NSW Business Chamber

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Submission to the Market Practice and Premium Guidelines for Premium Filings on or after January 2018

January 2018

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Overview

The NSW Business Chamber (the Chamber) welcomes the opportunity to provide a submission to the Market Practice and Premium Guidelines ("MPPGs") Consultation.

The Chamber is one of Australia's largest business support groups, with a direct membership of more than 20,000 businesses, providing services to over 30,000 businesses each year. Tracing its heritage back to the Sydney Chamber of Commerce, established in 1825, the Chamber works with thousands of businesses ranging in size from owner operators to large corporations, and spanning all industry sectors from product-based manufacturers to service provider enterprises.

The Chamber is a leading business solutions provider and advocacy group with strengths in workplace management, work health and safety, industrial relations, human resources, international trade and business performance consulting.

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Note

While the Chamber has reviewed the material provided in the Market Practice and Premium Guidelines ("MPPGs") closely, the Chamber is not in a position to adequately assess the potential impact of the changes proposed on the funding ratios and premium pool of the workers compensation scheme in its own right.

The Chamber notes advice it has received from Insurance and Care NSW ("icare") on the potential impact these changes will have on the scheme and has considered this advice in responding to the MPPGs.

The Chamber's submission will address the matters it wishes to raise in the same order of numbering as is used in the MPPGs.

Submissions

1. Commencement

During 2017, the Chamber conducted a survey of its members and received feedback that the majority of its members require at least six months' notice of any change in their workers compensation premium.

> The Chamber submits that, for future years, SIRA consider having a commencement date for the MPPGs that would enable employers to be given at least six months' notice of any likely increase in premium.

5. Principles

Clause 5.2. Principle 2: Balance between risk pooling and individual employer experience

The Chamber notes that a number of changes have been made to this principle but will only address the changes made to the last paragraph, which is reproduced below:

> "*As employer size increases, they generally have more influence over the management of their risk and return to work. Insurers can take into account the employer's own claims experience and* ***risk management practices*** *in addition to industry-based rates* ***increasingly*** *according to the~~ir~~ employer's size. ~~, whereby t~~The largest employers can be rated almost entirely on their claims experience, return to work management and risk management practices*." (emphasis added)

"Risk management practices"

The second reading speeches made to both houses of parliament in relation to what is now the *State Insurance and Care Governance Act 2015*, clearly stated that each of the three newly created agencies had specific roles to play; describing the focus of SafeWork NSW as being "*on harm prevention and improving safety culture in New South Wales workplaces*" and that of Insurance and Care NSW ("icare") as being "*a centre of excellence for long-term care needs, combining claim cohorts with similar care needs to focus on return to work and quality of life outcomes*".

Those speeches continue with a description of how the bill will "*create a clear statutory and operational separation between the functions of providing government insurance services and the regulation of those services*."

The Chamber recognizes that, as an insurer, it is appropriate for icare to conduct loss prevention activities. However, there are concerns that the overlap of activities being conducted by SafeWork NSW and icare in relation to harm prevention is causing confusion among employers in NSW.

> The Chamber submits that, given the reference to "*risk management practices*" in this principle, the MPPGs should include a requirement that any overlap of activities that may exist between icare and of SafeWork NSW from time to time in relation to "*harm prevention*" be clearly explained to employers.

"increasingly"

The purpose of the inclusion of the word "increasingly" in the paragraph quoted above is unclear.

> The Chamber submits that, as the inclusion of the word "*increasingly*" is confusing and makes the paragraph difficult to follow, this paragraph should be amended.

Clause 5.3. Principle 3: Premiums should not be unreasonably volatile or excessive

The Chamber notes that this principle has been amended by the inclusion of following text:

> "*For example, a **small** employer's premiums (in one year or collectively over a few years) should not increase as a result of a claim by more than the **value** of the claim*" (emphasis added).

The Chamber cannot identify a situation where, under the current workers compensation system, such an increase could occur to a small business's premium (as opposed to an experience-rated employer's premium) and suspects that the use of the word "small" is a typographical error.

In addition, it is not clear why the phrase "value of a claim" was used instead of "costs" of a claim.

> The Chamber submits that the example provided in this section should be amended by deleting the word "*small*" and replacing it with "*experience-rated*" and, in the interests of clarity, a worked example should be included to explain what is meant by the "value" of a claim as opposed to the "costs" of the claim.

6. Policies of insurance requirements for licensed insurers

Clause 6.7. Employer Definitions

The Chamber has concerns about the proposal to change the definition of "small employers" and "experience-rated employers" and has met with representatives from SIRA to understand the reasons for the change and with representatives from both SIRA and icare to understand the impact such a change will have on the scheme.

Information provided by SIRA

From the information provided by SIRA, the Chamber understands that the underlying reasons for the change include:

- A need to address volatility.
- A belief that the inclusion of the industry classification within the definition has a discriminatory effect between employers of a similar size.
- A desire on the part of SIRA to more closely align the definition of "employer" for workers compensation purposes with the definition of "employer" for pay-roll tax purposes.
- The outcome of modelling performed by SIRA shows that having a wages threshold of $750,000 "has the least impact with the premium impacting pool" than any of the alternative thresholds of $1M, $1.5M or $2M respectively.

The Chamber also understands that if the definition is changed, then:

- Just over 17,000 employers who are currently classified as "small employers" will be classified as being "experience-rated" employers.
- Of those, approximately 11,000 haven't had a claim in the past three years.
- The majority of those 11,000 employers will experience a premium decrease of less than or equal to 10% and the rest will experience a decrease of between 10% and 20%.
- The balance remaining of 6,000 employers who have had a claim over the past three years will experience an increase in premium, where:
    - The majority will experience an increase of up to 10%;
    - A small proportion will experience an increase of between 10% and 20%; and
    - The remainder (consisting of approximately 200 employers) will experience an increase of greater than 20%.
- It is towards this cohort of 200 (who will experience an increase greater than 20%) than the 30% cap (provided for by clause 6.12) will apply (as a transitional measure).

Information provided by icare about the effect of the change

From the information provided by icare, the Chamber understands that this change in definition will

- result in a much higher level of cross-subsidisation between industries than currently exists due to the definition no longer referring to the Basic Tariff Premium (which includes the WIC code); and
- notwithstanding the exclusion of any reference to the Basic Tariff Premium, equate to having the Basic Tariff Premium of $1,700.00 as the cut-off point between small employers and experience-rated employers.

The Chamber's concerns

A need to address volatility.

Factors that currently cause volatility in the system

In order to address volatility, consideration needs to be given to the factors that are said to cause that volatility.

Some of those factors are performance-related (for example, the lack of actively managed claims during 2017 when icare transitioned to the new claims management model) but, more importantly, there are many factors that due to shortcomings in the premium formula currently being used for experience-rated employers.

From feedback obtained by its members (both formally and informally), the Chamber believes that much of the volatility that currently exists in the system is largely due to the manner in which the formula, as it applies to experience-rated employers, fails to recognise that poor return to work outcomes are commonly a result of circumstances that are beyond the control of the injured worker's employer.

Examples include: lengthy hospital waiting periods delaying the recovery and rehabilitation of an injured worker, the refusal of stakeholders to consult and communicate with employers (for example, in order to identify suitable duties), and the attitude of recalcitrant workers towards their rehabilitation and recovery at work.

The Chamber is concerned that these causes of volatility have been overlooked by the MPPGs.

The probability that the proposed changes will increase volatility in the system

The Chamber believes that by re-classifying 17,000 small employers as experience-rated employers, without a corresponding change in formula to address the above factors, there will be an increase in volatility in the system both in the short and the long term.

The short term volatility will be imposed upon those small employers who become experience-rated and receive an increase in premium.

Any increase in premium of more than 10% (in accounting terms) is a material change and many small businesses will find it difficult to generate sufficient cash flow to cover this unexpected (and therefore unbudgeted) cost.

Should this change eventuate, those small employers who will experience an increase in premium will need to be advised of the increase as soon as possible, so they can prepare for the adverse effect it will have on their cash flow position.

In the long term, the level of volatility that already exists in the system will be exacerbated by the likelihood that those 17,000 small employers who will become experience-rated employers will not have the necessary skills, business systems or cash flow to enable them to adequately manage the responsibilities and costs involved in being an experience-rated employer if and when a worker is injured.

The Chamber strongly opposes the proposed changes to the employer definitions on the grounds it believes that, in relation to volatility:

- The proposed definitions fail to address the current causes of volatility that already exist within the workers compensation system.
- The proposed definitions will create volatility within the system for those small employers who will experience an increase in premium because of the change in definitions.
- The proposed definitions will exacerbate the current level of volatility in the system given that a substantial number of employers who are currently classified as being “small employers” will be classified as being experience-rated employers and many will be ill-equipped to adjust to the added burden that such a change to bring to their businesses.

“Removing discrimination”

Rather than “removing discrimination”, the Chamber is of the view that removing the WIC code from the definition of “employer” will increase discrimination in that those employers who operate within “low risk” industries will be disadvantaged compared with those employers who operate in “high risk” industries. This is due to the markedly increased level of cross-subsidisation between industries that this change in definition will bring.

The Chamber recognizes that a degree of cross-subsidisation will be inherent in any insurance system, but believes that the degree of cross-subsidisation that will be brought about by this change to the employer definitions is unacceptable.

The Chamber strongly opposes the proposed changes to the employer definitions on the grounds it believes that, rather than “removing discrimination”, the removal of the WIC code from the definition of “employer” will increase discrimination in that those employers who operate within “low risk” industries will be disadvantaged compared with those employers who operate in “high risk” industries. This is due to the markedly increased level of cross-subsidisation between industries that this change in definition will bring.

A closer alignment of definitions

The Chamber notes that there is an intent to increasingly align the “employer” definitions used for workers compensation purposes with the “employer” definitions used for pay-roll tax purposes.

The manner in which this alignment is being created appears to be via the adoption of a “wages” definition similar to those currently being used for pay-roll tax purposes.

The Chamber has three concerns in relation to this.

First of all, the Chamber believes that the removal of an employer’s risk profile from the definition of employer for workers compensation purposes is not only in conflict with the underlying policy objectives of the workers compensation system but will result in an unacceptable high level of cross-subsidisation between industries with vastly different risk profiles. It will make the system inequitable for those employers who operate in a low-risk business environment vis-à-vis those who operate in a high risk environment.

Secondly, after having introduced a “wages only” definition for employers, the Chamber anticipates that the next step would be to adopt some, if not all, of the ”worker” definitions being used in the pay-roll tax system. From conversations with SIRA representatives, the Chamber is concerned that this exercise will be undertaken with very little, if any, consultation with industry and that due regard will not be given to the fact that pay-roll tax definitions have evolved over time as a consequence of having to capture specific labour arrangements created to avoid pay-roll tax liabilities.

Thirdly, this change may create an unnecessary level of confusion amongst employers as employers may mistakenly believe that being under the $750,000 threshold will mean that their workplace is not subject to either of the two statutory regimes.

The Chamber strongly opposes the proposed changes to the employer definitions on the grounds it believes that, this move to effect a closer alignment between the definitions used within the workers compensation system and those used within the pay-roll tax system:

- may cause confusion and result in employers mistakenly equating their pay-roll obligations with their workers compensation obligations, particularly with respect to whether the statutory regime applies to their workplace; and
- if it proceeds, will require the adoption of a careful and measured approach that includes a comprehensive consideration of all the ramifications involved by following such a course of action (it is not simply a “red tape” issue) and must include a rigorous consultation process that involves the participation of employer and industry representatives.

$750,000 having the least impact with the premium impacting pool

The Chamber notes that those currently within the premium impacting pool are comprised of experience-rated employers who operate in a wide range of industries each having a different risk-profile.

The Chamber believes that any change that removes the risk profiles of employers and imposes additional (and onerous) statutory obligations on those small employers who will be re-classified as being experience-rated employers represents a significant impact.

The Chamber strongly opposes the proposed changes to the employer definitions on the grounds it believes that, a substantive change to the definition of employer is unnecessary and unwarranted, especially as it will lead to an unacceptable level of cross-subsidisation between industries that have vastly different risk profiles.

6.10. Apprentice Incentive

From information provided by representatives of SIRA, the Chamber understands that the reason for changing the way in which the apprentice incentive (formerly referred to as the apprentice discount) is calculated is to better reflect the additional cost of employing an apprentice (which is done by replacing the basic tariff premium with the employer premium rate).

The Chamber suggests that an education and awareness campaign in relation to the changes to the apprentice incentive needs to be undertaken by SIRA and coincide with the release of the new MPPGs in early 2018.

The Chamber recommends that SIRA closely monitor the effect that this change will have upon the safety behavior of those businesses that employ apprentices as this change may result in a need, on the part of SIRA, to adopt additional or alternative measures to influence the safety performance of these employers.

6.12. Transitional arrangements

It is not clear whether this 30% cap is a one-off measure for the 2018-19 year or whether it will continue to apply in future years.

The Chamber submits that this section needs to be amended to clarify whether or not the cap is a one-off transitional measure that is confined to the 2018-19 year or whether it will continue to apply in future years as long as there is a sufficient nexus between this version of the MPPGs and an increased premium.

6.13. Premium volatility due to claims impact

The 50% cap for experience-rated employers

The Chamber notes the proposed introduction of a 50% cap for experience-rated employers who experience an increase in premium as a result of their own claims experience.

While the Chamber recognises that much of the volatility incurred as a result of an experience-rated employer's own claims experience is also caused by factors outside of an employer's control (for example, the duration of some hospital waiting lists) the Chamber is unsure whether this can justify a cap of the magnitude suggested.

The role of premiums in motivating behavioural change needs to be considered closely and the Chamber is simply not in a position to determine whether this can still be achieved with a cap of this magnitude. Further discussion and modelling of the cap should be discussed with icare to see how best to moderate volatility and to ensure incentives exist for better safety performance.

The need for an additional cap

The Chamber understands that icare's development of its new claims management model includes a review of the different interpretations that have been applied in the past by the five scheme agents who are now being replaced by three claims agents.

The Chamber also understands that icare intends to "moderate" the interpretation of those codes as icare believes that 50% of WIC rates have been incorrectly applied by some of those scheme agents resulting in 96% of those employers having underpaid their premiums. The Chamber has not seen any data to this effect.

- The Chamber submits that the role of premiums in motivating behavioural change needs to be considered closely and the Chamber is simply not in a position to determine whether this can still be achieved with a cap of this magnitude.
- The Chamber also submits that further discussion and modelling of the cap should be discussed with icare to see how best to moderate volatility and to ensure incentives exist for better safety performance.
- The Chamber suggests consideration needs to be given to whether or not there is a need, on the part of SIRA, to include an additional measure to protect employers (both small and experience-rated) from any volatility that may result from icare's "moderation" of the interpretation of WIC rates.

7. Premium filing process

The Chamber supports SIRA on its efforts to improve the premium filing process, especially in those areas where it has introduced an increased level of rigour around the information provided by licensed insurers in their filings.

However, the Chamber finds the way in which clause 7.1 has been expressed (as a triple negative) very confusing.

The Chamber supports the proposed changes in section 7 of the MPPGs but submits that paragraph 7.1 needs amending, perhaps by expressing it as a positive obligation.

8. Market Practices

The Chamber welcomes the measures being introduced by this section of the MPPGs.

Clause 8.2. Premium compliance assurance program

The Chamber supports the changes to this clause but requests that consideration be given to requiring that an outline of compliance activities or focus areas similar to those published by SafeWork NSW be published by the nominal insurer.

Clause 8.5. Employer premium dispute process

The Chamber supports the introduction of a detailed dispute resolution process but submits that the clause should be amended in the following way:

- The complaints process to be undertaken pursuant to AS/NZ 10002:2014 (which should remain) should be contained in a separate clause, as the subject matter of complaints made by employers about licensed insurers are not confined to complaints about their premiums.
- The remaining process described by clause 8.5 needs to be amended to clarify whether it is one of review or one of review and appeal as currently, clause 8.5.1 only permits an employer to make an application for review, yet the remaining clauses refer to a "complaint, review or appeal". A review process (as opposed to an appeal process) is purely administrative in nature.
- Clauses 8.5.4 and 8.5.6 need to be amended to clarify that the:
    - scope of the second review encompasses an examination by SIRA as to whether or not the licensed insurer has complied with its premium filing; and
    - the effect of SIRA's second review is to replace the decision made by icare during the first review.

Annexure E

The Chamber welcomes the introduction of a formal procedure to review the primary activity guideline

The Chamber suggests that, to avoid unnecessary volatility, transitional arrangements should be introduced to apply to the following year's premium should SIRA decide that the employer's primary activity is to be re-classified (and such re-classification results in an increase in premium).