

14 December 2015

Workers Compensation Regulation
Attention: [REDACTED] Licensing & Monitoring Manager
State Insurance Regulatory Authority
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By Email: sifeedback@sira.nsw.gov.au

Dear [REDACTED]

Submission to the Review of the Self-Insurance Licensing Framework

Thank you for the opportunity for Toll to provide a submission to this review and in response to the Issues Paper of November 2015.

Toll Holdings Limited has been a licensed Group self-insurer in New South Wales since 28 February 2014 and prior to that, a licensed Single self-insurer since 1 July 2001.

We employ in excess of 8,000 employees in NSW and well over 40,000 employees globally.

Toll also holds self-insurance status in Victoria, Queensland and South Australia.

As a **key** stakeholder, Toll believes it is in an excellent position to make an informed submission to the review.

We note that the review will assess the self-insurance licensing framework with consideration of the NSW Government's aim to "make it easier to do business" in NSW. That is both a commendable and essential purpose of the review.

In the Issues Paper, Principle 6 of 3.1 "Best practice regulation" states:

"The simplification, repeal, reform or consolidation, of existing regulation should be considered"

We urge that this review endeavours to achieve the intentions of this principle.

We further note that the legislative framework relating to the determination of an organisation's application for a licence is contained within the Workers Compensation Act 1987 No. 70, namely Division 5 of Part 7 and specifically Section 211(2):

211 Determination of application for licence

(2) The Authority, may, in determining an application for a licence, take into consideration:

- (a) The suitability of the applicant,
- (b) The financial ability of the applicant to undertake the liabilities under this Act,

- (c) The efficiency of the workers compensation system generally, and
- (d) Such other matters as the Authority thinks fit.

Thus, the critical legislated considerations with regard to the licensing of a self-insurer relate to its financial capacity and to the efficiency of its workers compensation system.

Toll submits that, beyond satisfaction that self-insurers are capable of meeting prudential and workers compensation system requirements, no further licensing conditions are required. The licensing framework for self-insurers should have the fundamental objective of substantially reducing the regulatory burden currently imposed on existing self-insurers and removing, as far as possible, the non-prudential barriers which are currently imposed on new applicants for self-insurance licences.

We now address the questions for stakeholders contained in the Issues paper.

1. Is licensing appropriate?

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

The current requirements imposed on self-insurers are significantly disproportionate to any risks posed by self-insurers, beyond those posed by other employers.

Organisations that are self-insured are the only employers in NSW that carry the direct and immediate costs that arise when an employee is injured. For this reason, self-insurers have a clear and positive incentive to minimise the risk of injuries to workers, ensure they are provided with all necessary medical care and to maximise return to work opportunities for them at the earliest available time. For these reasons, the risk profile of self-insured companies is minimal.

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

The only objectives and expectations of the government in relation to self-insurance should be to firstly, confirm the prudential capability of self-insurers to meet claims as and when they arise and secondly, to ensure the self-insurer manages its workers compensation claims in accordance with the relevant legislation and guidelines. This differs from the current practices in that the current practices impose substantial over-regulation in areas which are irrelevant to prudential and workers compensation considerations.

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

There are a number of elements of self-insurance which provide value to an employer and these include:

- Commitment to delivery of the best possible outcomes for employees through the establishment and maintenance of a safe and healthy workplace, and the provision of early intervention and effective injury management and return to work programs

- The potential to achieve considerable savings and benefits if the program is managed properly
- The capacity to create a culture in which employees feel valued at work and want to attend and contribute
- Employers retain premiums for use within their own business
- Greater incentive for injury prevention and ability to better monitor and control accident frequency and claims experience
- Payments and treatment to injured employees are delivered more expediently
- It provides an enhanced ability to manage structured return to work plans and programs for injured employees
- Claims decisions are invariably made more promptly
- All data & documentation is received and maintained by the self-insurer (employer)
- The adversary relationship is minimised
- More realistic setting of case estimates

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

- The most significant intrinsic cost of being self-insured are those substantial costs imposed as a result of regulatory compliance e.g including OHSMS and Case Management audit
- The self-insurer is responsible for the full costs of an injury or event, up to the level of re-insurance cover. There is no large loss limit as with non-self-insured employers.
- The premium payable in obtaining an appropriate level of re-insurance cover
- The provision of experienced and capable workers compensation staff
- The maintenance of compliant data recording and reporting systems for both incidents and claims.
- The fees incurred for obtaining and maintaining a bank guarantee
- The significant cost of the fund levy payable annually to the regulator

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

By the action of obtaining a self-insurance and the responsibilities it brings, senior executives have demonstrated the commitment of the organisation, its managers and staff to achieving better outcomes for their injured workers.

Self-insurers have in place well prepared preventative and post-injury management strategies.

2. Is licensing well designed?

Entry

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

There should be no minimum number of employees required for entry into self-insurance.

Beyond satisfaction that an organisation is capable of meeting prudential and workers compensation system requirements, no further entry level requirement should be necessary.

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

Toll is of the view that current licensing entry requirements are ineffective and create unnecessary barriers and this is evidenced by the extremely limited number of successful self-insurance licence applications in recent years. The present requirements currently act as a specific disincentive to new applicants.

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

Beyond financial capacity to meet liabilities, the regulator should expect no more of self-insurers than is required of all other, non-self-insured, employers.

However, should the regulator be looking at alternative measures for higher and lesser performing self-insurers, then indicators that may assist in this differentiation may include:

- Lost Time Claims
- Return to Work Outcomes
- Average Lost Time Duration
- Average Gross Incurred Cost Per Claim
- Percentage of New Claims Reported Within 7 Days
- Rate of Lost Time Injuries Per \$1M Wages
- Rate of New Claims Reported Per \$1M Wages
- Claims Closed Within 90 Days
- Incidence of (successful) Prosecutions, Improvement and Prohibition Notices

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

Longer renewal or licence terms would provide the organisation with some degree of security and provide them with the opportunity to plan for the longer term.

Licence terms vary significantly across the various jurisdictions within Australia. Some examples are:

- NSW – Maximum 3 years for existing and entry level self-insurers
- Victoria – Maximum 6 years, with provision for a 4 year term
 - Entry level 3 years
- South Australia – Maximum 5 years, with provision for a 4 year term
 - Entry level 2 years
- Queensland – Maximum 4 years
 - Entry level 2 years

- ComCare - 8 years
- NSW Specialised Insurers – 5 years

If it is accepted that there is benefit to a self-insurer in securing a licence of a longer term, then it can readily be seen that NSW lags behind the remaining jurisdictions. The entry level term in Victoria alone is equivalent to the maximum licence in NSW!

Further, in NSW licence renewal triggers mandatory audits, namely the Occupational Health & Safety Management Systems (OHSMS) and the Case Management audit. Hence, these audits occur at a minimum at 3 yearly intervals, but potentially at more frequent times depending on audit results.

However, other jurisdictions, including Queensland and Victoria, which have audits linked to licence terms, results in those organisations self-insured in those States, having less onerous audit requirements than NSW.

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

The impact of implementing an open-ended licence renewal period in NSW would be positive in reducing regulation and providing long-term security, enabling the organisation to drive better business outcomes.

Financial

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

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

Toll's levies in NSW for FY 14 were \$ [REDACTED], plus Dust Diseases contributions, not inconsiderable amounts but we have no knowledge of how the regulator determines the total pool of levies it wishes to collect, or how the funds are expended.

Claims Management

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

Good claims management practices provide their own rewards through:

- *Improved return to work rates*
- *Lower claims costs*
- *Enhanced employee relations*
- *Better outcomes for business*

Claims management is already heavily regulated by the Workers Compensation Commission (WCC), by the review process for work capacity decisions including by merit review, by the Workers Compensation Independent Review Officer and by the complaints process.

Licensing policy need not and should not be connected to claims management in any way. The inherent benefits of self-insurance result neither from punitive regulation, nor incentives.

Case, or injury management audits, provide no additional benefit to high-level performers, but only serve to distract and interrupt self-insurers from carrying out their core activity of claims management. There is extensive preparation and participation time for a self-insurer with the case management audit, disproportionate to any benefit that may be obtained.

Such audits should only be conducted in those situations where a self-insurer has generated a proportionately high number of complaints over a long period of time. It is essential that such a determination be predicated on actual "complaints" with a sound basis, as opposed to what often can only be classified as "enquiries".

What the Regulator applies to non-self-insured organisations and their commercial insurers should be the same for self-insured organisations. There should be fair, equitable, non-discriminatory treatment by the Regulator of a self-insurer, compared to a commercial workers compensation insurer.

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

A self-insurer already has the most direct incentive to optimise its claims management performance. Additionally, data supplied to SIRA should be sufficient to for the regulator to consider and assess claims management performance, if this was necessary in any event.

However, should SIRA wish to measure claims management performance, we submit that critical indicators may include:

- Return to Work Outcomes
- Average Lost Time Duration
- Average Gross Incurred Cost Per Claim
- Percentage of New Claims Reported Within 7 Days
- Number of complaints

What the Regulator applies to non-self-insured organisations and their commercial insurers should be the same for self-insured organisations. There should be fair, equitable, non-discriminatory treatment by the Regulator of a self-insurer, compared to a commercial workers compensation insurer.

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

The impact would be of significant benefit to the vast majority of self-insurers who carry out their claims management functions in a professional and timely fashion and in compliance with legislative requirements.

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

Toll values any guidance SIRA may provide that will enhance more efficient claims management and return to work outcomes. This is best served by way of training seminars and workshops, especially relevant to changes in legislation.

Workplace Health and Safety

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

Whilst there are generally no factors that make self-insured organisations any greater risk, they rather are generally a lesser risk because they are subject to the total direct cost of all claims and therefore have a greater incentive than other employers to improve safety outcomes.

Toll has a robust health and safety strategic and operational framework with a comprehensive governance structure and health and safety management system.

At present, the only matter that has a negative impact on safety issues for self-insurers is the requirement to deploy substantial work health and safety resources away from safety initiatives at the time of and leading up to, the OHSMS audit by Safe Work NSW.

It is a condition of our self-insurance licence that we undergo periodic safety audits by the regulator, at least 3 yearly and possibly at more frequent intervals depending on audit findings and outcomes.

To the best of our knowledge, these audits are only conducted on the 58 self-insured organisations and the 5 specialised insurers. No other employers in NSW are similarly audited by the Regulator or by the commercial insurer of the non-self-insured organisation. It is likely that these employers, many of whom are larger in size and greater in risk, contribute negatively to the cost of the State's workers compensation scheme and tend to be less resourced than self-insurers.

As an indication of the costs to self-insurers in preparation and audit time of the OHSMS audits, we estimate that the cost to Toll in our 2015 audit is in the region of \$ █. This includes the down time of Toll's senior management, WHS staff, business managers and employees. This had what we could only class as having a significant detrimental effect on our operations and our ability to do business, leading up to and during the audit itself. These audits take away from the day to day business and safety activities of our organisation.

This does not accord with the NSW Government's stated aim to "make it easier to do business in NSW" (Ref: 1.1 Purpose of the review).

As a final point, Toll was successful in changing its licence status from a "single" licence to a "group" licence in 2014. Notwithstanding that, since that time there has been neither a change in our core business activities or a material change in our employee numbers, the OHSMS audit conducted by SafeWork, by requirement of the regulator, was conducted at 3 sites over 5 days (excluding the preliminary meeting date).

If we had remained on a single licence, the audit would have incorporated 2 sites over 4 days. We reiterate, there were no material changes to our business activities or employee numbers. There can be no justification for this regulatory overkill.

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

There is no evidence that these audits by the Regulator improve WHS outcomes. Outcomes would be improved by the abolition of the audit, allowing the self-insurer to focus its resources on its day-to-day management of safety at its operations.

Toll conducts self-assessments and audits in accordance with our health and safety management standards and our health and safety governance requirements. In addition, several of our businesses are AS/NZS 4801 or ISO 18001 certified. Where applicable Toll customers also conduct health and safety audits of the Toll businesses that service them.

2.13 How should high WHS performance be defined?

The same as with non-self-insured organisations and their commercial insurers.

This is not a matter that should be subject to licensing conditions or SafeWork or SIRA review.

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

As should all employers in NSW, self-insurers should be monitored by SafeWork through reference to the frequency of Incidence of (successful) Prosecutions, Improvement and Prohibition Notices. There should be no differentiation in compliance requirements between self-insurers and all other employers in NSW.

3. Is licensing administered effectively/efficiently?

Financial

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

It is our view that these amounts are appropriate for present purposes, but that they should be indexed to keep pace with inflation.

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

We believe that the present security arrangements are appropriate.

Claims Management

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

Toll does not consider that any conflict of interest arises by reason of self-insurance. Any perceived conflicts of interest are far outweighed by the advantages flowing to both parties, in return to work arrangements and provision of suitable duties, decision making, document control and delivery of benefits and treatment. If anything, respective interests are better served in a self-insured environment.

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

Dealing with privacy issues are no different for employers generally and self-insured employers.

In saying that, Toll has been a self-insurer in NSW since 2001 and has received and managed in excess of [REDACTED] claims in that time. We have not had one issue or concern raised with regard to privacy of our injured employees' personal information.

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

We know of no evidence at all of any such conflict of interest. Further, we believe that this is irrelevant to licensing considerations. As no conflict exists no management is required, but in the event such a situation arose, our injured employees have the opportunity to seek resolution through our internal dispute mechanism, or alternatively, to SIRA or WIRO.

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

SIRA should have no involvement in case management compliance for the reasons previously identified in 2.7 above. The current onerous audit requirements in NSW take the self-insurer's focus away from managing the claim and the injury, whilst impeding our capacity to deliver benefits and treatment to the workers promptly and efficiently.

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

It is our view that the audit tool does nothing to improve performance and rather, whilst focusing on processes rather than outcomes, if anything, it detracts from performance.

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

Regulatory action is not a driver in the areas of claims management and does not influence return to work outcomes. These are not matters for consideration in a licensing policy.

The real drivers include:

- The capacity to deal directly with injured workers and providers
- Reduction in claims costs
- Reduced disruption to business
- Proactive activities resulting in early and durable return to work.

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

This is a matter which should be dealt with on a case by case basis having regard to the operational requirements of each business. However, it is critical that an impartial, accurate and realistic actuarial assessment of the outstanding liabilities attached to these tail claims be obtained and agreed upon by both the employer and regulator.

Workplace Health and Safety

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

The consideration should not be one of improvement but rather abolition. As previously stated, the regulator is able to monitor the frequency of Incidence of (successful) Prosecutions, Improvement and Prohibition Notices. There should be no differentiation in compliance requirements between self-insurers and all other employers in NSW.

Collection and provision of information

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

The current extent and depth of data provided by self-insurers to SIRA is sufficient for the regulator to monitor a self-insurer's claims management and WHS performance, without the need for additional auditing.

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

Most useful in tracking performances would be more frequent provision of data from SIRA, on a quarterly basis, showing a self-insurer's performance in a variety of Key Performance Indicators, by comparison with aggregated self-insurers, scheme employers and comparable industries.

4. Is the licensing scheme the best response?

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

Self-insurance has a very positive impact on the broader NSW scheme and the Nominal Insurer by improving standards in case management and return to work. Self-insurance provides a critical area of competition to the Nominal Insurer which drives improved performance and lower costs.

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

Toll is unaware of any evidence at all of any adverse outcomes from self-insurers not reporting significant matters to the regulator. In fact, it is most likely that all significant matters are reported to the regulator by self-insurers in accordance with legislative requirements.

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

In this submission, Toll advocates a reduction in the role of the regulator in compliance requirements for self-insurers.

The NSW government should have a specific policy that provides for self-insurance licensing for government entities and state owned corporations where they otherwise qualify.

In closing, Toll submits:

- As a self-insurer, we underwrite our own risks and there is a compelling financial imperative to maintain the health, safety and wellbeing of all its employees and contractors
- The current licensing and audit framework is driving substantially increased costs for self-insurers in NSW and imposes a regulatory burden that, in some respects, is too onerous
- Consideration as to whether an organisation is suitable for a licence should be based on prudential and claims management systems capabilities
- All employers in NSW, whether self-insured or not, should be subject to the same scrutiny in best practice Workplace Health and Safety
- There should be fair, equitable, non-discriminatory treatment by the Regulator of a self-insurer, compared to a commercial workers compensation insurer.
- Toll as a self-insurer, has a vested interest in managing our employees, rather than third party insurers managing claimants.

Yours sincerely,

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