AFEI
Australian Federation of Employers & Industries

Submission to: State Insurance Regulatory Authority (SIRA)

Matter: Claims administration manual and Guidelines Review

May 2018

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1. AFEI concurs with SIRA's objective to have an enforceable claims management guidance material which is fair, transparent and aligns with (rather than departs from) legislation. We have long held the view that the claims management process within ICNSW is in need of comprehensive overhaul and reform, along with effective supervisory oversight by SIRA to encourage greater accountability for ICNSW processes and performance.1 The nominal insurer's policies and operational directions have given rise to ill disciplined and costly claims management practices undertaken under the badge of "best practice" claims management.

2. The scheme's governing legislation and the regulations are drafted to enable SIRA and ICNSW to operate the scheme with minimum interference and minimum exposure to those who fund the scheme and own its liabilities — NSW employers. Consequently this unfettered ability to change how the legislation operates is not subject to external oversight or control (other than the bi- annual Committee on Law and Justice review). As a result the ICNSW approach to claims management is neither transparent, nor fair for employers.

3. ICNSW internal policy rulings and directives are not publically available yet operate to constrain any legislative requirement which may lead to rejection of a claim. For example, the limitations imposed on surveillance of claimants and the disregard of investigation reports via the internal ICNSW *" Surveillance and Desktop Investigation Guidelines "* which came into effect on 31 August 2017. These are not publically available. Earlier there

[1] See AFEI submission to the NSW Parliament of NSW Legislative Council Standing Committee on Law and Justice Statutory review of the *State Insurance and Care Governance Act 2015*

were the ICNSW directions (2015) to agents that where a referral to an IME was made, the worker must be afforded the opportunity to choose the IME. Further restrictions on employer use of IMEs and IMCs were instigated, despite the right of an employer to refer a worker to an IME in Section 119 of the 1998 Workers Compensation and Injury Management Act. Where an employer does exercise this right, the IME report is routinely rejected by ICNSW in favour of the treating doctor opinion.

4. Given this unbalanced decision making framework we have an overall concern as to how the Claims Administration Model (CAM) will inject greater balance and rigor into the scheme. This is concern is magnified by the SIRA's stated approach that the worker's experience is to be at the centre of the claims management process.2

5. In our recent submission to the Department of Finance Services and Innovation review of the dispute resolution process in NSW statutory workers compensation claims, AFEI emphasised that balanced, effective and disciplined claims management must be an integral and fundamental part of a fair and sustainable workers compensation scheme.

6. A missing element in the claims management process is the early and active involvement of employers from the outset of the claim, and not just in the notification process. In our members' experience, the new automated claims management arrangements have resulted in even less employer involvement, with the now almost universal acceptance of claims based solely on the treating doctor's certification. Claims are now routinely accepted:

- without any information sought from the employer as to work relatedness or the circumstances surrounding the alleged injury or illness;
- where there is factual evidence presented to EML that there was no workplace incident or injury and no reported workplace incident or reported injury;
- where workers refuse to sign statutory declarations that they are not receiving wages income while in receipt of compensation payments;
- where the claim should have been declined in accordance with section 11A;
- where an EML instigated investigation report recommends that the claim be denied;
- where EML rules that the claim is a frank injury despite medical evidence that the injury is a recurrence of a pre - existing injury;
- where an IME or IMC report which is unfavourable to the worker's claim is rejected in favour of the treating doctor's view.

7. This outcome is the direct result of ICNSW having too wide a discretion in its approach to claims management, without adequate accountability. This needs to be rectified and the CAM drafted accordingly. A significant factor for SIRA to consider here is that provisional acceptance of a claim is no protection for a premium impacted employer. Provisional

[2] Discussion Paper page 10

acceptance is a flawed concept but it is worse in NSW because provisional payments are included in the cost of claims even where the claim is ultimately declined.

8. Many of the issues which arise in ongoing claims management could be avoided by a more rigorous assessment of the facts of the claim at the outset. ICNSW should depart from its policy of accepting all claims and return to its legislated obligation to observe section 9A of the Workers Compensation Act 1987.

9. Further, once a claim is accepted, the nominal insurer is permissive of repeated worker non- compliance with their injury management plan and return to work obligations. This extends to allowing workers to routinely seek no change/downgraded certificates from their treating doctor or to change their treating doctor in order to obtain a work capacity certificate which certifies them as unfit (or partially fit) , and thus rendering them compliant and entitled to continued payments (and back payments).

10. This is symptomatic of the ICNSW process, rather than outcome, driven approach to claims management. The scheme measures its performance in metrics, ticking boxes at designated milestones in the claim history, and is are entirely concerned with timeframes, speed in delivery of treatments in conformity with the injury management plan, aggregated return to work rates (which have barely changed despite all the "reforms"), and "customer" experience. There is no concern with the financial component of these processes, despite lower claims numbers but higher claims costs. There is no analysis of the efficacy of treatment or the extent of overtreatment. There is no accounting for those claims in which a minor injury becomes a major chronic incapacitating condition. All of these are subsumed into an allegedly cost saving automated process, which is supposedly supported by triage teams and expert panels to manage more complex claims.

11. In contrast to its permissive stance with workers, ICNSW appears to have no qualms about withholding information from employers which may assist them with the worker's early return to work, in reducing the impact on their premium (or overall cost to the scheme) or placing them at risk of non compliance with other workplace and employment legislation. For example, it is not explained to employers that:

- they have a legislated right to obtain an independent medical examination (and as noted above, where this does not support the worker's claim, it is ignored by ICNSW /EML);
- where they are premium impacted, the claim will have an impact on their premium. Nor are they provided with information about the cost of a claim, unless they are employers who are experienced in operating within the scheme and request such information. Even this is now a dubious exercise, with employers reporting to us that EML says it does not provide cost of claim/ premium information and requests to ICNSW fall into a "black hole". This is despite ICNSW assertion that regular claims costs reports will accompany its automated, electronic claims management system with real time access. It is entirely uncertain how long

it will take EML/ICNSW to generate claims costs reports for anything other than new claims – a three year claims costs report is a rarity yet given the cost of claims for premium impacted employers, this is essential information for their operating budgets.

12. A recent disturbing practice by the nominal insurer is to notify employers that the worker is "job seeking" and that EML/ ICNSW will take over making payments to the worker. This is done with apparent disregard for the fact that the contractual relationship between the worker and the employer remains intact, the worker has not resigned, and the employer retains all their obligations to the worker under employment legislation and the terms of the employment contract. None of this is made known to the employer. To the contrary, the impression is conveyed that the worker is now to be "taken care of" by the insurer, who will no longer provide the employer with any information about the claim and its management. The employer is left exposed to the vagaries of the claims management process, from which they are now entirely isolated. Usually they do not understand that they must continue to accrue legislated benefits for the worker (annual leave etc) and meet other contractual and legislative obligations, along with the burden of claims experience costs where they are premium impacted.

13. The nominal insurer's reliance on worker privacy as a reason for not undertaking an investigation or making further inquiries of the worker about the circumstances of the claim is an issue which warrants SIRA's close attention in both initial and ongoing claims management. It is frequently reported to us that the nominal insurer cites "privacy reasons" for inaction in claims management. An employer is exempt from the operation of the Privacy Act where its act or practice is related directly to:

- The employment relationship between the organisation and the individual; and
- An employee record held by the organisation.

Workers compensation insurers are not exempt from the application of the Privacy Act Principles. This has created a situation in which EML/ICNSW will only collect personal information and sensitive information concerning a claimant, including the details and circumstances of the injury, with the consent of the worker. This applies to information obtained from a third party – medical practitioners, investigators - with the consent of the worker. The analogy is that of the police wanting to interview a suspect but being told they cannot for privacy reasons.

14. A further area which requires close attention by SIRA is the nominal insurer's almost universal reliance on the opinion of the NTD. Employer experience with claims management demonstrate a range of concerns arising from this continued dependency including:

- only providing a diagnosis based on what the NTD is told by an injured worker;
- unintentional or intentional restrictions on full disclosure of past work, medical and claims history, particularly given the nature of the doctor- patient relationship.

As a result non workplace injuries and conditions are funded by employer workers compensation premiums;

- ready referral for surgical treatment;
- apparent excessive reliance on physiotherapy, remedial massage and other allied health treatment regimes for prolonged periods without proper evidence of medical efficacy or the matching of treatment to actual improvement ;
- reliance on pain management treatment programs with little control over cost, duration and outcome;
- little review of success of such treatment regimes leading to a greater non accountability in treating practitioners' reliance upon them;
- claims continuing indefinitely.

15. AFEI has long held concerns that a system, such as the NSW scheme which is based predominantly on the reliance of a treating doctor's opinion, is heavily reliant on the NTD opinion based on what they have been told by the injured worker and the injured worker's view on their capacity to return to work. Frequently, questions get raised about the accuracy of a medical diagnosis provided by a treating practitioner, especially where there are lengthy delays in recovery of the injured worker's condition or return to work.

16. We recommend the process could be improved by a claims model based on accountability, performance review and continuous improvement. Work capacity assessments by NTDS and IME medical reports must be evidence based, forensic and impartial. The certification of an approved panel of properly trained independent medical experts, including injury management consultants and allied health providers (physiotherapists, exercise physiologists and psychologists, for example) by SIRA, should be instituted to make doctors aware of the necessity for, and trained to provide, evidence based medical reports which are impartial, unbiased and accurate.

17. The heavy promotion of rehabilitation provider use by the insurer is a further claims management area which is in need of urgent reform. ICNSW has adopted the policy of outsourcing case management to rehabilitation providers. Some are effective, many are not, and there remains the endemic problem of service providers, including rehabilitation providers, having a vested interest in the continued provision of their services which lends itself to extended periods of incapacity and greater claims costs.

18. There are numerous other instances of imbalance and costly unfairness for employers now embedded in the scheme, which should be targeted in this claims management review. These include:

- The legislation provides generous, and virtually open ended provisions to enable workers to make claims. Yet in circumstances where the worker has not notified

the employer of the injury or incident, does not make a claim until weeks (or even months) after the date of the alleged injury , the employer is penalised for non compliance with Section 160 of the 1987 Act and compelled to fund the first week of compensation.

- Employers have onerous return to work obligations and strict compliance deadlines, with penalties attached. Compliance requirements for workers are not are enforced, and where payments may eventually be suspended for long term non compliant workers, they are reinstated in full once a worker meets their obligations.

- There is no parallel process for the multifaceted dispute resolution pathways available for workers to utilise at every stage of the claim – internal reviews, merit reviews, the assistance of the WIRO.

- In managing claims, the attitude of claims managers to employers is one of "dealing with the enemy". This attitude is disguised within the PR speak of ICNSW – and the absurd customer satisfaction ratings where employer and worker views are reported together. [3]The use of the terminology "customer" and the conflation of worker and employer interests is nonsensical in a compulsory monopoly scheme where employers are regarded as entirely responsible for all injury and illness and the premium structure is intended to penalise employers when a claim is made.

[3] NSW Government NSW workers compensation system Annual performance report 2016/17 April 2018