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

Submissions

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

Table of Contents

PART ONE

PART TWO

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 plays an important role in promoting safety standards throughout the construction industry and in supporting our membership both on site as well as in the event that they become injured. The industry is characterised by heavy manual work, with workers working long hours, generally six days per week and in some cases far from home or in difficult environments. The safety and wellbeing of our members is our primary concern. The CFMEU is extremely committed to ensuring, where possible, our members are working in safe environments.

These submissions are presented in two parts:

1. An outline of the CFMEU's concerns about systemic issues in the workers compensation system, and
2. Submissions in response to the statutory review under s 32 of the *State Insurance and Care Governance Act 2015* (**SICG Act**).

Since 2012 the CFMEU has contributed submissions to various Standing Committee, Departmental and SIRA inquiries, including the most recent Standing Committee on Law and Justice Inquiry into the workers compensation system. The CFMEU is available to provide the independent reviewer with copies of its previous submissions and to meet with the review team to answer any questions arising from these submissions or to discuss its long standing experience with the workers compensation system, SIRA and icare.

PART ONE

2. Context

On 4 August 2015, the government introduced the *State Insurance and Care Governance Act 2015* (**SICG Act**) which was intended to abolish WorkCover and the Motor Accidents Authority and create three new entities, Insurance and Care NSW (**icare**), State Insurance Regulatory Authority (**SIRA**) and SafeWork NSW.

Following the split on 1 September 2015, icare managed to land on its feet and started operating at a full capacity. It had a clear understanding of its role and had managed the reorganisation of personnel quickly and seamlessly. SIRA on the other hand seemed to fall behind and took a lot longer to recognise its role in the system, the regulatory powers at its disposal and how to manage the personnel left behind. It took a couple of years for SIRA to come to terms with its new role as regulator and a few more years for it to grasp the extent of its regulatory functions. Meanwhile, SafeWork NSW and icare got on with their task.

This created a situation where icare was left to its own devices and able to create its own systems, procedures and protocols without interference from SIRA. The first time SIRA really became involved in understanding how icare managed its business was through the Nominal Insurer review. By that time icare had been operating for 4 years effectively self-regulated. SIRA is now in the process of playing catch up and trying to wrangle control of the system back from icare.

While this does not diminish the seriousness of the situation at icare, it does go some way to explaining how this situation was allowed to happen. Quite simply, icare was faster out of the gate than SIRA.

Confining the review to icare's practices without assessing the practices of the regulator is destined to result in an incomplete understanding of the issues within the workers compensation and how we got to the current situation. The review should also encompass the deficiencies in the regulator's practices and how they contributed to matters we are seeing.

There is no denying that icare could have done better but let's 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. 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.

3. Icare

The CFMEU is concerned that in all the media concerning icare very little has been said about injured workers and the way they are being treated in the system. The system itself is unfair and painful for injured workers but a functioning system can help to reduce the hurt and distress caused by the legislation. While everyone is focused on the icare board and the Executive tier no one is watching the frontline staff and it is starting to show in the quality of claims management.

The CFMEU is concerned at the patterns of behaviour emerging. The key to keeping the workers compensation system functioning is supportive, competent and effective claims management. Quality case management can produce better outcomes and clear communication, consistent and timely decision making and respectful interactions can go a long way to fostering good working relationships with injured workers.

3.1 Claims Management

The CFMEU routinely assists its members with lodging workers compensation claims and navigating the workers compensation system. Through these experiences we have noticed a number systemic issues that are affecting claims management.

3.1.1 Communication

The level of communication from case managers has deteriorated in the last few months. icare advised stakeholders that the quality of services provided by its scheme agents would not deteriorate despite the move to working from home as a result of the pandemic. Unfortunately, the CFMEU and its members have a different experience.

Members have reported that they are struggling to have their case managers return their phone calls or their emails. The CFMEU is having a similar experience. Matters that could easily be resolved with a return phone call are dragging out over a number of weeks and ultimately are only resolved with the intervention of WIRO.

The CFMEU does not believe that the lack of communication is malicious but is rather a matter of complacency. Regardless of the cause, icare needs to ensure that case managers are communicating effectively with the injured workers under their care.

3.1.2 Documents going missing

The CFMEU has recently become aware of two matters in which the scheme agent has misplaced documents fundamental to the injured workers claim. In both instances payslips had been provided to a case manager to allow them to calculate the workers' PIAWE. On each occasion a change in case manager led to these documents "going missing" causing delays in calculating the correct PIAWE rate. In one matter, following the intervention of WIRO the payslips were subsequently found.

Admittedly this does not appear to be a widespread concern but it is still a significant oversight that disadvantages the injured workers concerned.

3.1.3 Interaction with Brokers

The CFMEU is concerned about the way brokers are interfering in the timely and efficient management of workers compensation claims. Given that all policies are issued by icare it is unclear what role brokers have in the system beyond helping employers avoid their obligations under the workers compensation system. The CFMEU has recently assisted two members with their workers compensation claims where the broker has become a hindrance in the resolution of an issue.

In one case, a CFMEU member was not receiving his full workers compensation benefit from his employer. The CFMEU attempted to raise the issue with the member's case manager but was unable to get in contact with the case manager. After waiting two weeks for the case manager to

return our call, the CFMEU referred the matter to WIRO for assistance. When WIRO enquired as to the progress of the matter they were told that EML was waiting for the broker to provide the relevant wages information. After two weeks, EML was still waiting for the broker to provide wages information. WIRO kindly reminded EML that it could contact the employer directly to ask that they provide the information. Even then the scheme agent seemed reluctant to go around the broker.

Due to icare's reliance on the broker, the worker waited 6 weeks for the matter to be resolved. Had the scheme agent contacted the employer directly it is possible the matter would be resolved more quickly.

In another example where the injured worker was not receiving their full entitlement, icare outsourced the calculation of the adjustment payment to the broker. When the CFMEU requested a breakdown of the adjustment, the scheme agent informed the CFMEU that it would need to contact the broker. As the insurer responsible for handling the claim, the scheme agent is responsible for ensuring injured workers receive their full entitlement and ensuring that adjustments are properly calculated and passed on to the injured worker. The scheme agent cannot outsource this responsibility to a third party.

3.1.4 Interim PIAWE decisions

In or about early 2018, icare made the decision that where a scheme agent was unable to properly calculate the PIAWE rate within the first seven days of a claim, its case managers could issue an interim PIAWE decision. This approach was in response to the complexity in the calculation of the PIAWE under the pre-2019 provisions and the difficulty in scheme agents obtaining the relevant documents from the employer. The idea was to provide injured workers with some payments until such time as a proper PIAWE calculation could be completed. The basis for these interim decisions remains unclear.

Whilst on paper this seemed like a fair initiative it had the effect of allowing case managers to delay in calculating the correct PIAWE rate. It bred a culture of complacency fueled by the complicated PIAWE definition.

Following the introduction of the PIAWE amendments in 2019, the calculation of PIAWE became a straight forward exercise. In the majority of cases the new provisions make it unnecessary for interim decisions to be made. Despite the changes, the CFMEU is still seeing interim decisions being issued. This is particularly frustrating for our members, given many would qualify for the maximum rate and are instead being paid at an interim rate of approximately $720 per week.

The CFMEU is concerned that case managers are using the interim rate as a way to avoid calculating PIAWE at the commencement of the claim and allowing themselves more time to complete what is now a simple calculation.

3.2 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 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 separate 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.

4. SIRA

As noted earlier in our submissions, a review of the workers compensation system cannot be complete without looking at the conduct of the workers compensation regulator. The consistent flow of submissions from stakeholders in past inquiries paints a picture of a regulator who either chooses not to engage in its regulatory functions or does not understand its regulatory functions. We suggest the independent review take note of previous submissions.

The CFMEU is aware that SIRA in its evidence to the Law and Justice Committee has requested more regulatory and enforcement powers. The CFMEU does not support SIRA getting more powers in circumstances where it does not use its current powers to full effect. Whilst SIRA appears to be flexing its regulatory muscle with icare, the same cannot be said of employers.

The CFMEU is concerned that SIRA's continued focus on icare has allowed other actors in the system to avoid their responsibilities. SIRA needs to start regulating employers to ensure injured workers receive the dignity and respect that they deserve.

4.1 Providing Paperwork

The CFMEU understands that throughout the PIAWE review icare has discovered many of the past claims suffer from a lack of information. The CFMEU's experience suggests that this is not confined to past claims and has noticed a worrying trend of employers not providing the necessary information for scheme agents to calculate PIAWE and ongoing entitlements.

When notifying an insurer of a workplace injury an employer is required to advise the insurer whether the worker will be suffering a loss of earnings as a result of the injury. In those circumstances the employer is then required to provide the insurer with the relevant payroll information to allow the insurer to calculate the current PIAWE and weekly entitlement. Unfortunately, it is all too common for employers to shirk this responsibility as a way of avoiding impacting their premiums.

The CFMEU has recently assisted two members who have been paid the incorrect weekly entitlements because the employer has not advised the insurer that the worker is suffering a loss of earnings. The injured worker is thus being underpaid for a period of time due to the actions of their employer. When notified by the worker or the union of the discrepancies icare can only calculate the adjustment to be paid to the worker and remind the employer of its obligations and hope it does not happen again. icare does not have the power to enforce the legislation or apply it. SIRA is responsible for enforcing the legislation. The CFMEU is not aware of SIRA taking any action against an employer for its actions in this regard.

The CFMEU consistently assists injured workers with assessing whether their PIAWE rate is correct and has become aware that in approximately two thirds of cases the incorrect PIAWE is applied because the employer has failed to provide the relevant wages information. Despite the relevant scheme agent consistently requesting the information, icare has no power to force employers to provide the information. Again SIRA is responsible for enforcing the legislation not icare.

The CFMEU would like to see SIRA taking more responsibility for enforcing the legislation including by taking action against employers who refuse to engage with the relevant scheme agent or provide the information requested. The CFMEU has no doubt that many of the current issues with PIAWE would be resolved if employers were aware that the regulator was willing to take action for non-compliance.

5. Privatisation

The CFMEU was concerned to hear the Secretary of Treasury in his appearance before the Standing Committee on Law and Justice ruminating as to whether icare should be privatised. The CFMEU is strongly opposed to any attempts to privatise the workers compensation system. The recent issues regarding icare are evidence that there should be more governmental oversight over the Nominal Insurer rather than less. icare paid its executives as though it were a private entity rather than then a public sector department. That saw millions of dollars that would ordinarily be spent on the care, rehabilitation and compensation of injured workers lining the pockets of a chosen few. It is unclear how privatising the Nominal Insurer can benefit injured workers or employers. The cost of appropriate care and compensation should never be weighed against profit. Injured workers should not have to fight shareholders in addition to the workers compensation system.

A privatised workers compensation system benefits nobody.

PART TWO

6. Statutory Review required by S 32 of the SICG Act

On 4 August 2015, the government introduced the *State Insurance Care and Governance Bill 2015* into parliament. The Bill was intended to abolish WorkCover and the Motor Accidents Authority and create three new entities, Insurance and Care NSW, State Insurance Regulatory Authority and SafeWork NSW. In his Second Reading speech, the Minister for Finance Services and Property claimed that:

> The new structure will be far more transparent and accountable and, most importantly, lead to better outcomes for injured workers. The new organisations will become more customer-centric, streamlined and efficient, building economies of scale and focusing on clear objectives.[1]

Following the dissolution of WorkCover, SafeWork NSW assumed the role of the WHS regulator in NSW. Much has been said about the conduct of icare and SIRA since WorkCover's dissolution. The CFMEU does not intend to traverse well worn territory in this space. This section of our submissions will focus on SafeWork NSW and its role since becoming a separate agency.

6.1 SafeWork NSW

Section 152 of the *Work Health and Safety Act* 2011 sets out the functions of SafeWork NSW as follows:

> 152 Functions of regulator
>
> The regulator has the following functions—
>
> (a) to advise and make recommendations to the Minister and report on the operation and effectiveness of this Act,
>
> (b) to monitor and enforce compliance with this Act,
>
> (c) to provide advice and information on work health and safety to duty holders under this Act and to the community,

[1] New South Wales, *Legislative Assembly Hansard*, 5 August 2015, (Dominic Perrottet).

(d) to collect, analyse and publish statistics relating to work health and safety,

(e) to foster a co-operative, consultative relationship between duty holders and the persons to whom they owe duties and their representatives in relation to work health and safety matters,

(f) to promote and support education and training on matters relating to work health and safety,

(g) to engage in, promote and co-ordinate the sharing of information to achieve the object of this Act, including the sharing of information with a corresponding regulator,

(h) to conduct and defend proceedings under this Act before a court or tribunal,

(i) any other function conferred on the regulator by this Act.[2]

During the second reading speech, the Minister claimed that under the new regime:

> SafeWork NSW will focus on harm prevention and improving safety culture in New South Wales workplaces. It will also include the establishment of a centre of excellence for work, health and safety in New South Wales. The new structure will be more transparent and accountable and, most, importantly, lead to better outcome for injured workers.[3]

The government claimed that the separation would lead to a *"focused risk-based regulator for work health and safety in Safe Work NSW."*[4]

The new structure has done little to change the culture within SafeWork. During the *Review into the functions of the WorkCover Authority* participants raised concerns about the conflicting roles within the WHS division. The Committee noted that stakeholders expressed concern that they could not be confident which part they were dealing with, whether it be the regulator or the advisor. The Committee noted that the combined role raised concerns about whether WorkCover was satisfactorily fulfilling its role as regulator.[5]

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[2] *Work Health and Safety Act 2011*

[3] Above n 5.

[4] New South Wales, *Legislative Council Hansard*, 5 August 2015, (Niall Blair).

[5] Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Review into the functions of the WorkCover Authority* (2014) 29-32 [3.38] – [3.56]

SafeWork NSW appears to value is educational and advisory role more than its regulator role. The CFMEU raised concerns about SafeWork's complacency during the *Statutory review of the State Insurance and Care Governance Act 2015* in 2017 as did a number of stakeholders. In response to stakeholders concerns the Standing Committee on Law and Justice issued the following recommendation:

> That the NSW Government note the evidence received in this review concerning the relationship between icare and SIRA, and SIRA and SafeWork NSW's effectiveness in carrying out their enforcement and compliance functions, and keep a watching brief on these issues for consideration as part of the five-year statutory review of the State Insurance and Care Governance Act 2015.

The CFMEU is concerned that in combining the SICG Act review with the independent review into icare, the NSW Government is missing a valuable opportunity to address the matters outlined by stakeholders during the 2017 review. In particular, we are concerned that stakeholders will be dissuaded from making submissions regarding SafeWork NSW. The material provided with the terms of reference does not include any reference to SafeWork NSW despite its connection to the SICG Act. On 27 October 2020, the CFMEU emailed the independent review to get clarity on the reach of the SICG review and has yet to receive a response.

6.2 The need for Oversight

The CFMEU is concerned that the split in WorkCover has allowed the WHS regulator to become complacent in its role. SafeWork NSW is not subject to the same level of oversight as WorkCover. In fact there is currently no parliamentary oversight committee allowing the standards of safety regulation in NSW to deteriorate.

The CFMEU recommends that s 27 of the SICG Act be amended to include a provision that states:

> (2A) The resolution of the Legislative Council is to specify the terms of reference of the committee so designated which relate to the supervision of the work health and safety

regime and the regulatory and educational functions of the designated regulator under the *Work Health and Safety Act 2011*.

The CFMEU submits that independent oversight, such as that provided by the Standing Committee of Law and Justice in the workers compensation system, is the only way to encourage SafeWork NSW to take its regulator role safely and to fulfill its functions effectively.

The following sections are intended to highlight the failures and complacency of SafeWork NSW and support the need for greater oversight over their practices.

6.3 Non-Attendance

Section 38 of the *Work Health and Safety Act 2011* (**WHS Act)** imposes a duty on PCBU's to ensure the regulator is notified immediately after becoming aware that a notifiable incident arising out of the conduct of a business or undertaking has occurred. Notifiable incidents are defined as death of a person, serious injury or illness of a person, or a dangerous incident.[6] Section 36 outlines what the WHS Act considers to be a "serious illness or injury" and includes amputations, head injuries, eye injuries, burns, spinal injury, loss of bodily function and serious lacerations. A dangerous incident is defined as an incident that exposes a worker or any other person to a serious risk to a persons health or safety emanating from an immediate or imminent risk.[7]

Where a notifiable incident occurs, the community expects the WHS Regulator to attend the workplace to ensure the area is secured, no further danger exists and to investigate how and why the notifiable incident happened. Unfortunately SafeWork is falling well short of this reasonable expectation. The CFMEU has collated many stories from builders and HSR's which highlight SafeWork NSW's inadequate approach to safety. The following are just a handful of recent examples where SafeWork NSW has failed to attend significant notifiable incidents.

1. On or about 11 September 2020, a mobile crane was lifting an excavator into a hole to lower it down. The ground underneath moved causing the crane to roll on its side

[6] Section 35 WHS Act
[7] Section 37 WHS Act

slightly. It is unclear why a mobile crane was being used when a tower crane was in use on that section of the site. The builder notified SafeWork NSW of the incident and were told that SafeWork NSW was releasing the site and would not be sending an inspector to the site.

2. In or about mid September 2020, two timber planks fell several metres through the jumpform narrowly missing workers. The builder notified SafeWork NSW of the incident. SafeWork NSW did not attend the site until the following day. Approximately a week later a reo bar fell through the jumpform where workers were working. The builder notified SafeWork NSW of the incident and were told that SafeWork NSW was releasing the site and would not be sending an inspector to the site.

3. In or about early October 2020, an apprentice was electrocuted on a prominent construction site in Sydney. An ambulance was called and the worker was treated at the scene. The builder notified SafeWork NSW of the incident and were told that SafeWork NSW was releasing the site and would not be sending an inspector to the site. A week later there was a second electrocution on the site. The builder again notified SafeWork NSW and were told that SafeWork NSW was releasing the site and would not be sending an inspector to the site.

4. On 15 October 2020, the union attended a wind farm site in Bango. Whilst on the site they became aware that the defibrillator was approximately 8 minutes away and it would take up to 30 minutes for the onsite paramedic to reach a worker in distress. The union raised concerns given there were workers on the project over the age of 62 years old, the area was prone to extreme heat and snakes were common in the area. There was a dispute about the appropriateness of the emergency management plan. The union called SafeWork NSW to get assistance and were told that an inspector would not be attending. The union was told:

   "Work it out with the builder."
   "What are you trying to achieve anyway?"

5. On 21 October 2020, a rigger on a prominent government project was working as a rigger when his finger got caught in the equipment amputating his finger. He and his finger were rushed to hospital by ambulance for reattachment surgery. The builder notified SafeWork NSW of the incident. SafeWork NSW advised they would not be sending an inspector and released the site over the phone. As far as the builder is aware SafeWork NSW is not intending to investigate.

6. On 21 October 2020, a worker in circular quay had a beam fall onto the tip of his finger, crushing and amputating the top of his finger. The worker was then transported to hospital via ambulance. The builder notified SafeWork NSW of the incident and were told that SafeWork NSW was releasing the site and would not be sending an inspector to the site.

7. Also on 21 October 2020, a worker in Bondi Junction suffered a degloving incident on two fingers on his left hand. The worker was transported to hospital for treatment. The builder notified SafeWork NSW of the incident and were told that SafeWork NSW was releasing the site and would not be sending an inspector to the site.

8. On or about 22 October 2020, a tower crane was lifting a swing stage next to a building when the swing stage swung under the path of a man/material hoist with four workers inside. The hoist collided with the swing stage squashing the motor of the stage. Luckily it did not come off the stage as it would have hit the dogman standing below. The builder notified SafeWork NSW of the incident and were told that SafeWork NSW was releasing the site. An inspector did not attend the site until the following day.

9. On 27 October 2020, at a construction site in Macquarie Park a scaffolding was damaged with props being dislodged and weakening the structural integrity of the scaffold. The builder notified SafeWork NSW of the incident and were told that SafeWork NSW was releasing the site and would not be sending an inspector. This advice was later confirmed in writing.

10. On 28 October 2019 at approximately 6:30pm, a worker was crushed under a roller door after the roller door malfunctioned and came off its tracks. The worker suffered fractured ribs and a fractured collarbone. The builder complied with its duty to notify SafeWork NSW of the incident. In response SafeWork NSW advised they would not be sending out an inspector and they were unable to provide a reference number for the call because it was outside of normal business hours (despite the hotline supposedly being a 24 hour 7 day service). The builder had still not received the reference number 24 hours after the incident.

11. On 29 October 2020, a worker suffered a compound fracture to his tibia when a load hit him in the leg. The builder notified SafeWork NSW of the incident. The builder than received a telephone call from an inspector who said words to the effect:

    "It is not serious enough to send someone straight away"

    The union then contacted Tony Williams, SafeWork NSW's Director, Construction Services Metropolitan, to complain and an inspector was sent to the site where they issued a **verbal** prohibition notice. Not serious enough to attend straight away but serious enough to issue a notice when they did attend.

The above are just some examples of Safe Work NSW's failure to perform its primary function. At a prominent construction site in Sydney, four ambulances have been called to the site in the last month and SafeWork did not attend any of the incidents. A site in Macquarie Park recorded 16 notifiable incidents in 16 weeks and SafeWork NSW only attended one and that was the day after the incident.

On Friday 20 October 2020, a piece of plant hit the base of a scaffold that is approximately 10 storeys high causing significant buckling ay the base compromising the structural integrity of the scaffold. The builder notified SafeWork NSW and was told that SafeWork NSW was releasing the site and would not be sending an inspector to the site. An inspector was finally dispatched after

the union contacted Tony Williams. Less than 18 months after the death of 18 year old construction worker Christopher Cassaniti, who was killed by a falling scaffold, SafeWork NSW's response to this clearly imminent risk had the potential to place the safety of construction workers in jeopardy.

The CFMEU should not have to call the Director in order for an inspector to attend the site. We are increasingly concerned at the qualifications and experience of those on the SafeWork NSW hotline who are triaging notifiable incidents and making decisions about whether inspectors should be dispatched. It is unclear whether this is an operational directive to handle notifiable incidents in this way or a consequence of the merging of the inspectorates into one Better Regulation entity. Whatever the cause, this practice requires further examination.

The CFMEU has started collecting letters issues by "Customer Experience" confirming that SafeWork NSW will not be attending the site despite the seriousness of the incidents being notified. The CFMEU is prepared to provide the Inquiry with copies of these letters.

6.4 Failure to cease dangerous work

Even if the workers are lucky enough to have a SafeWork NSW inspector attend the site, the inspector does little to inspire confidence in SafeWork NSW's ability to enforce the legislation and maintain safety standards in NSW. The CFMEU experience is that SafeWork NSW's on-site attendances are predominantly focused on educative and information sharing responses and that there is an unwillingness on the part of the regulator to order unsafe practices cease.

The absence of prohibition notices means that the responsibility to cease or refuse unsafe work generally falls to the workers themselves and their elected representatives. The following examples highlight the unwillingness of SafeWork NSW to enforce the legislation and demand unsafe work cease:

TABLE 1: SAFEWORK FAILURE TO CEASE DANGEROUS WORK	
Kirawee November 2016	CFMEU officials identify broken asbestos sheeting throughout site. Officials and SafeWork inspector conduct inspection and find asbestos littered every 2 to 3 steps across 40 to 50 m circumference. Inspector states not enough asbestos present to stop the men from working and refuses to issue a prohibition notice Officials complain regarding absence of asbestos management plan, inspector states "I'm the regulator, I make the decisions." Improvement notice issued - however work allowed to continue
Green Square June 2017	CFMEU officials identify safety concerns with workers accessing top deck and meal room via ladder whilst carrying materials. Clear breach of access and egress requirements and fall from height issues. No stretcher access for emergency services. Inspector attends site, issues improvement notice however allows unsafe work practices to continue in the meantime. CFMEU officials are required to attend on the site for several days to advise workers of their rights regarding unsafe work.
Dee Why September 2017	CFMEU officials attend site after PVC pipes fall five stories from a crane narrowly missing an employee of a subcontracting concreting company. SafeWork inspector attends, issues improvement notice requiring building of overhead protection. Workers advise union of ongoing concerns regarding continued use of crane in question when the Inspector becomes argumentative and refuses to put any further restrictions in place.
Seven Hills October 2017	CFMEU officials attend site following complaints regarding use of substandard formwork materials. Officials identify widespread use of low-grade formwork plywood in advanced state of delamination. Despite risk of collapse, SafeWork inspector in attendance did not stop work and issues improvement notices only. Engineer's report subsequently identifies a risk of collapse.

Blacktown Hospital October 2017	CFMEU officials attend site after a worker falls 4.2 m through unprotected penetration whilst installing table formwork system. The worker suffers a serious head injury and admitted to intensive-care Westmead Hospital. SafeWork inspector issues improvement notice, not a prohibition notice. Inspector authorises work to continue on site whilst investigation underway. CFMEU officials note ongoing concerns regarding continuing use of temporary nailed plywood covers over penetrations together with freestanding handrails.
Hornsby November 2018	CFMEU officials attend site after an employee is struck by a 4.5 m tall concrete panel. The employee was admitted to hospital with fractured vertebrae. SafeWork inspector attended. CFMEU understands that no actions were taken other than the issuing of section 171 notice to produce documents. The CFMEU identified contraventions including incomplete/inappropriate safe work method statements, and inadequate inductions having regard to English being a second language.
West Gosford September 2019	CFMEU officials attend site in response to complaints including reinforced steel being lifted with single use bulker bags, electrical hazards, electrical supply to the crane being compromised and a falls from height hazard in a lift well/stair shaft. SafeWork inspectors attend and express concern that production needs to continue. Improvement notices issued.

The CFMEU is aware that SafeWork NSW has recently ceased issuing notices to builders and has taken to issuing verbal notices. There is no paperwork or written notification to support SafeWork NSW's decisions making it easier for recalcitrant employers to ignore their directions. We understand that where verbal notices are issued, electronic notices may be issued at the end of the day but will not be issued if rectification information is provided by the employer. This process undermines the effectiveness of the regulatory and enforcement regime and fails to protect workers in the long run.

6.5 Failure to act at all

The CFMEU commonly experiences situations where SafeWork NSW, in the face of significant safety concerns, takes no action at all. In these circumstances, there is a complete abrogation of responsibility on the part of SafeWork NSW and a failure by SafeWork NSW to perform its functions in accordance with s 152 to monitor and enforce compliance with the WHS Act.

TABLE 2: SAFEWORK INACTION	
Harold Park precinct April 2017	CFMEU officials attend on-site where an employee of subcontractor fell 2 m through an unsecured plywood penetration covering. Employee was impaled on a piece of steel reinforcement suffering serious internal injuries. Despite the matter being a notifiable injury and clear fall from height risks, CFMEU understands that the SafeWork inspector attending on-site took no action with respect to the matter
Parramatta June 2017	900 x 1500 steel frame formwork pan fell and a worker fell 2-3 metres. The worker is transported to hospital via ambulance. SafeWork is notified of the issue and does not attend. The CFMEU understands that SafeWork attended on a later date, decided not to undertake an investigation and issued no notices.
Belambi July 2017	CFMEU attends a site where workers are performing work on a rooftop during high winds unprotected. SafeWork Wollongong contacted and a SafeWork representative states SafeWork have no interest in the matter and will not be attending for purposes of inspection

6.6 Failure to co-operate with the Union and employees

The role of unions, union officials and union delegates as representative of the workers remains central to the day-to-day practical implementation of safety regulations on New South Wales construction sites. It is of serious concern that over several years the CFMEU has observed a continuing decline in engagement and support by SafeWork NSW towards union officials. There are particular concerns regarding ignorance and lack of interest on the part of SafeWork NSW

concerning union right of entry rules, and an increasing incidences of disrespect towards employee representatives.

The CFMEU remains concerned that SafeWork NSW is failing to fulfil its functions pursuant to s152(g) of the WHS Act to foster a cooperative, consultative relationship between duty holders and the persons to whom they are duties and their representatives in relation to, work health and safety matters. Examples include:

TABLE 3: LACK OF COOPERATION	
Liverpool February 2018	Organisers identify, multiple fall from heights and other breaches. Builder refuses entry and threatens physical harm to officials. SafeWork attends and joins the CFMEU organisers for a safety walk where multiple breaches identified. In presence of the inspectors the builder tells the organisers it will not allow future access and tells organisers to "piss off." The inspectors take no steps to appraise builder of obligations.
Sydney Airport March 2018	CFMEU attended the site in response to an asbestos contamination complaint. When they arrive they are advised by the site manager "this is a non-union site and you can't come in." The organisers then call SafeWork for assistance and several hours later an inspector arrives. The inspector misrepresents the law regrding entry requirements advising the organisers they must provide 24 hours notice and states the organisers cannot enter if there are no union members on the site. The Inspector then undertakes a safety walk declaring everything fine. The CFMEU is finally granted access later that day and discovers asbestos on site. The CFMEU complains to SafeWork about inspector misrepresenting the law and SafeWork fails to respond adequately.

Haberfield May 2018	SafeWork failed to support CFMEU complaints regarding air monitoring reports indicating crystalline silica samples well above former workplace exposure standard (0.19 and 0.15 micrograms per cubic metre). The CFMEU provided SafeWork with video evidence showing a significant silica plume. In response SafeWork refers the issue to the employer run Air Quality Working Group without taking any further action.
Haberfield July 2018	CFMEU inspections identify lack of personal protective equipment (facemasks) and lack of understanding/training amongst workforce regarding PPE in relation to dust exposure, access/egress issues, fall from height concerns, and emergency evacuation issues. The SafeWork Inspector arrives and announced he is not concerned with the safety matters and is only concerned with the officials right of entry. Inspector misrepresents the law regarding the time by which notice must be given. The CFMEU complains to SafeWork about inspector misrepresenting the law and SafeWork fails to respond adequately.
Terrigal September 2018	The CFMEU attempts to enter the site to investigate suspected contravention. Inspector misrepresents the law regarding the time by which notice must be given. The CFMEU complains to SafeWork about inspector misrepresenting the law and SafeWork fails to respond adequately and incorrectly explains the s117 & s122 right of entry provisions.
Westconnex April 2019	The CFMEU attends to investigate structural concerns following identification of continuing water leakage from concrete beams following slab injection/epoxy resin repairs. There are further concerns over failure to produce documents requested by organisers. The CFMEU complained to SafeWork and SafeWork fails to respond adequately instead focusing on external negotiations around the development of right of entry protocol.

Macquarie Park September 2019	Wide range of non-compliance issues identified by officials including crane base, access, scaffolding, working decks at risk of collapse, fall from heights. SafeWork attended and refused to deal with safety issues unless there was an imminent risk. The inspectors issued a notice to the builder prohibiting the crane from operating. As the inspectors leave the site, the CFMEU officials inform SafeWork that the crane has begun operating again. The inspectors continue to leave the site.
Rouse Hill March 2020	CFMEU organisers attend the site to investigate inadequate traffic control and exclusion zones for cranes on site and working at height issues. The organisers call the SafeWork hotline and are told that an inspector can only attend if an HSR has issued a pin. Matter escalated to SafeWork manager who does not respond. The CFMEU complains to SafeWork who simply states they cannot verify CFMEU enquiry.

The above examples show how easily inspectors misrepresent the rights of entry permit holders thereby hindering those permit holders in the exercise of their rights. Every time an inspector informs an entry permit holder that they must provide 24 hours notice when exercising their rights under s 119 of the WHS Act, the inspector is internationally and unreasonably hindering or obstructing a permit holder in contravention of s 145 of the WHS Act. It is concerning that SafeWork NSW is so blasé about its inspectors misrepresenting the laws they are legislatively required to enforce.

7. Conclusion

An effective and engaged WHS regulator is necessary for lifting safety standards in NSW. Safe workplaces are likely to have less incidences of workplace injury thereby reducing the burden on the workers compensation system. Quite simply, the workers compensation system benefits from the WHS regulator enforcing the WHS Act.

The examples outlined above support the need for independent oversight on the practices of SafeWork NSW, their willingness to regulate and their flawed approach to their regulatory functions.