Submission to the *icare* and State Insurance and Care Governance Act 2015 Independent Review – November 2020

Introduction

Business NSW has previously raised concerns about the experiences of employers during their engagement with the NSW workers compensation system. These issues were raised in our submissions to the Compliance and Performance Review of the Workers Compensation Nominal Insurer Scheme[1] and the 2020 Review of the Workers Compensation Scheme (2020 Review)[2].

For the purposes of this submission, these issues can be summarised as including (but are not limited to) to:

- the new structure
- the new premium-setting model
- the claims management model
- the lack of regulatory oversight.

To some extent, issues have their origin in the amendments made during the introduction of the State Insurance and Governance Act 2015 No.19 (the 2015 Act).

The 2015 changes contributed further to the erosion of accountability within the system that we believe has occurred since 2003. For this reason, Business NSW's submission sets out the impact of the 2015 amendments in the broader context encompassing reforms introduced in 2003 and again in 2012.

Business NSW is concerned the Nominal insurer 2020 Quarter 1 claims file review (July 2020) (the 2020 Quarter 1 review)[3] confirms many of the issues identified by the Independent reviewer report on the Nominal insurer of the NSW workers compensation scheme (December 2019) (the Dore Report)[4] are ongoing, despite progress having been made on some of the recommendations contained in that report. Of most concern are the issues relating to liability determination and injury and medical management planning.

Deeper investigation into the 2015 amendments is required to identify the underlying drivers for the scheme's poor performance and the steps required to effect change.

[1] https://www.sira.nsw.gov.au/__data/assets/pdf_file/0008/553679/025_NSW-Business-Chamber.pdf

[2] https://www.parliament.nsw.gov.au/lcdocs/submissions/68015/0005%20Business%20NSW%20(formerly%20NSW%20Business%20Chamber).pdf

[3] https://www.sira.nsw.gov.au/__data/assets/pdf_file/0004/876568/EY-Report-Nominal-Insurer-2020-Quarter-1-claims-file-review.pdf

[4] https://www.sira.nsw.gov.au/__data/assets/pdf_file/0005/584798/Independent-Reviewer-Report-into-the-Nominal-Insurer.pdf

Legal measures, including legislative amendments, are needed to improve the accountability, and ultimately the performance, of the nominal insurer.

Despite this, there remains considerable opportunity to improve stakeholder experiences through the introduction and refinement of operational measures that do not require legislative change. To take advantage of this opportunity, Business NSW has convened an employer coalition which has already identified and prioritised measures to improve the efficiency, effectiveness and transparency of the scheme.

Business NSW recommendations summary

The workers compensation scheme is a compulsory statutory insurance scheme which is also a statutory trust.

Despite the legislation nominating NSW employers and their workers as beneficiaries and describing the objects and purposes of the trust, we are concerned that it does not provide a sufficient level of accountability and transparency to protect beneficiary interests. These deficiencies have contributed to the current state of the scheme, which is currently non-compliant and underperforming.

Business NSW believes this situation needs to be urgently rectified, given employers bear the sole financial responsibility for any deficit in the trust fund regardless how that deficit was caused. The following table outlines our recommendations for addressing the key issues.

Issue	Business NSW recommendation
There is no trustee	**Recommendation 1:** That *icare*, as agent for the nominal insurer, be held liable as trustee for the Insurance Fund either by declaration of the Supreme Court or by amending the legislation.
Accountability of the agent for the nominal insurer	**Recommendation 2:** That representatives of NSW employers and their workers be appointed to a tri-partite Ministerial Advisory Council which is empowered to appoint sub-committees and industry reference groups to assist with its Ministerial advisory function.
	Recommendation 3: That the legislation be amended to clarify that the nominal insurer and its agents are subject to sections 181, 182, 192A and 194 and that adherence to the Market Practice and Premium Guidelines (MPPGs) is an additional condition that is specific to those licensed insurers who set premiums under the ‘file and write’ system.

Issue	Business NSW recommendation
Accountability of the agent for the nominal insurer (continued)	**Recommendation 4:** That this review consider whether there is a need to amend the legislation to clarify that the nominal insurer's agents are scheme agents as defined by section 154G of the 1987 given the scope of section 191 of the 1987 Act.
	Recommendation 5: That the efficacy of current ministerial oversight arrangements be examined with legislative amendments to strengthen these arrangements where deficiencies are found.
The 2015 restructure	**Recommendation 6:** That the legislation be amended so it clearly outlines the rights and responsibilities properly attributable to each of the three newly created entities, given that together, they are supposed to achieve the statutory objectives of the NSW workers' compensation system.
The statutory objectives are not being met	**Recommendation 7:** That *icare*'s Claims Management Model be reviewed and adapted to ensure: • suitably qualified individuals are making decisions in accordance with legislation, and • business systems are in place to ensure those decisions are made in the most effective and efficient manner possible. This would include providing liability decisions in writing, the contents of which would include the information being relied upon, and reasons for the decisions (such reasons to include references to the legislative requirements).
	Recommendation 8: That the legislation be amended to clarify how the privacy laws intersect with the workers compensation legislation.
	Recommendation 9: That employer and employee representatives be involved in the decision-making process when the new premium formula is being set, to improve the likelihood of achieving the system's statutory objectives and the level of transparency surrounding the formula.

Business NSW submission

There is no trustee

Recommendation 1

That *icare*, as agent for the nominal insurer, be held liable as trustee for the Insurance Fund either by declaration of the Supreme Court or by amending the legislation.

Until 2003, the legislation established statutory funds and set out the requirements relating to the assets of the statutory funds, including how the assets of those could be applied and invested.

It also provided that, in the event of a breach of those provisions, directors of the licensed insurers would be held liable as if they were a trustee and the policy holders were the beneficiaries.

In 2003, although most of the requirements relating to the application and investment of the statutory funds (which were amalgamated into one) remained, along with the provisions relating to the beneficiaries and the objects and purposes of the trust, the provision relating to liability as a trustee was removed and never replaced.

Instead, the Workers Compensation Amendment (Insurance Reform) Act 2003 No 81 (the 2003 Act) only referred to a trustee in terms of who was not the trustee. It provided that the newly established nominal insurer, the State, the Authority (in its capacity as agent for the nominal insurer) and any authority of the State was not the trustee of the Insurance Fund.

It is not clear whether, by removing any reference of a trustee and explicitly excluding those entities responsible for the Insurance Fund from liability as a trustee, the arrangement is a sham within the meaning of Equuscorp Pty Ltd v Glengallen Investments Pty Ltd (2004) 218 CLR 417 at [46].

The 2015 Act did not seek to nominate the statutory trustee. Instead, it abolished the Authority and created three new entities, which included Insurance and Care NSW (*icare*). It also provided that *icare* would act as the nominal insurer's agent.

The legislation still provides that the nominal insurer is a legal entity who can sue, be sued and hold property, and that *icare*, as the nominal insurer's agent, manages the fund. Given that the certainties of a trust are present, this implies that either the nominal insurer or the manager of the Insurance Fund is the trustee.

In the interests of clarity and to strengthen the level of accountability within the NSW workers' compensation system, the identity of the trustee needs to be confirmed.

Accountability of the agent for the nominal insurer

Even though the 2003 Act purported to remove liability as a trustee, there were nevertheless other mechanisms in place to hold the nominal insurer accountable.

The Ministerial Advisory Council (or its equivalent)

Recommendation 2

That representatives of NSW employers and their workers be appointed to a tri-partite Ministerial Advisory Council which is empowered to appoint sub-committees and industry reference groups to assist with its Ministerial advisory function.

Up until 2012, an acceptable level of accountability remained in the form of a Ministerial Advisory Council or its equivalent.

In 2012, the Safety, Return to Work and Support Board Act 2012 No 54 (the 2012 Act) not only established the Safety, Return to Work and Support Board but also abolished 'a number of advisory councils and industry reference groups which currently have a broad remit of advising the Minister and the authorities on the various schemes'[5].

Instead, the Act introduced two 'mechanisms' to replace those entities. The first mechanism was to give the board the power to establish committees. The second mechanism was to empower the Minister to appoint advisory committees on an ad hoc basis.

The 2015 Act abolished the Safety, Return to Work and Support Board and transferred its 'assets, rights and liabilities' to *icare*.

If those two mechanisms survived the 2015 amendments, they now rest with *icare* and neither appear to have been deployed.

This has allowed *icare* to establish its Claims Management Model without being held to account for the resultant level of non-compliance and under-performance within that part of the scheme being managed by *icare*.

Regulatory oversight

The nominal insurer as a licensed insurer

Recommendation 3

That the legislation be amended to clarify that the nominal insurer and its agents are subject to sections 181, 182, 192A and 194 and that adherence to the *Market Practice and Premium Guidelines* (MPPGs) is an additional condition that is specific to those licensed insurers who set premiums under the 'file and write' system.

[5] Second Reading Speech by the Treasurer, Mr Mike Baird on 19 June 2012.

The 1987 Act empowers the regulator to impose conditions on a licensed insurer's licence. Under sections 181 and 182, there is a general power which allows the regulator to impose conditions 'for the purpose of ensuring compliance with the obligations of the licensed insurer … preserving premiums paid for policies of insurance … the efficiency of the workers compensation system generally or for any other purpose of the same or of a different kind or nature that is not inconsistent with this Act'.

Under section 192A, the regulator has the power to impose a specific condition that licensed insurers comply with its Claims Administration Manual and, under section 194 to issue directions 'requiring the adoption and use by them of specified processes, procedures, strategies, policies and methods in the handling and administration of claims for compensation or work injury damages, either generally or in respect of a specified class or classes of cases'.

When it was established in 2003, the nominal insurer was given a number of functions and allowed to 'operate to the fullest extent as a licensed insurer' with the caveat that the licence was 'not subject to any conditions'. This created a degree of uncertainty of whether or not the regulator could subsequently impose conditions over the nominal insurer's licence. That situation may have been due to the fact that the regulator at the time ('the Authority') was acting as the nominal insurer's agent.

However, in practice this was overcome by the fact that the nominal insurer could appoint scheme agents (also established by the 2003 Act) over whom the regulator's authority (including the ability to impose conditions) extended.

The 2015 Act established *icare* and SIRA, with *icare* acting as the nominal insurer's agent and SIRA as the regulator. It did not remove or alter the provisions relating to scheme agents, but it did change the way the premium formula was determined to a 'file and write' system.

The 'file and write' system was introduced through an amendment to section 168 of the 1987 Act which required compliance with the Workers Compensation Market Practice and Premiums Guidelines (MPPGs). It also provided that it 'is a condition of the licence of an insurer (including the Nominal Insurer) that the insurer:

(a) complies with the Workers Compensation Market Practice and Premiums Guidelines, and

(b) does not charge an insurance premium that is rejected under section 169'.

This sequence of events brings two rules of statutory interpretation (Expressio Unius est Exclusio Alterius and Leges Posteriores Priores Contrarias Abrogant) into play. When read in light of these two rules, the 2015 amendment purports to remove the level of uncertainty created by the 2003 Act by ensuring that the nominal insurer's licence is only bound by conditions expressly called up in the legislation (and is therefore not subject to conditions imposed by SIRA under sections 181, 182, 192A and 194 of the 1987 Act).

Scheme agents

Recommendation 4

That this review consider whether there is a need to amend the legislation to clarify that the nominal insurer's agents are scheme agents as defined by section 154G of the 1987 given the scope of section 191 of the 1987 Act.

As part of its implementation of the 2015 amendments, *icare* (as agent of the nominal insurer) purported to replace the previously appointed 'scheme agents' with a single 'claims agent' (EML) which was later expanded by the appointment of 'Authorised Providers' (Allianz, GIO and QBE) to service 'eligible large business customers'.

The definition of 'scheme agent' is very wide and was left untouched by the 2015 Act.

Section 154G of the 1987 Act provides that the nominal insurer can 'enter into arrangements (agency arrangements) by contract or otherwise for the appointment of persons to act as agent (a scheme agent) for the Nominal insurer in connection with the exercise of any functions of the Nominal insurer' where the scheme agent is 'subject to the direction and control of the Nominal insurer as provided by the terms of the agency arrangement'.

In August 2020, the then CEO of *icare*, John Nagle, gave evidence before the 2020 Review about changing the scheme agent arrangements[6].

Mr Nagle's evidence included the following information on how claims would be managed following the 2015 amendments:

- *icare* had indicated to the scheme agents that "bringing the scheme in-house, potentially, taking it on ourselves" was an option'.
- EML was "the new model leader, where they would help us set up the new model".
- *icare* Support Solutions Proprietary Limited:
    - is a corporation wholly owned by the nominal insurer
    - was established "as a vehicle … to transfer staff from EML to another entity or take on claims direct"
    - was set up "when we awarded the new contract…the new case model"
    - was not referred to in the annual accounts as "it has no trading"
    - "is a contracting vehicle between *icare* and EML"
    - is "owned by the nominal insurer, it then contracts with EML for the provision of (claims) services"
    - "is inactive in a trading sense"

6 https://www.parliament.nsw.gov.au/lcdocs/transcripts/2380/Transcript%20-%203%20August%202020%20-%20UNCORRECTED.pdf at pages 70, 77 & 78 (downloaded 27 October 2020).

- acts as “a pass through from the nominal insurer to EML it sits there and instructions to EML and *icare* and the nominal insurer pass through”.

This indicates that these contractual arrangements have been entered into ‘by’ the nominal insurer to the effect that EML is not a scheme agent. Therefore, neither EML nor any other service providers under a similar arrangement are subject to SIRA’s regulatory oversight.

Ministerial oversight

Recommendation 5

That the efficacy of current ministerial oversight arrangements be examined with legislative amendments to strengthen these arrangements where deficiencies are found.

The 2015 Act introduces a level of uncertainty over the degree of oversight the Treasurer, in his capacity as the responsible Minister, has over the Board of *icare*.

Under section 7 of that Act, although the Minister has the power to issue a direction to the *icare* board if ‘satisfied that it is necessary to do so in the public interest’ and the *icare* board ‘must ensure that the direction is complied with’, that power appears to be limited by the requirement contained in subsection (3) that:

“Before giving a direction under this section, the Minister must:

(a) consult with the (*icare*) Board, and

(b) request the Board to advise the Minister whether, in its opinion, complying with the direction would not be in the best interests of (*icare*)’.

Given the current level of non-compliance and under-performance within that part of the scheme managed by *icare*, the efficacy of current ministerial oversight arrangements should be examined.

The 2015 restructure

Recommendation 6

That the legislation be amended so it clearly outlines the rights and responsibilities properly attributable to each of the three newly created entities, given that together, they are supposed to achieve the statutory objectives of the NSW workers’ compensation system.

The 2015 Act was intended to establish**7** :

- “clear statutory and operational separation between the functions of providing government insurance services and the regulation of those services”
- for the new structure to be “far more transparent and accountable” and . . .
- “lead to better outcomes for injured workers” with the new organisations being “more customer-centric, streamlined and efficient, building economies of scale and focusing on clear objectives”.

[7] Legislative Assembly Hansard – 5 August 2015

However, none of these objectives have occurred in practice.

The statutory and operational separation

Clear statutory separation has not been achieved. This is due to the way in which the 2015 Act has abolished bodies and simply transferred 'assets, rights and liabilities' of the Board instead of enumerating the functions. This is particularly problematic with respect to the Return to Work and Support Board.

While there is operational separation between *icare* and SafeWork NSW, this is not accompanied with clearly defined boundaries of each organisation's responsibilities with respect to the prevention of harm.

icare's focus on harm prevention has not only led to increased inefficiencies throughout the system due to a duplication of resources, but it has also meant that insufficient attention is being directed towards injury management and improving return to work outcomes. This has been borne out by the Dore Report.

Being far more transparent and accountable

We do not believe it can be said that the 2015 amendments have led to a 'far more transparent and accountable' structure. Instead, they have contributed to an insufficient level of regulatory oversight and accountability to the primary funders and beneficiaries of the scheme and weakened transparency over injury and claims management decisions.

This situation has been exacerbated by *icare*'s:

- communications being confined to overly simplified explanations of the legislation,
- reliance on 'commercial-in-confidence' as justification for refusing to release information about the way it is managing the scheme or conducting its operations.

Being more customer-centric, streamlined and efficient

Employer feedback and reporting on key indicators indicates declining return to work outcomes and increasing inefficiencies within the system since the 2015 amendments were implemented. This feedback has been corroborated by the reports released by SIRA after having conducted its compliance and performance reviews of the Nominal insurer.

The scheme's statutory objectives

Section 3 of the 1998 Act set out the system's objectives. Based on member feedback, we do not believe the following objectives are being met:

(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,

(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.

Effective and proactive management of injuries

Recommendation 7

That *icare*'s Claims Management Model be reviewed and adapted to ensure:

- suitably qualified individuals are making decisions in accordance with legislation, and
- business systems are in place to ensure those decisions are made in the most effective and efficient manner possible.

This would include providing liability decisions in writing, the contents of which would include the information being relied upon, and reasons for the decisions (such reasons to include references to the legislative requirements).

The statutory provisions that relate to injury management require decisions to be made on liability, as well as the medical aspect of a claim. The 2020 Quarter 1 review confirms that decisions being made within *icare*'s claims management model do not comply with the legislative requirements and are contributing to the declining return to work outcomes within the scheme.

These outcomes are partially attributable to *icare*'s decision to replace skilled and experienced claims managers with customer service officers and replace decision-makers with an algorithm to triage the claims as they are submitted through the portal.

Liability decisions

Feedback received by *Business NSW* suggests that, where decision-makers have been involved, they have not taken relevant considerations, or have taken irrelevant considerations, into account. This is resulting in a deteriorating level of confidence held by stakeholders in the system and being compounded by the lack of transparency surrounding the decision being made.

Medical decisions

Recommendation 8

That the legislation be amended to clarify how the privacy laws intersect with the workers compensation legislation.

Member feedback received by Business NSW indicates that appropriate treatment and rehabilitation services are not being provided in a timely manner. This is resulting in poor return to work outcomes and, in some cases, secondary psychological injuries.

Subsequently, the level of confidence held by stakeholders in the system is deteriorating, which is only compounded by the lack of transparency surrounding the decision being made.

This lack of transparency is partially attributable to *icare*'s interpretation of privacy laws and the role of the consent provided by the injured worker on their signed certificate of competency.

A narrow interpretation of the privacy laws has the potential to result in the workers compensation laws becoming unworkable in a practical sense and undermines the spirit and intention of the legislation.

Being fair, affordable and financially viable with employer contributions being commensurate with risks faced

Recommendation 9

That employer and employee representatives be involved in the decision-making process when the new premium formula is being set, to improve the likelihood of achieving the system's statutory objectives and the level of transparency surrounding the formula.

These objectives can only be achieved through the application of a well-designed premium formula. The current premium formula is not achieving these objectives.

Member feedback received by *Business NSW* indicates that, especially for larger employers, the premiums being charged are not fair or affordable.

They are not fair, because the premium being charged is not commensurate with the risks being faced by employers (see below) nor are they affordable, with many employers (especially those in regional areas) reporting the need to scale down operations, increase redundancies and bring forward retirement plans.

Known shortcomings with the formula include:

- the 'rationalisation' of WorkCover Industry Classification codes (which were based on the ANZSIC codes from 1993) means that the underlying risk profile of individual industries can longer be measured and acted upon
- the 'risk' of larger employers is being measured by the length of time an injured worker is in receipt of weekly benefits (with protracted return to work outcomes being regarded as proof of an employer's 'poor performance'). This is only a valid measure if the sole reason or the protracted return to work outcome could be attributed to the employer's behaviour. However, that is not the case. A timely and appropriate return to work is largely dependent on the nature of the injury coupled with the injured worker's ability to return to work and perform 'suitable duties' as described by the legislation. In addition, the Dore Report and the 2020 Quarter 1 review both confirm that poor return to work outcomes are being experienced at a scheme level and are attributable to poor injury management practices which are exacerbated by inadequately qualified claims managers.
- the incentives contained in the formula bear no relationship to strategies and performance of injury prevention as:
  - employer strategies and performance of injury management is not being measured or monitored,
  - a flat 10% discount, an apprentice rebate and an early payment discount bear no relationship to those strategies or performance, and

- for the reasons provide above, designing an incentive around the length of time it takes for an injured worker to return to work is not a true measure of the employer's performance.

There may be other reasons why the formula is not driving desired behaviour in the workplace. However, the current lack of transparency surrounding the premium formula, especially in relation to the premium filing, means employer and employee representatives are unable to provide feedback on the formula's design.

The ability to provide such feedback can only help improve outcomes. For example, when appearing[8] before Portfolio Committee No. 6 - Transport and Customer Service in March 2020, Ms Carmel Donnelly gave evidence (page 43) that *icare* included a 4 per cent increase in its premium filings for the 2020-21 financial year.

The Dore Report provided evidence that the current parlous state of the scheme was attributable to the changes brought about in 2015, with poor claims management practices being a significant driver of the scheme's poor performance. Therefore, increasing premiums would not have reversed the scheme's decline as it would not have addressed the underlying drivers of that decline. Independent reviews do not occur as a matter of course and having employer and employee representatives involved in the decision-making processes would provide the necessary safeguards to ensure the scheme meets its statutory objectives.

For further information

For further information about our submission, please contact Elizabeth Greenwood, Policy Manager, Workers Compensation, WHS and Regulation, on 0419 758 779 or elizabeth.greenwood@businessnsw.com.

8 https://www.parliament.nsw.gov.au/lcdocs/transcripts/2338/Transcript%20-%209%20March%202020%20-%20CORRECTED%20(Pending)%20-%20PC%206%20-%20Customer%20Service%20-%20Further%20hearing.pdf