



Submission by the Workers Compensation Independent Review Officer to the State Insurance Regulatory Authority concerning a *Claims Administration Manual* and Guidelines review.

General

The Workers Compensation Independent Review Officer (WIRO) welcomes the opportunity to make a submission.

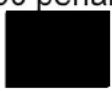
As a threshold point, WIRO wishes to emphasize that there is a significant distinction to be drawn between a participant in an industry and a regulator of that industry. It is when a regulatory body encroaches on the day to day running operations of an industry that problems can be created, which need not otherwise arise.

The conduct of insurers is prescribed by legislation and regulations. The question of whether or not Guidelines or Manuals are in any meaningful way enforceable is a question of construction of the legislative instrument under which they are made: see *Ali v AAI Ltd* [2016] NSWCA 110 (per Leeming, JA at 74-99).

icare currently controls around 85% of the NSW market. In the circumstances, it would seem more appropriate for *icare* to issue its own *Claims Administration Manual* (CAM) for use by its scheme agents, as it is considered that its genuine expertise regarding the day to day conduct of an insurer's business is likely to exceed that of the regulator.

If the CAM is to be issued pursuant to section 192A of the 1987 Act, it appears that adherence to it will likely be regarded as a "licensing requirement" - (s 192A(5)).

In addition to this, it is proposed that a breach of any direction made concerning compliance with the CAM might be visited with a financial penalty of "50 penalty units" - (s 192A(4) and (4A)).



The penalty prescribed in Schedule 5 to the *Workers Compensation Regulation* 2016 is a maximum of \$500. It is difficult to see the purpose of making compliance a licensing issue when such minor pecuniary penalties apply for the same offences. WIRO accepts that this is properly a question for Parliament to consider.

Focus Questions

Using the numbering appearing in the discussion paper provided by the State Insurance Regulatory Authority (SIRA) WIRO responds to the specific focus questions as follows:

1. Do you have any comments regarding the introduction of the CAM and the review of the Guidelines?

Answer: Section 192A was inserted into the 1987 Act at a time when “the Authority” included the Workers Compensation Nominal Insurer. At the time “the Authority” was both (a) a participant in the industry and (b) the regulator.

In the view of WIRO section 192A is a legislative anachronism which is no longer relevant given the advent of the *State Insurance and Care Governance Act* 2015. WIRO is therefore of the opinion that section 192A should either be amended to give the power to make a CAM (or CAMs) to *icare* and the cohort of self and specialised insurers, or repealed altogether.

2. Do you have any feedback on the proposed content?

Answer: The entry for “Work Capacity” retains references to “Merit Review” and “Procedural Review,”. The Minister has announced the proposed reforms which will abolish the present review process with effect from 31 December 2018.

3. Are there topics not covered that you would like to see included in the CAM?

Answer: WIRO notes that while it is proposed that the CAM should include a section on “Provisional Weekly Payments,” the current Guidelines state that workers need

only be notified how long provisional payments are expected to last. However, insurers do not have to say that the theoretical maximum is 12 weeks (or \$7,500).

This matter is a frequent cause of anxiety among workers who consult WIRO for assistance, and it causes extra work for insurers, as when they get close to the 12 week deadline, they are required to send a letter extending the period of provisional liability. Both the Guidelines and the CAM should advise workers of the maximum period for provisional liability and quantum of provisional payments together with a qualifying statement that this may be truncated if a liability decision is made in a shorter time.

In addition, there does not appear to be any separate reference in the CAM to the distinction between a 'new injury' and a 'recurrence.'

The former WorkCover Guidelines defined a recurrence as a spontaneous return of symptoms. The SIRA Guidelines do not repeat that definition. It is the experience of WIRO that some Insurers respond to queries about recurrence injuries with the words: "That was the old Guidelines," as though it were a distinction without a difference. WIRO does not accept that this is the case.

4. Do you have any feedback or information that you would like SIRA to consider regarding these topics?

Answer: No.

5. What would you like SIRA to consider in these areas?

Answer: The opening paragraph to page 15 includes the following sentence: "We want to make these areas clearer by accurately reflecting our policy positions and expectations in the CAM." It appears that the regulator is seeking to legislate by stealth, by including in a document that is being issued pursuant to a section of the Act containing penalty provisions, various policy proscriptions that do not form any part of the current legislative framework. WIRO would regard any such "policy position[s]" or "expectations" in such a document as being an undesirable development.



Issues such as surveillance of injured workers are regulated by other legislation and the rules of various Courts and Tribunals. No input from SIRA should be required in relation to these matters.

6. Are there any other claims management matters you believe would benefit from clarification from SIRA?

Answer: No.

Closing observations:

WIRO has had the benefit of seeing a draft submission by *icare*.

1. WIRO adopts and supports the recommendations made in that submission;
and
2. WIRO wishes to note concurrence with the following specific observations:
 - It is important to preface that a CAM cannot be used to fix deficiencies in the legislation. Only amendments to the legislation and subordinate legislation, can right the acknowledged wrongs in the operation of the workers compensation system.
 - *icare* further notes that section 192A(1) of the *Workers Compensation Act 1987* gives SIRA the power to prepare and publish a claims manual. This section does not give SIRA the power to dictate the administration of claims. Rather, section 192A(2) refers to the promotion of certain matters, for example prompt processing of claims.



- The separation of powers between the regulator and Nominal Insurer was a deliberate attempt to delineate between regulation and operations. It is noted that the proposed CAM appears to follow the Victorian WorkSafe manual very closely. The WorkSafe manual is quite prescriptive in its content, and in some instances down to the level of specifying who, what and when. Although the implementation of a CAM may work well in states such as Victoria, doing so within NSW may undermine the intent of the *State Insurance and Care Governance Act 2015*, and may not suit the arrangements for NSW workers compensation.

Dated: 24 May 2018



Kim Garling
Workers Compensation Independent Review Officer

