

Improving worker access to information in the NSW workers compensation system

Final Report

This report has been prepared by

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for the State Insurance Regulatory Authority Workers
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Executive Summary

This report commenced as an examination of the policy and legal considerations on worker access to records held by insurers in the workers compensation system.

The regulatory framework of the NSW workers compensation system is a complex arrangement of Acts, Regulations, and mandatory Guidelines which prescribe injury management and claims management procedures designed to meet the needs of injured workers when they sustain an injury at work.

The three key system objectives are: effective and efficient provision to injured workers of proactive injury management with appropriate benefits and supports to assist their recovery and promote their return to work; to secure the health, safety and welfare of workers by preventing work-related injury; to ensure the primary and secondary objectives are financially viable and that employer contributions are matched to the risks faced.

All stakeholders agree that the key consideration for any reform or change to the system is whether that reform or change advances the "*the system objectives*".

Workers assert key to the fulfilment of the system objectives is transparency and the sharing of information held and obtained by insurers. Workers argue that the system does not facilitate the timely sharing of information.

Existing privacy laws, both state and commonwealth establish an individual's "right to information" and a set of privacy principles which dictate how an individual's personal and health information will be shared with the individual and third parties. Workers have little awareness of their 'right to information' and the existence of those privacy principles.

Insurers agree that the system objectives are, primarily, fairness and effective and proactive management of injuries. They acknowledge that there is need for consistency in the provision of access to information to avoid disadvantage to any worker and to achieve the objectives of the system. Insurers, like workers, seem largely unaware of the overarching privacy laws and privacy principles which mandate transparency and open sharing of a worker's personal and health information.

The NSW workers compensation system does not limit the exercise of rights under overarching privacy legislation. It simply does not go far enough in facilitating a worker's exercise of their right to information or the fulfilment of an insurer's or employer's obligations to share information.

Other states' workers compensation systems, principally Queensland and Victoria, embrace the 'right to information' and provide practice rules based on privacy principles monitored and enforced by the regulator or within the workers compensation scheme.

It is a recommendation of this report that SIRA commence a process to embrace in the NSW workers compensation system, the rights and obligations in the privacy laws and privacy principles. As a first initiative and practical solution to improve sharing of information, SIRA is encouraged to publish a Claims Administration Manual which adopts privacy principles and obligations and prescribes practical guidance and directions relating to access to and sharing of information. Secondly, SIRA should consider amendment of the NSW workers compensation legislation to recognise and adopt a worker's right to information and to align obligations to provide access and the right to access information with the overarching Commonwealth and NSW freedom of information and privacy laws and principles.

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Introduction

This report examines the circumstances in which a worker can access their personal and health information in the NSW workers compensation system (regardless of which scheme of benefits they are entitled to receive). In doing so the author examines the workers compensation system objectives, whether a worker has an enforceable right to information and whether that right, if it exists, is adequate or sufficient as expressed in the NSW workers compensation legislation in light of Commonwealth and State freedom of information and privacy laws.

Workers have implored the NSW Workers Compensation regulator, SIRA, to, within the exercise of their functions and objectives, improve workers' access to the personal and health information collected by an insurer during the claims management process to enable them to make informed and meaningful decisions about health and work. Workers assert that the regulatory framework prescribing access to information operates in some circumstances as a barrier to a worker's full participation in the injury management process by only requiring an insurer to provide access to information in the event of a 'dispute'.

Some insurers provide full and early access to information to workers, but on a case by case basis. Those insurers' practices are inconsistent - they determine when access will be provided and the extent to which information will be provided. They are not guided by a set of rules, a practice code or directions. Only the State's self-insurer (TMF) considers and responds to all requests by workers for access to information under state's privacy and freedom of information legislation.

The primary objective of the NSW workers compensation system is that all injured workers be assisted back to health following injury as quickly as possible by the provision of prompt and effective treatment, injury management and vocational rehabilitation. This primary objective is supported by a further objective that a worker receive benefits including income support whilst they work towards achieving that aim. Central to and the focus of the primary objective is the injured worker and their path to health and work.

Some support for the proposal that access to information be improved is gained from the Clinical Framework for the Delivery of Health Services¹ adopted by the NSW workers compensation regulator. The clinical framework provides a set of 5 principles for the provision of health services to injured workers.² The third principle, 'empower the injured person to manage their injury', contains three key messages:

"Empowering the injured person to manage their injury is a key treatment strategy and should be incorporated in all phases of injury management,

The main ways to empower an injured person are education, setting expectations, developing self-management strategies and promoting independence from treatment,

¹ "Clinical framework for the Delivery of Health Services" TAC and WorkSafe Victoria 2012 adopted by SIRA

² The Clinical Framework outlines a set of guiding principles for the delivery of health services. These principles are intended to support healthcare professionals in their treatment of an injury:

1. Measurement and demonstration of the effectiveness of treatment
2. Adoption of a biopsychosocial approach
3. Empowering the injured person to manage their injury
4. Implementing goals focused on optimising function, participation and return to work
5. Base treatment on best available research evidence

Healthcare professionals need to empower an injured person to actively participate in activities at home, work and in the community as part of their rehabilitation".

Such an approach requires the injured person be kept informed of all aspects of their treatment and rehabilitation (injury management). An uninformed worker cannot be expected to participate and develop collaborative treatment goals or to learn and practice appropriate and effective self-management strategies. Earlier and more open access to personal and health information may assist in delaying the development of counter-productive or restrictive beliefs or development of behaviours that do not support recovery, independence and return to work.

Access to certain categories and types of information is permitted by the workers compensation Acts. Access to specific types of information is mandated by the Regulation only at the time of a liability dispute notice.

This report will examine the NSW workers compensation regulatory framework: how access to personal and health information is provided for currently, when access to information is provided and what information is accessible. It will consider stakeholder feedback on access to information in the workers compensation system: Are the current access arrangements sufficient? Do they further the system objectives? what could be done towards improving that access? Is there a practical outcomes based solution to address the issue?

This report explores the 'right to information': whether it exists and if so, its genesis and relevance. Essential to the examination of the 'right to information' is an understanding of the Commonwealth and state freedom of information and privacy laws and the way in which the Australian and state privacy principles interrelate with and impact upon the NSW workers compensation legislation. An assessment of other comparable jurisdictions is made to assist in the consideration of the options available to improve a worker's access to information in the NSW system.

In conclusion this report will identify the evidence base for improving a worker's access to information in light of policy and legal considerations, make recommendations and identify outcome based solutions to support the recommendations.

Report process and structure

Review/inquiry process

This report was commissioned by the State Insurance Regulatory Authority, Workers Compensation and Home Building Division in October 2016.

The task of the report was to undertake an analysis of the policy and legal considerations on workers' access to records held by insurers in the NSW workers compensation system and to make recommendations for improving worker access to information.

This report is not concerned with examining the benefits available nor the efficacy of the various schemes of benefits under the NSW workers compensation system.

The report is based on desktop research including a review of the NSW workers compensation legislation, comparable legislation in other jurisdictions, available literature review and analysis, documentary analysis, and has been enhanced through contributions by way of stakeholder submissions to the remake of the 2010 *Workers Compensation Regulation* carried out in 2016 by SIRA and roundtable and face to face consultation with some stakeholder groups.

In terms of the scope and breadth of the review of comparable legislation, the author commenced with an examination of Commonwealth freedom of information and privacy laws and identified principles that would assist in the comparison between various state's handling of access to information in their workers compensation legislation. An examination and analysis of the workers compensation legislation of the states of Victoria and Queensland was made in the context of the applicable privacy principles and that state's freedom of information and privacy legislation.

The report was undertaken in 20 days over a 6 month period and is a detailed examination of the regulatory framework and the evidence that might support policy or regulatory change.

Report structure

The report is divided into the following parts:

- Executive Summary
- Introduction
- Report process and structure
- Glossary of Terms
- Discussion
- Options
- Recommendations
- Appendices, and
- References and Bibliography.

As the author of this report I worked independently and have reached my own conclusions.

The views expressed in this paper are the author's personal views and do not necessarily reflect the views of the NSW State Insurance Regulatory Authority or stakeholders in the NSW workers compensation system.

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Glossary of terms

1987 Act refers to the *Workers Compensation Act 1987* (as amended).

1998 Act refers to the *Workplace Injury Management and Workers Compensation Act 1998*.

The Acts refers to the *Workers Compensation Act 1987* (as amended) and the *Workplace Injury Management and Workers Compensation Act 1998*.

Claim refers to a claim made by a worker for workers compensation benefits under the Acts.

Claims Guidelines refers to the *Guidelines for claiming workers compensation: Requirements, information and guidance for workers, employers, insurers and other stakeholders*, published by SIRA on 1 August 2016.

icare refers to *Insurance and Care NSW (ICNSW)* as defined and constituted under the *State Insurance and Care Governance Act 2015* (being a statutory body corporate and a NSW Government agency: see also section 13A, *Interpretation Act 1987*).

Information – is not defined within the Acts, regulation or guidelines. In this report 'information' where not specified is used to include any facts, document, report or thing in which details, particulars, data, knowledge, opinion or other personal and health information are stated or recorded pertaining to the worker.

Insurer(s) – A reference to insurer or insurers includes:

- The *Workers Compensation Nominal Insurer* (as defined in section 3, 1998 Act) and its five *scheme agents* (as defined in section 3, 1998 Act): Allianz Australia Workers' Compensation (NSW) Limited, CGU Workers Compensation (NSW) Limited, Employers Mutual NSW Limited, GIO General Limited and QBE Workers Compensation (NSW) Limited. As of 1 January 2018 Employers Mutual NSW Limited will be only scheme agent.
- *iCare Self-Insurance* (formerly SiCorp) through the Treasury Managed Fund (TMF) and its three workers compensation claims management service providers: Allianz Australia Insurance Ltd, Employer's Mutual Limited and QBE Insurance Australia Limited. icare self-insurance administers managed fund schemes serving NSW Government agencies and their employees.
- *Self-insurers* (as defined in section 3, 1998 Act) – those employers SIRA has licenced to manage their own workers compensation liabilities and claims.
- *Specialised insurers* (as defined in section 3, 1998 Act) - who hold a licence to provide workers compensation insurance for a specific industry or class of business or employers.

PIAWE refers to Pre-average weekly earnings as defined in the 1987 Act.

Regulation refers to the *Workers Compensation Regulation 2016*.

SIRA refers to the State Insurance Regulatory Authority Workers Compensation and Home Building Division as defined and constituted under the *State Insurance and Care Governance Act 2015* (being a statutory body corporate and a NSW Government agency: see also section 13A, *Interpretation Act 1987*), also known as 'the regulator'.

The Commission has the same meaning as in section 4 of the 1998 Act and refers to the Workers Compensation Commission of New South Wales.

WIRO refers to the Workers Compensation Independent Review Officer appointed from time to time under section 24 of the 1998 Act.

Discussion

1. The NSW workers compensation system objectives

- 1.1 The key objective of the NSW workers compensation system is to assist injured workers and promote their return to work as soon as possible following an injury by providing prompt treatment of injuries, effective and proactive management of injuries and necessary medical and vocational rehabilitation following injuries.³
- 1.2 Workers are to be assisted and supported during incapacity following injury by payment of income support, payment for reasonably necessary treatment and other related expenses and payment for permanent impairment or death.⁴
- 1.3 The system must be fair and ensure an employer's contribution (by means of premium payments for insurance) accurately reflects the risks faced by taking into account the employer's strategies and performance in injury prevention, injury management and return to work. Employers are invited to proactively and positively engage in the system to ensure that their workers are protected from injury, supported when injury occurs and encouraged to return to work as soon as possible after injury.
- 1.4 The system objectives put the worker at the centre of the system, supported by the employer, with payments of benefits and assistance by an insurer (sometimes the insurer will also be the employer or the government). The scheme of benefits is designed to ensure affordability and financial stability and sustainability of the system.
- 1.5 The system is "*the largest defined benefits system within Australia.*"⁵ The regulator (SIRA) has recently proposed a range of measures to monitor and regulate system performance against the system objectives. Most importantly, SIRA proposes to measure 'effectiveness', 'efficiency', 'customer experience' and 'equity'.⁶
- 1.6 An injured worker must make a claim for compensation benefits following an injury. Insurers and employers collect and use information about a worker to make informed decisions and determinations during the 'life' of the claim, for example, clinical records, employment records, medical reports. The types of decisions or determinations range from agreeing to pay weekly income support, meet treatment expenses or a particular regime of treatment, approve rehabilitation services, provide domestic and other supports and so on.
- 1.7 The system objectives apply regardless of the scheme under which the worker's benefits will be paid. The NSW workers compensation system includes separate and distinct schemes and benefit arrangements for coalminers, the 'exempt category of workers'⁷ (police officers, paramedics and firefighters) and bush fire, emergency and rescue services workers with the balance of NSW workers generally described as the 2012 scheme beneficiaries.

2. Information about a worker

- 2.1 Information collected about a worker falls into two broad categories: 'personal information', and 'health information'. The NSW workers compensation legislation does not define these categories however the Claims Guidelines provides that refusal by a

³ Section 3, 1998 Act

⁴ Ibid

⁵ SIRA *Workers compensation system performance report 2014/2015* paragraph 2.3

⁶ Ibid, Chapter 3

⁷ Claims Guidelines, Scope, page 5

worker to release or facilitate the collection of "personal or health information relevant to the injury to help determine their entitlement to compensation" founds the basis of a reasonable excuse for not commencing provisional payments of weekly payments upon notification of injury.⁸ The categorisation of information and the relevance of such categorisation will be discussed later in this report.

- 2.2 In the ordinary operation of the system and the compensation schemes, information about a worker is collected by the worker, the insurer and the employer.
- 2.3 Information is collected from many sources including the worker, the employer, service providers to the worker such as treatment providers, allied health service providers, hospitals, rehabilitation providers, vocational advisors, service providers to the employer or insurer such as investigators, witnesses, co-workers, 'independent medical examiners' or 'medico-legal assessors' and government and private sector agencies.

2.4 Information collected from workers

- 2.4.1 Workers must give oral or written notice of injury to their employer. The information grounding the notice includes the name and address of the injured worker, the cause of injury (in ordinary language) and the date on which the injury happened.⁹
- 2.4.2 Workers must provide information of any medical or related treatment, hospital treatment, workplace rehabilitation service or ambulance service or damage to property which occurs as a result of a work related injury to their employer.¹⁰
- 2.4.3 A worker who does not agree to the release or collection of personal or health information relevant to the injury may not receive provisional payments of weekly compensation.¹¹
- 2.4.4 Where weekly payments have commenced a worker must provide a form of authority to the insurer that authorises "a provider of medical or related treatment, hospital treatment or workplace rehabilitation services to the worker in connection with the injury to give the insurer information regarding the treatment or service provided or the worker's medical condition or treatment relevant to the injury".¹²
- 2.4.5 Failure to provide an authority within seven days of a request may result in the discontinuation of weekly payments of compensation.¹³
- 2.4.6 Workers are required to provide information to an insurer under a 'duty to co-operate'¹⁴ stated thus:
- “(1) A claimant must co-operate fully in respect of the claim with the insurer liable under the claim.
- (2) In particular, the claimant must comply with any reasonable request by the insurer to furnish specified information (in addition to the information

⁸ Claims Guidelines, Chapter A2, page 11.

⁹ Section 255(1), 1998 Act

¹⁰ Section 257(1)(b), 1998 Act

¹¹ Claims Guidelines, op cit Chapter A2.

¹² Section 270(1), 1998 Act

¹³ Section 270(2), 1998 Act

¹⁴ Section 71, 1998 Act

furnished in the claim form)."

The duty extends until proceedings are commenced in the Commission in respect of the claim. "Specified information" is not defined in the legislation, regulation or the Claims Guidelines.

- 2.4.7 It is worthy of note that workers must attend and participate in medical examinations and assessments at the direction of an employer¹⁵ and by a medical practitioner or other health care professional for the purpose of a work capacity assessment arranged by the employer or insurer¹⁶. A worker's refusal to attend or obstruct such an examination will result in the worker's weekly payments being suspended until the examination or assessment takes place. However, it is generally assumed and accepted that workers do not have a right to see the report generated following the assessment except for the good grace of the insurer/employer or at the time a dispute notice is generated.

2.5 Information collected by and from employers

- 2.5.1 Employers collect information about their employees (workers) in the ordinary course of business which forms part of 'employee records'. Defined in the *Privacy Act 1988 (CW)* 'employee records' in this context can be taken to mean:

"a record of personal information relating to the employment of the employee. Examples of personal information relating to the employment of the employee are health information about the employee and personal information about all or any of the following:

- (a) the engagement, training, disciplining or resignation of the employee;*
- (b) the termination of the employment of the employee;*
- (c) the terms and conditions of employment of the employee;*
- (d) the employee's personal and emergency contact details;*
- (e) the employee's performance or conduct;*
- (f) the employee's hours of employment;*
- (g) the employee's salary or wages;*
- (h) the employee's membership of a professional or trade association;*
- (i) the employee's trade union membership;*
- (j) the employee's recreation, long service, sick, personal, maternity, paternity or other leave;*
- (k) the employee's taxation, banking or superannuation affairs."*

- 2.5.2 Employers are obliged to notify the insurer of a worker's injury and to exchange information about the injury within 48 hours of becoming aware of the injury happening.¹⁷ The information required includes the name and

¹⁵ Section 119, 1998 Act

¹⁶ Section 44A(5), 1987 Act

¹⁷ Section 44, 1998 Act

address of the injured worker, the cause of injury (in ordinary language) and the date on which the injury happened.¹⁸

- 2.5.3 Employers (other than coal miner employers and bush fire, emergency and rescue services) are required to provide information as specified in the Claims Guidelines for claiming workers compensation, chapter A1. This information includes the name of the treating doctor (or medical centre or hospital) where relevant, and the time of injury or period over which the injury emerged, a description of how the injury happened and a 'description of the injury'.
- 2.5.4 Employers (other than self-insurers) who receive a claim for compensation "or any other documentation in respect of such a claim" must provide that claim or documentation to the insurer within 7 days of receipt.
- 2.5.5 Employers must provide "further specified information" requested of them by the insurer as is in their possession or is reasonably obtainable by them, in respect of a claim for compensation or documentation or notified injury, to an insurer within 7 days of a request.¹⁹
- 2.5.6 "Further specified information" is not defined in the legislation, regulation or the Claims Guidelines.

2.6 Information collected by insurers

- 2.6.1 Insurers are the central repository of all information (both personal and health information) relevant to a 'claim' made by a worker collected and provided by workers and employers.
- 2.6.2 The insurer's function is to manage a worker's claim: it is the primary contact for the worker and others involved in assisting workers return to work and recovery.
- 2.6.3 The insurer case manager makes early contact with the worker, employer and the doctor after receiving notification of a claim to determine the worker's requirements, authorises and arranges payment of reasonably necessary medical and related expenses, determines the worker's entitlement to weekly compensation payment and assists the employer to meet their obligations to support the worker.
- 2.6.4 In addition to information collected from the employer and the worker, the insurer can request information and documentation from the worker's service providers (nominated treating doctor, allied health practitioners), investigators, the employer witnesses to an accident or incident ('injury'), and service providers engaged to advise on certain aspects of a worker's recovery and return to work.
- 2.6.5 The insurer will collect information such as 'medical reports' from treating medical practitioners and allied health service providers, progress reports, treatment and assistance requests, rehabilitation reports (including vocational assessments and functional capacity assessments) and clinical notes.

¹⁸ Section 255(1), 1998 Act

¹⁹ Sections 69(1)(b) and 264(2), 1998 Act [section 69 is the only non-redundant section in Chapter 4, Part 2, Division 1 of the 1998 Act and is repeated and expanded in section 264]

- 2.6.6 Insurers may arrange assessments or examinations of a worker by an Independent Medical Examiner (section 119, 1998 Act and the *Guidelines for Independent Medical Examinations and Reports, 2012* WorkCover [now SIRA])
- 2.6.7 Insurers may arrange surveillance or investigation of the worker in certain circumstances including video, voice recordings, photographic material, reports and statements.

3. The NSW workers compensation regulatory framework

3.1 Introduction

- 3.1.1 The regulatory framework of the NSW worker's compensation system consists of Acts, regulations, orders and guidelines²⁰.
- 3.1.2 There are two Acts that provide the basis for the system: the *Workers Compensation Act 1987* (the 1987 Act) and the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act). Section 2A of the 1987 Act describes the relationship between the two Acts thus:
- "(1) *The Workplace Injury Management and Workers Compensation Act 1998 is referred to in this Act as the 1998 Act.*
- (2) *This Act is to be construed with, and as if it formed part of, the 1998 Act. Accordingly, a reference in this Act to this Act includes a reference to the 1998 Act.*
- (3) *In the event of an inconsistency between this Act and the 1998 Act, the 1998 Act prevails to the extent of the inconsistency.*"
- 3.1.3 There are two general regulation making powers: one in the 1998 Act and one in the 1987 Act. They are complimentary, however, section 248 of the 1998 Act is most often cited as the source of the power to make regulations.
- 3.1.4 Section 248 of the 1998 Act provides:
- "(1) *The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.*
- (2) *A regulation may be made under this Act for or with respect to any matter for which regulations may be made under the 1987 Act.*
- (3) *A regulation may create an offence punishable by a penalty not exceeding 20 penalty units."*
- 3.1.5 The current regulations are contained in the *Workers Compensation Regulation 2016* (The Regulation). The Regulation is the crucial 'tool' for providing operational effectiveness to the Acts, and in particular, the management of claims by insurers. The regulations can create offences for which a penalty may be imposed and can make provisions with respect to anything the Act permits by way of guidelines.

²⁰ See Appendix 1

3.1.6 Section 376 of the 1998 Act permits SIRA to issue Guidelines.

376 Issue of Guidelines

- (1) *The Authority may issue guidelines with respect to the following:*
 - (a) *the assessment of the degree of permanent impairment of an injured worker as a result of an injury,*
 - (a1) *the professional or other requirements (including qualifications, training or membership of professional bodies) for a medical practitioner to be permitted to assess (or carry out any function related to assessing), for the purposes of the Workers Compensation Acts, the degree of permanent impairment of an injured worker as a result of an injury,*
 - (b) *the giving of interim payment directions by the Registrar under Part 5,*
 - (c) *such other matters as a provision of the Workers Compensation Acts provides may be the subject of Workers Compensation Guidelines.*
- (2) *The Minister may issue guidelines with respect to the procedure for assessment under Part 7 (Medical assessment).*
- (3) *The Authority may amend, revoke or replace Workers Compensation Guidelines made by the Authority, and the Minister may amend, revoke or replace Workers Compensation Guidelines made by the Minister.*
- (4) *Workers Compensation Guidelines may adopt the provisions of other publications, whether with or without modification or addition and whether in force at a particular time or from time to time.*
- (5) *Workers Compensation Guidelines (including any amendment, revocation or replacement) are to be published in the Gazette and take effect on the day of that publication or, if a later day is specified in the Guidelines for that purpose, on the day so specified.*
- (6) *The regulations may make provision for or with respect to any matter for which the Workers Compensation Guidelines can provide.*

3.1.7 There are several guidelines issued, with the most relevant being the "Guidelines for claiming workers compensation: Requirements, information and guidance for workers, employers, insurers and other stakeholders."²¹

3.1.8 Unlike the regulations, the guidelines cannot create an offence for which a penalty can be imposed.

3.2 Insurance arrangements

3.2.1 The 1987 Act deals with insurance arrangements including the establishment of the "Workers Compensation Insurance Fund", the establishment of the 'Nominal Insurer', self and specialised insurers, insurance policies, premiums, licencing and regulation of insurers²².

²¹ SIRA Catalogue no. SIRA08084, 2016

²² See Part 7 Insurance, 1987 Act

- 3.2.2 Insurance and Care NSW (icare) is authorised to act for the Nominal Insurer²³. The Nominal Insurer is responsible for managing the operation of the insurance fund, including the investments of the assets of the fund. The assets of the fund "are subject to a statutory trust to be held on trust for the purposes to which assets of the Insurance Fund are authorised or required to be applied by or under [the 1987 Act] and for the benefit of workers and employers"²⁴.
- 3.2.3 The Nominal Insurer may appoint scheme agents who are to exercise the functions of the Nominal Insurer subject to the *direction* and *control* of the Nominal Insurer (icare)²⁵.
- 3.2.4 The regulations can create an offence for contravention by a scheme agent of any obligation imposed upon it under the agency agreement.²⁶
- 3.2.5 Employers must obtain a policy of insurance from a licenced insurer.²⁷ SIRA is responsible for the licencing of insurers.²⁸ SIRA can impose conditions on the granting of a licence or during the currency of a licence. Non-compliance with such a condition carries a penalty²⁹. SIRA can issue Market Price and Premiums Guidelines with which a licenced insurer, including the Nominal Insurer, must comply.³⁰

3.3 Regulation of licenced insurers – Claims Administration Manual

- 3.3.1 SIRA can publish a 'claims administration manual' (Claims Manual).³¹ The Claims Manual is required to promote, as far as is practicable:
 - "(a) *the prompt processing of claims and payment of amounts duly claimed, and*
 - (b) *the giving of information about workers' entitlements and about procedures for the making of claims and the resolution of disputes, and*
 - (c) *the minimisation of the effect of injuries to workers by the making of prompt arrangements for rehabilitation, and*
 - (d) *the proper investigation of liability for claims, and*
 - (e) *the recovery of proper contributions in connection with claims from other insurers or persons."*
- 3.3.2 Section 192A of the 1987 Act provides that the Claims Manual may "make provision in connection with all matters relating to the administration of claims" including rehabilitation assessment of injured workers, the provision or arrangement of suitable employment or rehabilitation training for injured workers, the monitoring of employment seeking activities or rehabilitation training by workers, arrangements for the settlement of claims for damages, and procedures to be followed before a claim is made so long as those

²³ Section 154C, 1987 Act

²⁴ Section 154D, 1987 Act

²⁵ Section 154G, 1987 Act

²⁶ Section 154N, 1987 Act

²⁷ Section 155, 1987 Act

²⁸ Section 177, 1987 Act

²⁹ Section 181, 1987 Act

³⁰ Section 168, 1987 Act

³¹ Section 192A, 1987 Act

provisions are not inconsistent with the 1987 Act, the 1998 Act or the regulations.

3.3.3 Section 192A also provides that the Workers Compensation Guidelines under the 1998 Act "can make provision in connection with any matter in connection with which the claims manual can make provision".

3.3.4 Most importantly, section 192A provides that SIRA can issue an insurer directions as to the procedure to be followed in the administration of any claim or a class of claims in order to comply with the Claims Manual, the Workers Compensation Guidelines or the Acts.³² It is a condition of an insurer's licence that they comply with any direction given under section 192A.³³ Failure to comply with such a direction is an offence and carries a penalty.³⁴

3.3.5 There is to the author's knowledge no current Claims Manual prepared or published by SIRA at the time of the writing of this report.

4. How workers' access to information is provided for within the NSW workers compensation regulatory framework

4.1 Introduction

4.1.1 Section 232 of the 1998 Act (Chapter 6 Miscellaneous) prescribes that a worker may request from their employer their address and their insurer's name and address. Failure to supply that information only or to supply false and misleading information will result in the imposition of a penalty.

4.1.2 The section operates to ensure that the employer does not withhold vital information necessary for a worker to be able to make and pursue a claim for compensation in the event of injury.

4.1.3 Chapter 4 (Workers Compensation), Part 2 (Compensation – claims and proceedings) of the 1998 Act contains the three primary legislative provisions which permit access by a worker to information collected pertinent to their claim: sections 73, 119 and 126.

4.1.4 Each of the sections provides a *regulation making power* which can specify the circumstances in which an insurer or employer is required to provide access to specified kinds of information to a worker.

4.1.5 Each section describes the 'type' of information that may be covered by the regulation, and, in some circumstances prescribes the time frame or circumstances in which the information must be provided.

4.1.6 Each section prescribes the penalty for failure to provide the information as required by the regulations.

4.1.7 In addition to sections 73, 119 and 126 of the 1998 Act, section 54 of the 1987 Act (the provision relating to notice of termination or reduction of weekly payments) and section 74 of the 1998 Act (the provision relating to notice of a liability dispute) each contain a regulation making power in relation to the form of notice and the 'other information' to be provided in or with the notice. Similarly, section 287A of the 1998 Act provides that the regulation can identify

³² Section 192A(4), 1987 Act

³³ Section 192A(5), 1987 Act

³⁴ Section 192A(4A), 1987 Act

what information is to accompany an application for review of a dispute notice.

- 4.1.8 The regulation making power in section 54 of the 1987 Act and sections 73, 74, 119, 126 and 287A of the 1998 Act has been invoked by the making of clauses 38 and 41 in the 2016 Regulation (formerly clauses 43 and 46 of the *Workers Compensation Regulation 2010*).
- 4.1.9 During the remake of the 2010 Regulation in 2016, SIRA invited submissions on the Regulatory Impact Statement and draft 2016 Regulation. Of the ten published submissions, five raised the issue of worker access to information.³⁵
- 4.1.10 In their consultation summary document³⁶ SIRA identified 'worker access to certain medical reports and other reports obtained by the insurer' as a 'key issue', stating:

"A majority of submissions expressed opposition to the proposal that the provisions relating to worker access to certain medical reports and other reports obtained by the insurer be remade without change. That is, a majority of submissions expressed views supporting broader access provision more generally, and also supporting the removal of a 'dispute' as a precondition for access."

4.2 Primary legislative provisions in the Acts for access to information by a worker:

4.2.1 Section 73, 1998 Act

- 4.2.1.1 Section 73 is sub-titled "Insurer to provide copies of reports to worker". The section is contained within Division 2 of Part 2 of Chapter 4, "Administration by insurers of claims for compensation or damages".
- 4.2.1.2 The section does not mandate the provision of reports by an insurer to a worker.
- 4.2.1.3 Sub-section (1) provides that "*The regulations may make provision for or with respect to requiring an insurer to provide a worker, a worker's legal representative or any other person with a copy of a specified report, or a report of a specified kind, obtained by the insurer in relation to a claim by the worker.*"
- 4.2.1.4 The section continues "*Without limiting subsection (1), the kind of reports to which the regulations under this section can apply include investigators' reports, rehabilitation providers' reports and reports of assessments under section 40A (Assessment of incapacitated worker's ability to earn) of the 1987 Act.*"³⁷

4.2.2 Section 119, 1998 Act

- 4.2.2.1 Section 119 is sub-titled "Medical examination of workers at direction of employer". The section is contained within Division 7 of Part 2 of Chapter 4, "Medical examinations and disputes".

³⁵ Relevant submissions are attached as **Appendix 2**

³⁶ <http://www.sira.nsw.gov.au/consultations/workers-compensation-regulation-amendments/outcomes/publications/draft-workers-compensation-regulation-2016-consultation-summary>

³⁷ Note: section 40A was repealed in 2012 and is only relevant in this context to the exempt category of workers. There is no new section which replaces section 40A except for the concept of a work capacity assessment referred to in section 44A(5) of the 1987 Act (as amended).

- 4.2.2.2 The section requires a worker who has given notice of an injury to submit himself or herself for a medical examination provided and paid for by the employer.
- 4.2.2.3 If the worker receives weekly payments of compensation then the worker must submit to such an examination from time to time.
- 4.2.2.4 The section does not mandate the provision of reports by an employer or insurer to a worker.
- 4.2.2.5 Subsection (5) states "*The regulations may make provision for or with respect to requiring an employer or insurer to provide a worker, a worker's legal representative or any other person, within the period required by the regulations, with a copy of any medical opinion or report furnished to the employer or insurer by a medical practitioner in connection with an examination of the worker pursuant to a requirement under this section.*"

4.2.3 **Section 126, 1998 Act**

- 4.2.3.1 Section 126 is sub-titled "Copies of certain medical reports to be supplied to worker". The section is contained (with section 119) within Division 7 of Part 2 of Chapter 4, "Medical examinations and disputes".
- 4.2.3.2 Unlike sections 73 and 119, section 126 contemplates provision of reports by an insurer to a worker if 'the worker's claim is disputed'.
- 4.2.3.3 The section does not mandate the provision of information to a worker if there is no dispute.
- 4.2.3.4 Sub-section (2) states "*The regulations may make provision for or with respect to requiring an employer or insurer in possession of a medical report relating to an injured worker to provide a copy of the report to the worker, the worker's legal representative or any other person, if the worker's claim is disputed*".
- 4.2.3.5 'Medical report' is defined in sub-section 1.

4.3 **Other relevant provisions in the Acts**

4.3.1 **Section 54, 1987 Act and sections 74 & 287A, 1998 Act**

- 4.3.1.1 Section 54 of the 1987 Act and section 74 of the 1998 Act concern the requirements of notice of termination or reduction of weekly payments, or notice when liability is disputed. Such notices must contain "*such other information as the regulations may prescribe*".
- 4.3.1.2 Similarly, section 287A of the 1998 Act, which concerns the notice to be provided on review of a dispute notice, must also "*contain the matters required to be set out under section 74 in a notice of a dispute and may contain such other information as the regulations may prescribe*".

4.3.2 **Section 238AA, 1998 Act**

- 4.3.2.1 Section 238AA of the 1998 Act gives an inspector the power to issue a notice demanding production of documents and information in

relation to a possible contravention of the Acts or the regulations within a specified timeframe.

4.3.2.2 The power to demand production of documents is to be used for specific purposes and does not appear to be a means by which a worker can access information held by an insurer or employer.

4.4 The regulation making power

4.4.1 The Acts contain regulation making provisions enabling the making of regulations "for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act".³⁸

4.4.2 Sections 73, 74, 119 and 126 contain regulation making powers to prescribe how and when workers can access various types of information during the 'life of a claim'.

4.4.3 Clauses 38 and 41 of the regulation are the only enactments of those regulation making powers.

4.4.4 The general regulation making power to prescribe access to information and documents in circumstances other than as identified in clauses 38 and 41 has not been invoked.

4.5 The 2016 Workers Compensation Regulation

4.5.1 Clause 41 of the 2016 Regulation prescribes the circumstances in which a worker can access information about themselves or their claim, what 'types' of information can be accessed, when access can be obtained and how access is obtained.

4.5.2 On the remake of the Regulation in 2016, the clauses relevant to access to information were renumbered and underwent minimal change. Most importantly and bearing in mind the Regulation applies across all 'schemes', two 'classes' or 'types' of information were removed from the predecessor to clause 41:

- *'reports of assessments under section 40A (Assessment of incapacitated worker's ability to earn) of the 1987 Act, and*
- *wage details required to be supplied under section 43(2) of the 1987 Act where a decision has been made to decline payment of, or reduce the amount of, weekly benefits, but only if such details have not already been supplied to the worker.'*

4.5.3 These removed categories of information remain relevant to coalminers and the exempt class of workers.

4.5.4 Clause 38 of the 2016 Regulation concerns the information to be provided with a liability dispute notice (section 74 notice). Clause 38 reinforces the obligations under clause 41.

³⁸ Section 248(1), 1998 Act; section 280(1), 1987 Act

4.6 **What information is accessible by workers in the Acts and Regulation?**

- 4.6.1 The legislation and regulations do not define the types of information accessible as broadly as 'personal information' or 'health information'. Rather the legislation speaks of "specified reports, or a report of a specified kind"³⁹ (which may include investigators' reports, rehabilitation providers' reports and reports of assessments of an incapacitated worker's ability to earn⁴⁰), "any medical opinion or report furnished...by a medical practitioner in connection with the examination of the worker"⁴¹, "medical reports"⁴², "such information as may be prescribed"⁴³ and "such other information as the regulations may prescribe"⁴⁴.
- 4.6.2 In clause 41 of the Regulation the types of reports in the possession of the employer or insurer that a worker can access are identified as:
- (a) *medical reports, including medical reports provided pursuant to section 119 (Medical examination of workers at direction of employer) of the 1998 Act,*
 - (b) *certificates of capacity,*
 - (c) *clinical notes,*
 - (d) *investigators' reports,*
 - (e) *workplace rehabilitation providers' reports,*
 - (f) *health service providers' reports,*
 - (g) *reports obtained by or provided to an employer or insurer that contain information relevant to the claim on which a decision to dispute liability is made."*
- 4.6.3 Clause 41 imposes a mandatory obligation on an insurer to provide such specified reports and information where an employer or insurer makes a decision to dispute liability, or a decision to discontinue or reduce weekly payments a payment or a decision upon the review of a decision (under section 287A).⁴⁵
- 4.6.4 The obligation in clause 41 "applies to any report that is relevant to the claim or any aspect of the claim to which the decision relates, whether or not the report supports the reasons for the decision".⁴⁶ Note that despite the broad categories of reports (information) in clause 41, it remains possible for an insurer to assert that a report (information) is not relevant to the claim or any aspect of it.

³⁹ Section 73(1), 1998 Act

⁴⁰ Section 73(2), 1998 Act

⁴¹ Section 119(5), 1998 Act

⁴² Section 126(1), 1998 Act

⁴³ Section 54(4), 1998 Act

⁴⁴ Sections 74(2)(b) & 287A(3), 1998 Act

⁴⁵ Clause 41(2), 2016 Regulation

⁴⁶ Clause 41(3) & (4), 2016 Regulation

4.7 When is information accessible by workers in the Acts and Regulation?

- 4.7.1 Sections 73 and 119 of the 1998 Act do not specify when, in time, information should be provided.
- 4.7.2 Section 126 of the 1998 Act prescribes that the regulation can make provision for access to medical reports "*if the worker's claim is disputed*"⁴⁷. A strict reading of section 126 suggests that it is only applicable in the event of a claim being disputed.
- 4.7.3 Clause 41 prescribes that a worker must have access to reports at the time the following decisions are made and notified:
- a decision to dispute liability in respect to a claim (in accordance with section 74, 1998 Act)
 - A decision to discontinue payments or reduce weekly benefits (in accordance with section 54, 1987 Act), or
 - A decision on a section 287A review of a section 54 or 75 decision except if the report has already been provided to the worker.
- 4.7.4 As to when this is temporally, one must consider the consequences of not providing information as contemplated by sections 73(3), 119(6) and 126(3) (see 4.10 below). Those subsections imply that specified reports and information must be provided (presumably immediately) before the issue of a notice to dispute liability or to reduce or terminate payments of compensation or before the issue of a work capacity decision where the report is to be relied upon by the insurer as grounds for the making of the notice or decision⁴⁸ in order that the consequences which are set out in sections 73, 119 and 126 are meaningful.
- 4.7.5 Clause 41 of the Regulation is silent as to when, if at all, workers can access reports and information at any other time and in any other circumstances other than on the issue of a dispute notice.

4.8 How do workers access information under the Acts and Regulation?

- 4.8.1 There is no request mechanism contained within the legislation or regulation.
- 4.8.2 The regulation presumes information will be provided with the relevant dispute notice.
- 4.8.3 In circumstances where there is no dispute notice there is no procedure identified by which a worker can access information except for the procedure in section 232 of the 1998 Act (a request and response procedure in relation to employer and insurer details).
- 4.8.4 The Claims Guidelines do not provide guidance on how a worker can access information.
- 4.8.5 In practice, a request for information (under sections 73, 119 and 126 of the 1998 Act) is made by a worker's legal representative at the commencement of the investigation into a claim for compensation benefits. Such an

⁴⁷ Section 126(2), 1998 Act

⁴⁸ *Work capacity decision* is defined in section 43 of the 1987 Act: see specifically section 43(1)(f)

investigation may be prompted by the issue of a section 54, 74 or 287A notice or a work capacity decision or a broader examination of the worker's entitlement to benefits.

4.9 Exceptions to the rules – when access to information will not be provided

- 4.9.1 Access to information contemplated by clause 41 is not to be provided directly to the worker if the employer or insurer forms the view that provision of the information would "*pose a serious threat to the life or health of the worker or any other person*".⁴⁹
- 4.9.2 Where the employer or insurer forms the view that a serious threat is posed clause 41 requires medical information (reports, certificates or clinical notes) to be provided to a medical practitioner nominated by the worker and any other information to be provided to a nominated law practice.⁵⁰
- 4.9.3 In the alternative, the employer or insurer can apply to SIRA for a direction in relation to the provision of a report either to a nominated person as SIRA considers appropriate or SIRA may make such other directions as SIRA sees fit.⁵¹
- 4.9.4 As will be seen later, these exceptions reflect the Australian Privacy Principles and the NSW Health Privacy Principles (see 6 below).

4.10 Consequences of failure to comply with the regulation

- 4.10.1 The consequences of failure to provide information as provided by clause 41 of the Regulation are found in section 73(3), 119(6) and 126(3) of the 1998 Act.
- 4.10.2 The consequences are expressed identically in all three sub-sections:
- "(a) *the employer or insurer cannot use the opinion or report to dispute liability to pay or continue to pay compensation or to reduce the amount of compensation to be paid and cannot use the opinion or report for any other purpose prescribed by the regulations for the purposes of this section, and*
- (b) *the opinion or report is not admissible in proceedings on such a dispute before the Commission, and*
- (c) *the opinion or report may not be disclosed to an approved medical specialist or an Appeal Panel in connection with the assessment of a medical dispute under Part 7 of Chapter 7.*"
- 4.10.3 The consequences of failure to comply with the Regulation are only relevant in the event of proceedings before the Commission in relation to a dispute.
- 4.10.4 Failure to provide information as required in the Regulation is not categorised as an offence.
- 4.10.5 There appears to be no stated adverse consequences if a report or information is not provided with a work capacity decision or in a work capacity decision review. However, procedural fairness should dictate that similar consequences ought to apply to work capacity decisions also.

⁴⁹ Clause 41(5), 2016 Regulation

⁵⁰ Clause 41(6), 2016 Regulation

⁵¹ Clause 41(6), 2016 Regulation

4.11 Enforceability of the requirement to provide information under the Acts and Regulation

- 4.11.1 Given that there is no offence for failure to comply with sections 73, 119 and 126, or clause 41, clause 41 is not enforceable by the issue of a penalty notice⁵² or by proceedings before the District Court or Local Court.⁵³
- 4.11.2 The only avenue to 'enforce' compliance with clause 41 is to object to the admissibility of the reports not provided in proceedings before the Commission.
- 4.11.3 It is the writer's experience that any reports not provided in accordance with Clause 41 are provided to the worker's legal representative after the commencement and during the course of Commission proceedings. Those reports are thereafter admitted in the proceedings by consent, so long as the worker is first given the opportunity to countenance the report and obtain their own evidence if required.
- 4.11.4 Other sections create an offence and prescribe a penalty for failure to provide information. For example, section 69(1) of the 1998 Act imposes a fine of 50 penalty units on an employer for unreasonably failing to provide further specified information or documentation in respect of a claim to an insurer; section 232 of the 1998 Act imposes a fine of 20 penalty units on an employer if it provides a worker with false or misleading information as to the employer's business name and address or the name and address of the insurer from whom the employer has obtained a policy of insurance.
- 4.11.5 The imposition of a penalty for failure to provide certain information such as in sections 69(1) and 232 presumes that an insurer must be placed in a position to quickly and efficiently administer their obligations under the Acts and effectively manage claims. Any means to obfuscate or prevent swift and efficient claims management will be penalised.
- 4.11.6 Conversely, if a worker does not "co-operate fully" and provide information as requested by an insurer, the worker is prevented from commencing proceedings in the Commission whilst the failure to co-operate continues.⁵⁴ In addition, if a worker fails or refuses unreasonably to attend medical examinations arranged by the employer or insurer or to comply with a reasonable direction by an insurer, their payments can be suspended, discontinued or terminated.

4.12 The Claims Guidelines

- 4.12.1 General access to information during the life of a 'claim' is not addressed by the Claims Guidelines except where a claim for permanent impairment benefits is made. The Claims Guidelines provide that in making a settlement offer on a permanent impairment claim the insurer should include "*the documents the insurer relied on in making the offer*".⁵⁵
- 4.12.2 The Claims Guidelines state that insurers should 'consider the principles of procedural fairness, including fair notice' when making decisions which may

⁵² See section 246 Penalty Notices, 1998 Act

⁵³ See section 245 Proceedings for Offences, 1998 Act

⁵⁴ Section 71(3), 1998 Act

⁵⁵ Claims Guidelines, Chapter B6, page 49

affect a worker's rights or interests:

"Insurers will need to determine what the principles of procedural fairness require, on a case by case basis, having regard to the nature and potential consequences of each decision that may be made".

- 4.12.3 The Claims Guidelines do not go so far as to mandate that an insurer provide a copy of information considered in the making of a work capacity decision with the written notice. A worker must request access to such information upon receipt of a work capacity decision.⁵⁶

5. What happens in practice - The Stakeholder Perspective

5.1 Stakeholder feedback to the consultation on the 2016 Regulation remake

- 5.1.1 During the consultation on the remake of the 2010 Regulation in May 2016, ten published submissions were received.⁵⁷
- 5.1.2 In five of the ten submissions reference was made to the draft regulation clause 39 (now clause 41, previously clause 46) concerning a worker's access to information. All five submissions called for improvement, clarity and better regulation around the access by workers to information.⁵⁸
- 5.1.3 SIRA issued a consultation summary⁵⁹ in which it was stated *"a majority of submissions expressed views supporting broader access provision more generally, and also supporting the removal of a 'dispute' as a precondition for access. Several submissions recommended the regulation be changed to better reflect and or align with related regulatory provisions of the Health Records and Information Privacy Act 2002 and Government Information (Public Access) Act 2009."*
- 5.1.4 Three of the submissions referenced a discussion paper distributed to the Advisory Committee in the 'Parkes Project' titled *"Access to information by a Worker"* and lent support to the Statement of Principles concerning access to information and the draft recommendations proposed to the Advisory Committee in the Parkes Project (inquiry). (For a discussion of the Parkes Project see 5.4.6 below)
- 5.1.5 A submission to the remake received from iCare (as nominal insurer) addressed the proposed clause 39 (now 41) noting that *"The provisions with respect to the exchange of information, in particular clause 39 in the consultation draft, have not been amended there had been no amendment"*. iCare indicated that *"it would be helpful to have a clear regulatory regime governing the exchange of information. In particular, the powers of SIRA to require insurers to provide claim information are not clear."* iCare expressed opposition to the proposed introduction of a penalty for failure to comply with clause 39, noting that it was not appropriate, *"excessive and unnecessary"*. iCare submitted:

⁵⁶ See *"How to advise the worker of the work capacity decision"*, Claims Guidelines page 25

⁵⁷ <http://www.sira.nsw.gov.au/consultations/workers-compensation-regulation-amendments/consultation-submissions>

⁵⁸ See **Appendix 2**

⁵⁹ <http://www.sira.nsw.gov.au/consultations/workers-compensation-regulation-amendments/outcomes/publications/draft-workers-compensation-regulation-2016-consultation-summary>

"If the purpose of the new penalty is to ensure workers get access to information about their claim, it is suggested that this is not an appropriate mechanism as the obligation to provide reports under clause 39(3) relates only to insurer decisions to dispute liability or discontinue weekly payments. Workers can make an application to the insurer at any time to have access to their claims information under the Privacy and Personal Information Act 1998."

The *Privacy and Personal Information Act 1998* is discussed later in this report.

- 5.1.6 No single insurer independently provided a submission to the remake consultation process.
- 5.1.7 It is clear from the submissions that there is overall a desire for a clearer 'regulatory regime' governing access to information.

5.2 Workers' feedback

- 5.2.1 The author's personal experience is that the issue of limited access to information has remain unresolved for many years. The limitations on access to information were identified after material changes to the Workers Compensation Regulation and the Workers Compensation Acts and the advent of the 2003 Workers Compensation Claims Guidelines. It was observed by the legal profession that there was no longer a 'right' within the Acts, Regulation or Claims Guidelines to access personal and health information collected by the insurer from the insurer except on the issue of a dispute notice. Requests for information were encouraged under earliest versions Claims Guidelines to be fulfilled.
- 5.2.2 In practice there is no 'presumption in favour' of the provision of information to a worker.
- 5.2.3 Whilst exchange of information between parties (worker and insurer/employer) is encouraged once a dispute has been referred for determination before the Commission, there is no encouragement for early sharing of information prior to the issue of a dispute notice.
- 5.2.4 Whilst nothing within the workers compensation legislation prevents a worker from requesting access to information at any time before the issue of a dispute notice, there is no means of enforcement within the workers compensation legislation of such a request (by the provision of information) other than a complaint to the WIRO about the insurer's refusal to release information.⁶⁰
- 5.2.5 Workers assert that *"early exchange of information about a claim has the ability to avoid disputation and instead redirect focus on reconciling concerns of the parties to a potential dispute"*.⁶¹
- 5.2.6 Workers seek that *"the NSW Workers Compensation system aligns itself with current standard government practice in the provision of health services and*

⁶⁰ It is clear to the author that there is an avenue of complaint to the NSW Information Privacy Commissioner, however, there is no real appreciation of the role of the Privacy Commissioner and NSW privacy laws amongst stakeholders in the workers compensation system.

⁶¹ Appendix 2, Submission to the consultation on the remake of the 2010 Regulation: Australian Lawyers Alliance, "Access to information by a Worker" Discussion paper, WIRO Parkes Project July 2015.

adopts a full disclosure and access model".⁶²

- 5.2.7 Unions submit that access to personal and health information, particularly information created for injury management purposes, should be made available in a 'timely manner' in order that the worker can actively and voluntarily participate and engage in injury management (specifically return to work processes or consideration of alternative vocational options), and make fully informed decisions. Unions submit that the inability to obtain 'rehabilitation and return to work information' hampers success in return to work objectives and outcomes.⁶³
- 5.2.8 Workers' attempts to secure access to information other than when a dispute notice is or has been issued are costly in terms of time, 'disputation' and delay. There is no meaningful consequence for the inconvenience to the worker in having to pursue an insurer to release information.
- 5.2.9 Workers and their representatives have made the following submissions and observations about the access to information:
- 5.2.9.1 There is an inherent imbalance in the relative knowledge and power of the worker and insurer with respect to the worker's current capacity and health: "*the sooner information is disclosed and shared by both parties the less likely there are to be inappropriate power balances.*"⁶⁴
- 5.2.9.2 The withholding and or delayed release of information, and or selective release of information ensures that injured workers are pushed to the periphery of injury management decisions having an adverse effect on their return to work. The decision to withhold information is about power and not about effective and proactive management of injuries or effective claims management.⁶⁵
- 5.2.9.3 Workers should be considered at the centre of the injury management objectives of the system. Denial of early access to injury management information pushes workers to the periphery of the process and results in disempowerment.
- 5.2.9.4 Disempowerment or the perception of disempowerment leads to greater disputation and perverse outcomes.
- 5.2.9.5 Information is accessible too late in the claims 'process'. Access only in the event of a dispute places the worker at 'incredible disadvantage' in the claims process and has the potential to cause reactive rather than co-operative behaviour in the injury management process.

⁶² Appendix 2, Submission to the consultation on the remake of the 2010 Regulation: Injured Workers Support Network.

⁶³ Appendix 2, Submission to the consultation on the remake of the 2010 Regulation: Australian Manufacturing Workers' Union.

⁶⁴ "Workers Compensation Dispute Resolution Procedures in Western Australia – The New Regime." Guthrie R., Goldacre L. and Claydon W. (2008) QUTLJJ 8 (1): 48-76 at p.76

⁶⁵ Appendix 2, Submission to the consultation on the remake of the 2010 Regulation: Australian Manufacturing Workers' Union.

- 5.2.9.6 Inability to access information may be considered lack of procedural fairness.
- 5.2.9.7 The return to work imperative embodied in the system objectives means 'injury management information' is inherently important in the engagement of a worker in 'return to work' and in meeting injury management obligations. Withholding of injury management information (rehabilitation reports, functional capacity evaluations and vocational capacity assessments) prevents a worker from fully participating in injury management.
- 5.2.9.8 Workers have a right to be informed and educated about their injury and therefore be empowered to participate in injury management. Late or no access to information in the hands of the insurer or injury management advisors is less about injury management and more about claims management, specifically, decisions to curtail a worker's benefits.
- 5.2.9.9 Inability to access health information is contrary to the principles in the *Health Records and Information Privacy Act 2002* (NSW).
- 5.2.9.10 The system should align itself with current standard Government practice in the provision of health information and adopt a "full disclosure and access model".⁶⁶
- 5.2.9.11 The system objectives are directed towards real and effective solutions to workplace injury including real and not hypothetical return to work options. Injury management reports (including rehabilitation reports, workplace and functional assessments and vocational assessments and workplace counselling reports⁶⁷) are often misused to deem a worker unfit for the inherent duties of work and deprive the worker of suitable employment rather than place the worker in suitable employment.
- 5.2.10 Workers submit⁶⁸ that there are significant risks to the fulfilment of the workers compensation system objectives as a consequence of workers' inability to access personal and health information, particularly injury management information, in a timely and open way. The risks identified are:
- displacing the worker from the centre of the injury management objectives,
 - disadvantage through absence of knowledge,
 - dis-engagement from active participation in injury management,
 - delay in return to health outcomes,
 - reduced participation in injury management and goal setting,
 - reduced self-management, and
 - poor psychological outcomes.

⁶⁶ Submission of the Injured Workers Support Network to the consultation process 'Remake of the *Workers Compensation Regulation 2010*' (**Appendix 2**)

⁶⁷ See NSW "Supplement to the Guide: Nationally consistent framework for workplace rehabilitation providers" June 2016 SIRA

⁶⁸ Appendix 2 Submissions to the consultation on the remake of the 2010 Regulation: Australian Lawyers Alliance, Unions NSW, Australian Manufacturing Workers' Union, Injured Workers Support Network.

5.2.11 Workers' representative groups submit that the *Health Records and Information Privacy Act 2002* (NSW) embodies the appropriate principles for access to information by workers in the workers compensation system.⁶⁹

5.3 Insurers' practices and feedback

5.3.1 There is no evidence that insurers withhold access to information in the event of the issue of a dispute notice as contemplated by clause 41.

5.3.2 The insurers acknowledge that the regulation limits compulsory sharing of information to the issue of a dispute notice. However, they generally agree that best practice and good claims management principles support the release of information to assist with return to work and injury management.

5.3.3 Insurers do exchange information with workers unless there is a legitimate reason not to do so. Some insurers do this proactively whilst others respond to requests for information from workers.

5.3.4 Some insurers consider that access to information should only be provided in exceptional circumstances outside the 'letter of the law'.

5.3.5 In its submission to the 2016 Regulation remake, iCare as the nominal insurer submitted "*it would be helpful to have a clear regulatory regime governing the exchange of information*", noting that "*the powers of SIRA to require insurers to provide claims information are not clear*".⁷⁰

5.3.6 For the purpose of this report roundtable consultation was arranged with all insurers including iCare, self-insurers, specialised insurers and scheme agents and took place on 8 November 2016. In addition, the author undertook consultation with TMF and EML (managed self-insurance), HEM and StateCover.

5.3.7 Feedback received during consultation with the insurers on current insurer practice can be summarised as follows:

5.3.7.1 Not many insurers receive requests for information outside of a dispute notification. This could be because the insurer's claims management practices are to provide information on receipt unless there is a 'reason' not to do so, such as legal professional privilege, or 'privacy'.

5.3.7.2 Some insurers believe workers are not 'entitled' to certain types of information other than on the issue of a dispute notice.

5.3.7.3 Some insurers regularly share information proactively and outside strict adherence to the regulation except where there is a 'legitimate' reason not to. This is considered on a case by case basis applying 'good common sense' so that if there is a risk of harm to the worker or others by the release of information, information will not be released or will be released following the practice in clause 41.

5.3.7.4 Best insurance practice and good insurance claims management principles support the release of information to assist with return to

⁶⁹ Appendix 2, Submission to the consultation on the remake of the 2010 Regulation: Injured Workers Support Network

⁷⁰ See Appendix 2

work and injury management.

- 5.3.7.5 The reasons quoted by insurers for voluntarily providing information are: best practice, proper and fair claims administration, achieving the objectives of the system, procedural fairness, fair notice, keeping the 'customer at centre', in addition to assisting return to work outcomes and injury management objectives.
- 5.3.7.6 The nominal insurer, iCare, seeks better guidance from SIRA in relation to access to information. The insurer is broadly aware of 'privacy' laws in NSW by which they are bound but require guidance as to the interaction of those laws with the workers compensation Acts and Regulation.
- 5.3.7.7 One self-insurer described the sharing of health and personal information with a worker as part of their inherent duty to their employees: *"from an operational and business perspective we need them back on deck"*.
- 5.3.7.8 The desire for 'transparency' should not override safety and the objectives of the Act which are to assist workers to safely and quickly return to work. As an example, some insurers believe that some rehabilitation reports, if released, may compromise the return to work relationship.
- 5.3.7.9 A small number of workers who do not want to return to work and those workers will resist the return to work process. Those workers' requests for information are treated with discretion and only information that is consistent with the system's objectives will be released.
- 5.3.7.10 Surveillance and or factual statements are not always released but will be released if they facilitate return to work. If information challenges factual assertions by the worker they will consider release.
- 5.3.7.11 Insurers will resist responding to requests from legal representatives for 'all information on work-related injuries' where no specific incident or injury is cited. These are considered 'fishing expeditions' or 'claims harvesting'.
- 5.3.7.12 There are administrative costs associated with responding to ad hoc requests for information. The focus is on returning the workers to work as soon as possible.
- 5.3.7.13 The insurer makes the determination as to whether information of certain types should be released. Currently they do not consider privacy principles or codes of conduct in this determination other than where they are dealing with a government employee⁷¹.
- 5.3.7.14 None of the insurers in roundtable consultation indicated that they had applied to SIRA for directions on the release of information as contemplated in clause 41(6).

⁷¹ The Government Information (Public Access) Act 2009 (NSW) and Privacy and Personal Information Protection Act 1998 (NSW) require consideration of all requests for release of personal and health information by public sector employees. These Acts are discussed later in this report.

- 5.3.7.15 Treasury Managed Fund, which must answer 'freedom of information' requests under the *Privacy and Personal Information Protection Act 1998* ("PIPA") and *Government Information (Public Access) Act 2009* ("GIPA"), employs someone full-time to answer such requests from government sector employees. TMF consider each request under the GIPA and assess each application on its merits and release information in good faith.
- 5.3.8 The following conclusions have been drawn from the feedback from the insurers:
- 5.3.8.1 Insurers are well aware of their obligations to comply with the Regulation and exhibit good compliance behaviours.
 - 5.3.8.2 Insurers generally support workers having more open access to information.
 - 5.3.8.3 Access to information must accord with the system objectives. Whilst transparency is desirable, it is not an objective of the system.
 - 5.3.8.4 More open access to information should not increase disputes.
 - 5.3.8.5 Insurers should have a discretion with certain types of information (generally based on their source and the purpose of the information coming into existence – for example surveillance reports, factual information and rehabilitation reports) as to whether the insurer is required to provide it to the worker.
 - 5.3.8.6 Access to information should not support workers who seek to 'game the system', or engage in 'fishing' or 'claims farming'. Workers should not be able to construct a claim purely based on information retained by insurers.
 - 5.3.8.7 Protections should be put in place as suggested in the Parkes Project "Access to information by workers" Discussion Paper and aligned with the *Health Records and Information Privacy Act 2002* ("HRIPA").
 - 5.3.8.8 The focus should be moved away from a dispute driven adversarial system. Procedural fairness and fair notice requirements dictate an outcomes based focus.
 - 5.3.8.9 The process of accessing information requires attention from SIRA to ensure consistency in practice and reinforcement of good 'claims management principles'. A more regimented process and greater regulatory burden around access to information would likely be counterproductive, resulting in an increase of disputation and greater regulatory and administrative cost. Ideally, the outcome should be one that acknowledges that there are good claims management practices but accepting that they are not always suitable for a minority of workers.
 - 5.3.8.10 A minority of insurers appear more focussed on compliance and rules rather than good claims management principles and ways in which they can achieve the system objectives.

- 5.3.8.11 Treasury Managed Fund as the only public sector agency is the only insurer required to respond to requests for information under the *GIPA* and *PPIPA* (see 6.6 below) and is acutely aware and observant of their obligations under state privacy laws in addition to the Acts and Regulation.
- 5.3.9 Generally speaking, insurers agree that the system is complex. They seek direction and guidance from SIRA as to how to effectively provide access to information but caution against additional regulatory burden and increased disputation as a consequence.
- 5.3.10 Some insurers hold the perception that permitting a worker to access personal and health information runs contrary to compliance with privacy legislation. It is not known what the level of understanding of the state and commonwealth privacy legislation is amongst insurers except TMF and whether those laws impact on insurers (other than TMF) in the NSW workers compensation system.

5.4 Observations and feedback from WIRO

- 5.4.1 The WIRO has functions as described in section 27 of the 1998 Act including dealing with complaints, reviewing work capacity decisions, inquiring and reporting to the Minister on such matters arising in connection with the operation of the Workers Compensation Acts as the Independent Review Officer considers appropriate and encouraging the establishment by insurers and employers of complaint resolution processes for complaints arising under the Acts.
- 5.4.2 The WIRO is tasked with investigating and dealing with complaints from workers about insurers.⁷²
- 5.4.3 The WIRO has the additional function of administering the payment of legal costs to lawyers representing workers. For that purpose WIRO created the 'Independent Legal Assistance and Review Service' (ILARS) with sole purpose to manage legal representation for workers and administer legal costs. In exercising this function WIRO collects information about a worker's claim and dispute and monitors and regulates the expenditure by a worker on disbursements such as medical report fees to support a claim or disputed claim.
- 5.4.4 The WIRO can require provision of information from a worker or an insurer but only where the worker applies for review of a work capacity decision and the information required is for the purpose of the exercise of the WIRO's procedural review function.
- 5.4.5 The WIRO established a 'Solutions Group' to manage complaints made by or on behalf of workers about insurers⁷³.
- 5.4.6 **The Parkes Project – Access to information discussion paper**
 - 5.4.6.1 Research around improving access to information for workers was conducted by the author of this report as Director of the 'Parkes

⁷² Sections 27(a) and 27A, 1998 Act

⁷³ Section 27A of the 1998 Act prescribes how the WIRO is to deal with complaints by workers about insurers.

Project', an inquiry under section 27(c) of the 1998 Act commenced by the WIRO in 2015.

5.4.6.2 The Advisory Committee to the inquiry (comprising representatives of all stakeholders, including representative bodies and representative organisations) accepted that a key issue for consideration in a review of the mechanical and operational issues with the legislation was one of 'access to information by workers' and they unanimously endorsed a Statement of Principles in July 2015 including the following principles around access to information by a worker:

1. There should be transparency about information collected by an employer or insurer about an individual injured worker.
2. A worker should be provided by the employer or insurer with information of the kind referred to in clause 46 of the WCR 2010⁷⁴ with the general exception that if the supply of that information would pose a serious threat to the life or health of the worker or any other person, the information, in the case of medical information, must be provided to a medical practitioner, or in other case, to a legal practitioner.

5.4.6.3 The principles were supported by a Discussion Paper (see **Appendix 2**) which concluded that "*Early exchange of information about a claim has the ability to avoid disputation and instead redirect focus on reconciling concerns of the parties to a potential dispute.*"

5.4.6.4 The inquiry proposed draft recommendations which were generally accepted by the Advisory Committee but not finalised, viz:

1. *Amend the Regulation to mandate provision to a worker or person nominated by the worker (such as a legal practitioner or union or doctor), upon request, of all documents relating to the worker's claim and return to work prior to or regardless of the issue of a dispute notice with appropriate restraints, for example where:*
 - *providing access would pose a serious threat to the life or health of the individual, (in which case access should be provided to a medical practitioner, legal practitioner or such other person as the Authority considers appropriate)*
 - *providing access would have an unreasonable impact on the privacy of other individuals*
 - *the information relates to existing or anticipated legal proceedings between the worker and the employer or insurer and the information would not be accessible by the process of discovery in those proceedings or is subject to legal professional privilege*
 - *providing access would reveal the intentions of the employer or insurer in relation to negotiations with the worker*

⁷⁴ Now clause 41 of the 2016 Regulation, save for wage records and Section 40A Assessments

in such a way as to expose the employer or insurer unreasonably to disadvantage.

2. *Amend the Workers Compensation Regulation 2010 and the Claims Guidelines and the Claims Manual to reflect a worker's entitlement to request and receive all information pertaining to the worker (other than information which is subject to legal professional privilege or other privilege).*

5.4.6.5 The Inquiry did not undertake an examination of privacy principles more broadly, or whether a worker's right to information exists.

5.4.6.6 Several of the submissions to the 2016 Regulation remake attached or referenced the Discussion Paper.

5.4.7 **Feedback and Solutions Group Case Studies**

5.4.7.1 The Solutions Group Acting Director advises that since 1 July 2016 there have been 104 complaints *"where one of the issues is provision of documents pursuant to s126 of the 1998 Act"*.

5.4.7.2 The Acting Director of the Solutions Group recently opined:

"Although some agents occasionally provide information simply because a worker requests same, my experience in this role is that most insurers take a view the Acts operate on a presumption against releasing information to the worker unless specific provision is made for same in the legislation."

5.4.7.3 The following examples of insurer behaviour have been identified by WIRO Solutions Group from selected redacted case studies:

- Both iCare and the scheme agent have responded to a worker that there was *'no legal obligation to provide specified documents as the claim was not in dispute'*.
- Insurers have withheld information (e.g. supplementary medical reports from IMEs) even where they have previously provided access to the IME's earlier reports. WIRO approached the insurer who agreed to provide the supplementary report in time for an upcoming appointment.
- Scheme agents have failed to provide all relevant information with a section 74 dispute notice, for example supplementary IME reports and factual investigation material, as *'they don't intend to rely on it'*. WIRO cited clause 41(4) of the Regulation to the insurer and awaiting further response.
- Scheme agents have cited *'no consent'* as a reason to withhold access to witness' statements referred to in a section 74 dispute notice. WIRO obtained the statements for the worker.
- Insurers have withheld information, for example an IME report as to the efficacy of surgery, by not referring to the report in the section 74 notice and denying access on the basis that they have made the decision to dispute liability on other information. WIRO were provided a copy of the report on the

basis they would not disclose it to the worker. WIRO observed that the report was supportive of the worker's claim, yet the insurer refused to withdraw their denial of liability. A GIPA request of the insurer was declined. SIRA, on contact by the worker's legal representatives, indicated they could not assist and advised the worker to advance their claim to the Commission.

- Rehabilitation reports recording complaints of consequential injury were withheld from a worker even after commencement of proceedings in the Commission in relation to the injury forcing the worker to issue a Direction to Produce to the rehabilitation provider. The insurer has maintained a denial of liability in the face of potential factual evidence in their possession causing a delay in the resolution of the claim, additional stress to the worker and additional costs to the scheme.
- Insurers have withheld medical evaluations of Whole Person Impairment (WPI) and resolved a worker's 'one' claim for permanent impairment compensation on the basis of the worker's report which provided a lower impairment evaluation (for example, complying agreement for 13% WPI when the insurer's medical opinion states 19% WPI). WIRO observes that workers could be deprived of significant benefits were this practice to continue, particularly where the undisclosed report provides an impairment evaluation of greater than 20%, such as access to lifetime medical expenses and ongoing weekly payments of compensation.
- An insurer failed to provide any supporting information from an employer to a worker rejecting a PIAWE calculation. The worker was unable to further elaborate and articulate the error in the calculation.
- Employers have failed to provide relevant information about additional tasks or other work the worker was undertaking at the time of injury which then affects the calculation of PIAWE leading to an incorrect work capacity decision.

5.4.8 There is evidence from WIRO that insurers do refuse access to information where the request falls outside the scope of clause 41 (that is, there is no dispute notice issued).

5.4.9 The WIRO has the capability to resolve complaints about insurers including complaints about the non-provision of access to information.

5.4.10 The WIRO's power to resolve complaints does not extend to forcing the insurer to provide information outside the scope of the Acts or Regulation.

6. Freedom of information and privacy law - Commonwealth and NSW privacy principles

6.1 Australian Privacy legislation

- 6.1.1 All Australians are protected by the International Covenant on Civil and Political Rights (adopted and contained within schedule 2 to the *Australian Human Rights Commission Act 1986*).
- 6.1.2 Privacy legislation prevents the disclosure of private and personal information to third parties (others) and, except in the most limited of circumstances, enables an individual to be given access to or to amend their personal information in the possession of a government organisation, corporation or private sector organisation.
- 6.1.3 The privacy legislation is complemented by 'freedom of information' legislation which sets out the means by which individuals can access information from government ministers, departments and government agencies.

6.2 The Privacy Act 1988 (Cth)

- 6.2.1 The Commonwealth Government has undertaken by virtue of the *Privacy Act 1988 (CW)* to give effect to the rights of persons not to be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence.
- 6.2.2 The objects of the *Privacy Act 1988* are to promote the protection of privacy of individuals, to recognise the protection of the privacy of individuals is balanced with interests of entities, to provide the basis for nationally consistent regulation of privacy and handling of personal information and to promote responsible and transparent handling of personal information by entities ensuring that Australia's international obligations in relation to privacy are implemented.
- 6.2.3 All Australian Government agencies, all organisations with an annual turnover of more than \$3 million, all businesses that sell or purchase information or provide a health service or hold health information except in an employee record, or disclose health or personal information for a benefit, service or advantage (collectively called 'APP entities'⁷⁵) have responsibilities under the *Privacy Act 1988*.
- 6.2.4 The definition of APP entity covers all insurers and scheme agents (including self and specialised insurers) involved in the NSW workers compensation system (other than icare self-insurance and TMF which are NSW state government agencies), all private sector health service providers and all employers (other than the state government, public sector employers and small businesses exempted from compliance with the Privacy Principles)⁷⁶. APP entities must take steps to comply with the 'Australian Privacy Principles'.
- 6.2.5 'Health service' is defined in section 6FB of the *Privacy Act* and is broadly an activity performed in relation to an individual if the activity is intended or claimed (expressly or otherwise) by the individual or the person performing it to assess, maintain or improve the individual's health; or where the individual's

⁷⁵ Section 6, *Privacy Act 1988*

⁷⁶ Ibid

health cannot be maintained or improved—to manage the individual's health; or to diagnose the individual's illness, disability or injury; or to treat the individual's illness, disability or injury or suspected illness, disability or injury; or to record the individual's health for the purposes of assessing, maintaining, improving or managing the individual's health. A reference to an individual's health includes the individual's physical or psychological health.

6.2.6 The 'Australian Privacy Principles' with which APP entities must comply are set out in Schedule 1 of the *Privacy Act*. There are twelve principles which apply across Australia except where there is commensurate State or Territory legislation that does not contradict or contravene the *Privacy Act 1988*.⁷⁷

6.3 The Australian Privacy Principles⁷⁸

6.3.1 The Australian Privacy Principles direct the way APP entities must handle, use and manage 'personal information'.

6.3.2 The principles cover:

- the open and transparent management of personal information including having a privacy policy
- an individual having the option of transacting anonymously or using a pseudonym where practicable
- the collection of solicited personal information and receipt of unsolicited personal information including giving notice about collection
- how personal information can be used and disclosed (including overseas)
- maintaining the quality of personal information
- keeping personal information secure
- the right for individuals to access and correct their personal information.⁷⁹

6.3.3 An APP entity must not breach a privacy principle.⁸⁰

6.3.4 Australian Privacy Principle 1 requires that APP entities manage *personal information* in an open and transparent way.

6.3.5 To comply with Principle 1 an APP entity must have a clearly expressed and up-to date **privacy policy** that contains specific information including the kinds of personal information that the entity collects and holds; how the entity collects and holds personal information; the purposes for which the entity collects, holds, uses and discloses personal information; how an individual may

⁷⁷ Section 3, *Privacy Act 1988* (CW): "It is the intention of the Parliament that this Act is not to affect the operation of a law of a State or of a Territory that makes provision with respect to the collection, holding, use, correction or disclosure of personal information (including such a law relating to credit reporting or the use of information held in connection with credit reporting) and is capable of operating concurrently with this Act. Note: Such a law can have effect for the purposes of the provisions of the Australian Privacy Principles that regulate the handling of personal information by organisations by reference to the effect of other laws."

⁷⁸ See **Appendix 3**

⁷⁹ Australian Government Office of the Australian Information Commissioner <https://www.oaic.gov.au/privacy-law/privacy-act/australian-privacy-principles>

⁸⁰ Section 15, *Privacy Act 1988*

access personal information about the individual that is held by the entity and seek the correction of such information; how an individual may complain about a breach of the Australian Privacy Principles and how the entity will deal with such a complaint.⁸¹

- 6.3.6 Australian Privacy Principle 3 provides that an APP entity must not collect sensitive information about an individual unless the individual **consents** to the collection of the information and "*the information is reasonably necessary for one or more of the entity's functions or activities*⁸²". "Sensitive information" is defined in section 6 of the Privacy Act and includes health information about an individual.
- 6.3.7 Australian Privacy Principle 5 concerns the **notification** to be given by an APP entity to an individual of the collection of personal information. In particular, an APP entity must notify an individual at or before the time the entity collects personal information of the fact that information has been collected and the 'circumstances' of that collection.
- 6.3.8 Part 5 of the Australian Privacy Principles deals with access to, and correction of, personal information. Principle 12 specifically deals with 'Access to Personal Information'.
- 6.3.9 Principle 12.1 describes the **right to information**: "*if an entity holds personal information about an individual, the entity **must**, on request by the individual, give the individual access to the information*". [Author's emphasis]
- 6.3.10 Relevant exceptions to the provision of access are contained in principle 12.3, repeated below:

"the entity is not required to give the individual access to the personal information to the extent that:

- (a) the entity reasonably believes that giving access would pose a serious threat to the life, health or safety of any individual, or to public health or public safety; or*
- (b) giving access would have an unreasonable impact on the privacy of other individuals; or*
- (c) the request for access is frivolous or vexatious; or*
- (d) the information relates to existing or anticipated legal proceedings between the entity and the individual, and would not be accessible by the process of discovery in those proceedings; or*
- (e) giving access would reveal the intentions of the entity in relation to negotiations with the individual in such a way as to prejudice those negotiations; or*
- (f) giving access would be unlawful; or*
- (g) denying access is required or authorised by or under an Australian law or a court/tribunal order; or*
- (h) both of the following apply:*

⁸¹ Australian Privacy Principle 1.4

⁸² Australian Privacy Principle 3.3 and 3.4

- (i) *the entity has reason to suspect that unlawful activity, or misconduct of a serious nature, that relates to the entity's functions or activities has been, is being or may be engaged in;*
 - (ii) *giving access would be likely to prejudice the taking of appropriate action in relation to the matter; or*
 - (i) *giving access would be likely to prejudice one or more enforcement related activities conducted by, or on behalf of, an enforcement body; or*
 - (j) *giving access would reveal evaluative information generated within the entity in connection with a commercially sensitive decision making process.*
- 6.3.11 Principle 12.4 prescribes the way in which requests for information are to be dealt with, the time period within which an APP entity must respond to a request for information made by an individual and the manner in which the response must be given.
- 6.3.12 Principle 12.5 requires an APP entity to take reasonable steps to give access to information in a way that meets the needs of the entity and the individual even where an exception to access (under clauses 12.3 applies). Principle 12.6 provides that access can be given through "*the use of a mutually agreed intermediary*".
- 6.3.13 A refusal to give access to personal information or to give access in the manner requested must be set out in a written notice to the individual.

6.4 Categories of information covered by the Australian Privacy Principles

- 6.4.1 The Australian Privacy Principles require and individual be given access to 'personal information' which is defined as:
- "information or an opinion about an identified individual, or an individual who is reasonably identifiable:*
- (a) whether the information or opinion is true or not; and*
 - (b) whether the information or opinion is recorded in a material form or not."* ^{83 84}
- 6.4.2 Personal information includes 'health information' which is:
- "(a) *information or an opinion about:*
- (i) the health, including an illness, disability or injury, (at any time) of an individual; or*
 - (ii) individual's expressed wishes about the future provision of health services to the individual; or*

⁸³ Section 6, *Privacy Act 1988*

⁸⁴ See also *Privacy Commissioner V Telstra Corporation Limited* ABN 33 051 775 556 [2017] FCAFC 4 in which the Federal Court indicated that to be 'personal' the information has to identify the individual. For example, metadata that does not identify the individual (as distinct from an unnamed person) is not 'personal' information.

- (iii) a health service provided, or to be provided, to an individual; that is also personal information;
- (b) other personal information collected to provide, or in providing, a health service to an individual; etc."⁸⁵

6.5 Conclusion: The Privacy Act 1988, the Australian Privacy Principles and the NSW workers compensation system.

- 6.5.1 It is the author's opinion that SIRA and TMF may be excluded from the application of the Australian Privacy Principles but that the APP would apply to icare, the scheme agents, self-insurers and specialised insurers and a great number of NSW employers.
- 6.5.2 The Australian Privacy Principles describe a "right to information" and a "right to access to information by an individual". They also set out the obligations of insurers and employers to have privacy policies, notification of collection of information and consents required from the individual.
- 6.5.3 These fundamental rights co-exist with any rights and obligations in the NSW workers compensation Acts.
- 6.5.4 Sections 73, 119 and 126 of the 1998 Act and clause 41 when read in conjunction with the APP operate to identify specific circumstances when specific types of personal and health information must be provided to a worker.

6.6 NSW freedom of information and privacy legislation: GIPA, PPIPA and HRIPA

6.6.1 The NSW Government has enacted three pieces of legislation that complement each other and complement other regimes by which an individual can access personal information and other information held by the state government. The Acts enact in respect of the state, the state's obligations in relation to the collection, management and disclosure of personal and other information under the *Australian Privacy Principles* and *Privacy Act*. They are:

- The *Government Information (Public Access) Act 2009* ("GIPA")
- The *Privacy and Personal Information Protection Act 1998* ("PPIPA")
- The *Health Records and Information Privacy Act 2002* ("HRIPA")

6.6.2 The HRIPA also applies to private sector organisations in NSW (6.6.5 below).

6.6.3 The Government Information (Public Access) Act 2009 ("GIPA")

6.6.3.1 The GIPA replaced the *Freedom of Information Act 1989* (NSW) on 1 July 2010. The GIPA establishes "a comprehensive system for public access to government information"⁸⁶.

6.6.3.2 The GIPA is similar in purpose to the Commonwealth FOI Act. The main object of the GIPA is 'to open government information to the public by authorising and encouraging the proactive public release of government information by agencies, and giving members of the

⁸⁵ Section 6FA, *Privacy Act 1988*

⁸⁶ NSW Government Department of Premier & Cabinet website:

http://www.dpc.nsw.gov.au/about/accessing_dpc_information/what_is_public_access_to_government_information

public and enforceable right to access government information, and providing that access to government information is restricted only when there is an overriding public interest against disclosure⁸⁷

6.6.3.3 The GIPA provides a "presumption in favour of disclosure of government information unless there is an overriding public interest against disclosure".⁸⁸

6.6.3.4 Government information is defined as "information contained in a record held by an agency".⁸⁹

6.6.3.5 The GIPA does not provide a viable means of access by public sector employees or by individuals to personal information including health information. That information generally falls within the public interest considerations against disclosure contained in the Table to Section 14 of the GIPA.

6.6.3.6 As an example of Government information relevant to a worker's compensation claim made by an individual, a GIPA application may disclose the investigation by Safework NSW of an industrial accident.

6.6.3.7 The process for accessing government information is by means of application and payment of an application fee. Applications must be decided within 20 days of receipt of a valid application.

6.6.3.8 Decisions to refuse access to information and other decisions that may restrict access to certain information are reviewable decisions. There is a right of internal review of a reviewable decision with a fee payable. Thereafter the Information Commissioner may conduct a review of a reviewable decision.

6.6.3.9 The GIPA does not provide a satisfactory viable, efficient, or timely or accessible way for all NSW workers to access personal information because the Act only provides access to information held by the Government and its application is limited to public sector employees who are employed by Government agencies.

6.6.3.10 Access to personal information by public sector employees is provided for under the *Personal Information and Privacy Protection Act 1998*.

6.6.4 **The Privacy and Personal Information Protection Act 1998 ("PPIPA")**

6.6.4.1 The PPIPA provides for the protection of personal information and for the privacy of individuals in relation to collection, management, disclosure of and access to personal information *held* by a state public sector agency.

6.6.4.2 A public sector agency is defined as any of the following: a public service agency or the teaching service, the office of a political officeholder, a statutory body representing the Crown, and includes the New South Wales Police Force, local government authorities,

⁸⁷ Section 3, GIPA

⁸⁸ Section 5, GIPA

⁸⁹ Section 4, GIPA

prescribed persons or bodies but does not include a State owned corporation.⁹⁰

- 6.6.4.3 The definition of "*public sector agency*" includes icare and icare self-insurance (Treasury Managed Fund).⁹¹
- 6.6.4.4 "*Personal information*" means "*information or an opinion about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion*".⁹² It does not include 'health information' within the meaning ascribed by the *Health Records and Information Privacy Act 2002*.⁹³ Applications for access to health information are to be made under the *Health Records and Information Privacy Act 2002*.
- 6.6.4.5 The PPIPA codifies the Australian Privacy Principles for state public sector agencies in relation to the collection, management, disclosure and access to personal information in Part 2, 'Information Protection Principles'.
- 6.6.4.6 Principle 7 in Section 14 prescribes the privacy principle "*Access to personal information held by agencies*" which defines a 'right to access personal information':
- "A public sector agency that holds personal information must, at the request of the individual to whom the information relates and without excessive delay or expense, provide the individual with access to the information"*.
- 6.6.4.7 The PPIPA mandates the application of the Information Protection Principles to public sector agencies and provides that the application of the principles "*may be modified by privacy codes of practice*".
- 6.6.4.8 A privacy code of practice must be made with the input of the NSW Privacy Commissioner and can be gazetted with the approval of the Minister.⁹⁴
- 6.6.4.9 Public sector agencies are required to prepare and implement a privacy management plan which must include provisions relating to the policies and practices that ensure compliance by the agency with the requirements of the PPIPA or the *Health Records And Information Privacy Act 2002*, the dissemination of those policies and practices to those within the agency, the agency's internal review procedures and any other matters that are considered relevant by the agency in relation to privacy and the protection of personal information held by the agency.⁹⁵

⁹⁰ Section 14, PPIPA

⁹¹ Section 4(2), *State Insurance and Care Governance Act 2015*. Note that section 13A of the *Interpretation Act 1987* provides that if an Act provides that a body is a NSW Government agency or a statutory body representing the Crown, the body has the status, privileges and immunities of the Crown.

⁹² Section 4, PPIPA

⁹³ Section 4A, PPIPA

⁹⁴ Section 31, PPIPA

⁹⁵ Section 33, PPIPA

6.6.5 **The Health Records and Information Privacy Act 2002 ("HRIPA")**

- 6.6.5.1 The purpose of the HRIPA is to promote fair and responsible handling of health information by protecting the privacy of an individual's health information held in the public and private sectors, enabling individuals to gain access to their health information and providing an accessible framework for the resolution of complaints regarding the handling of health information.⁹⁶
- 6.6.5.2 The objects of the HRIPA include "to enhance the ability of individuals to be informed about their health care".⁹⁷
- 6.6.5.3 The HRIPA applies to every organisation that is a "health service provider" or that collects, holds or uses "health information".⁹⁸
- 6.6.5.4 "Organisation" means a public sector agency or a private sector person (meaning a natural person, a body corporate, a partnership, trust or any other unincorporated association or body that is not a public sector agency but excludes small-business operators or an agency within the meaning of the *Privacy Act 1988 (CW)*).⁹⁹
- 6.6.5.5 "Health Information" is defined in section 6, and includes:
- (a) Personal information¹⁰⁰ that is information or an opinion about:
 - (i) the physical or mental health or a disability (at any time) of an individual, or
 - (ii) an individual's express wishes about the future provision of health services to him or her, or
 - (iii) a health service provided, or to be provided, to an individual, or
 - (b) other personal information collected to provide, or in providing, a health service, or
 - (c) other personal information about an individual collected in connection with the donation, or intended donation, of an individual's body parts, organs or body substances, or
 - (d) other personal information that is genetic information about an individual arising from a health service provided to the individual in a form that is or could be predictive of the health (at any time) of the individual or of a genetic relative of the individual, or
 - (e) healthcare identifiers,
- but does not include health information, or a class of health information or health information contained in a class of documents, that is prescribed as exempt health information for the purposes of

⁹⁶ Section 3, HRIPA

⁹⁷ Ibid

⁹⁸ Section 11, HRIPA

⁹⁹ Section 4, HRIPA

¹⁰⁰ Defined in section 5, HRIPA, in the same terms as the PPIPA

this Act generally or for the purposes of specified provisions of this Act.

- 6.6.5.6 "Health Service" is defined in section 4 and includes medical, hospital, nursing, dental, mental health, pharmaceutical, ambulance, community health, health education, welfare services, Chinese medicine, chiropractic, occupational therapy, optometry, osteopathy, physiotherapy, podiatry, psychology, optical dispensing, dietician, massage therapy, naturopathy, acupuncture, speech therapy, audiology, audiometry and other alternative health care field services whether provided as public or private services.
- 6.6.5.7 "Health service provider" includes organisations that provide health services but does not include exempted health service providers or an organisation "that merely arranges for a health service to be provided to an individual by another organisation".
- 6.6.5.8 All insurers in the NSW workers compensation system collect, hold or use health information of an injured worker and are therefore required to comply with the HRIPA. Similarly, it is the author's opinion that most NSW employers are also bound by the HRIPA if they collect, hold or use an employee's health information.
- 6.6.5.9 An organisation must comply with the HRIPA and the Health Privacy Principles in Schedule 1 of the Act. They must comply with any applicable health privacy code of practice and must not do anything or engage in any practice that contravenes the health privacy principles, a health privacy code of practice or the Act except where non-compliance is expressly authorised.¹⁰¹
- 6.6.5.10 The Health Privacy Principles are attached to this report as **Appendix 4**. The Principles are adapted from the Australian Privacy Principles and are specifically framed around the collection, management, disclosure, use and access to health information in NSW.
- 6.6.5.11 Principle 7 is concerned with 'access to health information'. It requires an organisation to provide access to health information to an individual on request 'without excessive delay or expense'.
- 6.6.5.12 The Health Privacy Principles may be modified by a health privacy code of practice. A health privacy code of practice must be made with the input of the NSW Privacy Commissioner and can be gazetted with the approval of the Minister.¹⁰²
- 6.6.5.13 Access to health information must be requested in writing by the individual or by someone nominated on behalf of the individual and must sufficiently identify the health information to which access is sought¹⁰³. Private sector organisations must respond to a request for access within 45 days after receiving the request, can charge a fee

¹⁰¹ Section 11, HRIPA

¹⁰² Section 40, HRIPA

¹⁰³ Section 26, HRIPA

for provision of access to information and can refuse access until after the fee is paid.¹⁰⁴

6.6.5.14 Access to an individual's health information is not to be granted to that individual if:

- "(a) providing access would pose a serious threat to the life or health of the individual or any other person and refusing access is in accordance with guidelines, if any, issued by the Privacy Commissioner for the purposes of this paragraph, or*
- (b) providing access would have an unreasonable impact on the privacy of other individuals and refusing access is in accordance with guidelines, if any, issued by the Privacy Commissioner, or*
- (c) the information relates to existing or anticipated legal proceedings between the private sector person and the individual and the information would not be accessible by the process of discovery in those proceedings or is subject to legal professional privilege, or*
- (d) providing access would reveal the intentions of the private sector person in relation to negotiations, other than about the provision of a health service, with the individual in such a way as to expose the private sector person unreasonably to disadvantage, or*
- (e) providing access would be unlawful, or*
- (f) denying access is required or authorised by or under law, or*
- (g) providing access would be likely to prejudice an investigation of possible unlawful activity, or*
- (h) providing access would be likely to prejudice a law enforcement function by or on behalf of a law enforcement agency, or*
- (i) a law enforcement agency performing a lawful security function asks the private sector person not to provide access to the information on the basis that providing access would be likely to cause damage to the security of Australia, or*
- (j) the request for access is of a kind that has been made unsuccessfully on at least one previous occasion and there are no reasonable grounds for making the request again, or*
- (k) the individual has been provided with access to the health information in accordance with this Act and is making an unreasonable, repeated request for access to the same information in the same manner."¹⁰⁵*

¹⁰⁴ Section 27, HRIPA

¹⁰⁵ Section 29, HRIPA

6.6.5.15 Where access is refused because of a serious threat to the life or health of the individual, the individual can request the information be provided to a medical practitioner nominated by the individual (such medical practitioner being nominated within 21 days of a notice of refusal to provide access is received). Access must be provided to that medical practitioner.

6.6.5.16 Complaints about contravention of a Health Privacy Principle or non-compliance with the Act or a health privacy code of practice can be taken to the NSW Privacy Commissioner within 6 months of the alleged activity the subject of the complaint.¹⁰⁶

6.7 Conclusion: The impact of privacy and freedom of information legislation on the NSW workers compensation system

6.7.1 The author's conclusions made at paragraph 6.5 are equally as valid when considering the relationship between the NSW privacy and freedom of information legislation, the GIPA, PPIPA and HRIPA, and the NSW workers' compensation legislation.

6.7.2 The HRIPA in particular provides a right of access to a worker's health information collected by insurers and employers in the course of management of a worker's claim under the Acts.

6.7.3 When considered in light of the NSW privacy legislation, section 232 of the 1998 Act does not provide 'a right to information'. It simply mandates employers to provide specified information at a particular point in time for which there is a penalty for failure to comply.

6.7.4 In light of the Health Privacy Principles and the HRIPA, clause 41 of the regulation must apply to specific information in specific circumstances. Clause 41 does not override the obligation to provide a worker to access to personal and health information under the *Privacy Act 1988 CW*, the *Australian Privacy Principles*, the *GIPA*, *PPIPA*, *HRIPA*, or the Health Privacy Principles.

6.7.5 As will be seen, some other State workers compensation systems embrace the Australian Privacy Principles in a more transparent and practical manner.

6.7.6 The interrelationship between Privacy Principles, Health Privacy Principles and a worker's right access to personal and health information in the NSW workers compensation system is poorly understood by stakeholders. It appears that very few stakeholders or their representatives are aware of the principles or the obligations that are imposed by them. Similarly, the role of the NSW Privacy Commissioner in facilitating an individual accessing their personal and health information is clearly not understood.

6.7.7 In the author's opinion it would be appropriate to embrace the privacy principles and health privacy principles in the Acts or Regulation and inform stakeholders in the scheme of their rights and obligations created by the privacy legislation (Commonwealth and State).

¹⁰⁶ Section 42, HRIPA

7. Comparable jurisdictions and schemes

- 7.1 Workers compensation is a statutory based compulsory insurance in every State and territory of Australia: "Any business that employs or hires workers on a full-time, part-time or casual basis, under an oral or written contract of service or apprenticeship, must have workers compensation insurance that covers all workers".¹⁰⁷
- 7.2 Each state scheme has different rules and a different regulatory frameworks. Each state government regulates that state's workers compensation scheme (or schemes as in NSW).
- 7.3 Each state scheme is administered in a different way with different insurance arrangements: in NSW, Victoria and South Australia the insurers are scheme agents on behalf of the government; in Queensland, the scheme is wholly operated by the state; in West Australia, Tasmania, Northern Territory and the ACT the scheme is privately underwritten by insurers.
- 7.4 A brief examination of other state jurisdictions has been conducted for the purpose of this report. With the limits on time and resources the author has focussed on the workers compensation schemes in Queensland and Victoria (and a brief examination of the mutual open disclosure rules in the West Australian workers compensation scheme) and the NSW and Queensland motor accident compensation schemes and any supporting legislation concerning freedom of information, right to information or privacy legislation that supports or underpins a worker's or claimants access to documents.

7.5 Queensland Workers Compensation legislation

- 7.5.1 The *Workers' Compensation and Rehabilitation Act 2003* (QLD) ("WCRA") establishes the workers compensation scheme for Queensland.
- 7.5.2 The Queensland workers compensation scheme is operated entirely by the state. WorkCover QLD is the scheme regulator.
- 7.5.3 Whilst expressed differently to NSW, the objectives of the scheme are similar to NSW, and are two-fold: "providing benefits for workers who sustain injury in their employment, for dependants if a worker's injury results in the worker's death, for persons other than workers, and for other benefits; and encouraging improved health and safety performance by employers".¹⁰⁸
- 7.5.4 The principal relevant difference between the QLD scheme and the NSW system is that apart from self-insurers, WorkCover Queensland is the exclusive provider of accident insurance and workers compensation insurance in the state.¹⁰⁹
- 7.5.5 Section 572(1) of the WCRA prescribes a worker's 'right to information' as an "entitlement" to a worker to obtain certain documents:

*"A person who is a claimant or worker for any provision of this Act may, by written notice, ask the Regulator or the insurer (the **document holder**) to give the person a copy of documents required to be kept*

¹⁰⁷ "Workers compensation" at <http://understandinsurance.com.au/types-of-insurance/workers-compensation> an initiative of the Insurance Council of Australia

¹⁰⁸ Section 5, *Workers' Compensation and Rehabilitation Act 2003* (QLD) ("WCRA")

¹⁰⁹ Section 385, WCRA

by the document holder that relate to the person's application for compensation or claim for damages".

- 7.5.6 Access must be provided to the claimant or worker within 20 business days of the request, unless there is reasonable excuse not to do so. It is a reasonable excuse if the document or part of it is protected by legal professional privilege, the document would alert the worker/claimant to the document holder's suspicion of fraud, or the document holder believes that the document meets the requirements of Schedule 3 of the *Right To Information Act 2009*.¹¹⁰ Schedule 3 does not identify any documents that would be considered personal or health information of a worker.
- 7.5.7 Neither of the terms "document" or "information" are defined in the WCRA.
- 7.5.8 In 2009 the Queensland Government enacted the *Right to Information Act 2009* and the *Information Privacy Act 2009* as part of an overhaul of the state's freedom of information and privacy legislation following recommendations made by an Independent Review. The Queensland Government in adopting most of the review's recommendations, committed to an overhaul of its freedom of information legislation and privacy legislation "to make Queensland the most open and accountable state of Australia"¹¹¹.
- 7.5.9 The two Acts operate side by side without limiting the operation of either Act and together incorporate the Australian Privacy Principles. The *Right to Information Act 2009* gives an individual a 'right of access to documents of an agency or of a Minister'¹¹². The *Information Privacy Act 2009* gives an individual a right of access to personal information in the government's possession or under the government's control.¹¹³
- 7.5.10 "Personal information" is defined in section 12 of the *Information Privacy Act 2009* as "information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion".
- 7.5.11 The *Right to Information Act 2009* and *Information Privacy Act 2009* apply to WorkCover Queensland, but not to a private sector self-insurer. The right to information and access to documents within those Acts is not constrained by the WCRA.
- 7.5.12 The *Information Privacy Act 2009* requires WorkCover Queensland and other QLD government agencies to comply with Information Privacy Principles (the IPPs) and a health agency to comply with the 'National Privacy Principles' ('NPP', referred to previously in this report as the 'Australian Privacy Principles'). Health information has a similar definition to the Australian Privacy Principles.
- 7.5.13 Private sector self-insurers remain bound by freedom of information and privacy obligations under the commonwealth privacy law (see 6.1, 6.2, 6.3 above).

¹¹⁰ Section 572(2) and (3), WCRA

¹¹¹ Office of the Information Commissioner Queensland <https://www.oic.qld.gov.au/about/legislation/freedom-of-information-history-in-queensland>

¹¹² Section 23, *Right to Information Act 2009 (QLD)*

¹¹³ Section 3(1), *Information Privacy Act 2009(QLD)*

- 7.5.14 There are no documents relevant to an individual workers compensation claimant exempted from access by an individual under the *Information Privacy Act 2009* or the *Right to Information Act 2009*.
- 7.5.15 WorkCover Queensland publish on their website the 'WorkCover Right to information and Information Privacy applications' page which sets out the means of accessing documents and information under the two Acts.¹¹⁴
- 7.5.16 WorkCover Queensland has developed a 'Worker Assist' App¹¹⁵ which provides information about claiming compensation claims. The key features are that a worker can check the status of their claim, view their next compensation payment date, send a medical certificate by uploading a photo, claim an expense by uploading a photo, view remittance records, add appointments, receive alerts, obtain claim contact details and direct message a claim contact and view correspondence about the claim.
- 7.5.17 **Conclusion:**
- 7.5.18 In Queensland the WCRA enshrines a 'right to information' which is also provided under the *Right to Information Act 2009* and the *Information Privacy Act 2009*.
- 7.5.19 In the Queensland workers compensation scheme a claimant/worker is entitled to access personal and health information upon request. There are no limitations on when the right can be exercised.

7.6 Victorian Workers Compensation legislation

- 7.6.1 The *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)* ("WIRCA") establishes the workers compensation scheme for Victoria in respect of injuries on or after 1 July 2014.
- 7.6.2 The Victorian workers compensation scheme is similar to NSW in that the insurers are scheme agents on behalf of the government. Worksafe Victoria is the scheme regulator.
- 7.6.3 Section 11 of the WIRCA provides a 'right of access to information' expressed : "A worker ... is entitled to information relevant to a claim for compensation in accordance with section 9".
- 7.6.4 The right to information is reinforced by a commensurate obligation on an employer under section 12(c) to "provide information relevant to a claim for compensation in accordance with section 9".
- 7.6.5 Section 9 of the WIRCA provides that the obligation is to fulfilled following a request:
- "(1) Subject to this Act, the Authority or a self-insurer must, at the request of a person who has made a claim for compensation, give that person in accordance with this section any information held by the Authority or self-insurer which is relevant to the claim for compensation.

¹¹⁴ <https://www.worksafe.qld.gov.au/home/right-to-information/right-to-information-and-IP>

¹¹⁵ <https://www.worksafe.qld.gov.au/online-services/workerassist>

(2) *The Authority, a self-insurer or an employer must, at the request of a person who has made a claim for compensation, give that person any information received from a provider to that person of a medical service or hospital service, being information regarding that service and relevant to the claim."*

7.6.6 All requests for access to injury claim information managed by authorised agents are to be processed in accordance with section 9 or administratively. Access to information or the reasons for denial of access to information must be provided within 28 days of the request.¹¹⁶

7.6.7 Access to information can be refused if:

- The information is exempt information (exempt information means information of a kind which, if it were contained in a document requested under the *Freedom of Information Act 1982*, would make that document an exempt document because section 30, 31, 32, 33 or 35 of the *Freedom of Information Act 1982* would apply).
- there are no reasonable grounds for requesting information which has been provided to the person making the request within the previous 12 months (whether sought under the WIRCA or any other Act) or to which access has previously been refused.
- the information is exempt information which is health information which would pose a serious threat to the life or health of the person if the information were given to that person (in which case procedure under the *Health Records Act 2001*) applies.

7.6.8 Failure to comply with section 9 is taken to be a **dispute** subject to the dispute resolution processes in the Act.

7.6.9 Section 598 of the WIRCA prevents disclosure of "information that is the subject of legal professional privilege or client legal privilege" or "affects the law or practice relating to legal professional privilege or client legal privilege".

7.6.10 The Victorian freedom of information and privacy principles are contained in the *Freedom of Information Act 1982*, the *Privacy and Data Protection Act 2014* and the *Health Records Act 2001*. The *Freedom Of Information Act 1982* provides the means of access to government held information including personal information. The *Privacy and Data Protection Act 2014* contains the Victorian Information Privacy Principles (IPP Vic). The *Privacy and Data Protection Act 2014* applies only to public sector 'organisations' and agencies. The *Health Records Act 2001* provides the means by which individuals can access personal health information from public sector agencies and private sector organisations.

7.6.11 IPP Vic 6 provides the right to access personal information in the hands of a government agency and exceptions to the granting of access. The exceptions essentially mirror those in section 29 of the NSW HRIPA (6.6.5.14 above). IPP Vic 6 does not apply to documents containing personal information or the personal information if the *Freedom of Information Act* applies.

¹¹⁶ Section 9(3), *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)* ("WIRCA")

- 7.6.12 The *Freedom of Information Act 1982 (Vic)* provides a "legally enforceable right" to an individual to obtain access to a document of an agency or an official document of a Minister other than an exempt document.¹¹⁷
- 7.6.13 Exempt documents are 'law enforcement documents', documents which would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege, documents affecting personal privacy or documents containing material obtained in confidence.
- 7.6.14 The *Health Records Act 2001 (Vic)* is the Victorian version of the NSW HRIPA with principal objects to "require the responsible handling of health information in the public and private sectors...[and] to enhance the ability of individuals to be informed about their health care or disability services"¹¹⁸.
- 7.6.15 It applies to public sector agencies (including WorkSafe Victoria) and private sector organisations that hold, collect or use 'health information' (including agents of WorkSafe).
- 7.6.16 The definition of 'health information' in section 3 of the Act is similar but not identical to the NSW HRIPA definition when considering 'health information' within the context of a worker's compensation claim.
- 7.6.17 The *Health Records Act 2001 (Vic)* requires compliance with the Victorian Health Privacy Principles (HPP Vic).
- 7.6.18 The HPP Vic embrace the Australian Privacy Principles in so far as health information is concerned. As to 'access' to health information, HPP Vic 6 .1 provides that an organisation MUST provide an individual with access to their health information in precisely the same terms and with the same exceptions as in section 29 HRIPA NSW.
- 7.6.19 Nothing in the *Health Records Act 2001* affects the operation of the *Freedom of Information Act 1982*.¹¹⁹ However, it is to be noted that the *Freedom of Information Act 1982* does not apply to private sector organisations.
- 7.6.20 **Victorian WorkCover Authority Claims Manual**
- 7.6.20.1 Worksafe Victoria have developed a **Claims Manual** for use by its staff and authorised agents who manage WorkCover claims. The Claims Manual is made in circumstances where Victoria WorkSafe acts as both the **regulator** and **underwriter** of the workers compensation scheme.
- 7.6.20.2 The Claims Manual sets out the standards and some of the procedures required of the Agents. "It contains matters of interpretation and policy, however it is not exhaustive"¹²⁰. The primary audience of manual is WorkSafe's staff and authorised Agents, but the manual is accessible online and encourages injured workers and employers to engage with it.

¹¹⁷ Section 13, *Freedom Of Information Act 1982 (Vic)* ("FOI Vic")

¹¹⁸ Section 6, *Health Records Act 2001 (Vic)*

¹¹⁹ Section 7, *Health Records Act 2001 (Vic)*

¹²⁰ WorkSafe Victoria Claims Manual, 2005: Purpose of the manual found at <http://www1.worksafe.vic.gov.au/vwa/claimsmanual/default.htm>

- 7.6.20.3 WorkSafe has issued Agent Operating Principles which outline the principles by which agents must provide claims management services on behalf of WorkSafe. Agents must adhere to legislative requirements and directives outlined in the Agent Operating Principles.
- 7.6.20.4 The Claims Manual reflects the Agent Operating Principles. If there is an inconsistency between the Agent Operating Principles and the applicable legislation, the legislation will prevail. If there is an inconsistency between the Agent Operating Principles and the Agency Agreement, the Agency Agreement will prevail; If there is an inconsistency between the Agent Operating Principles and the Claims Manual, the Claims Manual will prevail.
- 7.6.20.5 The Claims Manual has seven parts: 1 the WorkCover scheme; 2 claims management; 3 weekly payments; 4 medical and like services; 5 return to work 6 specialised payments; 7 dispute resolution. The Manual is accessible online at **Error! Hyperlink reference not valid..**
- 7.6.20.6 Part 1.2 of the Manual is headed "Access to Information and Privacy". The preface to Part 1.2 states:
- These guidelines have been developed to help Agents process requests made by workers or their nominated representatives for their injury claim information.*
- Every worker with an injury claim has a right to access documents in relation to their claim file managed by an Agent.*
- WorkSafe extends as far as possible the right of any worker to access records in its or its authorised agents' possession. To achieve this, it promotes transparency and adopts a pro-disclosure approach to access to information.*
- This is achieved through both informal processes, like administrative access and formal or legal mechanisms like the Workplace Injury and Rehabilitation Act 2013 (WIRC Act) or the Freedom of Information Act 1982 (FOI Act) for documents held by WorkSafe.*
- The WIRC Act gives workers and their authorised representatives the legal right to access information about their own claim, other than exempt information. The WIRC Act does not give third parties a right to access information.*
- However, WorkSafe does not require individuals to use formal legal processes like court orders and subpoenas or the WIRC Act as a matter of course or unnecessary. Workers may access records from their injury claim file without a formal request under the WIRC Act under administrative access arrangements."*
- 7.6.20.7 The Manual proceeds to identify processes to be followed in relation to various types of information and by different means – subpoena, formal request, informal request – and seeks to encourage disclosure of documents and information administratively. informal non-adversarial processes.

7.6.20.8 At 1.2.3 of the Manual it is stated "Administrative access arrangements operate within WorkSafe and Agents alongside formal WIRC Act requests and permitted by privacy principles and the Freedom of Information Act 1982 (FOI Act). Administrative access is a simpler, free and more efficient process than responding more formally to requests for documents under the WIRC Act."

7.6.20.9 Again at 1.2.3 the Manual provides that workers should be directed to make formal requests where administrative access arrangements may not be 'appropriate' such as:

- documents would disclose confidential legal communications or in anticipation of litigation
- release may breach the privacy laws or principles, for example: a record includes other individuals' personal information
- reports are provided in confidence
- the request would require significant resources to complete and would divert the relevant area/business resources.

7.6.21 **Conclusion**

7.6.22 The Victorian workers compensation legislation defines a right to access to information which is further supplemented by the *Privacy and Data Protection Act 2014* and the *Freedom of Information Act 1982* and on private sector agencies by the *Health Records Act 2001* and the *Privacy Act 1988 (CW)*.

7.6.23 The WIRCA defines refusal to provide access to information as a dispute which is to be handled through the defined dispute resolution pathways in the legislation.

7.6.24 Non-compliance with the freedom of information and privacy legislation is managed by a complaints system to the Victorian Information Privacy Commissioner.

7.6.25 The Worksafe Claims Manual is an effective tool to prescribe practices, principles, rules and guidance material around claims management and in particular, how the right to information should be exercised and how access to information is to be effected.

7.7 **West Australian workers compensation legislation**

7.7.1 The *Workers' Compensation and Injury Management Act 1981 (WA)* speaks in terms of a 'right to compensation'. There is no overt 'right to information' or specific section relating to 'access to information' like in Queensland or Victoria.

7.7.2 The West Australian workers compensation scheme is privately underwritten by insurers. The scheme regulator is WorkCover WA.

7.7.3 The *Workers' Compensation and Injury Management Act 1981 (WA)* requires workers to submit to a medical examination at the request of the employer or

insurer after giving notice of injury¹²¹ and from time to time during the period the worker receives weekly payments of compensation¹²².

7.7.4 Where a worker submits for a medical examination at the request of the employer or insurer there is an obligation on the employer or insurer to provide the worker with a copy of "*the report of that practitioner as to the worker's medical condition*" within 14 days of receipt of that report by the employer or insurer.¹²³

7.7.5 Failure to provide the workers with the report is an offence subject to a penalty of \$2,000.¹²⁴

7.7.6 There is a rule of 'mutual' or 'open' disclosure in section 70:

"Where a worker has been examined by a medical practitioner elected by himself, the worker shall, within 14 days after receiving the report of that practitioner as to the worker's medical condition, furnish the employer with a copy of that report".

7.7.7 WorkCover WA conducted an extensive consultation and review of the workers compensation legislation in 2013 culminating in a final report in 2014. The Final report discusses rewriting of the Act to properly accommodate piecemeal reform over long period. In the proposed amended Act Section 70 is retained under 'claims management' but it is proposed that the penalty be repealed.

7.8 Comparable schemes: Motor accident insurance schemes in NSW and QLD

7.8.1 Motor accident insurance schemes in the States and Territories are vastly different in scheme design and benefit delivery.

7.8.2 It is difficult to draw comparisons between the motor accident insurance compensation schemes and the NSW workers compensation scheme without the benefit of time and detailed analysis of all aspects of the schemes. This discussion is therefore restricted to a cursory examination of a claimant's access to information in the NSW and Queensland motor accidents insurance compensation schemes.

7.8.3 In NSW section 68 of the *Motor Accidents Compensation Act 2002* permits the Motor Accidents regulator to "issue to licensed insurers guidelines with respect to the manner in which insurers and those acting on their behalf are to deal with claims (Motor Accidents Claims Handling Guidelines)." It is a condition of an insurer's licence under Part 7.1 of the Act that the insurer comply with the Motor Accidents Claims Handling Guidelines.¹²⁵

7.8.4 The Motor Accident Claims Handling Guidelines are similar to the 'Claims Manual' contemplated by section 192A of the 1987 Act.

7.8.5 The recently amended Motor Accidents Guidelines - Claims handling and medical (treatment, rehabilitation and care) November 2016 [SIRA] provide:

¹²¹ Section 64, *Workers' Compensation and Injury Management Act 1981* (WA)

¹²² Section 65, *Workers' Compensation and Injury Management Act 1981* (WA)

¹²³ Section 70, *Workers' Compensation and Injury Management Act 1981* (WA)

¹²⁴ Section 75(2), *Workers' Compensation and Injury Management Act 1981* (WA)

¹²⁵ Note that the *Motor Accident Injuries Act 2017* contains a similar provision in sections 10.2 (Motor Accident Guidelines of Authority) and 10.7 (Compliance with Guidelines conditions of insurer's licence)

"The insurer will request documents from the injured person's treating medical, rehabilitation and health service providers promptly and will provide copies of all documents so obtained to the injured person as soon as possible (within 20 days of receipt) unless the treating medical, rehabilitation or health service provider indicates otherwise."

7.8.6 The NSW Motor Accidents Compensation Act 1999 does not contain a 'right to information', or any reference to an obligation on an insurer to provide a claimant with personal or health information. The insurers would nonetheless be bound by the HRIPA and the Privacy Act 1988 (CW).

7.8.7 In the current NSW reform process "On the road to a better CTP insurance scheme" submissions were made in consultation that SIRA should adopt the 'open disclosure rule' from the Queensland motor accidents compensation legislation.

7.8.8 The Motor Accidents Insurance Act 1994 (QLD) defines a "duty of insurer to cooperate with claimant" in section 47:

The insurer must cooperate with a claimant and, in particular—

(a) must provide the claimant with copies of reports and other documentary material in the insurer's possession about the circumstances of the accident or the claimant's medical condition or prospects of rehabilitation; and

(b) must, at the claimant's request, give the claimant information that is in the insurer's possession, or can be found out from the insured person, about the circumstances of, or the reasons for, the accident.

7.8.9 Under the Queensland Act disclosure cannot be withheld without proper grounds.¹²⁶ Disclosure is not required of information or documentary material that will alert the claimant to the discovery of grounds for suspicion of the claim or where the information could help in the furtherance of fraud, or where the information is protected by legal professional privilege. "However, investigative reports, medical reports and reports relevant to the claimant's rehabilitation must be disclosed even though protected by legal professional privilege but they may be disclosed with the omission of passages consisting only of statements of opinion." Failure to disclose without proper grounds attracts a penalty.¹²⁷

8. Is there a need to improve workers' access to information?

8.1 Better regulation

8.1.1 The NSW Government has recently called for SIRA to become a more risk based regulator. Andrew Nicholls, Executive Director of the NSW Motor Accidents Insurance Regulator argues: "The risk-based approach calls for a regulator that is not solely focussed on technical compliance and enforcement, but rather a more purpose-driven and agile approach in which the regulator exercises choices about the issues to focus on and employs a

¹²⁶ Section 48, Motor Accident Insurance Act 1994 (QLD)

¹²⁷ Subsection 4, section 48 Ibid.

range of instruments to address harms that impede the achievement of outcomes, and thus influence or ensure the delivery of public value."¹²⁸

- 8.1.2 According to Nicholls¹²⁹, risk-based regulation calls for a regulator to:
- *articulate the outcomes to be achieved to deliver public value;*
 - *develop rich and variable sources of data, metrics and evidence;*
 - *take a proactive and evidence-based approach to assessing the consequence and likelihood of the risks of achieving the outcomes (the harms);*
 - *choose the appropriate and proportionate instrument for managing the risk. which, depending on the risks:*
 - *may be light- or heavy-handed; and*
 - *may vary between hard or soft regulation or a combination of both;*
 - *monitor and evaluate the effectiveness of regulatory instruments over time; and*
 - *be agile in continually reviewing objectives and risks, and make changes in instrumental choices as necessary – as and when risks or objectives change.*
- 8.1.3 The *Subordinate Legislation Act 1989 (NSW)* sets out in Schedule 1 the Guidelines for the preparation of statutory rules.¹³⁰ These rules are embraced in the Better Regulation Principles in the NSW Guide to Better Regulation October 2016.
- 8.1.4 Principal 7 of the Better Regulation Principles¹³¹ demands "*regulation should be periodically reviewed, and if necessary reformed, to ensure its continued efficiency and effectiveness*".
- 8.1.5 The Better Regulation Principles support regulatory change where there is a gap, conflict or incompatibility with existing principles or legislation.
- 8.1.6 SIRA has monitored responses to its recent consultation processes, particularly in response to the remake of the Regulation, and has identified a need for examination of the issue of access to information for workers. The findings of this report are that there is a need for SIRA to consider regulatory reform to improve workers' access to information in the NSW workers compensation system.

8.2 Are procedural fairness and fair notice sufficient?

- 8.2.1 The insurers have said that the principles of procedural fairness and fair notice informs them about the appropriateness of providing a worker access to

¹²⁸ "The Challenges and Benefits of Risk-Based Regulation in Achieving Scheme Outcomes", presented to the Actuaries Institute Injury Schemes Seminar 8-10 November 2015, prepared by Andrew Nicholls, Executive Director, Motor Accidents Insurance Regulation, SIRA..

¹²⁹ Ibid, page 4

¹³⁰ See **Appendix 5**

¹³¹ The Better Regulation Principles, "NSW Guide To Better Regulation" October 2016, NSW Department of Premier & Cabinet: See **Appendix 6**

certain information outside the constraints of clause 41 of the Regulation, that is, at or before the issue of a dispute notice.

- 8.2.2 The Claims Guidelines implore the application of 'procedural fairness' when assessing work capacity:

*"Insurers should consider the principles of procedural fairness, including fair notice, when making any assessment that may affect a worker's rights or interests. Insurers will need to determine what the principles of procedural fairness require, on a case by case basis, having regard to the nature and potential consequences of the outcome of the assessment."*¹³²

- 8.2.3 The Claims Guidelines do not prescribe that access to personal and health information should be provided at the time of the issue of a work capacity decision.

- 8.2.4 Procedural fairness is an alternative expression for the 'rules of natural justice':

"Put simply, natural justice involves decision-makers informing people of the case against them or their interests, giving them a right to be heard (the 'hearing' rule), not having a personal interest in the outcome (the rule against 'bias'), and acting only on the basis of logically probative evidence (the 'no evidence' rule)"...

Natural justice allows persons whose rights or interests may be affected by decisions the opportunity:

- *to put forward arguments in their favour*
- *to show cause why proposed action should not be taken*
- *to deny allegations*
- *to call evidence to rebut allegations or claims*
- *to explain allegations or present an innocent explanation, and/or*
- *to provide mitigating circumstances".*¹³³

- 8.2.5 The rules of procedural fairness require action in the event of an adverse decision or a decision that adversely affects an individual's rights. Clause 41 of the Regulation takes up the rules of procedural fairness in so far as it requires exchange of information at the time of the making of a decision to deny liability in certain circumstances.

- 8.2.6 The rules of procedural fairness do not satisfy an individual's right to information, or a worker's right to access personal and health information in the course of their workers compensation claim. Procedural fairness does not address the system objectives, rather it is about justice and fairness in decision making

8.3 The current regulatory framework

- 8.3.1 There is a perception shared amongst some stakeholders (insurers) that the current regulatory framework is adequate although could be assisted by better 'guidance' material, education and 'awareness'.

¹³² Claims Guidelines, Chapter B1.2

¹³³ Ombudsman, New South Wales "Natural Justice/Procedural Fairness" Public Sector Agency Fact Sheet 14

- 8.3.2 Workers complain that the current regulatory framework is inadequate because it mandates a practice of exchange of certain information only in certain circumstances focussed on disputes and not on the central system objectives, in particular injury management. The inadequacy is compounded by workers' experience in being unable to access information outside the mandated process.
- 8.3.3 Given the right to information and insurer's obligation to provide personal and health information derives from Commonwealth and state privacy legislation and regulation it is appropriate to consider as an immediate measure a means of providing guidance material to correct misperceptions, educate stakeholders and drive consistency in the provision of access to information in the NSW workers compensation system.
- 8.3.4 Such 'guidance material' should ideally carry a regulatory and enforceability mechanism. One means available to SIRA is to publish a Claims Administration Manual under section 192A of the 1987 Act. Some advantages of the Claims Administration Manual is that it satisfies the need for monitoring and enforcement capabilities, it can embrace the privacy principles, it can provide direction to insurers (for which compliance is critical to maintaining a licence), it can provide practice guidance and practical solutions and can be modified over time to suit the needs of the regulator, and stakeholders. The development of a Claims Manual can be, as in Victoria, an iterative process subject to continual review and adaptation as needs require. It permits SIRA to be a 'more agile' and efficient regulator and respond to the needs of its key stakeholders quickly and efficiently.
- 8.3.5 Consideration should also be given to amending the Acts and Regulation to enshrine the right to information and the obligation to provide personal and health information to an injured worker and to remove the uncertainty that presently arises in relation to accessibility of information in the absence of a dispute notice.

8.4 Is there a 'right' to information?

- 8.4.1 There exists a right to information derived from the *Privacy Act 1988 (CW)* and Australian Privacy Principle 12.1.
- 8.4.2 In NSW an individual's right to 'personal information' from public sector agencies and the government is found in the GIPA and PPIPA.
- 8.4.3 In NSW, an individual's right to access 'personal information' from a private sector organisation is found in the *Privacy Act 1988* and the Australian Privacy Principles.
- 8.4.4 In NSW, an individual's right to access 'health information' is found in the HRIPA. The HRIPA provides a right to health information from public sector agencies and private organisations.
- 8.4.5 Sections 73, 119, 126 and 232 of the 1998 Act and clauses 38 and 41 of the Regulation are not inconsistent with the overarching right to information. However, there is no 'presumption in favour' of access to information and thus there is a need to establish processes to ensure that the right to information can be freely exercised outside the specific circumstances described in the

Acts and Regulation. Those processes should be capable of being monitored and enforced.

8.5 What information should be made available?

- 8.5.1 The information that should be available for access is provided for in the definitions of 'personal information' and 'health information' in existing privacy principles.
- 8.5.2 The definition of personal information should be consistently adopted for the public and private sector. The definition of health information in the HRIPA should also be adopted.
- 8.5.3 In the author's opinion, the definition of health information in the HRIPA appropriately captures all types of medical reports and medical and rehabilitation information prepared for or about an injured worker in the NSW workers compensation system, including treating medical provider reports, medical reports, allied health practitioner reports, rehabilitation reports, vocational assessments, functional capacity evaluations, independent medical reports, Independent Management Consultant reports, clinical notes, progress notes etc.

8.6 What principles should underpin improved access to information?

- 8.6.1 Having examined freedom of information and privacy obligations in Australia, NSW, Victoria and Queensland, and noting that the NSW workers compensation system in NSW involves public sector agencies and private sector organisations as insurers and employers, the NSW workers compensation regulatory framework should:
 - 8.6.1.1 Proclaim a worker's "right to access information", (not unlike Victoria (7.6.3 above) or Queensland (7.5.5 above)), consistent with the Australian Privacy Principles and the NSW Health Privacy Principles (cf. the 'right to information' in section 232 of the 1998 Act).
 - 8.6.1.2 Incorporate standardised definitions of information commensurate and consistent with the Australian Privacy Principles and state based freedom of information and privacy legislation, in particular the GIPA, PPIPA and HRIPA. Suggested types of information are 'personal information' and 'health information'.¹³⁴
 - 8.6.1.3 Create a legal presumption in favour of open disclosure.
 - 8.6.1.4 Provide a formal and informal mechanism or procedure for requesting and provision of access to information, including by written request, consistent with the Australian Privacy Principles and privacy and freedom of information legislation in NSW.
 - 8.6.1.5 Provide sufficient flexibility in the timeframes for compliance in consideration of what stage of administration or management the claim is in, for example, the injury management phase, dispute resolution phase.

¹³⁴ Note that the Claims Guidelines refer to 'personal' information and 'health' information without providing any definition.

- 8.6.1.6 Permit waiver of any fee in appropriate circumstances.¹³⁵
 - 8.6.1.7 Provide exempted categories of information consistent with the Australian Privacy Principles and Health Privacy Principles (NSW).
 - 8.6.1.8 Provide exceptions to open access consistent with the Australian Privacy Principles and the Health Privacy Principles¹³⁶. As an example, in circumstances where access to information (particularly health information) may pose a serious threat to the life or health of the worker or another, provide for the nomination of a medical practitioner or law practice to be provided with access to the information.¹³⁷
 - 8.6.1.9 Provide a monitoring, compliance and review mechanism. This could be by prescribing that failure to comply with an access request is a *dispute* (as in Victoria, 7.6.8 above) and therefore arguable in the Workers Compensation Commission¹³⁸ or by providing a review mechanism through the WIRO or an independent authority, for example, the NSW Privacy Commissioner (See Part 6, HRIPA). Alternatively, this could be effected through a practical guide such as a Claims Administration Manual that has monitoring and enforceability capability.
 - 8.6.1.10 Adopt the philosophy of 'centring the Person on Claim' and move away from focussing on 'eligibility' to achieving the system objectives with collaboration and fairness.¹³⁹ This requires embedding the 'biopsychosocial' approach put forward in the Clinical framework for the Delivery of Health Services and other Guides for service providers in the workers compensation system in the regulatory framework.
 - 8.6.1.11 Ensure sharing of information with a third party about a worker should be secondary to ensuring that the worker has access to that same information. That can be achieved by ensuring a worker is provided access to the worker to information provided to a consultant to the insurer at the same time as the consultant is provided with that information. For example, see the *Guidelines on Injury Management Consultants*, WorkCover 27 September 2012, Chapter 5.
- 8.6.2 As this report is only considering 'access to information by a worker' no consideration has been given to other matters of practice that may require consideration, such as limitations to be placed on the use of information

¹³⁵ Note that a worker's legal costs including 'disbursements' are generally paid under a grant of legal assistance made by WIRO. Fees incurred for access to information will be paid under the administrative scheme. To require a worker to pay a fee to obtain personal and health information is overly burdensome.

¹³⁶ Note for example *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)* Section 9.

¹³⁷ Note that clause 41(5), 2016 Regulation, provides for this protection in the case of any 'report'.

¹³⁸ Note that the Workers Compensation Commission has an expedited process by which to manage such a dispute through a 'Miscellaneous Application': see *Bell v Farleigh (Armidale) Pty Ltd* [2012] NSWCC 47, See also *Guide to completing Form 20 Miscellaneous Application* – July 2011, Workers Compensation Commission <http://www.wcc.nsw.gov.au/Forms/Documents/Form%20Docs/Guides%20to%20Completing%20Forms/Guide%20to%20Completing%20Form%2020.pdf>

¹³⁹ The author has had regard to "TAKING ACTION A Best Practice Framework for the Management of Psychological Claims", developed under the guidance of the Super Friend Insurance Reference Group Sub-Committee for the Life Insurance industry, 2015

collected about a worker in the workers compensation system by an employer or insurer.¹⁴⁰

8.7 Benefits of improving workers' access to information

8.7.1 Meeting the system objectives

- 8.7.1.1 All stakeholders consider that the system objectives should be considered foremost. The NSW workers compensation system objectives, in particular: "(b) to provide: prompt treatment of injuries, and effective and proactive management of injuries, and necessary medical and vocational rehabilitation following injuries in order to assist injured workers and to promote their return to work as soon as possible"¹⁴¹, call for collaboration between worker, insurer, employer and health service provider (including rehabilitation and injury management providers).
- 8.7.1.2 Collaboration to achieve the system objectives calls for a "level playing field". Movement towards a level playing field requires cultural and behavioural change from workers and insurers: empowering workers to participate and engage in self-management, insurers to injury management and away from dispute driven claims management.
- 8.7.1.3 Empowering the injured person to engage and participate in their injury management comes from education, expectation setting, influencing beliefs and facilitating self-management.
- 8.7.1.4 Empowerment depends on the worker being informed and in possession of the same information about their health and injury, regardless of source, as the insurer, employer and health service provider. This approach is supported by the Clinical Framework for the Delivery Of Health Services adopted by SIRA.

8.7.2 Return to work

- 8.7.2.1 The primary measure of the success of the system is the quick, safe, durable return to work of an injured worker, otherwise referred to as "successful return to work". Key to success is 'stakeholder participation' and communication between stakeholders.¹⁴²
- 8.7.2.2 Recognition of the right to information and early and timely exchange of information about a worker with a worker will assist to dispel the common misperception and restrictive beliefs that the worker is being 'kept in the dark' and a victim of the system (the david v goliath struggle), that the insurer is only concerned with eligibility for benefits (looking for the first opportunity to 'cut the worker off benefits') and not focussed on injury management objectives.

¹⁴⁰ See Submission of Unions NSW in **Appendix 2** attached

¹⁴¹ Section 3(b), 1998 Act

¹⁴² "Factors affecting return to work after injury or illness: best evidence synthesis of systematic reviews", Cancelliere C, Donovan J, Stochkendahl MJ, Biscardi M, Ammendolia C, Myburgh C, Cassidy JD. *Chiropractic & Manual Therapies* (2016) 24:32 and research papers published on <http://www.iscrr.com.au/recovery-and-return-to-work>, website for the Institute for Safety, Compensation and Recovery Research, a joint initiative of WorkSafe Victoria, TAC Victoria and Monash University

- 8.7.2.3 Dispensing with common misperceptions and beliefs would contribute to a focus on self-management and collaborative goalsetting particularly around injury management and return to work.
- 8.7.2.4 A worker with access to their personal and health information is more likely to develop optimistic expectations for recovery and to respond to return to work goal setting measures and aim for a durable return to work.¹⁴³

8.7.3 **Reduction in disputation**

- 8.7.3.1 While there is little evidence that there is considerable disputation created by denying early access to information, it is evident that early and timely access to information would result in a more engaged worker, that is - a better educated worker - less disenchantment and more inclination to focus on and participate in injury management and return to work: *"Early injury management should focus on educating the injured person about their injury, reassuring them about the natural history of the injury, and emphasising the importance of early participation in home, work and community life despite the injury. By focusing on these areas early in the management of an injury, there is reduced risk of developing long-term activity limitations, participation restrictions and persistent pain."*¹⁴⁴
- 8.7.3.2 *"Information is power, particularly in litigation, and the sooner information is disclosed and shared by both parties the less likely there are to be inappropriate power balances."*¹⁴⁵ Early exchange of information about a claim has the ability to avoid disputation (and hence litigation) and instead redirect focus on reconciling concerns of the parties to a potential dispute.¹⁴⁶
- 8.7.3.3 Providing early access to information to a worker and an appropriate administrative review mechanism would mitigate against burgeoning disenchantment and disengagement and would alleviate perceptions of injustice and concerns that workers are being treated unfairly, captive to a system which focusses on claims management as opposed to injury management.
- 8.7.3.4 The NSW workers compensation system is overly dispute focussed. Improving a workers access to information upon which decisions about their claim are made – including decisions to terminate, suspend, or discontinue payments or deny liability – the desire to challenge a decision may be ameliorated. Providing improved access to information alone is unlikely to be the sole reason for reduced disputation but it may be a factor in the reduction in the

¹⁴³ For a discussion on reviewed factors affecting return to work after injury or illness, see *"Factors affecting return to work after injury or illness: best evidence synthesis of systematic reviews"*, Op Cit.

¹⁴⁴ *"Clinical Framework For the Delivery of Health Services"*, Op Cit, page 6

¹⁴⁵ *"Workers Compensation Dispute Resolution Procedures in Western Australia – The New Regime"*. Op cit at p.76

¹⁴⁶ *"Access to Information Discussion paper"*, WIRO Parkes Project, July 2015. May, R, **Appendix 2**, 1.7

number of challenges made about claims, in particular, work capacity reviews or injury management decisions.

8.7.4 **Building trusting relationships**

- 8.7.4.1 "Openness and transparency are key ingredients to build accountability and trust, which are necessary for the functioning of democracies and market economies".¹⁴⁷
- 8.7.4.2 The literature reviewed shows that information 'sharing' and openness is important in the creation of trusting relationships in circumstances where one party is 'vulnerable' (the injured worker).
- 8.7.4.3 The importance of a trusting relationship between an injured worker and an insurer underpins good practice which, in a heavily regulated environment, is reinforced by formal processes. The formal mandatory requirements in Clause 41 of the Regulation do not go far enough because they only apply when a dispute notice is issued.
- 8.7.4.4 The "General Insurance Code of Practice"¹⁴⁸ (which is said not to apply to workers compensation products but see earlier discussion regarding freedom of information and privacy legislation) reinforces the desirability of transparency and openness in claims handling (7.2). Clause 14 of the Code "Access to information" (**Appendix 7**) commits to access to information in accordance with the *Privacy Act 1988* (CW).
- 8.7.4.5 Insurers and employers are required to share a worker's personal information (including health information) with a variety of service providers. Medical practitioners, allied health service providers and consultants are required to conduct assessments of injured workers in accordance with clinical framework models, accreditation codes of practice and guidance material for each discipline of allied health service provision. These practice codes, accreditation processes and guidance material are aimed at ensuring consistency, appropriateness, a degree of objectivity and sound evidence based decisions and reports including the provision of opinions on injury management.¹⁴⁹
- 8.7.4.6 There appears no cogent reason as to why a worker should not be provided with the same level of access to personal or health information that an insurer or employer is permitted to share with a third party provider. Withholding of information in such circumstances can only engender distrust and suspicion.
- 8.7.4.7 Achievement of the system objectives (demonstrated above) relies on positive experiences and the dispelling of common misperceptions. A worker provided with access to personal and

¹⁴⁷ "Openness and Transparency - Pillars for Democracy, Trust and Progress", OECD, Better Policies for Better Lives, by Angel Gurría, Secretary-General of the OECD

¹⁴⁸ "General insurance Code of Practice", Insurance Council of Australia 2014, <http://codeofpractice.com.au/assets/documents/Code%20of%20Practice.pdf>

¹⁴⁹ For example, "Nationally Consistent approval framework for workplace rehabilitation providers", Heads of Workers Compensation Authorities Australia and New Zealand, August 2015; "NSW Supplement to the Guide : Nationally Consistent approval framework for workplace rehabilitation providers " SIRA June 2016 Catalogue No. SIRA 08082

health information collected by the insurer contributes to perceptions of 'openness' and 'transparency' and generates trust.

8.8 Real or perceived risks and sensitivities of improving workers' access to information

8.8.1 Costs and administrative burden

- 8.8.1.1 Providing access to information is a bureaucratic and resource intensive activity.¹⁵⁰
- 8.8.1.2 It is beyond the scope of the author's knowledge or the scope of this report to conduct a cost benefits analysis in monetary terms. The author suggests that the proposals considered and recommendations made are unlikely to have any or any significant cost impact and are likely to be cost neutral.
- 8.8.1.3 Given that the government and insurers have existing obligations under the GIPA, PPIPA, HRIPA and the Australian Privacy Principles, and given that many insurers engage in information sharing practices beyond what is required of them, there would appear to be little persuasive argument that creating a practice guide (claims manual, for example) which directs and guides how access should be provided and which has regulatory and enforceability capacity would significantly add to cost or administration of claims.
- 8.8.1.4 All insurers except government and self-insurers would be aware of the General Insurance Code of Practice 2014 and particularly clause 14 thereof . The concept of a worker having a right to access information upon request would not be foreign to them, nor would it cast an insurmountable administrative burden on them.
- 8.8.1.5 Potentially mitigating against any additional cost is the ability through innovation to align information access procedures with modern and secure information management practices being implemented around the world (cloud storage, Dropbox, claims portals etc).

8.8.2 Gaming the system, fraud and fishing

- 8.8.2.1 It is reported that 80% of all workers who make a claim for workers compensation benefits either take no time away from work or return to work without the need for assistance within 3 weeks of injury. Given the short duration of their entitlements, it is suggested that the majority of workers would have little need for access to either personal or health information from their insurer.
- 8.8.2.2 There is little if no evidence of workers 'gaming the system' other than a suggestion that some workers will request general information about 'any injury' or 'any claim for compensation' they may have had in order to allegedly 'manufacture' a claim for benefits. This has been referred to in consultation with insurers as 'claims harvesting' or a 'fishing exercise'.

¹⁵⁰ "Opportunities for information sharing: Case Studies", Report prepared for the NSW Department of Premier and Cabinet, April 2015 Matthew Keeley, Jane Bullen, Shona Bates, Ilan Katz, Ahram Choi. Social Policy Research Centre UNSW.

- 8.8.2.3 It is common for workers to have sustained many injuries over their working life and may as a consequence have established entitlements arising from such injuries. A worker in such a situation who has made previous claims for compensation is entitled to access personal and health information through the various freedom of information or privacy laws and privacy principles from their employer and insurer and from government sector agencies. Those principles provide for exceptions to the types of information to which access is to be provided and the circumstances in which access is exempt. The existing principles and legislation adequately provision for the very small minority of worker's requests which may be categorised as a fishing exercise.
- 8.8.2.4 Requests to access information as a fishing exercise could impose an administrative burden and hence additional costs particularly where the worker does not have a current or open claim for compensation. Where the worker is engaged in a fishing exercise outside the parameters of a current claim, the current freedom of information and privacy legislation and principles provide for the imposition of a fee. A fee could be a significant deterrent for workers not to undertake such an activity.
- 8.8.2.5 The privacy laws ensure that access to information is not generally available in the nature of a 'open request' and protects against access where there is suspicion of fraud. For example, in relation to health information, section 29 of the HRIPA provides the necessary protections.

8.8.3 **Scheme sustainability and affordability**

- 8.8.3.1 The subject matter of this report, improving a worker's access to information, does not in the author's opinion, require the enhancement, increase or creation of a benefit available to an injured worker in the current NSW workers compensation system (across all schemes of benefits).
- 8.8.3.2 The proposals considered and recommendations made in this report do not levy any greater impost on insurers, employers or the regulator nor necessitate an increase in monetary benefits returned to workers.
- 8.8.3.3 The author is unable to measure the impact on the system/scheme in order to make any meaningful comment other than to suggest that the proposals considered and recommendations made are unlikely to affect scheme sustainability.

8.8.4 **Potential to increase disputes**

- 8.8.4.1 Some insurers have suggested that particularly in 'claim harvesting' and disingenuous claims, mandatory disclosure is likely to increase disputes.
- 8.8.4.2 This concern appears stated without regard for overarching obligation under the *Privacy Act 1988* and HRIPA to provide access to information to a worker, regardless of clause 41 of the Regulation.

- 8.8.4.3 The author concedes that workers in possession of personal and health information through a fishing exercise may create more claims which in turn may lead to a greater number of disputed claims. However, if the author's opinion regarding the right to information is accepted, there has always been the potential for increase in claims and disputes were it not for ignorance of the right to access personal and health information and the means by which to do so.
- 8.8.4.4 Good insurer practices in which workers are provided with early and open access to personal and health information on 'procedural fairness and fair notice' principles have not discernibly created a noticeable increase in disputes, to the contrary, insurers report better claims and injury management and better relationships with workers as a consequence.
- 8.8.5 One of the keys to neutralising the perceived risks is to modify or change behaviours. Just as those workers who are insistent on gaming the system may be less able to do so if privacy principles such as the Health Privacy Principles are entrenched in the workers compensation system, likewise those insurers which maintain an adversarial relationship with workers, focussed on claims 'closure' as the main claims management strategy rather than injury management may be less inclined to pursue such a strategy and may redirect their focus on achieving the system objectives.

9. Options for reform

9.1 Better regulation

- 9.1.1 Regulation should be fit for purpose in a changing environment. The challenge for Government and SIRA is "*to get better regulatory outcomes for the community at large*".¹⁵¹ Regulatory change can be effected through Acts of Parliament, subordinate legislation such as regulations and mandatory Guidelines.
- 9.1.2 Non-regulatory options should always be considered as an alternate intervention to regulatory change. Non-regulatory options might include provision of improved information, support for self-regulation or development of guides, voluntary codes of conduct, codes of practice, directions or practice notes developed in partnership with stakeholders. Non-regulatory options however do not usually provide monitoring and enforcement processes.

9.2 Regulatory options for improvement of access to information for workers

- 9.2.1 There are, according to Nicholls, *hard* and *soft* regulatory options.
- 9.2.2 Hard regulatory options are the more traditional options, more prescriptive and reactive to events, adapted from a 'bottom up approach'. Nicholls' examples of hard regulation are investigations and enforcement, auditing, licencing¹⁵². In the author's opinion hard regulatory options might also include legislative amendment (which must be passed through the Parliament or

¹⁵¹ "Independent Review of the NSW Regulatory Policy Framework Issues Paper", November 2016, 'Message by the Chair' the Hon Nick Greiner AC, Chair, Regulatory Policy Framework Review Panel

¹⁵² "The Challenges and Benefits of Risk-Based Regulation in Achieving Scheme Outcomes", Op cit, page 4

undergo risk evaluation) and which are not agile but more rigid processes with fixed outcomes.

9.2.3 *Soft* regulatory options are 'more modern', more proactive and preventative and might include education programs, consumer information, industry advisory and guidance or standards.¹⁵³ In the author's opinion, soft regulatory options are naturally more agile, iterative and immediate. They have the benefit of avoiding the difficulties of amendment of legislation and offering a more expedient practical outcome to an issue.

9.2.4 The *hard* regulatory option is two-fold:

1: Amendment of the 1998 Act

- Add a legal right to information and a create a legal presumption in favour of access to information.
- Add a corresponding obligation on an employer and insurer to provide access to information to a worker.
- Add definitions of personal information and health information consistent with applicable privacy legislation and make any other terminology in the Act consistent. This may necessitate amendment of sections 73 and 126 of the 1998 Act.
- Where possible define 'specified information ' or 'other information' to give existing provisions clarity.
- Prescribe the exemptions or exceptions to exercise of the right to access information (by adopting the exemptions to the right to access information within section 29 of the HRIPA as appropriate).
- Define the manner in which the right to access information can be exercised before the issue of a dispute notice. The author considers there are several options to be considered:
 - Mandatory exchange upon receipt by an insurer of health information or within a short timeframe, say 7 - 10 days of receipt by the insurer of the information, with a right to request access
 - Voluntary exchange upon receipt by an insurer of health information or within a short timeframe, say 7 - 10 days of receipt by the insurer of the information, with a right to request access
 - Mandatory exchange of health information by an insurer at least 10 days before a worker is required to attend an assessment or medical examination arranged by the insurer with a right to request access
 - Voluntary exchange of health information by an insurer or at least 10 days before a worker is required to attend an assessment or medical examination arranged by the insurer with a right to request access
 - Upon request and within a defined timeframe, say 7 -10 days from date of request. If by request there should a simple easy-to-use

¹⁵³ Ibid.

request form (potentially adapted from the GIPA, PPIPA or HRIPA process).

- Other options are available through the HRIPA and, as an example, the Victorian or Queensland workers compensation legislation (28 days and 20 business days respectively).
- Amend section 126 of the 1998 Act to remove the words "*if the worker's claim is disputed*".
- Provide a formal complaint/review mechanism or dispute resolution pathway in the event of refusal or denial to provide access to information by categorising such refusal/denial as one of the following:
 - a dispute (see Victorian legislation as an example). Such a dispute would be resolved by the Registrar of the Workers Compensation Commission
 - a complaint (see Section 27(c) of the 1998 Act. Such a complaint would be resolved by the WIRO under their current complaints resolution model, or
 - a complaint under privacy principles. Such a complaint would be made to, and resolved by, the NSW Privacy Commissioner.
- Supplement formal processes with prescribed informal processes for resolution of 'disputes' or complaints around enforcement of the right to access information. This could be done by way of a Claims Manual, as in Victoria.

2: Amendment of the 2016 Regulation:

- reflect freedom of information and privacy principles under the *Privacy Act 1988* and the HRIPA (and GIPA and PPIPA)
- broaden the circumstances in which access is to be provided consistent with privacy principles
- retain the current mandated exchange of ALL information in the event of the issue of a dispute notice (for consistency: see also clause 38 of the Regulation, section 54 of the 1987 Act and 74 of the 1998 Act)
- include in the definition of 'dispute' the making of an 'adverse' work capacity decision
- support the review mechanism and provide for the making of guidelines or codes of practice on compliance.
- Develop and publish a Claims Administration Manual (with stakeholders) that provides direction and practice guidance to insurers and employers in the management of claims including provision of access to information. Use the Worksafe Victoria Claims Manual as a working example.
- Amend the Claims Guidelines to identify the right to information and the practices and procedures around a worker accessing personal and health information.

- Amend the Claims Guidelines including Chapter B1.3 'How to advise the worker of the work capacity decision' to mandate compulsory exchange of all information (as currently required in clause 41 of the regulation) on the issue of an adverse work capacity decision or an internal review of a work capacity decision, merit review or procedural review.

9.2.5 The following *soft* regulatory options are available:

Option 1: Develop and publish a Claims Administration Manual in accordance with section 192A of the 1987 Act.

- A working example of a Claims Manual is found in the Victorian Workers compensation system which is for the benefit of licenced insurers and is also openly accessible by workers and others and provides simple practical guidance in relation to all aspects of claims management and claims administration.
- The Manual can make provision for procedures to be followed before a claims is made, and in relation to any aspect of claims management or the administration of claims.
- The Claims Administration Manual could clarify the right to information.
- The Claims Administration Manual could prescribe that there is, in effect, a 'p[re]sumption in favour of sharing of information.
- The Claims Administration Manual could embrace and put into effect all of the suggested 'principles ' referred to in 8.6 above.
- The Claims Administration Manual carries sufficient regulatory and enforcement power: SIRA is able to give insurers 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 [the 1987] Act*"¹⁵⁴; an insurer's licence is conditional upon compliance with directions¹⁵⁵; failure to comply with a direction constitutes an offence and is punishable by the imposition of a fine¹⁵⁶.
- The Claims Administration Manual (Section 192A(2) appropriately focusses SIRA the practical means of promoting:
 - the prompt processing of claims
 - the procedures for the making of claims and the resolution of disputes
 - the minimisation of the effect of injuries to workers by focussing on rehabilitation and injury management
 - ensuring insurers properly investigate liability for claims.

¹⁵⁴ Section 192A(4), 1987 Act

¹⁵⁵ Section 192A(5), 1987 Act

¹⁵⁶ Section 192A(4A), 1987 Act

Option 2: Make or amend the Claims Guidelines.

- This option contemplates that the Guidelines set out what the Claims Administration Manual would achieve.
- The limitations on this option are as follows:
 - The Guidelines are limited in effect to what is prescribed by the Acts¹⁵⁷.
 - The Guidelines do not carry any monitoring and enforcement capability.
 - The Guidelines cannot overcome the existing issues around the absence of a presumption in favour of access.

Option 3: Issue the insurers with 'directions' procedure under section 194 of the 1987 Act.

- Under section 194 of the 1987 Act SIRA can give insurers **directions** "for or with respect to requiring the adoption and use by them of specified processes, procedures, strategies, policies and methods in the handling and administration of claims for compensation or work injury damages, either generally or in respect of a specified class or classes of cases".
- Section 194(2) provides that compliance with a direction is a condition of an insurer's licence.
- This option has the benefit of providing an immediate solution to the issue however suffers from the following limitations:
 - Openness and transparency
 - The direction can be withdrawn at any time.
 - Directions are less likely to be made accessible by workers
 - Workers would be better informed by a process, such as contemplated by the Claims Administration Manual, where they could bring 'non-compliance' to the attention of SIRA.

9.3 Non-regulatory options

9.3.1 Non-regulatory options might include:

- education and training of stakeholders
- provision of improved information around the right to information
- the development of a practice guide for insurers
- a voluntary code of conduct
- insurer directions or practice notes developed in partnership with stakeholders directing application of the GIPA, PPIPA and HRIPA and practices in accordance with those Acts.

9.3.2 The author is of the opinion that there is a need for improved information about the right to information for all stakeholders. Education and training is also required to inform insurers of their obligations under the commonwealth

¹⁵⁷ Section 376(1)(c), 1998 Act

and state privacy legislation. However, this information and education does not overcome the inadequacy of the regulatory framework. Information for stakeholders about the right to information and any education program is unlikely to dramatically change practice and provide a practical and measurable solution to the issue.

- 9.3.3 The non-regulatory options will only be satisfactory if they can be monitored and have a compliance or enforcement mechanism. Behaviours and practice can change quickly if all stakeholders are clear about the process and there is a satisfactory means of ensuring compliance.
- 9.3.4 It is the author's opinion that any limitations and fetters on the exercise of a 'right' to access personal or health information cannot be undone or remedied by a practice note, code of practice or guidance material alone even where that practice note or guidance material refers workers and insurers to the GIPA, PPIPA and HRIPA and the privacy principles and the processes available under those Acts to access information.
- 9.3.5 A direction to workers to avail themselves of processes available in the privacy legislation will create confusion and tension and an added layer of complexity to an already complex system.
- 9.3.6 There is scope for discussion and engagement between SIRA and the NSW Information and Privacy Commissioner to discuss education and training of stakeholders in relation to freedom of information and privacy laws in NSW which bind the insurers and employers in the NSW Workers compensation system.
- 9.3.7 There is sufficient scope in the powers and functions of the WIRO for the WIRO to be provided with the role of facilitating a worker's access to information from an insurer if the recommendations are accepted.

Recommendations

The author acknowledges the call by workers to improve a workers access to information in the NSW workers compensation system and the insurers' call for greater openness and codification of practice around a worker's access to information.

The author commends those insurers which engage in practices aligned to the General Insurance Code of Practice in recognition of privacy laws and principles rather than strict adherence to the NSW workers compensation legislation.

The author is of the opinion that there is a need to improve a worker's access to personal and health information in the NSW workers compensation system.

Whilst the GIPA, PPIPA and HRIPA provide a right to information and the means of accessing information, the GIPA and PPIPA only apply to Government held information or government sector employees. The HRIPA applies to public sector agencies and private sector organisations and is administered by the NSW Privacy Commissioner. If workers are to utilise the access provisions in the HRIPA to health information the timeframes and complaints/review mechanisms do not sufficiently accommodate workers compensation claim timeframes and are unduly cumbersome.

The author therefore recommends that SIRA engage in regulatory and non-regulatory options to address the issue.

RECOMMENDATIONS

That SIRA take a two-staged approach:

First Stage: As a practical outcome capable of being put into effect quickly, SIRA should adopt the 'soft' regulatory option 1 and prepare and publish a Claims Administration Manual in accordance with section 192A of the 1987 Act for use by licenced insurers and workers to provide remedy to the issue of workers' access to information and other claims management and claims administration issues. This would provide SIRA with the means to address similar issues in a timely way. It has the benefit of prescribing both formal and informal means of early access to information which is called for by workers, providing practical guidance and direction which is called for by insurers and is capable of being monitored and enforced (if needed).

Second stage: SIRA should take the 'hard' regulatory option and embark on a process of consultation to amend the Acts and Regulation to correct the deficiencies in various provisions including sections 73, 119, 126, and 232 of the 1998 Act and clauses 38 and 41 of the Regulation.

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1. **Section 3 1998 Act - Objectives of the system**
2. **Regulation making provisions**
3. **Provisions in the 1998 Act permitting regulations to be made around access/supply of information**
4. **Other relevant sections of both the 1987 and 1998 Acts that have regulation making powers or can mandate exchange of information**
5. **Clause 41 of the 2016 Regulation**

1. SECTION 3 1998 ACT - OBJECTIVES OF THE SYSTEM

Section 3 System objectives

The purpose of this Act is to establish a workplace injury management and worker's compensation system with the following objectives:

- (a) to assist in securing the health, safety and welfare of workers and in particular preventing work-related injury,
- (b) to provide:
 - prompt treatment of injuries, and
 - effective and proactive management of injuries, and
 - necessary medical and vocational rehabilitation following injuries,in order to assist injured workers and to promote their return to work as soon as possible,
- (c) to provide injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses,
- (d) to be fair, affordable, and financially viable,
- (e) to ensure contributions by employers are commensurate with the risks faced, taking into account strategies and performance in injury prevention, injury management, and return to work,
- (f) to deliver the above objectives efficiently and effectively.

2. REGULATION MAKING PROVISIONS

1998 Act

Section 248 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) A regulation may be made under this Act for or with respect to any matter for which regulations may be made under the 1987 Act.
- (3) A regulation may create an offence punishable by a penalty not exceeding 20 penalty units

1987 Act

Section 280 Regulations and orders

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) A regulation may create an offence punishable by a penalty not exceeding 20 penalty units.
- (3) A provision of a regulation or order under this Act or the 1998 Act may:
 - (a) apply generally or be limited in its application by reference to specified exceptions or factors,
 - (b) apply differently according to different factors of a specified kind, or
 - (c) authorise any matter or thing to be from time to time determined, applied or regulated by any specified person or body,or may do any combination of those things.
- (4) A regulation or order under this Act or the 1998 Act prescribing a maximum amount in respect of any compensation payable under this Act for any service or thing may provide that the maximum amount applies to a service or thing after the date the regulation or order takes effect in respect of an injury received or accident occurring before that date as well as to a service or thing in respect of an injury received or accident happening after that date.

3. PROVISIONS IN THE 1998 ACT PERMITTING REGULATIONS TO BE MADE AROUND ACCESS/SUPPLY OF INFORMATION

Section 73, 119 and 126 of the 1998 Act

73 Insurer to provide copies of reports to worker

- (1) The regulations may make provision for or with respect to requiring an insurer to provide a worker, a worker's legal representative or any other person with a copy of a specified report, or a report of a specified kind, obtained by the insurer in relation to a claim by the worker.
 - (2) Without limiting subsection (1), the kind of reports to which the regulations under this section can apply include investigators' reports, rehabilitation providers' reports and reports of assessments under section 40A (Assessment of incapacitated worker's ability to earn) of the 1987 Act.
 - (3) If an insurer fails to provide a copy of a report as required by the regulations under this section:
 - (a) the insurer cannot use the report to dispute liability to pay or continue to pay compensation or to reduce the amount of compensation to be paid and cannot use the report for any other purpose prescribed by the regulations for the purposes of this section, and
 - (b) the report is not admissible in proceedings on such a dispute before the Commission, and
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- (c) the report may not be disclosed to an approved medical specialist or an Appeal Panel in connection with the assessment of a medical dispute under Part 7 of Chapter 7.

119 Medical examination of workers at direction of employer

- (1) A worker who has given notice of an injury must, if so required by the employer, submit himself or herself for examination by a medical practitioner, provided and paid by the employer.
- (2) A worker receiving weekly payments of compensation under this Act must, if so required by the employer, from time to time submit himself or herself for examination by a medical practitioner, provided and paid by the employer.
- (3) If a worker refuses to submit himself or herself for any examination under this section or in any way obstructs the examination:
 - (a) the worker's right to recover compensation under this Act with respect to the injury, or
 - (b) the worker's right to the weekly payments,is suspended until the examination has taken place.
- (4) A worker must not be required to submit himself or herself for examination by a medical practitioner under this section otherwise than in accordance with the Workers Compensation Guidelines or at more frequent intervals than may be prescribed by the Workers Compensation Guidelines.
- (5) The regulations may make provision for or with respect to requiring an employer or insurer to provide a worker, a worker's legal representative or any other person, within the period required by the regulations, with a copy of any medical opinion or report furnished to the employer or insurer by a medical practitioner in connection with an examination of the worker pursuant to a requirement under this section.
- (6) If an employer or insurer fails to provide a copy of an opinion or report as required by the regulations under subsection (5):
 - (a) the employer or insurer cannot use the opinion or report to dispute liability to pay or continue to pay compensation or to reduce the amount of compensation to be paid and cannot use the opinion or report for any other purpose prescribed by the regulations for the purposes of this section, and
 - (b) the opinion or report is not admissible in proceedings on such a dispute before the Commission, and
 - (c) the opinion or report may not be disclosed to an approved medical specialist or an Appeal Panel in connection with the assessment of a medical dispute under Part 7 of Chapter 7.

126 Copies of certain medical reports to be supplied to worker

- (1) In this section:

"insurer" means a licensed insurer or a former licensed insurer.

"medical report", in relation to an injured worker, means a written report by:

- (a) a medical practitioner by whom the worker has been referred to another medical practitioner for treatment or tests related to the injury, or
 - (b) a medical practitioner who has treated the injury, or
 - (c) a medical practitioner who has been consulted by a medical practitioner referred to in paragraph (a) or (b) in connection with treatment of, or tests related to, the injury.
- (2) The regulations may make provision for or with respect to requiring an employer or insurer in possession of a medical report relating to an injured worker to provide a copy of the report to the worker, the worker's legal representative or any other person, if the worker's claim is disputed.
- (3) If an employer or insurer fails to provide a copy of a report as required by the regulations under subsection (2):
- (a) the employer or insurer cannot use the opinion or report to dispute liability to pay or continue to pay compensation or to reduce the amount of compensation to be paid and cannot use the report for any other purpose prescribed by the regulations for the purposes of this section, and
 - (b) the report is not admissible in proceedings on such a dispute before the Commission, and
 - (c) the report may not be disclosed to an approved medical specialist or an Appeal Panel in connection with the assessment of a medical dispute under Part 7 of Chapter 7.

4. OTHER RELEVANT SECTIONS THAT HAVE REGULATION MAKING POWERS OR CAN MANDATE EXCHANGE OF INFORMATION

Section 54 1987 Act

54 Notice required before termination or reduction of payment of weekly compensation

- (1) If a worker has received weekly payments of compensation for a continuous period of at least 12 weeks, the person paying the compensation must not discontinue payment, or reduce the amount, of the compensation without first giving the worker not less than the required period of notice of intention to discontinue payment of the compensation or to reduce the amount of the compensation.

Maximum penalty: 50 penalty units.

- (2) The required period of notice for the purposes of this section is:
- (a) when the discontinuation or reduction is on the basis of any reassessment by the insurer of the entitlement to weekly payments of compensation resulting from a work capacity decision of the insurer—3 months, or
 - (b) in any other case—2 weeks for a worker who has been receiving weekly payments of compensation for a continuous period of less than 1 year, or 6 weeks for a worker who has been receiving weekly payments of compensation for a continuous period of 1 year or more.

- (3) If the payment of compensation to a worker is discontinued, or the amount of compensation is reduced, by a person in circumstances involving the commission by that person of an offence under subsection (1), the worker may, whether or not that person has been prosecuted for the offence, recover from the person an amount of compensation that:
- (a) if no period of notice has been given—is equal to the amount of compensation, or additional compensation, that would have been payable during the required period of notice if payment of the compensation had not been discontinued or if the amount of compensation had not been reduced, or
 - (b) if less than the required period of notice has been given—is equal to the amount of compensation that would have been payable during the balance of the required period of notice if payment of the compensation had not been discontinued or if the amount of the compensation had not been reduced.
- (4) The notice referred to in this section is to be given to the worker personally or by post and (if the regulations so require) be in such form or contain such information as may be prescribed by the regulations.
- (5) This section does not affect the operation of section 58 (Refund of weekly payments paid after return to work etc).
- (6) This section does not apply to a reduction in weekly compensation as a result only of the application of different rates of compensation after the expiration of earlier periods of incapacity for which higher rates were payable.

Note. See sections 44BD and 44BE for the effect of a review under section 44BB on the required period of notice.

Section 74 1998 Act

74 Insurers to give notice and reasons when liability disputed

- (1) If an insurer disputes liability in respect of a claim or any aspect of a claim, the insurer must give notice of the dispute to the claimant.
- (2) The notice must contain the following:
- (a) a concise and readily understandable statement of the reason the insurer disputes liability and of the issues relevant to the decision (indicating, in the case of a claim for compensation, any provision of the workers compensation legislation on which the insurer relies to dispute liability),
 - (b) such other information as the regulations may prescribe.
- (3) The regulations may make provision for the form of and for other information to be included in or to accompany a notice under this section. The regulations may require an insurer to give a copy of a notice under this section to the claimant's employer.
- (4) The regulations may create offences in connection with any failure to comply with this section.

Note. A dispute as to liability to commence weekly payments within the requisite period after a claim for compensation is made must be notified in accordance with this section (see section 93 and the offence arising under section 94).

- (5) Notice is not required to be given under this section with respect to a dispute if notice has been given under section 54 of the 1987 Act with respect to the dispute and that notice contained the statements and information that a notice under this section is required to contain.
- (6) This section does not apply to a dispute based on a work capacity decision of an insurer under Division 2 of Part 3 of the 1987 Act.

Section 287A 1998 Act

287A Reviews prior to referral

- (1) A worker may request an insurer to review a claim after the insurer has disputed the claim or any aspect of the claim. A request may be made at any time before the dispute is referred to the Registrar for determination by the Commission.
- (2) On such a request, the insurer must review the claim not later than 14 days after the request is made and may accept the claim or, if the insurer determines that it disputes liability in respect of the claim or any aspect of the claim, must give notice of the dispute to the claimant.
- (3) The notice must contain the matters required to be set out under section 74 in a notice of a dispute and may contain such other information as the regulations may prescribe.
- (4) The notice is to comply with the other requirements for a notice given under section 74.

Section 154N 1987 Act

154N Regulations

- (1) The regulations may make provision for or with respect to the following:
 - (a) requiring the making and keeping of records by scheme agents and the giving of access to those records by scheme agents,
 - (b) the obligations of scheme agents with respect to confidentiality and disclosure of information (including personal information),
 - (c) the ownership, custody and control of records and other documents made and kept, or received and kept, by scheme agents.
- (2) The regulations may create offences, punishable by a penalty not exceeding 200 penalty units, for a contravention by a person of an obligation imposed on the person by or under an agency arrangement.
- (3) A reference in this section to a scheme agent includes a reference to a person who was formerly (but is no longer) a scheme agent.

Section 192A 1987 Act

192A Claims administration manual

- (1) The Authority may prepare and publish a claims manual for use by licensed insurers under this Division.
- (2) In preparing the claims manual, the Authority is required to promote, as far as practicable:

- (a) the prompt processing of claims and payment of amounts duly claimed, and
 - (b) the giving of information about workers' entitlements and about procedures for the making of claims and the resolution of disputes, and
 - (c) the minimisation of the effect of injuries to workers by the making of prompt arrangements for rehabilitation, and
 - (d) the proper investigation of liability for claims, and
 - (e) the recovery of proper contributions in connection with claims from other insurers or persons.
- (3) The claims manual may make provision (not inconsistent with this Act, the 1998 Act or the regulations under those Acts) in connection with all matters relating to the administration of claims, including:
- (a) liaison between insurers and employers concerning rehabilitation assessment of injured workers, and
 - (b) the provision or arrangement of suitable employment or rehabilitation training for partially incapacitated workers, and
 - (c) the monitoring of employment-seeking activities or rehabilitation training by partially incapacitated workers, and
 - (d) arrangements for the settlement of claims for damages, and
 - (e) procedures to be followed before a claim is made, such as procedures in connection with early notification of injury and provisional acceptance of liability.
- (3A) The Workers Compensation Guidelines under the 1998 Act can make provision in connection with any matter in connection with which the claims manual can make provision.
- (4) The Authority may 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.
- (4A) An insurer who fails to comply with a direction under subsection (4) is guilty of an offence.
- Maximum penalty: 50 penalty units.
- (5) It is a condition of the licence of an insurer under this Division that the insurer comply with any direction given to the insurer under this section.
- (6) Any claims manual in force under section 93B, immediately before its repeal, is taken to have been prepared and published under this section.

5. CLAUSE 41 OF THE 2016 WORKERS COMPENSATION REGULATION

41 Access to certain medical reports and other reports obtained by insurer

- (1) This clause applies to the following types of reports that an employer or insurer has in the employer's or insurer's possession:
 - (a) medical reports, including medical reports provided pursuant to section 119 (Medical examination of workers at direction of employer) of the 1998 Act,

- (b) certificates of capacity,
 - (c) clinical notes,
 - (d) investigators' reports,
 - (e) workplace rehabilitation providers' reports,
 - (f) health service providers' reports,
 - (g) reports obtained by or provided to an employer or insurer that contain information relevant to the claim on which a decision to dispute liability is made.
- (2) This clause applies to the following decisions of an employer or insurer relating to an injured worker:
- (a) a decision to dispute liability in respect of a claim, or any aspect of a claim (in circumstances requiring the insurer to give the worker a notice and reasons under section 74 of the 1998 Act),
 - (b) a decision to discontinue payment, or to reduce the amount of weekly benefits (in circumstances requiring the insurer to give the worker a notice of intention under section 54 of the 1987 Act),
 - (c) a decision on the review under section 287A of the 1998 Act of a decision described in paragraph (a) or (b) that confirms the original decision.
- (3) For the purposes of sections 73(1) and 126(2) of the 1998 Act, if an employer or insurer makes a decision to which this clause applies, the employer or insurer must provide a copy of any relevant report to which this clause applies to the worker, as an attachment to a notice under section 74 of the 1998 Act, section 54 of the 1987 Act or section 287A of the 1998 Act, as the case may be, except where the report has already been supplied to the worker and that report is identified in a statement under clause 38(1)(d).
- (4) The obligation in this clause to provide a copy of a report applies to any report that is relevant to the claim or any aspect of the claim to which the decision relates, whether or not the report supports the reasons for the decision.
- (5) If the employer or insurer is of the opinion that supplying a worker with a copy of a report would pose a serious threat to the life or health of the worker or any other person, the employer or insurer may instead supply the report:
- (a) in the case of a medical report, certificate of capacity or clinical notes—to a medical practitioner nominated by the worker for that purpose, or
 - (b) in any other case—to a law practice representing the worker.
- (6) If, on the application of an employer or insurer, the Authority is satisfied that supplying the worker with a copy of the report would pose a serious threat to the life or health of the worker or any other person and that supplying the report as provided by this clause would not be appropriate, the Authority may:
- (a) direct that the report be supplied to such other persons as the Authority considers appropriate, or
 - (b) make such other directions as the Authority thinks fit.

STAKEHOLDER VIEWS EXPRESSED IN RELEVANT SUBMISSIONS TO THE CONSULTATION ON THE REMAKE OF THE 2010 REGULATION

1. **SIRA Consultation Summary**
2. **AMWU**
3. **Australian Lawyers Alliance (including Parkes Project Discussion Paper)**
4. **Injured Workers Support Network**
5. **Unions NSW**
6. **icare**

1. SIRA CONSULTATION SUMMARY

Worker access to certain medical reports and other reports obtained by the insurer

A majority of submissions expressed opposition to the proposal that the provisions relating to worker access to certain medical reports and other reports obtained by the insurer be remade without change. That is, a majority of submissions expressed views supporting broader access provision more generally, and also supporting the removal of a 'dispute' as a precondition for access. Several submissions recommended the regulation be changed to better reflect and or align with related regulatory provisions of the *Health Records and Information Privacy Act 2002* (<http://www.legislation.nsw.gov.au/#/view/act/2002/71>) and *Government Information (Public Access) Act 2009* (<http://www.legislation.nsw.gov.au/#/view/act/2009/52>).

Several submissions attached or referenced a discussion paper issued as part of the WIRO Parkes Review, titled "Access to Information by a Worker". The paper provided detailed discussion and recommendations on this issue.

One submission also noted concern with the proposed insertion of a new penalty offence at clause 39 of the draft 2016 Regulation. The RIS noted the insertion of the new penalty offence was to address an apparent anomaly in Schedule 5 of the 2010 Regulation. However, the submission asserted that the introduction of the penalty offence into clause 39 was not appropriate and was not an 'equivalent replacement penalty to a 20 penalty unit provision...that has not been in place since 2005'.

2. AMWU – AUSTRALIAN MANUFACTURING WORKERS' UNION

Regulatory Impact Statement and Better Regulation Statement – Draft Workers Compensation Regulation 2016 – May 2016 -- AMWU Response June 2016 (pages 5 - 6)

Information to be provided to injured workers to enable Chapter Three, Injury Management, Workplace Injury and Workers Compensation Act 1998 (WIMWC1998)^{1, 2}

- a. The AMWU seeks the regulation to address the omission in the current regulation to ensure that workers receive injury management information in a timely and safe manner so that they may be properly informed and therefore able to participate fully in their injury management. The omission can be addressed by introducing an additional subclause (7) to draft clause 39.
- b. The AMWU proposes that clause 39(7) reflect the intent of provisions as provided under section 73 of the WIMWC 1998³
- c. We recommend clause 39 be retitled to "Access to certain medical reports and other reports obtained by insurer: sections 73, 126 and Chapter 3 of 98 Act.
- d. This addition is required to ensure that information relevant to a workers injury management is not withheld from the worker, and is provided in a timely manner.
- e. That the information must be provided as soon as possible and no later than ten calendar days prior to the report or information being used in a decision subject to Chapter 3 of the 98 Act.
- f. It must be provided in its full and complete form without edit.
- g. The purpose of this recommendation is to ensure that injured workers are informed and educated about their injury and therefore empowered to participate in their injury management.
- h. The withholding and or delayed release of information, and or selective release of information ensures that injured workers are pushed to the periphery of injury management decisions having an adverse effect on their return to work.
- i. The AMWU routinely comes across the following practices –
 - i. Withholding of injury management information such as a Functional Capacity Evaluation (FCE), Vocational Assessment, Workplace Assessment or other rehabilitation information until the worker is a case conference with others such as employer representatives and 'insurer representatives'. All but the workers have been in possession of injury management information prior to the case conference. At times the NTD may be provided with injury management information only at the time of the case conference. The injured worker is then expected to comply with the employer and insurers expectations whilst been uninformed and not afforded the opportunity to provide informed consent;

¹ Section 41 Workplace Injury Management and Workers Compensation Act 1998 NSW

² "The objectives of SIRA are set out in the SICG Act. The principle objectives..." page 8 and 9, Regulatory Impact Statement and Better Regulation Statement – Draft Workers Compensation Regulation 2016 – May 2016

³ Section 73 Insurer to provide copies of reports to workers "(1) the regulation may make provision for or with respect to requiring an insurer to provide a worker..." WIMWC1998

- ii. Injury Management Consultant reports i.e. injury management information being withheld, deliberately or never provided to the injured worker in contravention of the SIRA Injury Management Consultants Guide;
 - iii. The injured worker being expected to cooperate as they are obliged to by the WIMWC1998 without being in receipt of injury management information when a Return To Work and or Injury Management Plan is being prepared; extraordinarily some employers representatives withhold a copy of Return To Work Plans whilst expecting the worker to sign and comply with the Return To Work Plan
 - iv. Variations of the above practices including the extraordinary action of one government self- insurer advising an injured worker that if they want to see the Functional capacity evaluation and Voc. Assessment carried out upon them and spoken to a NTD Case Conference by the employer/insurer representative they will have to make GIPA application to see the information.
- j. The withholding of injury management information is about power, it is not about returning injured workers to work in a safe, timely and durable manner and as such is contrary to the objectives of the legislation.
- k. It seems that by withholding this information employers and insurers are selectively exercising a legal privileged created by section 73 WIMWC1998 and yet without due action and notice expecting an injured worker to become spontaneously informed and therefore cooperative. This predatory behaviour needs to stop as it harms workers.
-

3. AUSTRALIAN LAWYERS ALLIANCE (ALA)

Draft Workers Compensation Regulation 2016, 21 June 2016 (page 2)

"In addition to our call for broad review of the Regulation and attention to Schedule 6, the ALA implores SIRA to consider amending the proposed Regulation on an urgent basis to provide workers with **early** access to information on their claims file (of the kind and types referred to in clause 46 of the *Workers Compensation Regulation 2010*). The ALA believes that early access to information would facilitate implementation of return to work protocols and goals and potentially avoid disputes about work capacity. That a worker can only access such information in the event of the issue of a section 54,74 or 287A 'dispute' notice (*Workers Compensation and Work Injury Management Act 1998*) places the worker at an incredible disadvantage in the claims process and often necessitates reactive behaviour which ultimately results in a dispute. In this regard the ALA commends to you the Parkes Project Discussion Paper "Access to Information by a Worker", a copy of which is provided with this letter." [reproduced with permission of the Workers Compensation Independent Review Officer, Kim Garling]

PARKES PROJECT DISCUSSION PAPER (REPRODUCED BELOW)

ACCESS TO INFORMATION BY A WORKER

1.1 Discussion

Under the provisions of the Workers Compensation Legislation a worker is not entitled to access information from his/her claims file unless there is a dispute¹ and cannot effectively enforce a request for information unless proceedings about the dispute have been commenced in the Commission.

Access to information about the worker is practically a one way street with the worker having a 'duty to co-operate' expressed as:

- "(1) A claimant must co-operate fully in respect of the claim with the insurer liable under the claim.*
- (2) In particular, the claimant must comply with any reasonable request by the insurer to furnish specified information (in addition to the information furnished in the claim form).*
- (3) The duty under this section applies only until proceedings before the Commission are commenced in respect of the claim but if the claimant fails without reasonable excuse to comply with this section, proceedings before the Commission cannot be commenced in respect of the claim while the failure continues."*²

There is no commensurate duty on the employer/insurer in the ordinary course of administration of a claim prior to notification of a dispute except for the 'right to information', with the information to which a worker has a right of access being *"the employer's name and address for the service of documents for the purposes of this Act, and the name and address of the insurer from whom the employer has obtained a policy of insurance or, if the employer is a self-insurer, to be so informed."*³

1.2 Provisions relating to access to information prior to commencement of proceedings in the Commission

Whilst access to information about a worker is contemplated in sections 73,119 and 126 of the 1998 Act, the section provide a regulation making power.

Section 73 of the 1998 Act contemplates provision for exchange of, and access to, information about a worker not limited to any particular point in time. The Section provides:

- (1) The regulations may make provision for or with respect to requiring an insurer to provide a worker, a worker's legal representative or any other person with a copy*

¹ Clause 46 of the Workers Compensation Regulation 2010 mandates provision of certain information when notice is given of the following disputes:

(a) a decision to dispute liability in respect of a claim, or any aspect of a claim (in circumstances requiring the insurer to give the worker a notice and reasons under section 74 of the 1998 Act),

(b) a decision to discontinue payment, or to reduce the amount of weekly benefits (in circumstances requiring the insurer to give the worker a notice of intention under section 54 of the 1987 Act),

(c) a decision on the review under section 287A of the 1998 Act of a decision described in paragraph (a) or (b) that confirms the original decision.

² Section 71 of the 1998 Act

³ Section 232(1) of the 1998 Act

of a specified report, or a report of a specified kind, obtained by the insurer in relation to a claim by the worker.

- (2) Without limiting subsection (1), the kind of reports to which the regulations under this section can apply include investigators' reports, rehabilitation providers' reports and reports of assessments under section 40A (Assessment of incapacitated worker's ability to earn) of the 1987 Act.
- (3) If an insurer fails to provide a copy of a report as required by the regulations under this section:
 - (a) the insurer cannot use the report to dispute liability to pay or continue to pay compensation or to reduce the amount of compensation to be paid and cannot use the report for any other purpose prescribed by the regulations for the purposes of this section, and
 - (b) the report is not admissible in proceedings on such a dispute before the Commission, and
 - (c) the report may not be disclosed to an approved medical specialist or an Appeal Panel in connection with the assessment of a medical dispute under Part 7 of Chapter 7.

Section 119 of the 1998 Act, directs a worker who has given notice of an injury to attend a medical examination by a medical practitioner provided and paid for by the employer, if required by their employer, and provides that:

*"The regulations may make provision for or with respect to requiring an employer or insurer to provide a worker, a worker's legal representative or any other person, within the period required by the regulations, with a copy of any medical opinion or report furnished to the employer or insurer by a medical practitioner in connection with an examination of the worker pursuant to a requirement under this section."*⁴

Section 126 of the 1998 Act contemplates, in relation to medical reports in the possession of the insurer or employer, that *"the regulations may make provision for or with respect to requiring an employer or insurer in possession of a medical report relating to an injured worker to provide a copy of the report to the worker, the worker's legal representative or any other person, if the worker's claim is disputed"*⁵. Section 126 contemplates similar penalties for non-provision of the reports in breach of the regulation.

There is thus scope for the regulations to prescribe how and when workers can access all kinds of information about their claim at any time in the claims lifecycle. However, the regulations provide only for exchange of information when a dispute notice is issued (and not a Work Capacity Decision). By the time a dispute is notified it is too late for the worker to do anything about their claim except consider challenging the dispute.

A Work Capacity Decision is not bound by the same provisions as a dispute notice under section 74 of the 1998 Act. The Work Capacity Guidelines⁶ provide that the written work capacity decision advice must comply with any requirements of the 1987 Act and Review Guideline and

⁴ Section 119(5) of the 1998 Act

⁵ Section 126(2) of the 1998 Act

⁶ Work Capacity Guidelines - September 2013, Chapter 5.3.2

"... outline the evidence considered in making the decision, noting the author, the date and any key information. All evidence considered should be referred to, regardless of whether or not it supports the decision... advise that any documents or information that have not already been provided to the worker can be provided to the worker on request to the insurer."

It is not necessary for the documentation relied upon or considered in the making of the Work Capacity Decision to be provided to the worker; rather the worker can request the information from the insurer after the Decision is made. To facilitate the management of complaints the Independent Review Officer (WIRO) *"may require an insurer or a worker who has applied for review of a work capacity decision of an insurer to provide specified information that the Independent Review Officer reasonably requires for the purposes of the exercise of any function of the Independent Review Officer."*⁷

1.3 The Regulation

The only relevant clause of the Regulation is clause 46⁸ (formerly clause 43) which only provides access to information of varying kinds where there is a dispute. The general regulation making power to prescribe access to information and documents in any other circumstances has not been invoked.

Access to information by a worker is predicated upon their being a liability dispute and a dispute notice issued (sections 54, 74 and 287A of the 1998 Act).

Clause 46 of the Regulation requires that copies of the following documents and information that an employer or insurer has in their possession be provided as an attachment to the dispute notice:

- "(a) medical reports, including medical reports provided pursuant to section 119 of the 1998 Act (Medical examination of workers at direction of employer),*
- (b) medical certificates,*
- (c) clinical notes,*
- (d) investigators' reports,*
- (e) workplace rehabilitation providers' reports,*
- (f) health service providers' reports,*
- (g) reports of assessments under section 40A (Assessment of incapacitated worker's ability to earn) of the 1987 Act,*
- (h) reports obtained by or provided to an employer or insurer that contain information relevant to the claim on which a decision to dispute liability is made,*
- (i) wage details required to be supplied under section 43(2) of the 1987 Act where a decision has been made to decline payment of, or reduce the amount of, weekly benefits, but only if such details have not already been supplied to the worker."*⁹

⁷ Section 27B of the 1998 Act

⁸ Of the Workers Compensation Regulation 2010 (the 2010 Regulation)

⁹ Clause 46(1) of the 2010 Regulation

The obligation in Clause 46 applies “to any report that is relevant to the claim or any aspect of the claim to which the decision relates, whether or not the report supports the reasons for the decision”¹⁰.

Where there is concern that the supply of a document would “pose a serious threat to the life or health of the worker or any other person” the clause provides for the document or information to be provided to either a nominated medical practitioner, a legal practitioner representing the worker or a person considered appropriate by the WorkCover Authority.¹¹

1.4 The Claims Guidelines

Access to information by a worker during the administration of a claim is not assisted by the Claims Guidelines except where a permanent impairment claim is made. The Claims Guidelines provide that where there is an exchange of offers in relation to a permanent impairment claim the insurer should provide a copy of the medical report supporting their position to the worker: “Copies of the reports and documents relied upon by the insurer in the making of the offer must be attached to the written advice of the offer to the worker. If the insurer is of the opinion that supplying the worker with a copy of a medical report would pose a serious threat to the life or health of the worker or any other person, the insurer may instead supply the medical report to a medical practitioner nominated by the worker for that purpose.”¹²

1.5 Access to information after proceedings have been commenced in the Commission

Exchange of information is encouraged between the parties once a dispute is referred for determination by the Commission.¹³ The rules provide for information and documents to be exchanged between the parties and the penalties imposed for non-compliance.

The Commission’s rules provide for the issue of notices to produce or orders for access to information by the Registrar in certain circumstances. The commission can also direct any person (including a party to proceedings) to produce information or documents¹⁴. Once documents are produced to the commission following a direction, the commission can produce or furnish the documents to a party to the proceedings.¹⁵

1.6 Access to information by a worker where there is no dispute

There is nothing to prevent a worker requesting information (including documents) accumulated by an insurer during the course of administration of a claim. There is however, no means, other than by means of a complaint to WIRO to enforce the request.

When a worker makes a request for documents and information pertaining to them on their claims file, the usual response is to deny access on the basis of 'privacy' rather than 'legal privilege'.

The *General Manual* which forms part of the *Nominal Insurer Deed* provides in Chapter 5 of Appendix B, directions on how to manage ‘Nominal Insurer’s Confidential Information’. The

¹⁰ Clause 46(4) of the 2010 Regulation

¹¹ Clauses 46(5) and (6) of the 20101 Regulation

¹² Chapter 6.6 of the Claims Guidelines

¹³ Section 290 of the 1998 Act

¹⁴ Section 357 of the 1998 Act

¹⁵ Section 358 of the 1998 Act

glossary to the Deed defines Nominal Insurer's Confidential Information as including all records and insurance records. Records is described as "*all information that is made or kept, or received and kept, by the scheme agent in the exercise of its functions on behalf of the Nominal Insurer.*"

The deed explains that competitive and market sensitive information are excluded from the *Government Information (Public Access) Act 2009* (NSW) ("GIPA"). Chapter 5.1 of Appendix B explains that this exemption in relation to claims "*is not intended to override the rights conferred on workers elsewhere in the workers compensation legislation option to obtain access to their claims information. For example, sections 73, 119 and 126 of the 1998 Act require an insurer to provide copies of certain medical reports to workers as required by the regulation.*"

Specifically in relation to release of information to workers, Appendix B refers to the disclosure to workers of all reports relevant to a decision to dispute liability. Appendix B provides no guidance to the scheme agent in relation to access to, release or exchange of information upon request by a worker other than where a dispute notification has been provided.

Generally, the experience of workers is that access to information of the kind referred to in clause 46 of the 2010 Regulation is refused upon request where there is no dispute.

It is worthy of note that the Commonwealth Compensation Scheme provides that "*A relevant authority shall ... on request by a claimant--give to the claimant any document held by the authority that relates to the claimant's claim*".¹⁶

1.7 Consequences of lack of early access to information

*"Information is power, particularly in litigation, and the sooner information is disclosed and shared by both parties the less likely there are to be inappropriate power balances."*¹⁷

Early exchange of information about a claim has the ability to avoid disputation and instead redirect focus on reconciling concerns of the parties to a potential dispute.

The Commission has expressed its concerns about non-provision of information to a worker in an E Bulletin August 2013 thus:

"Provision of Reports to Workers – Clause 46 of the 2010 Regulation

Clause 46(3) of the Workers Compensation Regulation 2010 requires that an employer or insurer "must provide a copy of any relevant report to which the clause applies to the worker", as an attachment to a section 74 notice, except where the report has already been supplied to the worker. The employer or insurer is obligated to provide a copy of any report relevant to the claim, whether or not the report supports the reasons for a decision (cl 46(4)).

Respondents in Commission proceedings should be aware of this requirement and ensure compliance by their insurer clients."

The insurer or employer commences to gather information and documentation about a worker once an initial notification of an injury is made. A great deal of that information and documentation is personal to the worker obtained from service providers providing a service

¹⁶ *Safety Rehabilitation and Compensation Act 1988* (CW) section 59(1)

¹⁷ Guthrie R., L. Goldacre and W. Claydon (2008) "*Workers Compensation Dispute Resolution Procedures in Western Australia – The New Regime*" QUTLJJ 8 (1): 48-76 at p.76

to the worker directly. For example medical practitioners, allied health service providers, rehabilitation providers. Information exchange is referred to within the acts however not enabled by the regulations.

Early exchange of information between worker and insurer and employer is required to facilitate the accomplishment of the primary objectives of the scheme, particularly quick safe and durable return to work.

The following principles should be adopted:

1. There should be transparency about information collected by an employer or insurer about an individual injured worker.
2. A worker should be provided by the employer or insurer with information of the kind referred to in clause 46 of the WCR 2010 with the general exception that if the supply of that information would pose a serious threat to the life or health of the worker or any other person, the information, in the case of medical information, must be provided to a medical practitioner, or in other case, to a legal practitioner.

1.8 Access to workers compensation claim information under other State legislation

Limited access to information collected by a claims manager is available to certain injured workers under other State Acts. These methods are generally considered to be inefficient, time consuming and cumbersome and in some circumstances unresponsive to the needs of the injured worker.

1.8.1 Health Records and Information Privacy Act 2002 (NSW)

Workers compensation claimants may be able to access their own workers compensation claim information from public and private organisations through the *Health Records and Information Privacy Act 2002* (NSW).

The purpose of the *Health Records and Information Privacy Act 2002* is to promote fair and responsible handling of 'health information' including by enabling individuals to gain access to their health information.

The Act is said to apply to every organisation that is a health service provider or that collects, holds or uses health information. The term "organisation" means a "*public sector agency or a private sector person.*"¹⁸ Organisations are required to comply with the Health Privacy Principles set out within the Act

"*Health Information*" includes:

- personal information that is information or an opinion about the physical or mental health or a disability of an individual or a health service provided, or to be provided to an individual,
- other personal information collected to provide, or in providing a health service

The Health Privacy Principles state that an organisation must not collect health information unless the information is collected for a lawful purpose directly related to a function or activity of the organisation.

Health Privacy Principal 7 provides that an organisation that holds health information must provide an individual with access to the information without excessive delay or expense.

¹⁸ Section 4 of the *Health Records and Information Privacy Act 2002* (NSW).

Access must be requested in writing. Private sector persons must respond to a request for access within 45 days after receiving the request, can charge a fee for provision of access to information and can refuse access until after the fee is paid. Access can be refused where access would pose a serious threat to the life or health of the individual.

1.8.1.1 Situations where access is not to be granted under the HRIPA

The *Health Records and Information Privacy Act 2002* states that a private sector person is not required to provide an individual with access to 'health information' if, for example¹⁹:

- providing access would pose a serious threat to the life or health of the individual or
- providing access would have an unreasonable impact on the privacy of other individuals and refusing access is in accordance with guidelines, if any, issued by the Privacy Commissioner, or
- the information relates to existing or anticipated legal proceedings between the private sector person and the individual and the information would not be accessible by the process of discovery in those proceedings or is subject to legal professional privilege, or
- providing access would reveal the intentions of the private sector person in relation to negotiations, other than about the provision of a health service, with the individual in such a way as to expose the private sector person unreasonably to disadvantage, or
- providing access would be unlawful, or
- providing access would be likely to prejudice an investigation of possible unlawful activity, or
- providing access would be likely to prejudice a law enforcement function by or on behalf of a law enforcement agency, or
- a law enforcement agency performing a lawful security function asks the private sector person not to provide access to the information on the basis that providing access would be likely to cause damage to the security of Australia, or
- the request for access is of a kind that has been made unsuccessfully on at least one previous occasion and there are no reasonable grounds for making the request again, or
- the individual has been provided with access to the health information in accordance with this Act and is making an unreasonable, repeated request for access to the same information in the same manner.

1.8.2 Privacy and Personal Information Protection Act 1998

Section 14 of the *Privacy and Personal Information Protection Act 1998* requires public sector agencies to provide access to personal information to individuals.

'Public sector agency' is defined as any of the following:

- (a) a Public Service agency or the Teaching Service,

¹⁹ Section 29 of the *Health Records and Information Privacy Act 2002* (NSW).

- (a1) the office of a political office holder within the meaning of the Members of Parliament Staff Act 2013, being the office comprising the persons employed by the political office holder under Part 2 of that Act,
- (b) a statutory body representing the Crown...
- (d) a person or body in relation to whom, or to whose functions, an account is kept of administration or working expenses, if the account:
 - (i) is part of the accounts prepared under the Public Finance and Audit Act 1983, or
 - (ii) is required by or under any Act to be audited by the Auditor-General, or
 - (iii) is an account with respect to which the Auditor-General has powers under any law, or
 - (iv) is an account with respect to which the Auditor-General may exercise powers under a law relating to the audit of accounts if requested to do so by a Minister of the Crown,
- (e) the NSW Police Force,
- (f) a local government authority,
- (g) a person or body that:
 - (i) provides data services (being services relating to the collection, processing, disclosure or use of personal information or that provide for access to such information) for or on behalf of a body referred to in paragraph (a)–(f) of this definition, or that receives funding from any such body in connection with providing data services, and
 - ii) is prescribed by the regulations for the purposes of this definition,

but does not include a State owned corporation.

"Personal information" means "information or an opinion about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion". It does **not** include health information within the meaning of the *Health Records and Information Privacy Act 2002*.

Access must be given by the public sector agency at the request of the individual to whom the information relates without excessive delay or expense.

1.8.3 Government Information (Public Access) Act 2009

NSW Public Sector employees may also access workers compensation claims information under the *Government Information (Public Access) Act 2009* ("GIPA").

Access to information must be sought by way of a 'valid' application form which includes sufficient information to enable the agency to identify the government information requested, be accompanied by the prescribed fee, and sent to the agency concerned. On receipt of an application the agency has to first decide whether the application is valid and communicate that decision to the applicant within 5 days of the application being made. A decision must then be made as to access. That must be done within 20 days after the application is received. If access is granted it may be granted to limited material.

A GIPA application is an inefficient and time consuming way for an injured public sector employee to access personal information collected about them for the purposes of their workers compensation claim.

1.9 Recommendations

1. Amend the Regulation to mandate provision to a worker or person nominated by the worker (such as a legal practitioner or union or doctor), upon request, of all documents relating to the worker's claim and return to work prior to or regardless of the issue of a dispute notice with appropriate restraints, for example where:
 - providing access would pose a serious threat to the life or health of the individual, (in which case access should be provided to a medical practitioner, legal practitioner or such other person as the Authority considers appropriate)
 - providing access would have an unreasonable impact on the privacy of other individuals
 - the information relates to existing or anticipated legal proceedings between the worker and the employer or insurer and the information would not be accessible by the process of discovery in those proceedings or is subject to legal professional privilege
 - providing access would reveal the intentions of the employer or insurer in relation to negotiations with the worker in such a way as to expose the employer or insurer unreasonably to disadvantage.
 2. Amend the Workers Compensation Regulation 2010 and the Claims Guidelines and the Claims Manual to reflect a worker's entitlement to request and receive all information pertaining to the worker (other than information which is subject to legal professional privilege or other privilege)
-

4. INJURED WORKERS SUPPORT NETWORK

Formal feedback on the SIRA proposed 2016 Workers Compensation regulation is 13 June 2016 (pages 3 -7)

Part 7 Notices and claims procedure

Background:

The 2010 regulations will be adopted into the 2016 regulations without change or adaptation.

Response:

The Injured Workers Support Network objects to the continued use of this part in the ongoing refusal to provide access to the medical files of workers. This refusal is contrary to the presumption of full access to health and other files in NSW Health as outlined in the NSW Health Privacy Act and in other departments where responsibility for decisions that impact the lives of NSW citizens reside.

The Injured Workers Support Network demands that the NSW Workers Compensation system aligns itself with current standard government practice in the provision of health services and adopts a full disclosure and access model.

To this end we are propose an adaption of the 2016 regulation to reflect this.

Part 7 Notice and claims procedure clause 39 must be changed to reflect open and transparent access. In the following ways:

Recommendation:

2016 draft regulation	2016 adapted regulation
39: Access to certain medical reports and other reports obtained by insurer: secs 73 and 126 of 1998 Act	Delete "Certain"
Sub clause 2	Add: (d) a decision under sections 36, 37 and 38 of the workers compensation Act 1987
Sub clause 3	Add: "All" between "copy of" and "relevant"
Sub clause 3	Delete: except where the report has already been supplied to the worker and that report is identified in a statement under clause 36 (1) (d).
Sub Clause 4	Add: "all" between the words "to" and "report"
Sub Clause 4	Add: "are" between the words "that" and "relevant"
Sub Clause 5	Add: "must submit a request to withhold or divert the report to the Authority" between the words "insurer" and "who"
Sub Clause 5	Add: "make a determination to" between the words "instead" and "supply".
Sub Clause 5	Add: (b) to an identified representative of the worker such as their Union

	<p>New Sub Clause 6</p> <p>(6) The Authority must inquire from relevant external authorities (such as police and mental health services) as to the veracity of the employer or insurer's opinion in part (5) is legitimate prior to any decision to divert or withhold the report.</p>
	<p>New Sub Clause 7</p> <p>(7) The Authority may delegate this function to an adequately qualified body or individual to make this determination.</p>
Sub Clause 7	<p>Re numbered sub clause 8 Add:</p> <p>"and after relevant inquiry as per part (6)" between the words "insurer" and "the"</p>
	<p>New sub clause 9</p> <p>(9) The Authority must provide written notification of a decision to withhold or restrict records from the worker to a medical practitioner nominated by the worker for that purpose and to a law practice representing the worker.</p>

Add: Part 13 Workers right to access records held by the Authority or other parties.

(66) The Authority and all parties relating to the claims management, medical care and rehabilitation must adhere to the Health Privacy Principles in schedule 1 of the Health Records and Information Privacy Act 2002.

Amended extract:

"39 Access to certain medical reports and other reports obtained by insurer: secs 73 and 126 of 1998 Act

- (1) This clause applies to the following types of reports that an employer or insurer has in the employer's or insurer's possession:
 - (a) medical reports, including medical reports provided pursuant to section 119 of the 1998 Act (Medical examination of workers at direction of employer),
 - (b) certificates of capacity,
 - (c) clinical notes,
 - (d) investigators' reports,
 - (e) workplace rehabilitation providers' reports,
 - (f) health service providers' reports,
 - (g) reports obtained by or provided to an employer or insurer that contain information relevant to the claim on which a decision to dispute liability is made.
- (2) This clause applies to the following decisions of an employer or insurer relating to an injured worker:
 - (a) a decision to dispute liability in respect of a claim, or any aspect of a claim (in circumstances requiring the insurer to give the worker a notice and reasons under section 74 of the 1998 Act),

- (b) a decision to discontinue payment, or to reduce the amount of weekly benefits (in circumstances requiring the insurer to give the worker a notice of intention under section 54 of the 1987 Act),
 - (c) a decision on the review under section 287A of the 1998 Act of a decision described in paragraph (a) or (b) that confirms the original decision.
 - (d) a decision under sections 36, 37 and 38 of the Workers Compensation Act 1987
- (3) If an employer or insurer makes a decision to which this clause applies, the employer or insurer must provide a copy of all relevant reports to which this clause applies to the worker, as an attachment to a notice under section 74 of the 1998 Act, section 54 of the 1987 Act or section 287A of the 1998 Act, as the case may be. ~~except where the report has already been supplied to the worker and that report is identified in a statement under clause 36(1)(d).~~ Maximum penalty: 50 penalty units
- (4) The obligation in this clause to provide a copy of a report applies to all report that are relevant to the claim or any aspect of the claim to which the decision relates, whether or not the report supports the reasons for the decision.
- (5) If the employer or insurer is of the opinion that supplying a worker with a copy of a report would pose a serious threat to the life or health of the worker or any other person, the employer or insurer must submit a request to withhold or divert the report to the Authority who may instead make a determination to supply the report:
- (a) in the case of a medical report, certificate of capacity or clinical notes—to a medical practitioner nominated by the worker for that purpose, or
 - (b) to an identified representative of the worker (i.e Union)
 - (c) in any other case - to a law practice representing the worker.
- (6) The Authority must inquire from relevant external authorities (such as police and mental health services) as to the veracity of the employer or insurer's opinion in part (5) is legitimate prior to any decision to divert or withhold the report.
- (7) The Authority may delegate this function to an adequately qualified body or individual to make this determination.
- (8) If, on the application of an employer or insurer, and after relevant inquiry as per part (6) the Authority is satisfied that supplying the worker with a copy of the report would pose a serious threat to the life or health of the worker or any other person and that supplying the report as provided by this clause would not be appropriate, the Authority may:
- (a) direct that the report be supplied to such other persons as the Authority considers appropriate, or
 - (b) make such other directions as the Authority thinks fit.
- (9) The Authority must provide written notification of a decision to withhold or restrict records from the worker to a medical practitioner nominated by the worker for that purpose and to a law practice representing the worker."

5. UNIONS NSW

Unions NSW: Review of the Workers Compensation Regulation 2016 (pages 4 – 5)

Access to Information for a Worker

1. Currently often the last person to know what a doctor has written about an injured worker is the injured worker themselves.
2. Currently injured workers are required to lodge a dispute before the information is shared.
3. There are significant time constraints for workers who undertake a dispute or seek a review of a work capacity decision. These timeframes lead the worker to be at a disadvantage if they have not got a copy of the medical reports that have been written about them.
4. The secrecy also leads to unprofessional reports with inaccurate information which can lead claims into disputation.
5. The WIRO Parkes Review was unanimous (employers, insurers and workers) in its recommendation that workers be able to access their own medical reports.
6. Although the Parkes Review did not adopt the Unions NSW recommendation regarding a real time online portal for injured workers to access the entire file, which would be a better and innovative Regulation, they did recommend allowing workers or their representatives to access this information without the requirement for a dispute to be initiated.
7. The confidential document WIRO, Access to Information by a Worker Discussion Paper is at Attachment **E**. The recommendations of the WIRO Parkes Project Advisory Committee are at Attachment **F**.
8. Unions have reported cases where injured workers have been dismissed for being unable to undertake the inherent requirements of the job based on medical reports that they have not seen or verified. The Macquarie University research Unions NSW commissioned (Attachment **G**¹), noted that workers are often terminated on the basis of information contained in their workers compensation medical reports. These reports, although designed to assess a workers capacity to work, are unfortunately used to calculate hypothetical work capacity, which can be applied to reduce workers compensation payments. These reports are also often used to deem the worker unfit for the inherent duties of the work.
9. For example, a lawyer injures their back getting boxes of files to court. The back injury requires surgery and 7 months later they are on the path to recovery but require some consideration of standing and sitting times as well as lifting restrictions. Their doctor's report overstates these restrictions. The law firm says they can't accommodate the restrictions. The insurance clerk takes this report and uses it to say the lawyer is fit for office duties (at any office job that doesn't require heavy boxes to be carried around) and therefore reduces the workers compensation payment to zero. The employer then uses the failure to return to pre-injury duties as grounds to terminate.

¹ Markey R., Holley S., Thornthwaite L., O'Neill S., *The Impact on Injured Workers of Changes to NSW Workers Compensation Report No.3 for Unions NSW, 2015*

10. Unions NSW submits there should be a prohibition on the use of workers compensation medical reports for purposes other than the workers compensation process.

Recommendations

The Regulation should be amended to allow workers to access medical and associated medical reports contained on their employer or insurer files.

The Regulation should be amended to prohibit the use of workers compensation medical reports for purposes other than workers compensation.

6. ICARE

State Insurance Regulatory Authority (SIRA) Public consultation draft of the Workers Compensation Regulation 2016 – Submission from icare (pages 7 – 8)

Part 7, clause 39

The provisions with respect to the exchange of information, in particular clause 39 in the consultation draft, have not been amended. While it is out of scope according to the Better Regulation Statement, given the new governance arrangements it would be helpful to have a clear regulatory regime governing the exchange of information. In particular, the powers of SIRA to require insurers to provide claim information are not clear.

Part 7, clause 39 (3)

This clause contains a new penalty offence, and while this change has been noted in the table under the list of amendments, it has not been noted as a policy change.

The rationale for the introduction of a penalty in the table in the Better Regulation Statement is that the equivalent penalty has been removed from the penalty notice provisions under Schedule 5. With respect to this view, the introduction of a new 50 unit penalty provision under new clause 39 is not an equivalent replacement penalty to a 20 penalty unit provision (or \$200 penalty notice offence) that has not been in place since 2005.

The penalty notice offence under Schedule 5 of the Regulation is redundant and has been since the penalty was removed from the Workplace Injury Management and Workers Compensation Act 1998 in December 2005. The penalty provision was removed from the 1998 Act following other amendments to the dispute resolution process that prevented insurers from relying on reports not provided in the dispute notice as evidence at the Workers Compensation Commission (sections 73 and 126 of the 1998 Act).

In addition, compliance with the clause is subject to the concept of the relevance of any given report. That is, the clause provides that only 'relevant' reports need be attached to a dispute notice. What constitutes a 'relevant' report will vary from case to case and require the decision maker to exercise judgement in relation to what reports are relevant. icare's view is that it is not appropriate to introduce a penalty in these circumstances.

It is icare's view that the introduction of the penalty offence now is excessive and unnecessary. icare is not aware of any evidence requiring the need to apply the penalty now, some 11 years after it was removed, and that the current dispute resolution process

works effectively in informing workers of the information used to decline liability for compensation (sections 73 and 126 of the 1998 Act).

If the purpose of the new penalty is to ensure workers get access to information about their claim, it is suggested that this is not an appropriate mechanism as the obligation to provide reports under clause 39(3) relates only to insurer decisions to dispute liability or discontinue weekly payments. Workers can make an application to the insurer at any time to have access to their claims information under the *Privacy and Personal Information Act 1998*.

[End Submissions]

PRIVACY ACT 1988 (CW)

SCHEDULE 1—AUSTRALIAN PRIVACY PRINCIPLES

Note: See section 14.

Overview of the Australian Privacy Principles

Overview

This Schedule sets out the Australian Privacy Principles.

Part 1 sets out principles that require APP entities to consider the privacy of personal information, including ensuring that APP entities manage personal information in an open and transparent way.

Part 2 sets out principles that deal with the collection of personal information including unsolicited personal information.

Part 3 sets out principles about how APP entities deal with personal information and government related identifiers. The Part includes principles about the use and disclosure of personal information and those identifiers.

Part 4 sets out principles about the integrity of personal information. The Part includes principles about the quality and security of personal information.

Part 5 sets out principles that deal with requests for access to, and the correction of, personal information.

Australian Privacy Principles

The Australian Privacy Principles are:

Australian Privacy Principle 1—open and transparent management of personal information

Australian Privacy Principle 2—anonymity and pseudonymity

Australian Privacy Principle 3—collection of solicited personal information

Australian Privacy Principle 4—dealing with unsolicited personal information

Australian Privacy Principle 5—notification of the collection of personal information

Australian Privacy Principle 6—use or disclosure of personal information

Australian Privacy Principle 7—direct marketing

Australian Privacy Principle 8—cross border disclosure of personal information

Australian Privacy Principle 9—adoption, use or disclosure of government related identifiers

Australian Privacy Principle 10—quality of personal information

Australian Privacy Principle 11—security of personal information

Australian Privacy Principle 12—access to personal information

Australian Privacy Principle 13—correction of personal information

Part 1—Consideration of personal information privacy

1 Australian Privacy Principle 1—open and transparent management of personal information

- 1.1 The object of this principle is to ensure that APP entities manage personal information in an open and transparent way.

Compliance with the Australian Privacy Principles etc.

- 1.2 An APP entity must take such steps as are reasonable in the circumstances to implement practices, procedures and systems relating to the entity's functions or activities that:
- (a) will ensure that the entity complies with the Australian Privacy Principles and a registered APP code (if any) that binds the entity; and
 - (b) will enable the entity to deal with inquiries or complaints from individuals about the entity's compliance with the Australian Privacy Principles or such a code.

APP Privacy policy

- 1.3 An APP entity must have a clearly expressed and up to date policy (the APP privacy policy) about the management of personal information by the entity.
- 1.4 Without limiting subclause 1.3, the APP privacy policy of the APP entity must contain the following information:
- (a) the kinds of personal information that the entity collects and holds;
 - (b) how the entity collects and holds personal information;
 - (c) the purposes for which the entity collects, holds, uses and discloses personal information;
 - (d) how an individual may access personal information about the individual that is held by the entity and seek the correction of such information;
 - (e) how an individual may complain about a breach of the Australian Privacy Principles, or a registered APP code (if any) that binds the entity, and how the entity will deal with such a complaint;
 - (f) whether the entity is likely to disclose personal information to overseas recipients;
 - (g) if the entity is likely to disclose personal information to overseas recipients—the countries in which such recipients are likely to be located if it is practicable to specify those countries in the policy.

Availability of APP privacy policy etc.

- 1.5 An APP entity must take such steps as are reasonable in the circumstances to make its APP privacy policy available:
- (a) free of charge; and
 - (b) in such form as is appropriate.

Note: An APP entity will usually make its APP privacy policy available on the entity's website.

- 1.6 If a person or body requests a copy of the APP privacy policy of an APP entity in a particular form, the entity must take such steps as are reasonable in the circumstances to give the person or body a copy in that form.

2 Australian Privacy Principle 2—anonymity and pseudonymity

- 2.1 Individuals must have the option of not identifying themselves, or of using a pseudonym, when dealing with an APP entity in relation to a particular matter.
- 2.2 Subclause 2.1 does not apply if, in relation to that matter:
 - (a) the APP entity is required or authorised by or under an Australian law, or a court/tribunal order, to deal with individuals who have identified themselves; or
 - (b) it is impracticable for the APP entity to deal with individuals who have not identified themselves or who have used a pseudonym.

Part 2—Collection of personal information

3 Australian Privacy Principle 3—collection of solicited personal information

Personal information other than sensitive information

- 3.1 If an APP entity is an agency, the entity must not collect personal information (other than sensitive information) unless the information is reasonably necessary for, or directly related to, one or more of the entity's functions or activities.
- 3.2 If an APP entity is an organisation, the entity must not collect personal information (other than sensitive information) unless the information is reasonably necessary for one or more of the entity's functions or activities.

Sensitive information

- 3.3 An APP entity must not collect sensitive information about an individual unless:
 - (a) the individual consents to the collection of the information and:
 - (i) if the entity is an agency—the information is reasonably necessary for, or directly related to, one or more of the entity's functions or activities; or
 - (ii) if the entity is an organisation—the information is reasonably necessary for one or more of the entity's functions or activities; or
 - (b) subclause 3.4 applies in relation to the information.
- 3.4 This subclause applies in relation to sensitive information about an individual if:
 - (a) the collection of the information is required or authorised by or under an Australian law or a court/tribunal order; or
 - (b) a permitted general situation exists in relation to the collection of the information by the APP entity; or
 - (c) the APP entity is an organisation and a permitted health situation exists in relation to the collection of the information by the entity; or
 - (d) the APP entity is an enforcement body and the entity reasonably believes that:
 - (i) if the entity is the Immigration Department—the collection of the information is reasonably necessary for, or directly related to, one or more enforcement related activities conducted by, or on behalf of, the entity; or
 - (ii) otherwise—the collection of the information is reasonably necessary for, or directly related to, one or more of the entity's functions or activities; or
 - (e) the APP entity is a non profit organisation and both of the following apply:
 - (i) the information relates to the activities of the organisation;

- (ii) the information relates solely to the members of the organisation, or to individuals who have regular contact with the organisation in connection with its activities.

Note: For **permitted general situation**, see section 16A. For **permitted health situation**, see section 16B.

Means of collection

- 3.5 An APP entity must collect personal information only by lawful and fair means.
- 3.6 An APP entity must collect personal information about an individual only from the individual unless:
 - (a) if the entity is an agency:
 - (i) the individual consents to the collection of the information from someone other than the individual; or
 - (ii) the entity is required or authorised by or under an Australian law, or a court/tribunal order, to collect the information from someone other than the individual; or
 - (b) it is unreasonable or impracticable to do so.

Solicited personal information

- 3.7 This principle applies to the collection of personal information that is solicited by an APP entity.

4 Australian Privacy Principle 4—dealing with unsolicited personal information

- 4.1 If:
 - (a) an APP entity receives personal information; and
 - (b) the entity did not solicit the information;the entity must, within a reasonable period after receiving the information, determine whether or not the entity could have collected the information under Australian Privacy Principle 3 if the entity had solicited the information.
- 4.2 The APP entity may use or disclose the personal information for the purposes of making the determination under subclause 4.1.
- 4.3 If:
 - (a) the APP entity determines that the entity could not have collected the personal information; and
 - (b) the information is not contained in a Commonwealth record;the entity must, as soon as practicable but only if it is lawful and reasonable to do so, destroy the information or ensure that the information is de identified.
- 4.4 If subclause 4.3 does not apply in relation to the personal information, Australian Privacy Principles 5 to 13 apply in relation to the information as if the entity had collected the information under Australian Privacy Principle 3.

5 Australian Privacy Principle 5—notification of the collection of personal information

- 5.1 At or before the time or, if that is not practicable, as soon as practicable after, an APP entity collects personal information about an individual, the entity must take such steps (if any) as are reasonable in the circumstances:

- (a) to notify the individual of such matters referred to in subclause 5.2 as are reasonable in the circumstances; or
 - (b) to otherwise ensure that the individual is aware of any such matters.
- 5.2 The matters for the purposes of subclause 5.1 are as follows:
- (a) the identity and contact details of the APP entity;
 - (b) if:
 - (i) the APP entity collects the personal information from someone other than the individual; or
 - (ii) the individual may not be aware that the APP entity has collected the personal information;

the fact that the entity so collects, or has collected, the information and the circumstances of that collection;
 - (c) if the collection of the personal information is required or authorised by or under an Australian law or a court/tribunal order—the fact that the collection is so required or authorised (including the name of the Australian law, or details of the court/tribunal order, that requires or authorises the collection);
 - (d) the purposes for which the APP entity collects the personal information;
 - (e) the main consequences (if any) for the individual if all or some of the personal information is not collected by the APP entity;
 - (f) any other APP entity, body or person, or the types of any other APP entities, bodies or persons, to which the APP entity usually discloses personal information of the kind collected by the entity;
 - (g) that the APP privacy policy of the APP entity contains information about how the individual may access the personal information about the individual that is held by the entity and seek the correction of such information;
 - (h) that the APP privacy policy of the APP entity contains information about how the individual may complain about a breach of the Australian Privacy Principles, or a registered APP code (if any) that binds the entity, and how the entity will deal with such a complaint;
 - (i) whether the APP entity is likely to disclose the personal information to overseas recipients;
 - (j) if the APP entity is likely to disclose the personal information to overseas recipients—the countries in which such recipients are likely to be located if it is practicable to specify those countries in the notification or to otherwise make the individual aware of them.

Part 3—Dealing with personal information

6 Australian Privacy Principle 6—use or disclosure of personal information

Use or disclosure

- 6.1 If an APP entity holds personal information about an individual that was collected for a particular purpose (the primary purpose), the entity must not use or disclose the information for another purpose (the secondary purpose) unless:
- (a) the individual has consented to the use or disclosure of the information; or
 - (b) subclause 6.2 or 6.3 applies in relation to the use or disclosure of the information.

Note: Australian Privacy Principle 8 sets out requirements for the disclosure of personal information to a person who is not in Australia or an external Territory.

- 6.2 This subclause applies in relation to the use or disclosure of personal information about an individual if:
- (a) the individual would reasonably expect the APP entity to use or disclose the information for the secondary purpose and the secondary purpose is:
 - (i) if the information is sensitive information—directly related to the primary purpose; or
 - (ii) if the information is not sensitive information—related to the primary purpose; or
 - (b) the use or disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order; or
 - (c) a permitted general situation exists in relation to the use or disclosure of the information by the APP entity; or
 - (d) the APP entity is an organisation and a permitted health situation exists in relation to the use or disclosure of the information by the entity; or
 - (e) the APP entity reasonably believes that the use or disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body.

Note: For **permitted general situation**, see section 16A. For **permitted health situation**, see section 16B.

- 6.3 This subclause applies in relation to the disclosure of personal information about an individual by an APP entity that is an agency if:
- (a) the agency is not an enforcement body; and
 - (b) the information is biometric information or biometric templates; and
 - (c) the recipient of the information is an enforcement body; and
 - (d) the disclosure is conducted in accordance with the guidelines made by the Commissioner for the purposes of this paragraph.

- 6.4 If:
- (a) the APP entity is an organisation; and
 - (b) subsection 16B(2) applied in relation to the collection of the personal information by the entity;

the entity must take such steps as are reasonable in the circumstances to ensure that the information is de identified before the entity discloses it in accordance with subclause 6.1 or 6.2.

Written note of use or disclosure

- 6.5 If an APP entity uses or discloses personal information in accordance with paragraph 6.2(e), the entity must make a written note of the use or disclosure.

Related bodies corporate

- 6.6 If:
- (a) an APP entity is a body corporate; and
 - (b) the entity collects personal information from a related body corporate;

this principle applies as if the entity's primary purpose for the collection of the information were the primary purpose for which the related body corporate collected the information.

Exceptions

6.7 This principle does not apply to the use or disclosure by an organisation of:

- (a) personal information for the purpose of direct marketing; or
- (b) government related identifiers.

7 Australian Privacy Principle 7—direct marketing

Direct marketing

7.1 If an organisation holds personal information about an individual, the organisation must not use or disclose the information for the purpose of direct marketing.

Note: An act or practice of an agency may be treated as an act or practice of an organisation, see section 7A.

Exceptions—personal information other than sensitive information

7.2 Despite subclause 7.1, an organisation may use or disclose personal information (other than sensitive information) about an individual for the purpose of direct marketing if:

- (a) the organisation collected the information from the individual; and
- (b) the individual would reasonably expect the organisation to use or disclose the information for that purpose; and
- (c) the organisation provides a simple means by which the individual may easily request not to receive direct marketing communications from the organisation; and
- (d) the individual has not made such a request to the organisation.

7.3 Despite subclause 7.1, an organisation may use or disclose personal information (other than sensitive information) about an individual for the purpose of direct marketing if:

- (a) the organisation collected the information from:
 - (i) the individual and the individual would not reasonably expect the organisation to use or disclose the information for that purpose; or
 - (ii) someone other than the individual; and
- (b) either:
 - (i) the individual has consented to the use or disclosure of the information for that purpose; or
 - (ii) it is impracticable to obtain that consent; and
- (c) the organisation provides a simple means by which the individual may easily request not to receive direct marketing communications from the organisation; and
- (d) in each direct marketing communication with the individual:
 - (i) the organisation includes a prominent statement that the individual may make such a request; or
 - (ii) the organisation otherwise draws the individual's attention to the fact that the individual may make such a request; and

- (e) the individual has not made such a request to the organisation.

Exception—sensitive information

- 7.4 Despite subclause 7.1, an organisation may use or disclose sensitive information about an individual for the purpose of direct marketing if the individual has consented to the use or disclosure of the information for that purpose.

Exception—contracted service providers

- 7.5 Despite subclause 7.1, an organisation may use or disclose personal information for the purpose of direct marketing if:
- (a) the organisation is a contracted service provider for a Commonwealth contract; and
 - (b) the organisation collected the information for the purpose of meeting (directly or indirectly) an obligation under the contract; and
 - (c) the use or disclosure is necessary to meet (directly or indirectly) such an obligation.

Individual may request not to receive direct marketing communications etc.

- 7.6 If an organisation (the first organisation) uses or discloses personal information about an individual:
- (a) for the purpose of direct marketing by the first organisation; or
 - (b) for the purpose of facilitating direct marketing by other organisations; the individual may:
 - (c) if paragraph (a) applies—request not to receive direct marketing communications from the first organisation; and
 - (d) if paragraph (b) applies—request the organisation not to use or disclose the information for the purpose referred to in that paragraph; and
 - (e) request the first organisation to provide its source of the information.
- 7.7 If an individual makes a request under subclause 7.6, the first organisation must not charge the individual for the making of, or to give effect to, the request and:
- (a) if the request is of a kind referred to in paragraph 7.6(c) or (d)—the first organisation must give effect to the request within a reasonable period after the request is made; and
 - (b) if the request is of a kind referred to in paragraph 7.6(e)—the organisation must, within a reasonable period after the request is made, notify the individual of its source unless it is impracticable or unreasonable to do so.

Interaction with other legislation

- 7.8 This principle does not apply to the extent that any of the following apply:
- (a) the *Do Not Call Register Act 2006*;
 - (b) the *Spam Act 2003*;
 - (c) any other Act of the Commonwealth, or a Norfolk Island enactment, prescribed by the regulations.

8 Australian Privacy Principle 8—cross border disclosure of personal information

8.1 Before an APP entity discloses personal information about an individual to a person (the overseas recipient):

- (a) who is not in Australia or an external Territory; and
- (b) who is not the entity or the individual;

the entity must take such steps as are reasonable in the circumstances to ensure that the overseas recipient does not breach the Australian Privacy Principles (other than Australian Privacy Principle 1) in relation to the information.

Note: In certain circumstances, an act done, or a practice engaged in, by the overseas recipient is taken, under section 16C, to have been done, or engaged in, by the APP entity and to be a breach of the Australian Privacy Principles.

8.2 Subclause 8.1 does not apply to the disclosure of personal information about an individual by an APP entity to the overseas recipient if:

- (a) the entity reasonably believes that:
 - (i) the recipient of the information is subject to a law, or binding scheme, that has the effect of protecting the information in a way that, overall, is at least substantially similar to the way in which the Australian Privacy Principles protect the information; and
 - (ii) there are mechanisms that the individual can access to take action to enforce that protection of the law or binding scheme; or
- (b) both of the following apply:
 - (i) the entity expressly informs the individual that if he or she consents to the disclosure of the information, subclause 8.1 will not apply to the disclosure;
 - (ii) after being so informed, the individual consents to the disclosure; or
- (c) the disclosure of the information is required or authorised by or under an Australian law or a court/tribunal order; or
- (d) a permitted general situation (other than the situation referred to in item 4 or 5 of the table in subsection 16A(1)) exists in relation to the disclosure of the information by the APP entity; or
- (e) the entity is an agency and the disclosure of the information is required or authorised by or under an international agreement relating to information sharing to which Australia is a party; or
- (f) the entity is an agency and both of the following apply:
 - (i) the entity reasonably believes that the disclosure of the information is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body;
 - (ii) the recipient is a body that performs functions, or exercises powers, that are similar to those performed or exercised by an enforcement body.

Note: For permitted general situation, see section 16A.

9 Australian Privacy Principle 9—adoption, use or disclosure of government related identifiers

Adoption of government related identifiers

9.1 An organisation must not adopt a government related identifier of an individual as its own identifier of the individual unless:

- (a) the adoption of the government related identifier is required or authorised by or under an Australian law or a court/tribunal order; or
- (b) subclause 9.3 applies in relation to the adoption.

Note: An act or practice of an agency may be treated as an act or practice of an organisation, see section 7A.

Use or disclosure of government related identifiers

9.2 An organisation must not use or disclose a government related identifier of an individual unless:

- (a) the use or disclosure of the identifier is reasonably necessary for the organisation to verify the identity of the individual for the purposes of the organisation's activities or functions; or
- (b) the use or disclosure of the identifier is reasonably necessary for the organisation to fulfil its obligations to an agency or a State or Territory authority; or
- (c) the use or disclosure of the identifier is required or authorised by or under an Australian law or a court/tribunal order; or
- (d) a permitted general situation (other than the situation referred to in item 4 or 5 of the table in subsection 16A(1)) exists in relation to the use or disclosure of the identifier; or
- (e) the organisation reasonably believes that the use or disclosure of the identifier is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body; or
- (f) subclause 9.3 applies in relation to the use or disclosure.

Note 1: An act or practice of an agency may be treated as an act or practice of an organisation, see section 7A.

Note 2: For **permitted general situation**, see section 16A.

Regulations about adoption, use or disclosure

9.3 This subclause applies in relation to the adoption, use or disclosure by an organisation of a government related identifier of an individual if:

- (a) the identifier is prescribed by the regulations; and
- (b) the organisation is prescribed by the regulations, or is included in a class of organisations prescribed by the regulations; and
- (c) the adoption, use or disclosure occurs in the circumstances prescribed by the regulations.

Note: There are prerequisites that must be satisfied before the matters mentioned in this subclause are prescribed, see subsections 100(2) and (3).

Part 4—Integrity of personal information

10 Australian Privacy Principle 10—quality of personal information

10.1 An APP entity must take such steps (if any) as are reasonable in the circumstances to ensure that the personal information that the entity collects is accurate, up to date and complete.

10.2 An APP entity must take such steps (if any) as are reasonable in the circumstances to ensure that the personal information that the entity uses or discloses is, having regard to the purpose of the use or disclosure, accurate, up to date, complete and relevant.

11 Australian Privacy Principle 11—security of personal information

11.1 If an APP entity holds personal information, the entity must take such steps as are reasonable in the circumstances to protect the information:

- (a) from misuse, interference and loss; and
- (b) from unauthorised access, modification or disclosure.

11.2 If:

- (a) an APP entity holds personal information about an individual; and
- (b) the entity no longer needs the information for any purpose for which the information may be used or disclosed by the entity under this Schedule; and
- (c) the information is not contained in a Commonwealth record; and
- (d) the entity is not required by or under an Australian law, or a court/tribunal order, to retain the information;

the entity must take such steps as are reasonable in the circumstances to destroy the information or to ensure that the information is de identified.

Part 5—Access to, and correction of, personal information

12 Australian Privacy Principle 12—access to personal information

Access

12.1 If an APP entity holds personal information about an individual, the entity must, on request by the individual, give the individual access to the information.

Exception to access—agency

12.2 If:

- (a) the APP entity is an agency; and
- (b) the entity is required or authorised to refuse to give the individual access to the personal information by or under:
 - (i) the Freedom of Information Act; or
 - (ii) any other Act of the Commonwealth, or a Norfolk Island enactment, that provides for access by persons to documents;

then, despite subclause 12.1, the entity is not required to give access to the extent that the entity is required or authorised to refuse to give access.

Exception to access—organisation

12.3 If the APP entity is an organisation then, despite subclause 12.1, the entity is not required to give the individual access to the personal information to the extent that:

- (a) the entity reasonably believes that giving access would pose a serious threat to the life, health or safety of any individual, or to public health or public safety; or
- (b) giving access would have an unreasonable impact on the privacy of other individuals; or
- (c) the request for access is frivolous or vexatious; or

- (d) the information relates to existing or anticipated legal proceedings between the entity and the individual, and would not be accessible by the process of discovery in those proceedings; or
- (e) giving access would reveal the intentions of the entity in relation to negotiations with the individual in such a way as to prejudice those negotiations; or
- (f) giving access would be unlawful; or
- (g) denying access is required or authorised by or under an Australian law or a court/tribunal order; or
- (h) both of the following apply:
 - (i) the entity has reason to suspect that unlawful activity, or misconduct of a serious nature, that relates to the entity's functions or activities has been, is being or may be engaged in;
 - (ii) giving access would be likely to prejudice the taking of appropriate action in relation to the matter; or
- (i) giving access would be likely to prejudice one or more enforcement related activities conducted by, or on behalf of, an enforcement body; or
- (j) giving access would reveal evaluative information generated within the entity in connection with a commercially sensitive decision making process.

Dealing with requests for access

12.4 The APP entity must:

- (a) respond to the request for access to the personal information:
 - (i) if the entity is an agency—within 30 days after the request is made; or
 - (ii) if the entity is an organisation—within a reasonable period after the request is made; and
- (b) give access to the information in the manner requested by the individual, if it is reasonable and practicable to do so.

Other means of access

12.5 If the APP entity refuses:

- (a) to give access to the personal information because of subclause 12.2 or 12.3; or
- (b) to give access in the manner requested by the individual;

the entity must take such steps (if any) as are reasonable in the circumstances to give access in a way that meets the needs of the entity and the individual.

12.6 Without limiting subclause 12.5, access may be given through the use of a mutually agreed intermediary.

Access charges

12.7 If the APP entity is an agency, the entity must not charge the individual for the making of the request or for giving access to the personal information.

12.8 If:

- (a) the APP entity is an organisation; and
 - (b) the entity charges the individual for giving access to the personal information;
- the charge must not be excessive and must not apply to the making of the request.

Refusal to give access

12.9 If the APP entity refuses to give access to the personal information because of subclause 12.2 or 12.3, or to give access in the manner requested by the individual, the entity must give the individual a written notice that sets out:

- (a) the reasons for the refusal except to the extent that, having regard to the grounds for the refusal, it would be unreasonable to do so; and
- (b) the mechanisms available to complain about the refusal; and
- (c) any other matter prescribed by the regulations.

12.10 If the APP entity refuses to give access to the personal information because of paragraph 12.3(j), the reasons for the refusal may include an explanation for the commercially sensitive decision.

13 Australian Privacy Principle 13—correction of personal information

Correction

13.1 If:

- (a) an APP entity holds personal information about an individual; and
- (b) either:
 - (i) the entity is satisfied that, having regard to a purpose for which the information is held, the information is inaccurate, out of date, incomplete, irrelevant or misleading; or
 - (ii) the individual requests the entity to correct the information;

the entity must take such steps (if any) as are reasonable in the circumstances to correct that information to ensure that, having regard to the purpose for which it is held, the information is accurate, up to date, complete, relevant and not misleading.

Notification of correction to third parties

13.2 If:

- (a) the APP entity corrects personal information about an individual that the entity previously disclosed to another APP entity; and
- (b) the individual requests the entity to notify the other APP entity of the correction;

the entity must take such steps (if any) as are reasonable in the circumstances to give that notification unless it is impracticable or unlawful to do so.

Refusal to correct information

13.3 If the APP entity refuses to correct the personal information as requested by the individual, the entity must give the individual a written notice that sets out:

- (a) the reasons for the refusal except to the extent that it would be unreasonable to do so; and
- (b) the mechanisms available to complain about the refusal; and
- (c) any other matter prescribed by the regulations.

Request to associate a statement

13.4 If:

- (a) the APP entity refuses to correct the personal information as requested by the individual; and
- (b) the individual requests the entity to associate with the information a statement that the information is inaccurate, out of date, incomplete, irrelevant or misleading;

the entity must take such steps as are reasonable in the circumstances to associate the statement in such a way that will make the statement apparent to users of the information.

Dealing with requests

13.5 If a request is made under subclause 13.1 or 13.4, the APP entity:

- (a) must respond to the request:
 - (i) if the entity is an agency—within 30 days after the request is made; or
 - (ii) if the entity is an organisation—within a reasonable period after the request is made; and
- (b) must not charge the individual for the making of the request, for correcting the personal information or for associating the statement with the personal information (as the case may be).

HEALTH RECORDS AND INFORMATION PRIVACY ACT 2002 (NSW)

SCHEDULE 1 HEALTH PRIVACY PRINCIPLES

1 Purposes of collection of health information

- (1) An organisation must not collect health information unless:
- (a) the information is collected for a lawful purpose that is directly related to a function or activity of the organisation, and
 - (b) the collection of the information is reasonably necessary for that purpose.
- (2) An organisation must not collect health information by any unlawful means.

2 Information must be relevant, not excessive, accurate and not intrusive

An organisation that collects health information from an individual must take such steps as are reasonable in the circumstances (having regard to the purposes for which the information is collected) to ensure that:

- (a) the information collected is relevant to that purpose, is not excessive and is accurate, up to date and complete, and
- (b) the collection of the information does not intrude to an unreasonable extent on the personal affairs of the individual to whom the information relates.

3 Collection to be from individual concerned

- (1) An organisation must collect health information about an individual only from that individual, unless it is unreasonable or impracticable to do so.
- (2) Health information is to be collected in accordance with any guidelines issued by the Privacy Commissioner for the purposes of this clause.

4 Individual to be made aware of certain matters

- (1) An organisation that collects health information about an individual from the individual must, at or before the time that it collects the information (or if that is not practicable, as soon as practicable after that time), take steps that are reasonable in the circumstances to ensure that the individual is aware of the following:
- (a) the identity of the organisation and how to contact it,
 - (b) the fact that the individual is able to request access to the information,
 - (c) the purposes for which the information is collected,
 - (d) the persons to whom (or the types of persons to whom) the organisation usually discloses information of that kind,
 - (e) any law that requires the particular information to be collected,
 - (f) the main consequences (if any) for the individual if all or part of the information is not provided.
- (2) If an organisation collects health information about an individual from someone else, it must take any steps that are reasonable in the circumstances to ensure that the individual is generally aware of the matters listed in subclause (1) except to the extent that:
- (a) making the individual aware of the matters would pose a serious threat to the life or health of any individual, or
 - (b) the collection is made in accordance with guidelines issued under subclause (3).
-

- (3) The Privacy Commissioner may issue guidelines setting out circumstances in which an organisation is not required to comply with subclause (2).
- (4) An organisation is not required to comply with a requirement of this clause if:
 - (a) the individual to whom the information relates has expressly consented to the organisation not complying with it, or
 - (b) the organisation is lawfully authorised or required not to comply with it, or
 - (c) non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law (including the State Records Act 1998), or
 - (d) compliance by the organisation would, in the circumstances, prejudice the interests of the individual to whom the information relates, or
 - (e) the information concerned is collected for law enforcement purposes, or
 - (f) the organisation is an investigative agency and compliance might detrimentally affect (or prevent the proper exercise of) its complaint handling functions or any of its investigative functions.
- (5) If the organisation reasonably believes that the individual is incapable of understanding the general nature of the matters listed in subclause (1), the organisation must take steps that are reasonable in the circumstances to ensure that any authorised representative of the individual is aware of those matters.
- (6) Subclause (4) (e) does not remove any protection provided by any other law in relation to the rights of accused persons or persons suspected of having committed an offence.
- (7) The exemption provided by subclause (4) (f) extends to any public sector agency, or public sector official, who is investigating or otherwise handling a complaint or other matter that could be referred or made to an investigative agency, or that has been referred from or made by an investigative agency.

5 Retention and security

- (1) An organisation that holds health information must ensure that:
 - (a) the information is kept for no longer than is necessary for the purposes for which the information may lawfully be used, and
 - (b) the information is disposed of securely and in accordance with any requirements for the retention and disposal of health information, and
 - (c) the information is protected, by taking such security safeguards as are reasonable in the circumstances, against loss, unauthorised access, use, modification or disclosure, and against all other misuse, and
 - (d) if it is necessary for the information to be given to a person in connection with the provision of a service to the organisation, everything reasonably within the power of the organisation is done to prevent unauthorised use or disclosure of the information.

Note. Division 2 (Retention of health information) of Part 4 contains provisions applicable to private sector persons in connection with the matters dealt with in this clause.

- (2) An organisation is not required to comply with a requirement of this clause if:
 - (a) the organisation is lawfully authorised or required not to comply with it, or
 - (b) non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law (including the State Records Act 1998).

- (3) An investigative agency is not required to comply with subclause (1) (a).

6 Information about health information held by organisations

- (1) An organisation that holds health information must take such steps as are, in the circumstances, reasonable to enable any individual to ascertain:
- (a) whether the organisation holds health information, and
 - (b) whether the organisation holds health information relating to that individual, and
 - (c) if the organisation holds health information relating to that individual:
 - (i) the nature of that information, and
 - (ii) the main purposes for which the information is used, and
 - (iii) that person's entitlement to request access to the information.
- (2) An organisation is not required to comply with a provision of this clause if:
- (a) the organisation is lawfully authorised or required not to comply with the provision concerned, or
 - (b) non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law (including the State Records Act 1998).

7 Access to health information

- (1) An organisation that holds health information must, at the request of the individual to whom the information relates and without excessive delay or expense, provide the individual with access to the information.

Note. Division 3 (Access to health information) of Part 4 contains provisions applicable to private sector persons in connection with the matters dealt with in this clause.

Access to health information held by public sector agencies may also be available under the *Government Information (Public Access) Act 2009* or the *State Records Act 1998*.

- (2) An organisation is not required to comply with a provision of this clause if:
- (a) the organisation is lawfully authorised or required not to comply with the provision concerned, or
 - (b) non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law (including the *State Records Act 1998*).

8 Amendment of health information

- (1) An organisation that holds health information must, at the request of the individual to whom the information relates, make appropriate amendments (whether by way of corrections, deletions or additions) to ensure that the health information:
- (a) is accurate, and
 - (b) having regard to the purpose for which the information was collected (or is to be used) and to any purpose that is directly related to that purpose, is relevant, up to date, complete and not misleading.
- (2) If an organisation is not prepared to amend health information under subclause (1) in accordance with a request by the individual to whom the information relates, the organisation must, if so requested by the individual concerned, take such steps as are reasonable to attach to the information, in such a manner as is capable of being read with the information, any statement provided by that individual of the amendment sought.

- (3) If health information is amended in accordance with this clause, the individual to whom the information relates is entitled, if it is reasonably practicable, to have recipients of that information notified of the amendments made by the organisation.

Note. Division 4 (Amendment of health information) of Part 4 contains provisions applicable to private sector persons in connection with the matters dealt with in this clause.

Amendment of health information held by public sector agencies may also be able to be sought under the *Privacy and Personal Information Protection Act 1998*.

- (4) An organisation is not required to comply with a provision of this clause if:
- (a) the organisation is lawfully authorised or required not to comply with the provision concerned, or
 - (b) non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law (including the State Records Act 1998).

9 Accuracy

An organisation that holds health information must not use the information without taking such steps as are reasonable in the circumstances to ensure that, having regard to the purpose for which the information is proposed to be used, the information is relevant, accurate, up to date, complete and not misleading.

10 Limits on use of health information

- (1) An organisation that holds health information must not use the information for a purpose (a secondary purpose) other than the purpose (the primary purpose) for which it was collected unless:
- (a) **Consent** the individual to whom the information relates has consented to the use of the information for that secondary purpose, or
 - (b) **Direct relation** the secondary purpose is directly related to the primary purpose and the individual would reasonably expect the organisation to use the information for the secondary purpose, or

Note. For example, if information is collected in order to provide a health service to the individual, the use of the information to provide a further health service to the individual is a secondary purpose directly related to the primary purpose.

- (c) **Serious threat to health or welfare** the use of the information for the secondary purpose is reasonably believed by the organisation to be necessary to lessen or prevent:
 - (i) a serious and imminent threat to the life, health or safety of the individual or another person, or
 - (ii) a serious threat to public health or public safety, or
- (c1) **Genetic information** the information is genetic information and the use of the information for the secondary purpose:
 - (i) is reasonably believed by the organisation to be necessary to lessen or prevent a serious threat to the life, health or safety (whether or not the threat is imminent) of a genetic relative of the individual to whom the genetic information relates, and
 - (ii) is in accordance with guidelines, if any, issued by the Privacy Commissioner for the purposes of this paragraph, or
- (d) **Management of health services** the use of the information for the secondary purpose is reasonably necessary for the funding, management, planning or evaluation of health services and:

- (i) either:
 - (A) that purpose cannot be served by the use of information that does not identify the individual or from which the individual's identity cannot reasonably be ascertained and it is impracticable for the organisation to seek the consent of the individual for the use, or
 - (B) reasonable steps are taken to de-identify the information, and
 - (ii) if the information is in a form that could reasonably be expected to identify individuals, the information is not published in a generally available publication, and
 - (iii) the use of the information is in accordance with guidelines, if any, issued by the Privacy Commissioner for the purposes of this paragraph, or
- (e) **Training** the use of the information for the secondary purpose is reasonably necessary for the training of employees of the organisation or persons working with the organisation and:
- (i) either:
 - (A) that purpose cannot be served by the use of information that does not identify the individual or from which the individual's identity cannot reasonably be ascertained and it is impracticable for the organisation to seek the consent of the individual for the use, or
 - (B) reasonable steps are taken to de-identify the information, and
 - (ii) if the information could reasonably be expected to identify individuals, the information is not published in a generally available publication, and
 - (iii) the use of the information is in accordance with guidelines, if any, issued by the Privacy Commissioner for the purposes of this paragraph, or
- (f) **Research** the use of the information for the secondary purpose is reasonably necessary for research, or the compilation or analysis of statistics, in the public interest and:
- (i) either:
 - (A) that purpose cannot be served by the use of information that does not identify the individual or from which the individual's identity cannot reasonably be ascertained and it is impracticable for the organisation to seek the consent of the individual for the use, or
 - (B) reasonable steps are taken to de-identify the information, and
 - (ii) if the information could reasonably be expected to identify individuals, the information is not published in a generally available publication, and
 - (iii) the use of the information is in accordance with guidelines, if any, issued by the Privacy Commissioner for the purposes of this paragraph, or
- (g) **Find missing person** the use of the information for the secondary purpose is by a law enforcement agency (or such other person or organisation as may be prescribed by the regulations) for the purposes of ascertaining the whereabouts of an individual who has been reported to a police officer as a missing person, or
- (h) **Suspected unlawful activity, unsatisfactory professional conduct or breach of discipline** the organisation:
- (i) has reasonable grounds to suspect that:
 - (A) unlawful activity has been or may be engaged in, or

- (B) a person has or may have engaged in conduct that may be unsatisfactory professional conduct or professional misconduct under the Health Practitioner Regulation National Law (NSW), or
 - (C) an employee of the organisation has or may have engaged in conduct that may be grounds for disciplinary action, and
 - (ii) uses the health information as a necessary part of its investigation of the matter or in reporting its concerns to relevant persons or authorities, or
 - (i) **Law enforcement** the use of the information for the secondary purpose is reasonably necessary for the exercise of law enforcement functions by law enforcement agencies in circumstances where there are reasonable grounds to believe that an offence may have been, or may be, committed, or
 - (j) **Investigative agencies** the use of the information for the secondary purpose is reasonably necessary for the exercise of complaint handling functions or investigative functions by investigative agencies, or
 - (k) **Prescribed circumstances** the use of the information for the secondary purpose is in the circumstances prescribed by the regulations for the purposes of this paragraph.
- (2) An organisation is not required to comply with a provision of this clause if:
- (a) the organisation is lawfully authorised or required not to comply with the provision concerned, or
 - (b) non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law (including the State Records Act 1998).
- (3) The Ombudsman's Office, Health Care Complaints Commission, Anti-Discrimination Board and Community Services Commission are not required to comply with a provision of this clause in relation to their complaint handling functions and their investigative, review and reporting functions.
- (4) Nothing in this clause prevents or restricts the disclosure of health information by a public sector agency:
- (a) to another public sector agency under the administration of the same Minister if the disclosure is for the purposes of informing that Minister about any matter within that administration, or
 - (b) to any public sector agency under the administration of the Premier, if the disclosure is for the purposes of informing the Premier about any matter.
- (5) The exemption provided by subclause (1) (j) extends to any public sector agency, or public sector official, who is investigating or otherwise handling a complaint or other matter that could be referred or made to an investigative agency, or that has been referred from or made by an investigative agency.

11 Limits on disclosure of health information

- (1) An organisation that holds health information must not disclose the information for a purpose (a secondary purpose) other than the purpose (the primary purpose) for which it was collected unless:
- (a) **Consent** the individual to whom the information relates has consented to the disclosure of the information for that secondary purpose, or
 - (b) **Direct relation** the secondary purpose is directly related to the primary purpose and the individual would reasonably expect the organisation to disclose the information for the secondary purpose, or

Note. For example, if information is collected in order to provide a health service to the individual, the disclosure of the information to provide a further health service to the individual is a secondary purpose directly related to the primary purpose.

- (c) **Serious threat to health or welfare** the disclosure of the information for the secondary purpose is reasonably believed by the organisation to be necessary to lessen or prevent:
 - (i) a serious and imminent threat to the life, health or safety of the individual or another person, or
 - (ii) a serious threat to public health or public safety, or
- (c1) **Genetic information** the information is genetic information and the disclosure of the information for the secondary purpose:
 - (i) is to a genetic relative of the individual to whom the genetic information relates, and
 - (ii) is reasonably believed by the organisation to be necessary to lessen or prevent a serious threat to the life, health or safety (whether or not the threat is imminent) of a genetic relative of the individual to whom the genetic information relates, and
 - (iii) is in accordance with guidelines, if any, issued by the Privacy Commissioner for the purposes of this paragraph, or
- (d) **Management of health services** the disclosure of the information for the secondary purpose is reasonably necessary for the funding, management, planning or evaluation of health services and:
 - (i) either:
 - (A) that purpose cannot be served by the disclosure of information that does not identify the individual or from which the individual's identity cannot reasonably be ascertained and it is impracticable for the organisation to seek the consent of the individual for the disclosure, or
 - (B) reasonable steps are taken to de-identify the information, and
 - (ii) if the information could reasonably be expected to identify individuals, the information is not published in a generally available publication, and
 - (iii) the disclosure of the information is in accordance with guidelines, if any, issued by the Privacy Commissioner for the purposes of this paragraph, or
- (e) **Training** the disclosure of the information for the secondary purpose is reasonably necessary for the training of employees of the organisation or persons working with the organisation and:
 - (i) either:
 - (A) that purpose cannot be served by the disclosure of information that does not identify the individual or from which the individual's identity cannot reasonably be ascertained and it is impracticable for the organisation to seek the consent of the individual for the disclosure, or
 - (B) reasonable steps are taken to de-identify the information, and
 - (ii) if the information could reasonably be expected to identify the individual, the information is not made publicly available, and
 - (iii) the disclosure of the information is in accordance with guidelines, if any, issued by the Privacy Commissioner for the purposes of this paragraph, or

- (f) **Research** the disclosure of the information for the secondary purpose is reasonably necessary for research, or the compilation or analysis of statistics, in the public interest and:
- (i) either:
 - (A) that purpose cannot be served by the disclosure of information that does not identify the individual or from which the individual's identity cannot reasonably be ascertained and it is impracticable for the organisation to seek the consent of the individual for the disclosure, or
 - (B) reasonable steps are taken to de-identify the information, and
 - (ii) the information will not be published in a form that identifies particular individuals or from which an individual's identity can reasonably be ascertained, and
 - (iii) the disclosure of the information is in accordance with guidelines, if any, issued by the Privacy Commissioner for the purposes of this paragraph, or
- (g) **Compassionate reasons** the disclosure of the information for the secondary purpose is to provide the information to an immediate family member of the individual for compassionate reasons and:
- (i) the disclosure is limited to the extent reasonable for those compassionate reasons, and
 - (ii) the individual is incapable of giving consent to the disclosure of the information, and
 - (iii) the disclosure is not contrary to any wish expressed by the individual (and not withdrawn) of which the organisation was aware or could make itself aware by taking reasonable steps, and
 - (iv) if the immediate family member is under the age of 18 years, the organisation reasonably believes that the family member has sufficient maturity in the circumstances to receive the information, or
- (h) **Find missing person** the disclosure of the information for the secondary purpose is to a law enforcement agency (or such other person or organisation as may be prescribed by the regulations) for the purposes of ascertaining the whereabouts of an individual who has been reported to a police officer as a missing person, or
- (i) **Suspected unlawful activity, unsatisfactory professional conduct or breach of discipline** the organisation:
- (i) has reasonable grounds to suspect that:
 - (A) unlawful activity has been or may be engaged in, or
 - (B) a person has or may have engaged in conduct that may be unsatisfactory professional conduct or professional misconduct under the Health Practitioner Regulation National Law (NSW), or
 - (C) an employee of the organisation has or may have engaged in conduct that may be grounds for disciplinary action, and
 - (ii) discloses the health information as a necessary part of its investigation of the matter or in reporting its concerns to relevant persons or authorities, or
- (j) **Law enforcement** the disclosure of the information for the secondary purpose is reasonably necessary for the exercise of law enforcement functions by law enforcement agencies in circumstances where there are reasonable grounds to believe that an offence may have been, or may be, committed, or

- (k) **Investigative agencies** the disclosure of the information for the secondary purpose is reasonably necessary for the exercise of complaint handling functions or investigative functions by investigative agencies, or
 - (l) **Prescribed circumstances** the disclosure of the information for the secondary purpose is in the circumstances prescribed by the regulations for the purposes of this paragraph.
- (2) An organisation is not required to comply with a provision of this clause if:
 - (a) the organisation is lawfully authorised or required not to comply with the provision concerned, or
 - (b) non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law (including the *State Records Act 1998*), or
 - (c) the organisation is an investigative agency disclosing information to another investigative agency.
 - (3) The Ombudsman's Office, Health Care Complaints Commission, Anti-Discrimination Board and Community Services Commission are not required to comply with a provision of this clause in relation to their complaint handling functions and their investigative, review and reporting functions.
 - (4) Nothing in this clause prevents or restricts the disclosure of health information by a public sector agency:
 - (a) to another public sector agency under the administration of the same Minister if the disclosure is for the purposes of informing that Minister about any matter within that administration, or
 - (b) to any public sector agency under the administration of the Premier, if the disclosure is for the purposes of informing the Premier about any matter.
 - (5) If health information is disclosed in accordance with subclause (1), the person, body or organisation to whom it was disclosed must not use or disclose the information for a purpose other than the purpose for which the information was given to it.
 - (6) The exemptions provided by subclauses (1) (k) and (2) extend to any public sector agency, or public sector official, who is investigating or otherwise handling a complaint or other matter that could be referred or made to an investigative agency, or that has been referred from or made by an investigative agency.

12 Identifiers

- (1) An organisation may only assign identifiers to individuals if the assignment of identifiers is reasonably necessary to enable the organisation to carry out any of its functions efficiently.
- (2) Subject to subclause (4), a private sector person may only adopt as its own identifier of an individual an identifier of an individual that has been assigned by a public sector agency (or by an agent of, or contractor to, a public sector agency acting in its capacity as agent or contractor) if:
 - (a) the individual has consented to the adoption of the same identifier, or
 - (b) the use or disclosure of the identifier is required or authorised by or under law.
- (3) Subject to subclause (4), a private sector person may only use or disclose an identifier assigned to an individual by a public sector agency (or by an agent of, or contractor to, a public sector agency acting in its capacity as agent or contractor) if:

- (a) the use or disclosure is required for the purpose for which it was assigned or for a secondary purpose referred to in one or more paragraphs of HPP 10 (1) (c)–(k) or 11 (1) (c)–(l), or
 - (b) the individual has consented to the use or disclosure, or
 - (c) the disclosure is to the public sector agency that assigned the identifier to enable the public sector agency to identify the individual for its own purposes.
- (4) If the use or disclosure of an identifier assigned to an individual by a public sector agency is necessary for a private sector person to fulfil its obligations to, or the requirements of, the public sector agency, a private sector person may either:
- (a) adopt as its own identifier of an individual an identifier of the individual that has been assigned by the public sector agency, or
 - (b) use or disclose an identifier of the individual that has been assigned by the public sector agency.

13 Anonymity

Wherever it is lawful and practicable, individuals must be given the opportunity to not identify themselves when entering into transactions with or receiving health services from an organisation.

14 Transborder data flows and data flow to Commonwealth agencies

An organisation must not transfer health information about an individual to any person or body who is in a jurisdiction outside New South Wales or to a Commonwealth agency unless:

- (a) the organisation reasonably believes that the recipient of the information is subject to a law, binding scheme or contract that effectively upholds principles for fair handling of the information that are substantially similar to the Health Privacy Principles, or
- (b) the individual consents to the transfer, or
- (c) the transfer is necessary for the performance of a contract between the individual and the organisation, or for the implementation of pre-contractual measures taken in response to the individual's request, or
- (d) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the individual between the organisation and a third party, or
- (e) all of the following apply:
 - (i) the transfer is for the benefit of the individual,
 - (ii) it is impracticable to obtain the consent of the individual to that transfer,
 - (iii) if it were practicable to obtain such consent, the individual would be likely to give it, or
- (f) the transfer is reasonably believed by the organisation to be necessary to lessen or prevent:
 - (i) a serious and imminent threat to the life, health or safety of the individual or another person, or
 - (ii) a serious threat to public health or public safety, or
- (g) the organisation has taken reasonable steps to ensure that the information that it has transferred will not be held, used or disclosed by the recipient of the information inconsistently with the Health Privacy Principles, or

- (h) the transfer is permitted or required by an Act (including an Act of the Commonwealth) or any other law.

15 Linkage of health records

- (1) An organisation must not:
 - (a) include health information about an individual in a health records linkage system unless the individual has expressly consented to the information being so included, or
 - (b) disclose an identifier of an individual to any person if the purpose of the disclosure is to include health information about the individual in a health records linkage system, unless the individual has expressly consented to the identifier being disclosed for that purpose.
- (2) An organisation is not required to comply with a provision of this clause if:
 - (a) the organisation is lawfully authorised or required not to comply with the provision concerned, or
 - (b) non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law (including the State Records Act 1998), or
 - (c) the inclusion of the health information about the individual in the health records information system (including an inclusion for which an identifier of the individual is to be disclosed) is a use of the information that complies with HPP 10 (1) (f) or a disclosure of the information that complies with HPP 11 (1) (f).

- (3) In this clause:

health record means an ongoing record of health care for an individual.

health records linkage system means a computerised system that is designed to link health records for an individual held by different organisations for the purpose of facilitating access to health records, and includes a system or class of systems prescribed by the regulations as being a health records linkage system, but does not include a system or class of systems prescribed by the regulations as not being a health records linkage system.

SUBORDINATE LEGISLATION ACT 1989 (NSW)

SCHEDULE 1 GUIDELINES FOR THE PREPARATION OF STATUTORY RULES | Section 4

1. Wherever costs and benefits are referred to in these guidelines, economic and social costs and benefits are to be taken into account and given due consideration.
 2. Before a statutory rule is proposed to be made:
 - (a) The objectives sought to be achieved and the reasons for them must be clearly formulated.
 - (b) Those objectives are to be checked to ensure that they:
 - are reasonable and appropriate, and
 - accord with the objectives, principles, spirit and intent of the enabling Act, and
 - are not inconsistent with the objectives of other Acts, statutory rules and stated government policies.
 - (c) Alternative options for achieving those objectives (whether wholly or substantially), and the option of not proceeding with any action, must be considered.
 - (d) An evaluation must be made of the costs and benefits expected to arise from each such option as compared with the costs and benefits (direct and indirect, and tangible and intangible) expected to arise from proceeding with the statutory rule.
 - (e) If the statutory rule would impinge on or may affect the area of responsibility of another authority, consultation must take place with a view to ensuring in advance that (as far as is reasonably practicable in the circumstances):
 - any differences are reconciled, and
 - there will be no overlapping of or duplication of or conflict with Acts, statutory rules or stated government policies administered by the other authority.
 3. In determining whether and how the objectives should be achieved, the responsible Minister is to have regard to the following principles:
 - (a) Administrative decisions should be based on adequate information and consultation concerning the need for and consequences of the proposed action.
 - (b) Implementation by means of a statutory rule should not normally be undertaken unless the anticipated benefits to the community from the proposed statutory rule outweigh the anticipated costs to the community, bearing in mind the impact of the proposal on the economy and on consumers, members of the public, relevant interest groups, and any sector of industry and commerce, that may be affected.
 - (c) The alternative option that involves the greatest net benefit or the least net cost to the community should normally be chosen from the range of alternative options available to achieve the objectives.
 4. A statutory rule must be expressed plainly and unambiguously, and consistently with the language of the enabling Act
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NSW GUIDE TO BETTER REGULATION OCTOBER 2016, NSW DEPARTMENT OF PREMIER & CABINET

THE BETTER REGULATION PRINCIPLES

- Principle 1:** The need for government action should be established. Government action should only occur where it is in the public interest, that is, where the benefits outweigh the costs.
- Principle 2:** The objective of government action should be clear.
- Principle 3:** The impact of government action should be properly understood by considering the costs and benefits (using all available data) of a range of options, including non-regulatory options.
- Principle 4:** Government action should be effective and proportional.
- Principle 5:** Consultation with business and the community should inform regulatory development.
- Principle 6:** The simplification, repeal, reform, modernisation or consolidation of existing regulation should be considered.
- Principle 7:** Regulation should be periodically reviewed, and if necessary reformed, to ensure its continued efficiency and effectiveness.

GENERAL INSURANCE CODE OF PRACTICE, Insurance Council of Australia, 1 July 2014

14 ACCESS TO INFORMATION

- 14.1 We will abide by the principles of the Privacy Act 1988 when we collect, store, use and disclose personal information about you.
- 14.2 Subject to 14.4, you will have access to information about you that we have relied on in assessing your application for insurance cover, your claim or your Complaint, if you request.
- 14.3 Subject to 14.4, you will also have access to reports from Service Suppliers or External Experts that we have relied on in assessing your claim, if you request.
- 14.4 In special circumstances, we may decline to provide access to or disclose information to you, such as:
- (a) where information is protected from disclosure by law, including the Privacy Act 1988;
 - (b) where, in the case of a claim, the claim is being or has been investigated; or
 - (c) where the release of the information may be prejudicial to us in relation to a dispute about your insurance cover or your claim (except in the case of External Experts' reports), or in relation to your Complaint.
- 14.5 If we decline to provide access to or disclose information to you:
- (a) we will not do so unreasonably;
 - (b) we will give you reasons for doing so; and
 - (c) we will provide details of our Complaints process