

18 November 2022

## Workers Compensation Amendment Regulation 2022– icare submission

### Executive summary

1. Insurance and Care NSW (**icare**) thanks the State Insurance Regulatory Authority (**SIRA**) for the opportunity to provide feedback on the proposed amendments to the Workers Compensation Regulation 2016 (**Regulation**).
2. icare supports the new section 25(1A) introduced through the *Motor Accidents and Workers Compensation Legislation Amendment Act 2022 (MAWCLA Act)* which requires an employer to pay additional compensation to cover certain investment and management fees concerning the lump sum benefit paid to a dependant of a deceased worker, when it is paid to the NSW Trustee and Guardian (**TAG**). icare acknowledges the important intent behind the provision, to protect the child's lump sum from being eroded by fees over time.
3. icare notes that SIRA's proposed methodology for calculating the fees is a prescribed formula based on the current drafting of section 25(1A) of the MAWCLA Act. icare also acknowledges the proposed expansion of section 25(1A) in the Personal Injury Commission Amendment Bill 2022 which is currently before Parliament.
4. While there is a risk that a one-off amount calculated by the formula may result in over or under calculation of the additional compensation amount, icare considers that the formula will provide the necessary certainty for the family of the deceased as well as for employers and insurers. To assist icare and the insurers with implementation of the proposed formula, icare provides some recommendations for SIRA's consideration below.

### Practical application of the formula

5. icare notes that it is intended that the Personal Injury Commission (**Commission**) will apply the formula to calculate the additional fees to be paid to the NSW Trustee and Guardian (**TAG**) as part of the apportionment of the lump sum death benefit. The two amounts will then be specified on the Certificate of Determination and transferred to the TAG as a single sum.
6. icare queries whether the practical effect of this is that the total amount of fees the TAG charges will then be calculated on the total amount (fees plus lump sum) and therefore result in the actual management fees being higher than the Commission initially calculated.
7. For example, if a three years old minor's lump sum death benefit of \$200,000 is apportioned to a TAG trust, according to the formula, the fee would amount to \$57,996. This means that the total amount paid into the trust, including the fee and lump sum death benefit, is \$257,996. As SIRA's consultation pack provides, the TAG is not set up to invoice/receive money into individual trusts and this total amount will have to be transferred to the TAG as a single sum. The actual management fees of the fund would then be calculated on the total amount of \$257,996, resulting in the fees closer to \$70,714. This means

the beneficiary may be disadvantaged, as only \$57,996 was awarded to cover the fees. At the same time, this may will mean that the total interest accrued will also be higher.

8. icare acknowledges the balance that must be struck to ensure a viable option and recommends SIRA to consider the above example to ensure there are no unintended consequences of the practical operation of the draft Regulation.
9. In the event the lump sum and the fees are to be made as separate payments into the trust, icare would require an additional payment code to be established to ensure the system is able to respond. If there will be one payment code for both the fee and the lump sum payment, icare will require time to make any system changes to increase the current maximum death benefit lump sum amount.

### **Lump sum death benefit fees for dependants of deceased volunteers**

10. icare, acting for NSW Self Insurance Corporation (**SICorp**), apportions lump sum death benefits for dependants of deceased volunteers as these matters do not proceed to the Commission. icare's data shows that the majority of settlements are held in trust privately by the family, rather than by the TAG. However, this remains an option and the family may elect for the money to be paid to the TAG trust in the future. This will require icare to also utilise the formula to calculate the management and investment fees.
11. icare requests SIRA to consider making available a calculator on its website to ensure consistent application of the formula by the Commission, icare, insurers and legal representatives. It would ensure transparency for all parties, including the families of the deceased, on how the fees are calculated and assist to minimise any disputes.
12. icare would also welcome further guidance materials from SIRA on specific scenarios where the formula must be used, particularly for more difficult cases such as in the case of volunteers, and an opportunity to attend a training session with SIRA.

### **Uncertainty of fees following future changes**

13. icare previously raised the potential scenario of the trust being drawn down for instances such as education or medical costs for the minor child. If the trust is drawn down, the amount held in trust would reduce and therefore the TAG annual investment fee would reduce. SIRA has confirmed this scenario was considered and advised the TAG must act in the interest of the beneficiary and in this event any unused portion of the fees will form part of the trust for the child's benefit.
14. icare acknowledges the uncertainty of calculating future fees with a set formula and welcomes a confirmation from the TAG that any unused fees will form part of the trust. icare also welcomes a confirmation from SIRA that the formula will be reviewed annually to ensure it remains appropriate for calculating the TAG fees should those increase in the future.

### **Next steps**

15. icare welcomes the opportunity to discuss this submission further and to work collaboratively with SIRA to assist with implementation of the draft Regulation.

16. Please do not hesitate to contact [REDACTED], on  
[REDACTED] to discuss further.

Yours sincerely

[REDACTED]

**Mary Maini**

Group Executive Workers Compensation