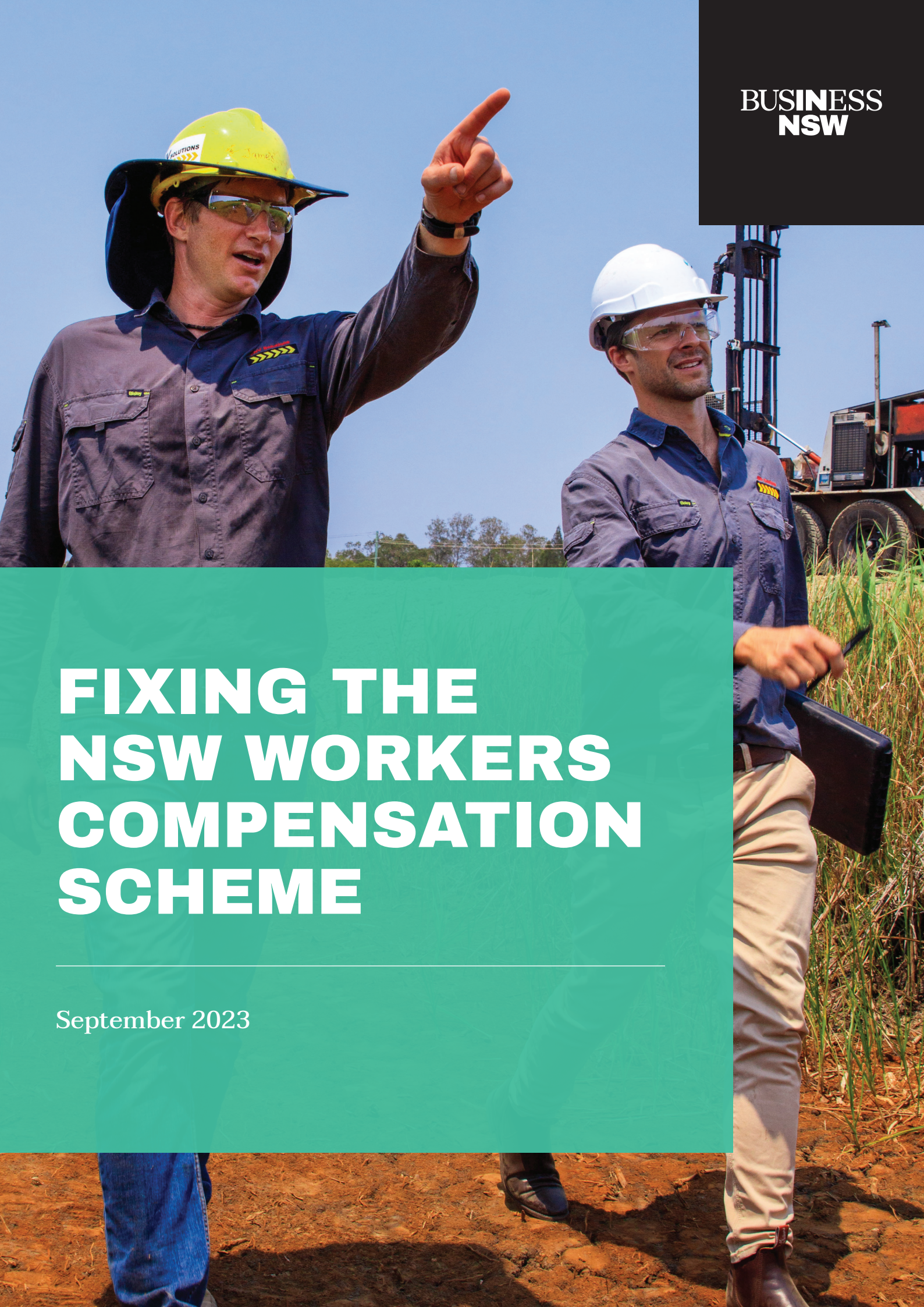

BUSINESS NSW

FIXING THE NSW WORKERS COMPENSATION SCHEME

September 2023

FOREWORD

The information provided in our Interim Report is not a substitute for professional advice. We accept no legal responsibility regarding the accuracy and reliability of material in this Interim Report.

New South Wales has had its own workers' compensation scheme since 1910. It is responsible for taking care of the workforce after injury or illness in the workplace and having been involved in the NSW workers' compensation scheme since its inception, Business NSW (at the time, known as The Chamber of Manufactures of NSW) takes a very close interest in how it has progressed over the years.

All workers' compensation schemes are complex and need constant fine-tuning to keep them heading in the right direction. The NSW workers' compensation scheme is currently in deficit[1], and it is not unusual for schemes like this to have periods when they run at a loss. When schemes are in deficit, we need to focus on how the scheme is run, not just the cost of premiums and their respective benefits. This is the only way to ensure that the scheme returns to financial health.

A scheme that is run both efficiently and effectively will recover financially over time. Business NSW's overarching policy in relation to the scheme is that, when the scheme is in deficit, the initial focus must be on those factors within the scheme that are contributing to the poor performance (such as claims duration, injury and claims management practices, and return to work rates) rather than simply increasing premiums and/or reducing benefits.

While premium and benefit changes may well have short-term positive impacts, history has shown those impacts are likely to be quickly overwhelmed by the underlying drivers of poor scheme performance and non-compliance.

This report contains Business NSW's roadmap outlining the actions that need to be taken so the scheme can recover. Business NSW looks forward to working together with icare, SIRA and industry to fix the NSW workers' compensation system.

Dan Hunter
CEO, Business NSW

[1] Minister rejects icare premium plea, caps rises at 8%, The Sydney Morning Herald, 24 April 2023

Why This Report?

IT STARTED WITH MEMBER FEEDBACK

Throughout 2016 to 2018, Business NSW became increasingly concerned by the experiences their members were having when trying to manage their workers' compensation claims being administered by icare (referred to in the legislation as Insurance and Care NSW).

What we found was that both the design of the NSW workers' compensation scheme ('the scheme') and the way it was being managed (by icare 'acting for' the Nominal Insurer ('NI')) was resulting in significantly detrimental outcomes for both NSW employers and their injured workers.

Given the scheme is compulsory for all NSW employers (with non-compliance attracting a high penalty, including imprisonment[2]), together with the fact NSW employers bear sole financial responsibility for any deficit in the scheme[3], this was clearly an unacceptable situation and one which needed urgent attention.

BUSINESS NSW CALLS FOR A REVIEW

On 6 December 2018, after several unsuccessful informal approaches to relevant government entities, Business NSW issued a media release calling for an independent post-implementation review into the 2015 reforms.

THEN CAME A NUMBER OF REVIEWS

THE DORE REVIEW

On 16 May 2019, the State Insurance Regulatory Authority ('SIRA') appointed Janet Dore to conduct the *Compliance and Performance Review of the Workers Compensation Nominal Insurer managed by icare* ('the Dore Review').

In her report[4] ('the Dore Report'), Janet Dore found that since the 2015 reforms (where the WorkCover Authority of New South Wales was abolished and replaced with icare, SIRA and SafeWork NSW), the scheme had deteriorated significantly.

She attributed much of the scheme's decline to the *"introduction of the new claims model in January 2018" where "further deterioration occurred following the launch of the Nominal Insurer Single Platform (NISP), in February 2019", observing that the "cohort operating under the new claims model will continue to grow and therefore further impact NI's overall performance"*[5].

Ms Dore's report reiterated the importance of observing the fundamentals, stating that ***"performance of the NI must improve on the basic indicators of RTW, claims management service and premium transparency".***

TWO FURTHER REVIEWS IN 2020

Throughout 2020, two further reviews were held. They were the *2020 Review into the Workers Compensation Scheme ('the 2020 Review') and the Independent Review of icare and State Insurance and Care Governance Act 2015 Review* ('the McDougall Review').

For these two reviews, Business NSW focused mainly on the legislative change it believed was required to restore an adequate level of oversight back into the system.

Despite most of Business NSW's recommendations for legislative change having been adopted and introduced into NSW parliament in early 2022, the much-needed reform never eventuated[6].

AND YET ANOTHER REVIEW IN 2022

Given the growing unrest about the way psychological injuries were being managed in the scheme, Business NSW made a detailed submission to the *2022 Review of the Workers Compensation Scheme* ('the 2022 Review') which focused on psychological injuries.

At the time of the election in early 2023, the Legislative Council's Standing Committee on Law and Justice had not tabled a report.

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[2] Subsection 155(1) of the Workers Compensation Act 1987 No 70 ('the 1987 Act')

[3] Subsection 154D(4) of the 1987 Act

[4] Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme, For the State Insurance Regulatory Authority (NSW), Janet Dore, December 2019, at page 5

[5] The Dore Report, paragraph 5.5.4, at page 42

[6] Despite passing the Legislative Assembly (with amendments) and having been introduced into the Legislative Council, the State Insurance and Care Legislation Amendment Bill 2022 was never debated and lapsed on prorogation on 27 February 2023

BUSINESS NSW'S VIEW

Despite agreeing with Dore regarding the need to improve the performance of the NI, Business NSW believes that, in terms of the scheme's decline, the introduction of the new claims model was simply a tipping point.

In our view, it was the gradual erosion of the statutory safeguards that were put in place in 1998, together with the mechanisms introduced into the scheme following the failure to privatise in 1999, that has led to the current situation.

Under icare's watch, despite its failure to achieve the statutory objectives, its executives continued to receive eye-watering bonuses while the scheme continued to deteriorate.

At the date of writing this report, Business NSW understands that the NI's premium filing sought a 22% increase in employer premiums due to the scheme's 'parlous'[7] state.

NSW employers now find themselves in a position that, without urgent reform, they will continue to be financially responsible for the scheme despite having no say in or influence over the way it is being managed.

This situation is clearly unsustainable; icare cannot keep relying on premium increases to plug the scheme's deficit.

The scheme's legislation contains a list of statutory objectives, none of which are being met either adequately or at all and the current levels of poor performance and non-compliance must be addressed as a matter of urgency.

Business NSW welcomes Minister Cotsis's statement that *"the required reform starts now"*[8] and calls upon the NSW Government to commit to immediate action on these three focus areas:

1. Injury (and claims) management.
2. Statutory safeguards.
3. The scheme's fitness for purpose.

[6] Despite passing the Legislative Assembly (with amendments) and having been introduced into the Legislative Council, the State Insurance and Care Legislation Amendment Bill 2022 was never debated and lapsed on prorogation on 27 February 2023

[7] Minister rejects icare premium plea, caps rises at 8%, The Sydney Morning Herald, 24 April 2023

[8] Ibid

RECOMMENDATIONS

1. INJURY AND CLAIMS MANAGEMENT PRACTICES

Business NSW wants an improvement in the areas of:

Claims management services – where:

- the previous level of choice and service delivery has been restored,
- suitably qualified and trained individuals are making decisions in accordance with this legislation, and
- business systems are in place to ensure those decisions are made in the most effective and efficient manner possible. This should include having systems that enable an account management approach to be adopted.

Administration processes – where changes are made to ensure that:

- when a claim is being made, all relevant information required by the legislation is collected and considered by an experienced claims manager, and
- when a liability decision is made, a written Notice of Decision is provided, setting out the reasons for the decision, with reference to the legislative requirements and the evidence received so workers and employers can better understand the basis for the decision.

Suitable duties – where programs are refined to make accommodation for those employers who are unable to provide their injured worker with suitable duties.

2. STATUTORY SAFEGUARDS

Business NSW wants the following changes made, to ensure there is a sufficient level of oversight, accountability and transparency:

- **Ministerial oversight** – needs to be restored to ensure the scheme's statutory objectives are being met.
- **Regulatory oversight** – needs to be restored by clarifying that:
  - The NI's licence is subject to the same conditions as the other licensed insurers, and
  - service providers (engaged by icare 'acting for' the NI) are 'scheme agents' (and therefore subject to SIRA's regulatory oversight).
- **Stakeholder oversight** – needs to be restored by reinstating the Council as originally designed by the 1998 reforms or its equivalent to ensure there is an adequate level of:
  - access for employers and workers and their representatives to important information about the workers' compensation and work health and safety regulatory systems in NSW, and
  - involvement in the decision-making processes of the regulators, most importantly, in relation to the premium-setting system to ensure a data-driven approach is used to truly reward safe behaviours.

3. BEING FIT FOR PURPOSE

To improve the navigability of the scheme:

- **The legislation** – needs to be consolidated and restructured so it is easier for stakeholders to understand and comply with it. This should include having a clear outline of 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 level of information and guidance for employers and workers** – needs to be improved. Employers need easy access to a dedicated (and effective) support service and review mechanisms service. The focus needs to be on small to medium-sized enterprises that have little to no experience with the NSW workers' compensation scheme.

1. INJURY AND CLAIMS MANAGEMENT PRACTICES

These Practices Are Important

The proactive management of injuries was 'central' to the 1998 reforms. They were designed to *"promote early intervention to effect a timely, safe and durable return to work at the highest possible level of earnings for injured workers"*[9].

The 1998 reforms are important because they not only prescribed claims management practices (where a claim is found to be compensable under the *Workers' Compensation Act 1987 No 70* ('the 1987 Act)) but they also introduced provisional support on a 'without prejudice' basis.

This meant an injured worker could receive a limited amount of medical and/or income support to recover at or return to work in a timely and appropriate manner without it impacting the employer's liability under the scheme.

Checks and measures introduced in 1998 included:

- strict timeframes for giving and acting on a notice of injury,
- the requirement for insurers to have an injury management program in place that integrates all aspects of injury management, including treatment, rehabilitation, retraining, claims management and employment management practices,
- the requirement for employers to have a return-to-work program ('a RTW program') in the event of a workplace injury,
- the imposition of additional requirements when it appeared that an injured worker's incapacity was likely to continue for more than seven days, and
- requiring a consultative approach for the management of workplace injuries and imposing reciprocal obligations – for injured workers to recover at or return to work and for employers to provide suitable duties.

[9] Second reading speech of the Hon JW Shaw (Attorney General, Minister for Industrial Relations, and Minister for Fair Trading) [2.39pm], Hansard, Legislative Council, Friday 26 June 1998 pp 6706-6709

Return to Work (RTW) Rates Are Key

The effectiveness of injury and claims management practices is measured through RTW rates, especially at the four-week mark.

Over time, despite the statutory requirements relating to injury management having been strengthened, the most recent data from SIRA indicates that RTW rates remain poor.

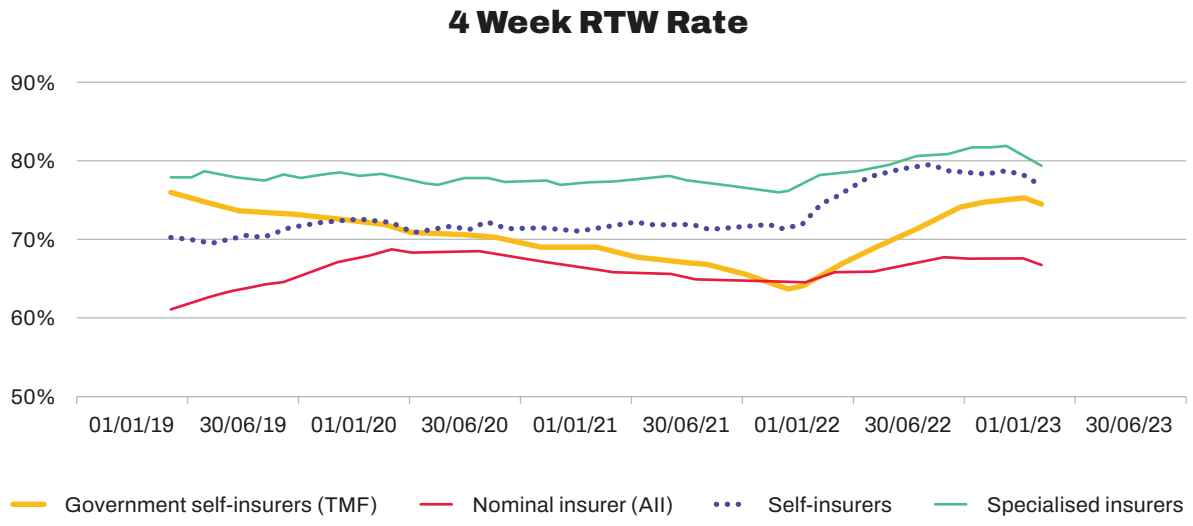

Figure 1: Line Graph – 4 Week RTW Rate (data sourced from sira.nsw.gov.au).

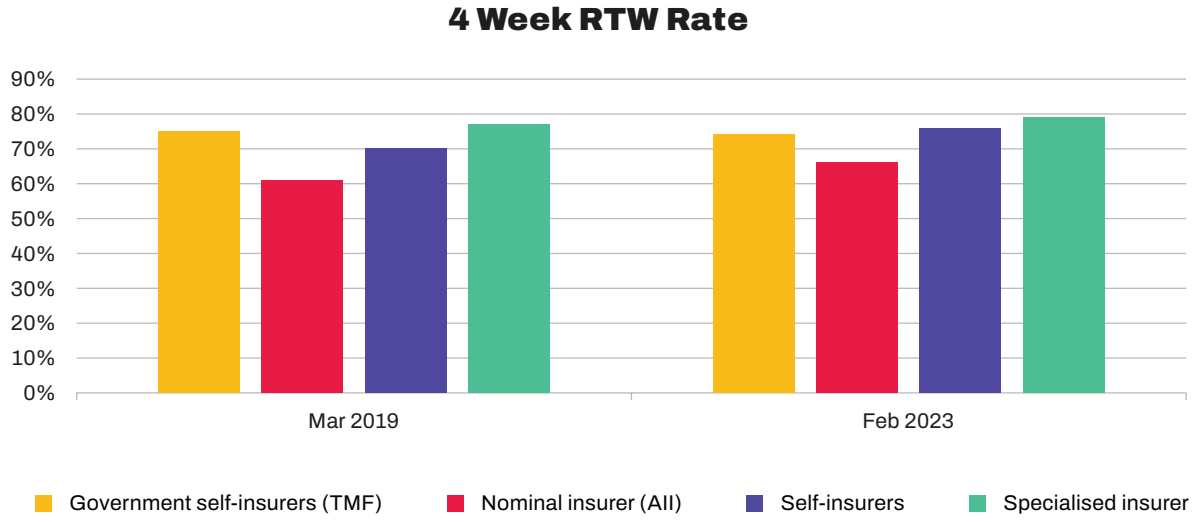

Figure 2: Bar Chart – 4 Week RTW Rate (data sourced from sira.nsw.gov.au)

Why RTW Rates Are Low

There is evidence to show RTW rates have been and remain low due to the NI's (and therefore icare and its agents):

- **poor performance** – of injury and claims management practices, and
- **non-compliance** – with its obligations under the legislation.

EVIDENCE OF POOR PERFORMANCE

MEMBER EXPERIENCES

The problems outlined in this section are based on member feedback and conversations with icare personnel.

Prior to icare's new claims management model

Prior to icare's new claims management model, employers were offered a choice of scheme agents.

This ensured the interests of employers and their injured workers were better protected as competition resulted in a level of service far greater than that which later became available under icare's claims management model.

Regardless of which scheme agent was chosen, employers and workers had access to a dedicated claims manager who:

- over time, became familiar with an employer's business operations and the type of suitable duties available to an injured worker, given the nature of the injury,
- possessed the necessary skills and experience to actively manage their portfolio of claims,
- was able to make decisions to conduct a factual investigation, refer the matter to an independent medical expert for review, and work with stakeholders to resolve any issues between employers and injured workers and achieve successful medical and RTW outcomes,
- was appropriately incentivised to actively manage their portfolio and appropriately awarded for achieving successful RTW outcomes, and
- communicated well with the employer and injured worker providing regular updates (including copies of reports from any factual investigation or medical examination) and reviews.

For many businesses this translated into more efficient RTW outcomes, as the dedicated scheme agent was familiar with an employer's business operations and RTW systems.

In the lead up to icare's new claims management model

In the lead up to icare's new claims management model being implemented, icare decided to bring claims management in-house.[10]

This meant that icare felt it would no longer needed the five scheme agents operating within the system. Instead, it would gradually reduce the number of agents to three and then to one, being Employers' Mutual Limited ('EML'), before bringing claims management in-house.

The reduction from five agents to three was to occur in preparation for a 1 January 2017 start.

In February 2016, CGU Insurance ('CGU') (being one of the original five) announced it would not apply for a claims agent contract. Then, in April 2016, icare announced that QBE Insurance (Australia) Ltd's ('QBE') application had been unsuccessful.

All agents were required to clean (the data on) their files so they could be loaded into the new system.

Throughout this period, several businesses told Business NSW that claim files were left dormant while staff (particularly from CGU and QBE) went on extended periods of leave. We understand similar issues have been experienced by injured worker representatives.

During this time, members were also reporting concerning claims management practices, including:

- Certificates of Capacity being accepted despite being incomplete, out-of-date, forward-dated and/or unsigned by the injured worker.
- Failing to consult or communicate with employers adequately or at all when determining matters such as:
  - the circumstances of the injury,
  - whether the employer could offer suitable duties, or
  - whether an injured worker was in breach of their obligations (for example, failing to report they were working elsewhere).
- Staff being inexperienced or poorly trained.
- Failing to refer injured workers to rehabilitation providers.
- Issuing liability decisions that did not adequately reference the legislative requirements and/or evidence taken into consideration.

In addition to medical treatment for injured workers being delayed, the inactive management of claims led to larger employers (known as experience-rated employers) being charged prohibitively expensive premium increases (through their Claims Performance Adjustment).

[10] As advised by icare's stakeholder manager during a telephone conversation 2 March 2017.

icare's new claims management model

For many employers, the implementation of the new claims management model led to a noticeable deterioration in RTW outcomes.

One member reported that their number of open claims had doubled on account of administrative delays.

For some experience-rated employers, the inefficiencies arising from the design of the model contributed to suboptimal RTW outcomes and a further escalation in premiums.

Some members reported feeling that the new model was appearing to focus solely on the injured worker and exclude any involvement on the part of employers. For example, some employers were reporting that, despite being able to provide 'suitable duties', injured workers were being permitted to refuse to RTW, despite having the capacity to do so.

In terms of injury management, some of the more observable problems with the new model included:

- the triaging of claims according to an algorithm which took a cookie cutter approach and failed to consider the nature of the workplace and the ability of the employer to offer suitable duties,
- replacing skilled and experienced claims managers with unskilled and inexperienced customer service officers in an attempt to make the system less adversarial (instead of upskilling claims managers to handle conflict and manage difficult conversations which, given the purpose of the scheme, often need to be had), and
- establishing a call centre where an employer typically had to speak to a different customer service operator each time they needed a progress update on the status of their claim and having to repeat the same information on multiple occasions.

In terms of claims management, member feedback was consistent: the NI was making liability decisions in a manner that did not properly protect the employer's interests.

This included where the NI had:

- failed to enquire into the circumstances of the injury (which, in some cases, were clearly dubious),
- ignored evidence to the contrary being offered and/or provided (including by eyewitnesses),
- refused to conduct a factual investigation or refer the matter for an independent medical examination,
- approved a factual investigation and accepted its findings despite the investigation having clearly been conducted in an improper and/or inadequate manner, and
- exceeded the statutory timeframe for making such decisions.

Once made, the avenues available to employers to challenge the NI's decisions or actions were inadequate.

Although problems with claims management practices existed prior to the 2015 amendments, the new structure and model exacerbated those issues which, in turn, have contributed to unfair, unaffordable, and volatile premiums.

> Business NSW is continuing to receive reports of poor claims management practices resulting in declining RTW outcomes. We understand similar reports have been received by Unions NSW – the peak worker representative body.
>
> Those reports continue to be supported by data provided by the State Insurance Regulatory Authority (SIRA).

EVIDENCE PROVIDED BY THE RECENT REVIEWS

The Dore Report[11]

The Dore Report included a graph which showed that, over the period between September 2015 (when the 2015 reforms were introduced) and September 2019, there was a steep decline in the NI's RTW rate at four weeks, and the NI's RTW rates trailed well behind those being achieved by the other workers' compensation insurers in NSW.

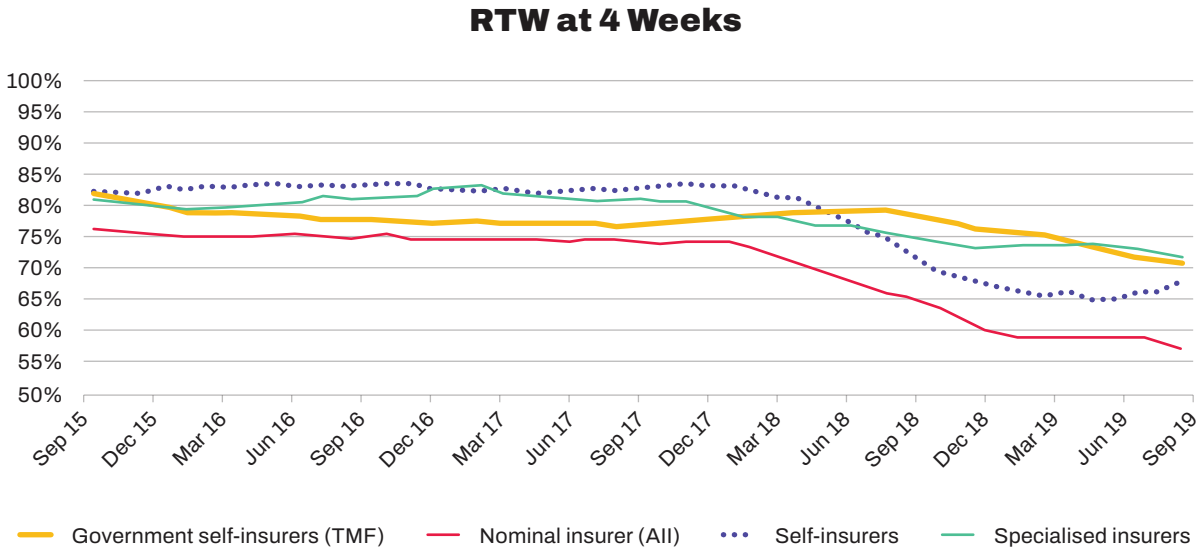

Figure 3: The NSW 4-week RTW rate showing the steep decline in the NI's performance which trails well behind the other insurer types within the scheme. Source: The Dore Report, Figure 15 at Page 41

In her report, Dore observed that deterioration *"in NI RTW performance followed shortly after the introduction of the new claims model in January 2018. Further deterioration occurred following the launch of the Nominal Insurer Single Platform (NISP), in February 2019."*[12]

The McDougall Report

The McDougall Report[13] (also dated April 2021) observed that "*there can be no real dispute that RTW rates have declined during icare's management of the schemes, most notably since the introduction of the NCOM in 2018*". [14]

Mr McDougall went on to "*acknowledge the significant steps taken by icare. However, it is unfortunate that, while there has been some improvement in RTW rates since the Dore 2019 Review, those rates have not improved markedly or consistently, and are still well below 2017 levels.*"[15]

He also noted that *"icare has introduced a number of actions aimed at improving the skills of, and providing coaching for, claims management staff. Those actions are intended to improve performance in achieving higher RTW rates. Those actions being acknowledged, it remains the fact that skills and capability are recognised throughout independent studies and previous reviews as key areas of risk, which, as Ms Dore states 'need to be subject of laser like focus and commitment to outcomes'"* [16] (references omitted).

[11] The Dore Report, at page 12
[12] The Dore Report, paragraph 5.5.4, at page 42
[13] icare and State Insurance and Care Governance Act 2015 Independent Review, Report by the Hon Robert McDougall QC, Independent Reviewer 30 April 2021
[14] The McDougall Report, paragraph 186 at page 183
[15] The McDougall Report, paragraph 195 at page 185
[16] The McDougall Report, paragraph 201 at page 187

EVIDENCE OF NON-COMPLIANCE

These reviews also provided evidence of non-compliance within the scheme.

THE DORE REPORT

The Dore Report cited an icare Board report which stated that injury management practices featured by that claims model were not only poor but, in some respects, were non-compliant.

That Board report, which Dore explained[17], contained evidence that:

"icare's compliance with determining liability within the 12 weeks allowed for provisional liability status, is adhered to in only 54 per cent of cases. Further, this same report highlights this risk as an intermediate or amber risk. The report also suggests that 46 per cent of the NI's claims managed within the new claims model are non-compliant with the legislation, and that icare considers this non-compliance as a lower order risk. ***This approach to compliance seems to indicate an absence of concern with regulatory matters."***

SIRA'S RECENT AUDIT REPORT[18]

SIRA's recent audit report shows that, insofar as injury management plans are concerned (the additional support needed for when an injured worker is likely to remain out of the workplace for longer than seven days), an unacceptable degree of non-compliance with proactive injury management practices continues to exist.

This is despite improvements in compliance being found elsewhere.

Some examples of poor levels of compliance found by the audit are set out in Table 1 (below):

AREA	CRITERION	%
Data accuracy	The date the claim was made	14%
Compliance with the legislation	Initial contact with Nominated Treating Doctor (NTD)	48%
	The insurer makes sufficient efforts to obtain required information prior to reasonably excusing liability on a claim	67%
	Review of liability decisions on claims placed under a 'Reasonable Excuse'	55%
Quality and compliance with Standards of Practice	Quality of initial contact with NTD	45%
	Quality of Injury Management Plans	21%
	Updating and reissuing Injury Management Plans	42%

Of most concern is the commentary attached to the low scoring of injury management plans, namely *"IMPs scored poorly with the audited plans mostly generic, often missing details, strategies, stakeholder actions and goals. These IMPs were not viewed as a plan and reference document for the workers recovery and RTW, rather they focussed on worker obligations, implying use as a compliance tool."*[19]

[17] The Dore Report, paragraph 3.3.6, at page 12

[18] Nominal Insurer Audit Report January 2023, exercised under section 202A of the 1987 Act

[19] Nominal Insurer Audit Report January 2023, at page 4 of 37

The Effect of Low RTW Rates

Low RTW rates:

- cause poorer health outcomes for injured workers,
- pose a risk to the scheme's viability, and
- result in increased employer premiums.

CAUSE POORER HEALTH OUTCOMES FOR INJURED WORKERS

THE DORE REPORT

In her report, Dore found that the *"decline in 'Returned to work rate' to 84 per cent is concerning, particularly for those who reported mental health conditions where only 52 per cent reported a RTW outcome. Work disability has serious consequences. Delaying returning to work can hinder a worker's overall recovery, this is certainly the case for people with mental illness"* (with references omitted).[20]

THE 2020 REPORT[21]

The 2020 Report contained a finding that *"return to work rates have fallen further in schemes managed by icare than in schemes managed by specialist and self-insurers".*

RISK THE SCHEME'S FINANCIAL VIABILITY

THE DORE REPORT

Dore also explained in her report how poor RTW rates posed a risk to the scheme's viability in the following way:

"(The) RTW measure has a direct correlation to both weekly payments and medical expenses. These two cost elements represent the greatest financial cost to the scheme. Hence a deteriorating RTW rate has a direct and real impact on the performance and continued viability of the workers compensation scheme."[22]

THE 2020 REPORT

The 2020 Report confirmed Dore's view by finding :

- *"That the multi-billion losses incurred recently by the Nominal Insurer and Treasury Managed Fund have been caused, in large part, by a collapse in return to work rates arising from icare's decision to introduce a new claims management model."*
- *"That icare has failed to address the fall in return to work rates in the Nominal Insurer and the Treasury Managed Fund with either the urgency or thoroughness they deserved given the negative impacts falling return to work rates have on injured workers and the financial sustainability of the scheme."*
- *"That the Nominal Insurer and the Treasury Managed Fund will continue to sustain major underwriting losses until icare improves return to work rates."*

[20] The Dore Report, paragraph 5.6.6 at page 43
[21] 2020 review of the Workers Compensation Scheme Report 75, April 2021.
[22] The Dore Report, paragraph 5.7.4 at page 45
[23] 2020 review of the Workers Compensation Scheme Report 75, April 2021, findings 1 to 4 on page 35

INCREASE EMPLOYER PREMIUMS

ALWAYS INCREASE THE PREMIUMS OF LARGER EMPLOYERS

Poor RTW rates threaten the viability of those larger employers known as experience-rated employers.

This is because the weekly benefits paid to their workers are, in effect, recouped from those employers in the form of an additional loading (known as the Claims Performance Adjustment) which is added to their basic tariff premium.

MAY RESULT IN AN INCREASE TO ALL PREMIUMS

Under the NSW workers' compensation legislation, NSW employers are solely responsible for any deficit in the scheme.

This is why, for the 2023-24 premium year, there will be an average premium increase of 8%.

Business NSW understands that the 'average' 8% increase' does not translate into an 8% cap for all employers but will result in a range of premium increases (based on an employer's risk profile) which averages out to an increase of 8%.

What Needs To Change

It is difficult to understand why, despite the intense scrutiny that accompanied reviews in 2019, 2020 and 2021, that as of mid-2023 fundamental injury management practices (which are both well-known and long-established) and compliance levels remain so poor.

Independent reviews do not occur as a matter of course. However, given the poor level of regulatory and stakeholder oversight that currently exists within the scheme, further reviews will need to occur at regular intervals.

In our view, a proliferation of reviews can be avoided by introducing practical and regulatory measures to address the poor RTW rates and improve the level of oversight.

Business NSW wants an improvement in the areas of:

Claims management services – where:

- the previous level of choice and service delivery is restored,
- 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 should include having systems that enable an account management approach to be adopted.

Administration processes – where changes are made to ensure that:

- when a claim is made, all relevant information required by the legislation is collected and considered by an experienced claims manager, and
- when a liability decision is made, a written Notice of Decision is provided, setting out the reasons for the decision, with reference to the legislative requirements and the evidence received so workers and employers can better understand the basis for the decision.

Suitable duties – where programs are refined to make accommodation for those employers who are unable to provide an injured worker with suitable duties. Under the current regulatory regime, icare can choose not to adopt the practical measures suggested by Business NSW. This is due to insufficient oversight of the scheme.

Under the current regulatory regime, icare can choose not to adopt the practical measures suggested by Business NSW. This is due to insufficient oversight of the scheme.

This was not always the case.

The 1998 reforms both strengthened existing statutory safeguards and introduced new ones to ensure the scheme would achieve its statutory objectives.

However, over time, those safeguards have been either eroded or eliminated.

Part 2 of this report describes what those statutory safeguards were, how they changed over time and the regulatory changes needed to ensure adequate oversight of the scheme.

2. STATUTORY SAFEGUARDS

Statutory Safeguards Are Important

Unlike Dore, Business NSW believes the decline in the NSW workers' compensation scheme cannot be solely attributable to the implementation of the 2015 reforms.

We agree with Dore regarding the need to improve the performance of the NI. However, we also believe the introduction of the new claims model was simply a tipping point.

In our view, it was the gradual erosion of the statutory safeguards that were originally put into place in 1998, together with the mechanisms introduced into the scheme following the failure to privatise in 1999, that has led to the current situation.

Given that the NSW workers' compensation scheme is a statutory trust with the only reference to a trustee confined to which entities (including SIRA, icare and the NI) are ***not*** the trustee, this needs to change.

WHAT ARE THEY

Business NSW believes that, in addition to other improvements, to ensure the scheme's objectives are being met, there needs to be a strengthening of:

- ministerial oversight
- regulatory oversight, and
- stakeholder oversight.

The Dilution of Ministerial Oversight

BEFORE THE 2015 REFORMS

Prior to the 2015 reforms, WorkCover NSW was the regulator for both the workers' compensation legislation and the work, health and safety (WHS) legislation.

When the NI was created in 2003, WorkCover NSW also became the entity that 'acted for' the NI.

Up until the 2015 reforms, the Board and Chief Executive Officer of WorkCover NSW were *"in the exercise of their respective functions under this or any other Act to the extent they relate to the Authority,* ***subject to the control and direction of the Minister****, except in relation to the contents of any advice, report or recommendation given to the Minister."*[24]

THE EFFECT OF THE 2015 REFORMS

Under the 2015 reforms, WorkCover NSW was replaced by three newly constituted entities, being:

- SIRA – the workers' compensation regulator,
- SafeWork NSW – the WHS regulator, and
- icare – an entity to act for the NI and manage the Insurance Fund.

The level of ministerial oversight was also changed.

In relation to the NSW workers' compensation scheme, the Minister was given the power to give both SIRA and icare a written direction *"if the Minister is satisfied that it is necessary to do so in the public interest."*[25]

The Act then required both SIRA and icare to "*ensure that the direction is complied with."*[26]

However, unlike SIRA, before giving icare a direction the Minister is required to "*consult with*" the Board of icare and "*request the Board to advise the Minister whether, in its opinion, complying with the direction would not be in the best interests of (icare)*."[27]

Given that the assets of the NSW workers' compensation scheme (held in the Workers Compensation Insurance Fund28) are held in trust for the beneficiaries of the scheme (being employers and their workers) coupled with the fact that neither icare nor the NI are the trustee of that fund, this situation is unacceptable.

[24] Section 18 of Workplace Injury Management and Workers' Compensation Act 1998 No 86 ('the 1998 Act'), which was repealed by the State Insurance and Care Governance Act 2015 No 19

[25] Subsections 7(1) and 20(1) of State Insurance and Care Governance Act 2015 No 19('the 2015 Act')

[26] Subsections 7(2) and 20(2) of the 2015 Act

[27] Subsection 7(3) of the 2015 Act

[28] Section 154D of the 1987 Act

The Dilution of Regulatory Oversight

PRIOR TO THE 1998 REFORMS

The 1987 Act empowers the regulator to impose conditions on a licensed insurer's licence.

There is a **general power 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.*"[29]

There is also a power for the regulator to "*give an insurer directions as to the procedure to be followed in the administration of any claim or class of claims in order to comply with the claims manual, the Workers Compensation Guidelines, the 1998 Act and this Act*" with **compliance with such direction becoming a condition** of the insurer's licence.[30]

PRIOR TO THE 2003 REFORMS

The 1998 reforms, which were designed to improve the entire scheme, contained two parts, but only one part was enacted.

The part that wasn't enacted contained the provisions that would enable the scheme to transition from being a centrally managed fund to being privately underwritten.

In 2001, it became clear that the arrangements to privatise the scheme would not eventuate. An alternative insurance model was needed.

THE 2003 REFORMS

That alternative insurance model consisted of an NI which was given the power to manage the Workers Compensation Insurance Fund (where the assets are held in a statutory trust).

The NI was "*taken to be a licensed insurer... as if that licence were not subject to any conditions*"[31] and "*operate to the fullest extent as a licensed insurer.*"[32]

This created a degree of uncertainty over the regulator's ability to subsequently place conditions on the NI's licence.

However, at the time, this situation did not cause much concern as it was the regulator who acted for the NI and, in that capacity, could appoint scheme agents.[33]

The Authority's functions as a regulator of licensed insurers (including the power to impose conditions) was extended to those scheme agents and could not be limited by any agency arrangement between the NI and its scheme agents.[34]

PRIOR TO THE 2015 REFORMS

In the lead-up to the 2015 reforms, it was felt that, by both **acting for** the NI and **being** the regulator of the scheme agents (who were appointed by the NI), the Authority had a conflict of duty and interest.

[29] Subsection 182(2) of the 1987 Act
[30] Subsection 192A(4) and (5) of the 1987 Act
[31] Subsection 154(1) of the 1987 Act
[32] Subsection 154B(2) of the 1987 Act
[33] Section 154G of the 1987 Act
[34] Sections 154H and 154I of the 1987 Act

THE 2015 REFORMS

The 2015 reforms purported to address the concerns about the regulator's conflict by replacing WorkCover NSW with three new entities, being:

- **icare** – to act for the NI and manage the Insurance Fund (in that capacity, any actions taken by icare were taken to be those of the NI),
- **SIRA** – the workers' compensation regulator, and
- **SafeWork NSW** – the WHS regulator.

These reforms also required icare to *"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."*[35]

However, as explained earlier in this report, icare has not achieved these outcomes.

The 2015 reforms also introduced a new premium-setting system commonly known as a 'file and write' system.

It allows (workers' compensation) insurers to set their own premiums if they follow the procedures contained in the new regulatory instrument known as the *Workers Compensation Market Practice and Premiums Guidelines* (MPPGs).

To follow these procedures, icare (acting for the NI) submits its proposed premium formula ('the filing') to the regulator (SIRA), which would then decide whether it will accept or reject the filing.

Once accepted, icare (acting for the NI) is then permitted to charge ('write') premiums according to that formula.

The amendments relating to this new system included a provision which states that it is "*a condition of the licence of an insurer (including the Nominal Insurer) that the insurer ... complies with the Market Practice and Premiums Guidelines*."[36]

This means that, in effect:

- **the only condition** that can be placed on the Nominal Insurer's licence is the statutory condition of compliance with the MPPGs (which contains a premium-setting process that lacks transparency), and
- even though icare, when "acting for the Nominal Insurer ... 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"[37], if it fails to do so, **there is no ability on the regulator to enforce compliance** with the legislation through the mechanism of placing a condition or conditions on the licence of the NI (for whom icare acts).

IMPLEMENTING THE 2015 REFORMS

Following the 2015 reforms, icare's implementation of its new claims management model included bringing claims 'in-house' and replacing the previously existing scheme agents with a claims management 'service provider'.

In other words, not only was SIRA unable to impose licence conditions on (icare acting for) the NI, but by 2017, scheme agents no longer existed.

Instead, (icare acting for) the NI managed its own claims and engaged service providers (which over time became one, EML) to provide those services on its behalf. Later, as part of the same arrangement, the NI engaged additional service providers ('Authorised Providers').

In effect, SIRA is unable to regulate the way (icare acting for) the NI managed claims. This protection (through icare) extended to EML and the other Authorised Providers because the NI was managing claims in-house .

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[35] Subsection 154CA(3) of the 1987 Act
[36] Subsection 168(6) of the 1987 Act
[37] Subsection 154CA(3) of the 1987 Act
[38] This arrangement was confirmed by Mr John Nagle, the then CEO of icare, in August 2020, when he gave evidence at a hearing of the 2020 Review. 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).

The Dilution of Stakeholder Oversight

By 'stakeholder', we are referring to the primary stakeholders, being the scheme's beneficiaries (employers and their workers[39]).

THE 1998 REFORMS – THE COUNCIL

In 1998, in order to *"promote stakeholder control and accountability"* a *"permanent Workers Compensation Advisory Council"* ('the Council') was established.[40]

It was given a "*key advisory role in relation to the ongoing policy direction and review of the scheme, and further recommendations for change*" and was to formulate all "*legislative amendment proposals, including regulation making proposals.*"

Key features of this original arrangement (of which Business NSW was a member) included:

- **Membership** being confined to the primary stakeholders of the scheme (being employer and worker representatives) with other stakeholders able to provide advice as subject matter experts.
- **Access to data** such as comprehensive actuarial materials and advice so members of the Council:
  - could fully understand the context of the trends being experienced within the scheme,
  - could identify the underlying drivers behind these trends, and
  - engage in informed debate to collaboratively agree on solutions.
- **The ability to establish industry reference groups** to develop specific industry management and safety strategies and provide education and practical advice to workers and employers.
- **A direct link back to the Minister's.office**

The Council would then nominate those employer and employee representatives who would also sit on:

- the Workers Compensation Premium Ratings Bureau, and
- the Occupational Health and Safety Council of New South Wales.

This was particularly important in relation to the way the premium formula was set. The statutory objectives relating to premiums are:

"(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."[41]

These objectives can only be achieved through the application of a well-designed premium formula.

Those employer and employee representatives nominated by the Council to sit on the premium-setting body were able to consider any proposed changes to the formula.

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[39] Subsection 154D(2) of the 1987 Act.

[40] Second reading speech of the Hon JW Shaw (Attorney General, Minister for Industrial Relations, and Minister for Fair Trading) [2.39pm], Hansard, Legislative Council, Friday 26 June 1998 pp 6706-6709

[41] Section 3 of the 1998 Act

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

This was facilitated by those representatives being provided with detailed (confidential) actuarial briefings and then given to the opportunity to:

- interrogate the data by asking questions of the scheme's actuaries,
- engage in informed debate, and
- provide feedback in relation to those proposed changes.

BETWEEN 1998 AND 2012 – CHANGES TO THE COUNCIL

From 1998 to 2012, membership of the Council was expanded to allow other stakeholders such as medical and legal service providers, and the regulator wrestled back some control over policy decisions.

Although these changes made the Council's processes more unwieldy, an acceptable level of accountability, transparency and informed debate in the decision-making process nevertheless remained.

THE 2012 REFORMS

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 ('the 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"*[42].

This included the Council.

The 2012 Act introduced two 'mechanisms' to replace those entities. They were:

- giving the Board power to establish committees, and
- empowering the Minister to appoint advisory committees on an ad hoc basis.

THE 2015 REFORMS

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

THE CURRENT SITUATION

WORKERS COMPENSATION

In relation to workers' compensation, if those two mechanisms survived the 2015 amendments, they now rest with icare and neither appear to have been deployed.

This situation allowed icare to establish its Claims Management Model without having to consult with or obtain feedback from the scheme's beneficiaries.

Although, in late 2020, the CEO of icare established a Nominal Insurer Advisory Committee (the 'NIAC'), this arrangement bears little to no resemblance to the Council in its original form.

SIRA also established the Tripartite Advisory Committee, which consists of employer and employee representatives. However, it also fails to compare with the degree of transparency and consultation with the Council.

This situation is particularly problematic with the premium-setting system.

Not only is the filing that contains the proposed premium formula (which is submitted to SIRA) confidential, but SIRA permits icare to claim 'commercial-in-confidence' over the resultant formula that is 'written'.

One of the very few aspects of the formula that is understood by employers is that, for experience-rated employers, the longer an injured worker is in receipt of weekly benefits, the higher (and more volatile) the amount of loading that is added to their premium notice.

Given that the delays in an injured worker's RTW are not necessarily within the employer's control and can typically be due to poor injury and claims management practices on the part of the NI, this is not an acceptable position for employers.

One of the objectives of the premium formula is to drive safe behaviours in the workplace. One of the most fundamental safe behaviours in the workplace is the prevention of harm.

Given the existence of data sets being collected by the three agencies, together with the research being undertaken by the NSW Government's Centre for Work Health and Safety, it is difficult to understand why such a blunt instrument is still being used in the formula.

There may be other features within the premium formula which are similarly unacceptable, but which cannot be identified given the resultant formula being kept confidential.

WORK HEALTH & SAFETY

Even though the Occupational Health and Safety Council of New South Wales no longer exists, SafeWork NSW has nevertheless consulted extensively with employer and employee representatives when developing its strategies and regulatory instruments such as the *Code of Practice for Managing Psychosocial Hazards at Work*.[43]

[43] Business NSW is proud to have been part of this important and seminal work.

What Needs to Change

Business NSW wants the following changes made to ensure there is a sufficient level of oversight, accountability and transparency throughout the NSW workers' compensation scheme:

- **Ministerial oversight** – needs to be restored to ensure that the scheme's statutory objectives are being met.
- **Regulatory oversight** – needs to be restored by clarifying that:
  - the NI's licence is subject to the same conditions as the other licensed insurers, and
  - service providers (engaged by icare acting for the NI) are scheme agents (as defined by the 1987 Act) and therefore subject to SIRA's regulatory oversight.
- **Stakeholder oversight** – needs to be restored by reinstating the Council as originally designed by the 1998 reforms or its equivalent to ensure there is an adequate level of:
  - access to important information about the workers' compensation and work health & safety regulatory systems in NSW, and
  - involvement in the decision-making processes of the regulators, most importantly, in relation to the premium-setting system to ensure a data-driven approach is used to truly reward safe behaviours.

Given the current state of the scheme, Business NSW does not believe these measures alone will be enough.

We have noticed that employers' and worker representatives' trust and confidence in the NSW workers' compensation scheme has declined and is not showing any signs of improvement.

This can only be improved by strengthening oversight (as discussed previously), and improving transparency and navigability throughout the scheme.

As the future of work changes, there is also a need to review the ongoing relevance of the scheme and its fitness for purpose.

3. FITNESS FOR PURPOSE

Being Fit for Purpose is Important

In addition to ensuring the focus of the system remains firmly on the achievement of its statutory objectives, we find ourselves asking 'is the NSW workers' compensation scheme fit for purpose?'

This question needs to be asked because, over time, workplaces, workers and the types of injuries being experienced by workers have changed as has the statutory framework which, since 1987, has only been done in a piecemeal fashion.

Before addressing that question, stakeholders must have access to an acceptable level of transparency regarding the scheme.

Currently, an acceptable level of transparency (and therefore navigability) does not exist.

Changes That Are Needed Now

THE CUSTOMER EXPERIENCE

It should be remembered that for most businesses, a workplace injury that results in time off work is a relatively rare occurrence.

In addition, the scheme is governed by multiple pieces of legislation with substantial reforms having been made to workplace health and safety, workers' compensation and workplace injury management and rehabilitation laws.

Many employers will have a limited understanding or awareness of how to navigate their statutory obligations.

As primary customers and, ultimately, funders of the scheme, helping employers navigate the system effectively needs to be front of mind.

WHAT IS SUPPOSED TO HAPPEN

The 2015 Act was intended to establish:

- *"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".*

This has not been our members' experience.

WHAT IS HAPPENING

THE STATUTORY FRAMEWORK

The regulatory framework for the NSW workers' compensation scheme consists of three separate pieces of legislation, being the *Workers' Compensation Act 1987 No 70* ('the 1987 Act'), the *Workplace Injury Management and Workers' Compensation Act 1998 No 86* ('the 1998 Act') and the *State Insurance and Care Governance Act 2015 No 19* ('the 2015 Act').

This is confusing for employers and injured workers seeking to understand and comply with their obligations. Additionally, the lack of transparency and accountability has increased since the 2015 reforms were implemented.

THE LACK OF INFORMATION AND GUIDANCE

Business NSW has received the following member feedback:

- The information currently available is either overly simplistic or too voluminous and/or not fit for purpose.
- Employers are being given incorrect advice or, when seeking advice, being referred between agencies with each passing accountability for information to the other.
- In some instances, claims agents are either refusing to contact employers or take weeks (and in some cases, months) to respond to requests for updates.

OVERLAPPING AGENCY ACTIVITIES

Members are confused by SafeWork NSW inspectors acting as return-to-work inspectors for SIRA and icare undertaking prevention activities as well as claims management activities. In addition, those agency representatives who enter the workplace typically have a poor understanding of the needs of the business, especially the regulatory requirements NSW businesses must comply with.

WHAT NEEDS TO CHANGE

To improve the navigability of the scheme:

- **The legislation** – needs to be consolidated and restructured so it is easier for stakeholders to understand and comply with it. A clear outline of the rights and responsibilities for each of the three newly created entities should be provided, as they collectively aim to achieve the statutory objectives of the NSW workers' compensation system.
- **The premium formula** – needs to be published in full.
- **The level of information and guidance for employers** – needs to be improved. Employers need easy access to a dedicated (and effective) support service and review mechanisms service. The focus needs to be on small to medium-sized enterprises who have little to no experience with the NSW workers' compensation scheme.

Other Changes May be Required

THE CHANGING NATURE OF WORK

With the changing nature of the future of work, the ongoing relevance of the scheme and its fitness for purpose needs to be reviewed.

In 2018, Safe Work Australia, Data 61 and CSIRO released a report called *"Workplace Safety Futures: The impact of emerging technologies and platforms on work health and safety and workers' compensation over the next 20 years"*.

It identified six megatrends:

- The extending reach of automated systems and robotics.
- Rising issue of workplace stress and mental health issues.
- Rising screen time, sedentary behaviour, and chronic illness.
- Blurring the boundaries between work and home.
- The gig and entrepreneurial economy.
- An ageing workforce.

The arrival of COVID-19 emphasised these megatrends, reminding us we should be examining their impact over a much shorter timeframe.

BUSINESS NSW'S FOCUS

Although Business NSW is concerned about all these megatrends, for the immediate future it has chosen to concentrate on the rising issue of workplace stress and mental health issues.

OUR VIEW

Business NSW highlighted its concerns about the management of psychological injuries to the Legislative Council's Standing Committee on Law and Justice's 2022 Review of the Workers Compensation scheme, which focused on the increase in psychological claims.

In its submission, Business NSW reiterated that it recognises the need to support injured workers and the benefit, where practical, of allowing this recovery to occur at work.

However, support for injured workers needs to be appropriately balanced against maintaining the long-term sustainability of the scheme.

Part of its submission addressed whether, insofar as psychological injuries are concerned, the NSW workers' compensation scheme was fit for purpose and whether, over the longer term, alternatives need to be considered.

This view arose from the increasing impact the WHS and workers' compensation regulatory environment is having on other regulatory frameworks that apply to the workplace.

THE CHANGING LANDSCAPE

The proliferation of research activity indicates the importance of this topic, underscoring the urgency to address the prevention of psychological injuries in the workplace.

For example, in their report *Connections Matter, A report on the impacts of loneliness in Australia*[44], the Groundswell Foundation and KPMG shine a light on the prevalence of loneliness in Australia, the effect it has on a person's physical and mental health and how it can affect the workplace.

Given the regulatory focus on preventing psychological injuries in the workplace, and the poor RTW outcomes associated with workers' compensation claims for psychological injuries, it is crucial NSW employers are better equipped to manage their workplace obligations.

[44] The Groundswell Foundation and KPMG, dated November 2022

Business NSW is undertaking a project to investigate how NSW workplaces can better manage mental health conditions. It will focus on employers' regulatory obligations in relation to anxiety and depression caused or aggravated by workplace behaviours, and will encompass learnings from recent research into mental health and the workplace.

Upon conclusion of the project, Business NSW will release a report with recommendations for the NSW Government's consideration.

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BUSINESS NSW