fund. The assets of the Insurance Fund may be invested in such manner as the Nominal Insurer thinks fit, subject to the investment strategies determined by ICNSW under the State Insurance and Care Governance Act 2015.

(4) ***Employers*** *are* ***entitled to participate in the distribution of any surplus*** *in the Insurance Fund, and* ***are responsible for meeting any deficit in the Insurance Fund****, by means of the fixing of premiums, levies and contributions as provided by this Act.* [emphasis added]

(5) The assets of the Insurance Fund cannot be applied for the purpose of enabling any payment as a dividend to the credit of the Consolidated Fund, whether by virtue of a direction of the Minister under this Act or the 1998 Act or pursuant to a requirement under section 5.4 of the Government Sector Finance Act 2018, or otherwise.

(6) For the purposes of this Act and any other Act or law, each of the State, the Nominal Insurer, ICNSW and any authority of the State—

(a) has no beneficial interest in or entitlement to the assets of the Insurance Fund, and

(b) has no liability to meet any deficit in the Insurance Fund and no entitlement to any surplus in the Insurance Fund, and

(c) is not trustee of the Insurance Fund.

Clearly, the Insurance Fund is established through the premiums paid by employers and the returns received for investing those funds. The responsibility for any deficit rests with NSW employers.

Therefore, any unfunded liabilities are the responsibility of NSW employers; those in existence now through current contributions and employers of the future who may have to deal with any deficits that accrue, now or in the future.

The scheme established by the SIGC Act, including icare and SIRA, fails to adequately recognise and acknowledge the responsibility of employers for the scheme's financial outcomes, either as its collective funders or as individual premium payers.

The closest legislation comes to addressing the issue lies in s.154C(3) of the *Workers Compensation Act 1987*, which states:

> *3) When acting for the Nominal Insurer, ICNSW must exercise its functions so as to ensure the efficient exercise of the functions of the Nominal Insurer and the proper collection of premiums for policies of insurance and the payment of claims in accordance with this Act and the 1998 Act.*

In reality, the avenue for employers or advocates for injured workers to influence scheme outcomes is through the Minister, who can give directions to icare in the public interest (s7 SIGC Act). This was also the case before the SIGC Act.

However, the principal standing forum for stakeholder engagement with the Minister on the workers compensation system was the Workers Compensation Advisory Council established under s10 of the Workplace Injury Management and Workers Compensation Act 1998 (the WIMWC Act).

Prior to being abolished in 2012 it was a longstanding forum for stakeholder engagement and early information sharing on scheme trends. This reflected the scheme's status as an important piece of community infrastructure, rather than a private entity.

Without such a forum, employer and employee advocates lose access to real time information on the scheme performance, a deep understanding of the trends driving performance and the opportunity to regularly give feedback on how workplace parties perceive the scheme operating, particularly its underlying sense of fairness, without which it loses credibility with employers, or workers or both, very quickly.

In the past, without such a forum, the scheme in its various forms has been allowed to deteriorate to the point where significant changes to benefits, or significant premium increases, are deemed necessary (and almost invariably reversed, at least in part, at the next change of government). Neither employers nor injured workers gain from such instability.

We note that s.9 of the SIGC Act gives the icare Board the power to establish committees *"to give advice and assistance to the ICNSW Board in connection with any particular matter or function of the ICNSW Board".* These committees can have non-Board appointees (s.9(2)), provided they are chaired by a Board member. We are aware that six such committees have been established to date, including a Governance Committee announced in August 2020. There is a Customer, Innovation and Technology Committee, but we are not aware of it including any customer representatives, only board members according to the icare 2018-19 Annual Report.

In early 2020, the icare board did start extending invitations to stakeholder representatives to meet with it. Ai Group received such an invitation in February 2020, which was scheduled for August 2020, postponed to September and subsequently cancelled.

The icare Board skillset appears to be skewed towards financial and general insurance experience at the expense of workers compensation experience and knowledge of how the scheme looks from the perspective of higher risk industry employers. There was one director with a union background, appropriately, but again reflecting a lack of balance in icare's engagement with both sides of workplace dynamics.

We believe it would be appropriate to restore a formal engagement forum with employers involved, either in the form of the Ministerial Council or as a board committee with non-director appointments, or both.

j. Relationship with the State Insurance Regulatory Authority

There have been a number of publicly reported examples of disagreement between SIRA and icare, including an extensive report on ABC Four Corners which aired on 27 July 2020.

It is crucial for the ongoing improvement of the scheme that the NI and the regulator are able to find ways to work cooperatively to achieve better outcomes for workers who need support after an injury, and the employers who fund the scheme.

There appears to be a significant structural flaw in SIRA's regulatory oversight of icare. Its main regulatory threat is withdrawal of icare's licence, which is akin to a nuclear threat when icare is the monopoly provider of services for the NI. The relationship problem may stem from this "too big to fail" set up, which is further discussed below.

f. Executive remuneration
h. Procurement practices
i. Management of probity matters such as gifts, travel & conflict of interest

Ai Group has no clear insight into the issues that may be considered in relation to these Terms of Reference.

However, as discussed earlier in this submission, all income derived by icare has been provided by employers; either directly through the premiums paid or by the returns derived from investing those premiums.

The collective level of premium payable each year is determined by icare, subject to approval by SIRA, to achieve an appropriate level of funding to ensure injured workers can receive the compensation established by law.

With this in mind, all expenditure must be carefully considered. The items listed in these Terms of Reference are an important consideration when ensuring the financial stability of the scheme and a sustainable level of premium for employers.

Employers in particular are very conscious that their premiums pay for the scheme's administration. Probity matters are important in relation to the overall credibility of the scheme, as perceived not only by employers, but workers and the community at large.

2) Review of the government-managed workers compensation schemes (NI and Treasury Managed Fund (TMF) and the legislative framework that supports them

In this section, Ai Group comments will be limited to those that are relevant to icare, as our members are not engaged with the TMF.

Whether the workers compensation schemes are delivering on their policy objectives

The policy objectives of the workers compensation schemes are established by section 3 of the Workplace Injury Management and Workers Compensation Act 1998 as outlined below:

> ***3 System objectives***
>
> *The purpose of this Act is to establish a workplace injury management and workers compensation system with the following objectives—*
>
> *(a) to assist in securing the health, safety and welfare of workers and in particular preventing work-related injury,*
>
> *(b) to provide—*
> - *prompt treatment of injuries, and*
> - *effective and proactive management of injuries, and*
> - *necessary medical and vocational rehabilitation following injuries,*

> *in order to assist injured workers and to promote their return to work as soon as possible,*
>
> *(c) to provide injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses,*
>
> *(d) to be fair, affordable, and financially viable,*
>
> *(e) to ensure contributions by employers are commensurate with the risks faced, taking into account strategies and performance in injury prevention, injury management, and return to work,*
>
> *(f) to deliver the above objectives efficiently and effectively.*

These objectives, which are consistent with those in other Australia schemes, are a complex balancing act for scheme managers and the regulators.

Whether a workers compensation scheme is "fair" is often hotly debated. What seems fair to one participant in the scheme may seem unfair to another.

There has been recent high-profile coverage of some claimants being "mistreated" within the scheme, illustrating a lack of fairness toward those claimants. We do not know the full details of such complaints and would not comment on individual cases that have been examined.

However, it is Ai Group's view that there are sufficient examples of employer's views not being taking into account to demonstrate that fairness to employers is not always applied in the consideration of claim liability and the payment of benefits.

Elsewhere in this submission we refer to issues associated with the consideration of psychological injuries where consideration is not always given to the full range of issues that may have led to the injury, including whether the reasonable management action exclusion should apply.

Of a more general nature the approach to provisional liability is also causing concern. The current letter provided to an employer commences with "we have been told that your employee has been injured at work … we are writing to let you know that we can help them immediately with provisional weekly payments and treatment expenses". In the body of the letter, it is further stated "we can do this even if they have not made a formal claim for compensation …"

In one example, the injury was a "wound to the finger without damage to nail". The provisional liability for medical expenses was up to $3,000, including access to up to 8 treatments from an approved physiotherapist, osteopath, chiropractor or accredited exercise physiologist. The provisional liability for weekly compensation was up to 6 weeks.

The issues raised by this one example are two-fold:

- The fact that the agent can make provisional liability decisions when a worker may have no intention of making a claim; and
- The provisional liability amounts do not appear to be commensurate with, or in the case of treatment even relevant to, the type and extent of the injury.

It appears that, in an attempt to ensure that workers receive immediate support, the scheme has now gone too far in its application of provisional liability entitlements. And has done so without the expected benefit of improved return to work.

Financial stability of the two schemes

The financial stability of the icare scheme is not something that the average employer would be focused on, or even understand. Even when the issue is aired by the media, the potential impact on individual employers is not understood.

However, it is of major importance to Ai Group, as a representative of the collective body of NSW employers. It may be argued that the current "average" premium paid by employers is not high, at 1.4%. icare was initially seeking an increase of 4% for the 2020/21, but this was withdrawn due to the impacts of COVID-19. Such an increase may not seem significant. However, 1.4% of the $198.5 billion wages that are insured by icare is $2.779 billion, and 4% of that is $111 million extra premium that would be collected from industry in the eye of severe COVID-19 induced economic downturn.

Further, the industry rates that are established across the scheme range from a low of 0.198% to a high of 11.24%. Hence, a 4% increase to the average premium could have a very significant impact on the higher industry rates, and the employers who operate in those industries.

The Dore Report identified that the funding ratio had reduced to 112.4% in FY2019. The financial results included an underwriting result of ($2,522M) and investment income of $1,648M; giving a net result of ($874.3M).

There is disagreement in relation to the cause of the decline between the Dore Report (which identifies increasing claims costs from poor return to work rates as the main driver) and icare's response (which is that the main reason for decline in the funding ratio "are largely factors beyond icare's control").

Whatever the driver of the decline, it is clear that return to work rates have reduced significantly in recent years and addressing these issues can be a major driver to improve the scheme's financial position.

A funding ratio of 112.4% does not in itself create a concern to the disinterested observer. However, with the underwriting loss, the sustainability of the scheme must be a major focus for icare and the employers that fund the scheme. This is particularly important with the financial impacts of COVID-19 expected to reduce investment returns globally.

Further, we note that the 31 December 2019 valuation by Finity Consulting reported the following:

> *The funding ratio for the NI at 80% probability of adequacy has decreased from 109% as at 30 June 2019 to 104% as at 31 December 2019. This is largely driven by strengthening in outstanding claims liability due to recent claim experience and valuation basis changes described further below. At the 75% probability of adequacy, the funding ratio for NI would be 107%.*
>
> *This is outside the target operating range by 6%. The capital management policy requires a management action review and/or plan to return the funding ratio to the target range within five years. icare is actively working on its key financial levers of claim cost savings via return to work improvements and medical cost containment, premium changes and expense savings. Claims experience will continue to be closely monitored so that icare management decisions can appropriately reflect emerging information.*

The legislative and regulatory structure of the schemes to the extent they relate to icare, the TMF, the NI, insurance, funding, of the powers, functions and independence of SIRA.

In section 3.3.8 of the Dore Report (page 12) it is identified that SIRA has a range of powers that it can utilise to enforce or direct insurers to undertake an action. However, it is also highlighted that many of these powers are constrained in relation to icare, stating "Under section 154B of the *Workers Compensation Act 1987*, the NI is taken to be a licensed insurer *and as if that licence were not subject to any conditions.*

In section 7.7.3 it is further highlighted that:

> *Although section 194(2) makes compliance with a direction a condition of an insurer's licence, the unconditional nature of icare's licence granted by section 154B appears to negate the power in respect of the NI. At best this is unclear, and at worse it means a constrained regulator"*

Whilst these constraints can be seen as an impediment to regulating the scheme, it is unclear how a better option could be implemented. In a practical sense, it is highly unlikely that any legislative option would create a real lever associated with SIRA being in a position to remove the licence from icare.

The SIRA Annual Report 2018-19 (page 19) identified that the NSW workers compensation system covered businesses that had $267 billion of reported wages. 74 per cent were insured by the Nominal Insurer (over $198.5 billion).

The remainder are covered by: self-insurers (large employers who carry their own risk), specialised insurers (four insurers covering specific industries) and the Treasury Managed Fund (TMF) for the NSW Government.

It is not foreseeable that SIRA would ever exercise a power given to it to cancel the licence of the major, and only real choice, of workers compensation insurer.

3) Statutory review required by s32 of the SICG Act

Whether the policy objectives of the SICG Act remain valid
Whether the terms of the SICG Act remain appropriate for securing those objectives

As outlined above the key objectives of the SICG Act was to remove any conflict of interest that arose by WorkCover being the nominal insurer and also the regulator of health and safety and workers compensation.

Whether this conflict was real or perceived, it is Ai Group's view that the best way forward is to enhance the implementation of the Act through better relationships between SIRA and icare. Further structural changes may be too disruptive.

Any innovative approaches to creating stronger regulatory levers for SIRA that are identified through this review should be carefully considered. However, as we outlined earlier, legislative changes designed to strengthen SIRA's ability to regulate icare are unlikely to be successful if the only penalty that could be applied is to withdraw their licence to operate as the nominal insurer.

There may also be options at a government level to increase scrutiny of the relationship between icare and SIRA and icare's compliance with the expectations established.