

14 December 2015

The State Insurance Regulatory Authority

Dear Sir/Madam

Hawkesbury City Council has held a Self-Insurers Licence since 1983 and welcomes the opportunity to participate in this review of the self-insurance licensing framework and respond to the Issues Paper developed in regard to the review. Council has in recent year questioned to apparent inequity and polarisation in the application of both the Workers Compensation Act 1987 and the WHS Act 2011 across NSW.

In the Workers Compensation area to the Government is disadvantaged in taking on the responsibility for all injuries that exceed both the quantum limit of \$150,000 and/or the time limit of 3 years in the claims experience whilst over burdening those Self Insured organisations that take the full responsibility for their injured workers and have for some years shown a proven record of meeting the aim of the legislation expressed the view that the current application.

In the WHS area those organisations that are generally insured are left to their own devices whilst the Self Insured organisations are subjected to a much focussed WHS (NAT) Audit every 3 years which is again a burden on the State Government to focus so many resources on such a small portion of the States Workforce. In the main the safety systems of the Self Insured are much higher than those insured through the open market. It is hoped that this review process might reduce the polarisation of the different approaches to the administration of the Safety and Workers Compensation legislation within NSW and assist SIRA in its role of achieving public policy as outlined in 2.1.3.

It is Councils view that the starting point for this review should be from the statutory framework governing self-insurers as set out in Division 5 of Part 7 of the *Workers Compensation Act 1987*. In particular Section 211 (2) which sets out those matters which the Regulator should take into account when considering all new and current applications for a self-insurers' licence. The key elements are as follows:-

- a) The suitability of the Applicant,
- b) The financial ability of the Applicant to undertake the liabilities under this Act,
- c) The efficiency of the workers compensation system generally, and
- d) Such other matters as the authority thinks fit.

It is clear from the legislation that the critical considerations in the licensing of the self-insurers relate to financial viability and the efficiency of the workers compensation system generally. Council believes that it is these matters which should primarily inform the review process.

This statutory framework assumes immediate relevance in the consideration of what is set out in paragraph 2.1.3 of the Issues Paper, relating to the regulation of self-insurers.

However, matters identified in the Issues Paper as being relevant to this regulation in the main find no basis in the legislation. Motherhood notions such as "improving workers compensation outcomes for both self-insurers and injured workers", whilst admirable, should not find a place in this review process. The review should be enabling an organisation to secure a self-insurers licence where appropriate even if this does not, in the short term, result in improved workers compensation outcomes for that organisation. (and subject of course to what is meant by "workers compensation outcomes"). Council notes that the experience of organisations that are self-insured is inevitably improvement in workers compensation outcomes both for the organisation and for its employees.

Also the regulatory framework in the context of the statute, should not involve a regulatory approach that incentivises performance and encourages compliance with the legislation. The regulatory framework should only be directed to the financial viability of the self-insurer and to the efficiency of the workers compensation scheme generally. This is particularly so because self-insurance has the inevitable consequence of incentivising performance as the self-insurer is directly liable for all of the costs of any injury in a workplace.

Further, Council submits that the licencing of self-insurers is not the appropriate process by which to encourage compliance with the legislation. The legislation itself already provides incentive for compliance (in the form of penalties) and already

heavily regulates non-compliance with the legislation by means of the dispute resolution processes. Council believes that these are therefore not areas which require additional regulatory oversighting under the Self-Insurance licencing process.

While the Council welcomes what is said to be the adoption of a risk based regulatory approach by the authority (Issues Paper 3.1.2) this should be applied in respect of the relevant risk which is clearly identified by the legislation as being prudential risk and scheme efficiency risk only.

It is the view Council and of the Self Insurers Association (SIA) that when these matters are properly understood, the structure of the analysis identified in Paragraph 3.2 of the Issues Paper should be limited to considerations of "entry" and "financial" matters only and should not proceed to a consideration of claims management or Work Health and Safety issues. Further any consideration of the entry requirements should exclude any consideration of Occupational Health and Safety issues and should otherwise be limited to prudential/financial considerations and considerations of the proper resourcing of claims management.

The current opportunity to review the licensing framework for self-insurers should have, in the view of the SIA, the fundamental objective of substantially reducing the regulatory burden currently imposed on existing self-insurers and removing, as far as possible, the non-prudential barriers which are currently imposed on new Applicant's for self-insurance licences.

In regard to the specific questions directed at stakeholders in the issues paper the Council will take each element from each stage and responds as follows:-

1. IS LICENSING APPROPRIATE?

1.1 *To what extent are the requirements of the self-insurance licensing framework proportionate to any risks posed by self-insurers above and beyond those posed by other employers?*

Council believes that the current licensing framework polarises the community and is disproportionate to risks posed by self-insurers beyond those risks posed by other employers. Companies that are self-insured are the only employers in New South Wales that carry the direct and immediate costs that arise when an employee is injured. For this reason the self-insured companies have a clear and positive incentive to minimise the risk of injuries to workers, to maximise return to work opportunities at the earliest available time and to deliver the payment of statutory workers compensation benefits in a timely and efficient way in order to minimise costs. For this reason the risk profile of self-insured companies is minimal.

1.2 *What should the government's objectives and expectations be in relation to self-insurance? How does this differ to current practices?*

The only objectives and expectations of the Government in relation to self-insurance should be to confirm the prudential capability of self-insurers to meet claims as and when they arise. The Self-insurer in assuming the full cost and management of all injury claims relieves the State from the burden of funding and managing those large long term claims. The current government practises impose substantial over-regulation in areas which are irrelevant to prudential considerations.

1.3 *What is the value of self-insurance to an employer?*

The value of self-insurance to an employer are numerous and which include but are not limited to having direct responsibility for risks in the workplace, for workplace injury and a concurrent direct incentive to reduce costs. Self-insurance also provides a definite ability to manage the structured and decisive return to work for injured employees and generally results in closer and improved relations with employees. Additional benefits arise by reason of improved flexibility in the provision of assistance to injured workers together with reduced costs and a reduction in the administrative burden in regard to such things as injury notification and claims.

1.4 *What are the intrinsic costs of being self-insured?*

The most significant intrinsic costs of being self-insured are those substantial costs imposed as a result of regulatory compliance. In addition, there are costs associated with systems for workplace injury and compensation management (such costs being increased at least in part by reason of the regulatory burden) together with substantial costs for levies paid to the regulator. Finally, additional intrinsic costs arise by reason of the fiduciary requirements for bank guarantees and for setting aside a provision for outstanding liabilities.

1.5 *How does an employer demonstrate its senior executive's commitment to self-insurance and achieving better outcomes for their injured workers?*

Council's senior executives demonstrate the commitment to both safety in the workplace and better outcomes for injured workers varies dependent upon the issues. In general terms safety & worker compensation issues form part of a monthly Senior Executive report and is also part of annual reporting. Council generally evidence its commitment by providing continual staff training in all areas of its safety program and 'incident reporting. Finally, the very fact of being self-insured of itself demonstrates the commitment of a senior executive to better outcomes for injured workers.

2 **IS LICENSING WELL DESIGNED?**

2.1 *Is there an appropriate minimum number of employees or another entry level requirement that an Applicant should have in order to be eligible and guarantee being able to perform as a self-insurer? If so, please explain why.*

Council supports the Self Insurer Association's (SIA) view that there is no minimum number of employees which should be required for the purpose of becoming self-insured. Employees' numbers are largely irrelevant to considerations of self-insurance. The primary considerations are (and should always be) prudential and financial issues. Otherwise it is generally the case that administrative costs relative to workers' compensation liabilities will usually dictate the viability or otherwise of self-insurance.

2.2 *What feedback do you have about the effectiveness and efficiency of the licensing entry requirements?*

The Council is strongly believes that current licensing entry requirements are ineffective and inefficient and this is evidenced by the extremely limited number of successful self-insurance licence applications in particular in the last 15 years. The present requirements currently act as a specific dis-incentive to new Applicants.

2.3 *What would define a self-insurer as a high performer?*

The promotion of self-insurance as a sound benefit financially and administratively will lighten the burden on the Government to manage the costly and long-term claims and will most definitely lead to the notions detailed in 2.1.3

In the context of this review process Council would question the relevance of performance levels of self-insurers. All self-insured companies in taking on the full costs of injury claims could properly be regarded as high performers in the area of WHS and workers compensation. Properly the only consideration for what constitutes a high performing self-insurer should be the organisations solvency. If a self-insurer is solvent and able to meet claims as and when they arise such a self-insurer should always be regarded as a high performer.

2.4 *What impact would a shorter or longer renewal period have on self-insurers, their employees and the broader system? What should be the maximum term of a licence?*

Longer licensing terms will have the immediate and significant effect of reducing regulation. Council supports the SIA view that the licensing term should be unlimited (as it is in Western Australia, which state has been excluded from the Issues Paper) or at the very least 10 years.

2.5 *What would be the impact of implementing an open-ended licence renewal period in NSW?*

The impact of implementing an open-ended licence renewal period in New South Wales would be positive in reducing regulation and providing long-term security for Self-insurers and business as a whole.

FINANCIAL

- 2.6 *What would be the benefits of greater transparency around the calculation and use of licence fees and levies?*

As with all Government fees and levies the calculation and amounts of levies should be entirely transparent as should be the specific manner in which such fees and levies are spent.

CLAIMS MANAGEMENT

- 2.7 *What regulatory changes to claims management licence requirements should be made to incentivise better injury prevention and return to work outcomes? Please state the change and impact.*

From a position that claims management is already heavily regulated by the Workers Compensation Commission, by the review process for work capacity decisions including by merit review, by the WorkCover Independent Review Officer and by the complaints process. Council supports the SIA view that the licensing policy should not be connected to claims management in any way.

- 2.8 *What indicators or risk factors should SIRA use to measure claims management performance?*

A self-insurer already has a number of most direct incentives to optimise its claims management performance. Council would contend that SIRA should not be involved in the measurement of claims management. It is clearly sufficient, from the monthly data submissions for SIRA to consider and assess claims risk if this was necessary in any event.

- 2.9 *What would be the impact of limiting claims management audits to those self-insurers that exhibit lesser performance?*

Council submits that the impact of limiting or, preferably, removing altogether claims management audits would be minimal. It is in the Self-insurers best interest to regularly self-audit and have additional regulatory oversight in claims management as identified in 2.8.

- 2.10 *How should SIRA promote best practice and/or innovation in claims management to deliver better return to work outcomes?*

Council supports the SIA view that SIRA should not be involved in claims management for self-insurers. Experience suggests that SIRA does not have the expertise to propagate best practise or innovative claims management in any event. Oversight of claims management should not form any part of the functions of the licence regulator.

WORKPLACE HEALTH AND SAFETY

- 2.11 *Do any factors make self-insurers a greater risk to maintaining a safe workplace compared with other employers? Please describe any relevant factors and how they could be mitigated.*

Absolutely not. It is counter intuitive to suggest that self-insurers are a greater risk to maintaining a safe place of work. In the view of the Association there are generally no factors that make self-insurers any greater risk and rather self-insurers are generally a lesser risk because they are subject to the total direct cost of all claims and therefore have a greater incentive than other employers to improve safety outcomes. At present the only matter that has a negative impact on safety issues for self-insurers is requirement to deploy substantial work health and safety resources away from safety initiatives at the time of and leading up to Work Health Safety Audits by the regulator.

It is a statutory requirement that all employers are compliant with the WHS Act and Regulations. How best to ensure that they comply with legislation is a question for all organisations determine. As a self-insurer, the National

Audit Tool (NAT) has additional compliance standards that are additional to legislative requirements, to ensure maintenance of the SI Licence.

Council supports that application of the NAT Tool as a methodology to enable transparent and consistent measurement of WHS compliance.

Councils concern is when and how the NAT tool is applied. Currently the NAT is being used as a pass/fail mechanism and therefore loses its continual improvement capability. Further due to its prescriptive application, the NAT loses the intent of preventing injury and illness and continuous improvement and focuses on process. This raises questions on the validity of the process considering the intent of the NAT and results in organisations focusing on the "bureaucratic" and "ticking the box" process rather than WHS behaviours. Additionally, the prescriptive application is not seen as adding value to safety in its application in the workplace.

2.12 *Are OHSMS audits improving WHS outcomes? How might this be improved?*

Once established auditing improves WHS outcomes through application and continuous improvement. However across NSW the introduction of the NAT for self-insured organisations does not result in appropriate application of the legislation.

The WHS area is one clear example of polarising legislation. Because a Self-insured organisation takes an initiative they subjected and burdened by regulation that dictates much higher measures of legislative compliance than over 90 % of the States workforce. The introduction of the NAT as a misguided measure of compliance to the WHS legislation for self-insured organisations places the emphasis on passing the WHS audits which is an extremely onerous and costly impost and serves only to distract staff and funds from actual continuous safety systems improvement and driving safety within the workplace. Council and the SIA are strongly of the view that these audits are not improving Work Health Safety outcomes. This would be improved by the abolition of Work Health Safety audits altogether and a focus toward a risk based culture.

Under the current arrangement to audits are adversarial in nature with little understanding or consideration to the how best to encourage safety in the workplace.

2.13 *How should high WHS performance be defined?*

Council strongly supports the view that this is not a matter that should be the subject of licensing conditions or of this review process.

2.14 *What other indicator or compliance activities (such as prosecutions or infringements) could be considered to determine and manage WHS performance throughout a licence term?*

Council strongly supports the view that it is unnecessary for the regulator to be involved in the consideration of Work Health Safety performance so far as the issue of licensing is concerned.

FINANCIAL

3 IS LICENSING ADMINISTERED EFFECTIVELY/EFFICIENTLY

3.1 *The current retention amounts for reinsurance are \$100,000.00 to \$1,000,000.00 per event. Should the excess for reinsurance be increased? If so, to what dollar amount?*

It is Councils view that the risks associated with these amounts are appropriate for present purposes but that they should be indexed.

3.2 *Should the security amount continue to be determined as 150 per cent of the central estimate (or forward central estimate if greater) or should employers be allowed to adopt a prudential margin based upon a probability of adequacy?*

It is Council's view is that the present security arrangements are appropriate.

CLAIMS MANAGEMENT

- 3.3 *To what extent are there potential conflicts of interest where an organisation is both the insurer and the employer?*

The legislation should be applied regardless which would suggest that this issue has nothing to do with a licensing consideration. Council does not consider that any conflict of interest arises by reason of self-insurance and the respective interests are better served in a self-insured environment.

- 3.4 *What evidence is there of issues associated with the privacy of claimant information? How could these issues be addressed?*

Whilst Council is bound by Government Information & Public Access Act (GIPPA) as well as the Privacy & Personal Information Protection Act (PPIPA) dealing with privacy issues are no different for employers generally and self-insured employers.

- 3.5 *What evidence is there of a conflict of interest when an employer is also the insurer in relation to the appointment of independent medical examiners? How should any conflict be managed?*

None. Council as an active member of the SIA has no knowledge of any evidence at all of any such conflict of interest. Council is of the view that this is irrelevant to this review process and of licensing considerations. Should any conflict exist surely it is the role of the Commission to determine and arbitrate within the statute.

- 3.6 *What should SIRA's claims management compliance monitoring and enforcement activities look like and how do they differ from your experiences?*

SIRA receives monthly updates to the self-insurers case management which we understand will flag any glaring issues with claims management. This should be the limit to SIRA's no involvement in case management compliance.

- 3.7 *How could the claims management audit tool be improved to deliver improved assessment on the compliance of case management practices and to improve performance?*

It is the view of Council that the Case Management audit tool does nothing to improve performance and rather, if anything, with the many changes to the Worker Compensation legislation over recent years serves only to detract from performance.

- 3.8 *What regulatory action should be taken to improve claims management practices and return to work outcomes?*

Council is of the view is that regulatory action is not appropriate in the areas of claims management and return to work outcomes. Further it is not appropriate in this review as these are not matters for consideration in a licensing policy.

- 3.9 *What benefits and costs would be created if an employer that ceases to be a licensed self-insurer was able to pass on its long-tail liabilities to the Nominal Insurer?*

Council is of the view that this is a matter which should be dealt with on a case by case basis having regard to the operational requirements of each business.

WORKPLACE HEALTH AND SAFETY

- 3.10 *How could OHS management system (OHSMS) audits be changed to improve their effectiveness in lifting WHS performance?*

It is Council's view that audits of the OHSMS should not be a consideration in this licencing review process. The inequity of an audit of the OHSMS is one of the key issues that currently polarise the application of legislation in NSW. For self-insurers the consideration should not be one of improvement but rather abolition. The proactive nature of the OHSMS is tested every time there is an incident or injury in the workplace and managed either within the system or through the claims management process that is reported to SIRA.

COLLECTION AND PROVISION OF INFORMATION

- 3.11 *Do the current requirements surrounding provision and quality of data to the regulator enable SIRA to adequately monitor self-insurer claims management and WHS performance?*

Yes. The current data requirements are already onerous and labour intensive and therefore, in Council's view, certainly provide more than enough information to enable SIRA to monitor all areas of performance.

- 3.12 *How could transparency of performance data be improved and should it be improved?*

In a balanced system efforts regarding the provision of data should be directed at simplification and reduction of frequency rather than transparency.

4 IS THE LICENSING SCHEME THE BEST RESPONSE?

- 4.1 *What impact does self-insurance have on the broader NSW system and the Nominal Insurer?*

Council submits that self-insurance has a very positive impact on the broader NSW scheme and the Nominal Insurer by improving standards in case management and return to work. Self-insurance provides a critical area of competition to the Nominal Insurer which drives improved performance and lower costs. The opening up of and promotion of the benefits of self-insurance would relieve the Nominal insurer of the burden on the significantly claims and of course the 'tail claims'.

- 4.2 *Is there any evidence of adverse outcomes from self-insurers not reporting significant matters to the regulator? How could these risks be mitigated?*

No. Council knows of no evidence at all of any adverse outcomes from self-insurers not reporting significant matters to the regulator. In fact all significant matters are reported to the regulator by self-insurers.

- 4.3 *What other policy options should be considered by the NSW State Government to improve the workers compensation system in the context of the self-insurance licensing arrangements?*

Council supports the view of the Association that the Government should have a specific policy that mandates self-insurance licensing for Government entities and state owned corporations where they otherwise qualify. In addition, Government policy should actively encourage the granting of self-insurers' licence to all organisations.

CONCLUDING REMARKS

Council supports the Self-Insurers Association's (SIA) very strong view that the current licencing framework is driving substantially increased costs for businesses in New South Wales and imposes a regulatory burden that is simply too onerous in a large number of respects. The only considerations relevant to the licensing or otherwise of a company for self-insurance should be prudential considerations and the prudential (as opposed to the) elements of the current licensing policy deal with this adequately.

Further it is Council's view that the SIA is clearly in the best position to provide input into the issues associated with the licensing framework for a self-insurer and would hope the views of the SIA are sought prior to finalisation of the draft policy conditions are formed.

Clearly the current licencing conditions which include the claims management and WHS audit regimes are inconsistent with the governments public policy outcomes detailed in 2.1.3 of the review document.

Yours faithfully

Greg Finnie
Manager Risk Management
Hawkesbury City Council