

The Review

Office of the Secretary

Department of Customer Service

McKell Building

2-24 Rawson Place

SYDNEY NSW 2000

28 October 2020

**By email and post: [independentreviews@customerservice.nsw.gov.au](mailto:independentreviews@customerservice.nsw.gov.au)**

Dear Mr McDougall QC,

***State Insurance and Care Governance Act ('SICG Act') Independent Review***

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

The ALA office is located on the land of the Gadigal of the Eora Nation.

The ALA welcomes the opportunity to submit to the *State Insurance and Care Governance Act* ('SICG Act') Independent Review ('the review') announced by the Treasurer and Minister for Customer Service on 4 August 2020.

The matters arising from the recent Four Corners investigation and associated media coverage are concerning. The ALA assumes that subject matter to be well known to the Independent Reviewer. In summary, the investigation revealed the Nominal Insurer, including the Executive, had engaged in maladministration and conduct which most ordinary

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).

members of the public would regard as corrupt.<sup>2</sup> A whistle-blower alleges to have been victimised for speaking out against perceived corrupt conduct.<sup>3</sup> Specific case studies identified by the Investigation and related press coverage revealed evidence of mishandling and maladministration of worker's compensation claims.<sup>4</sup>

Whilst the ALA is not placed to speak to specific instances of corruption, it is well placed to speak to the mishandling and maladministration of workers compensation claims. The ALA's members include senior practitioners and personal injury accredited specialists who routinely represent injured workers in the workers compensation jurisdiction. Colloquially, those matters highlighted by Four Corners investigation and related press coverage are commonplace, including:

1. Doctor shopping, in relation to independent medical examinations.
2. Insurer decision making unsupported by evidence.
3. Mismanagement and delay.

The objectives of the SICG Act are not being realised, though the ALA suggests the objectives remain desirable and achievable. The ALA has made previous detailed submissions in relation to the 2014 and 2016 review of the Worker's Compensation legislation, and further in relation to the statutory review of the SICG Act 2015 on 6 November 2017. The Regulator should remain separate from the Insurer so as to avoid conflicts of interest and generally ensure the effective operation of the Scheme. An effective Scheme should deliver benefits to injured workers in accordance with the legislation, in a timely manner. Administration costs should be kept to a minimum to the benefit of policy holders, in the form of lower premiums.

The ALA submits that reform is required to ensure that the objects of the SICG Act are realised. The Independent Reviewer Report on the Nominal insurer of the NSW Workers Compensation Scheme of December 2019 by Ms Dore ("The Dore Report") cited two issues which merit consideration by the Independent Reviewer:

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<sup>2</sup> See, for example, <https://www.abc.net.au/news/2020-08-24/wife-of-former-icare-ceo-was-paid-800000-nsw-inquiry-hears/12590276>.

<sup>3</sup> <https://www.smh.com.au/business/consumer-affairs/gutted-destroyed-betrayed-icare-whistleblower-victimised-after-speaking-up-20200823-p55ods.html>

<sup>4</sup> <https://www.smh.com.au/business/consumer-affairs/they-treated-me-like-a-leper-how-worker-comp-claims-were-rejected-20200727-p55fs9.html>

## 1. Culture

Ms Dore explained in discussing the 'impetus' for her review:

3.3.1 This Review has been conducted at a time of implementation of changes arising from the Hayne Royal Commission into the Financial Services Sector 2018 (**Hayne Royal Commission Report**).<sup>8</sup> A key question raised by that Commission was:

“Is there adequate oversight and challenge by the Board and its gatekeeper committees of emerging non-financial risks?”

3.3.2 The Commonwealth Bank of Australia (CBA) report 2017 and most recent Australia Prudential Regulation Authority (APRA) 2019 review also focussed strongly on the management tone and ensuing culture embedded in organisations. In uniquely complicated systems of workers compensation (WC) participants and responsibilities, these elements are critical in achieving successful outcomes.<sup>5</sup>

Ms Dore's findings in relation to the operative environment, including 'culture' included:

FINDING 2. Regular meetings between Board chairs, CE and CEO of SIRA and icare should be continued on an open and constructive basis to promote understanding between, and professional relations with, the two organisations in meeting their respective responsibilities.

FINDING 3. SIRA should continue its review of governance and capabilities within the emerging contemporary approach to regulation.<sup>6</sup>

## 2. Regulatory power

Ms Dore explained the difficulty encountered by SIRA in regulating the Nominal Insurer, when discussing the new claims management model under the SICG Act

7.7.1 As a regulator SIRA is somewhat limited (refer to section 3.3.7) in its powers over the NI due to the unconditional licence it has been granted. Section 189 of the 1987 Act enables SIRA to require the disclosure and provision of records relating to the business and financial position of an insurer. Section 192A of the 1987 Act

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<sup>5</sup> Page 10.

<sup>6</sup> Page 13.

enables SIRA to prepare and publish a claims administration manual and to give directions under sub-section (4) in relation to claims handling.

7.7.2 Under section 194 of the 1987 Act, SIRA has a broad power to issue directions to an insurer:

*“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 specified class or classes of cases.”*

7.7.3 Although section 194(2) makes compliance with a direction a condition of an insurer’s licence, the unconditional nature of icare’s licence granted by section 154B appears to negate the power in respect to the NI. At best this is unclear, and at worse means a constrained regulator. This should be no comfort to the employers of NSW who fund the system. Attached at **Appendix A** is a table of some of the legislative powers available to SIRA, the table illustrates the limitations SIRA has when exercising its powers over the NI, as compared to either the self or specialised insurers.

7.7.4 If the regulator is hamstrung and APRA oversight is not required, it seems fair to ask, “Where is the independent prudential assurance which is normally a regulatory function?”

FINDING 12. The legislative powers available to SIRA should be reviewed and strengthened to enable proper oversight of the NI.<sup>7</sup>

The ALA submits that the objects of the SICG Act are unlikely to be realised while the Nominal Insurer has a poor internal organisational culture, as evidenced by the Four Corner’s Investigation and media coverage, and where the Regulator has ineffective regulatory power. Ms Dore’s findings are supported by the ALA. If the cultural and regulatory issues are effectively addressed, the opportunity for corruption will lessen, and the incidence of maladministration will decline. One would also anticipate improved Scheme performance to the benefit of injured workers and policy holders.

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<sup>7</sup> Page 70.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Joshua Dale', is positioned above the printed name.

Joshua Dale

Australian Lawyers Alliance

NSW President