

icare and State Insurance and Care Governance Act 2015 Independent Review

Report by the Hon Robert McDougall QC, Independent Reviewer

30 April 2021

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1 Preface

I present this report to the Treasurer and the Minister for Customer Service, in response to the Terms of Reference dated 3 September 2020 that they set for me.

I express my appreciation to the executive and Boards of Insurance and Care NSW and the State Insurance Regulatory Authority for their active cooperation during the Review.

I am also grateful for the input of the external stakeholder groups, who provided written submissions and, in many cases, supplemented those submissions in interviews, and to those members of the public who responded to the public consultation.



Robert McDougall QC

Independent Reviewer

30 April 2021

2 Terms of Reference

- 1 The Terms of Reference were approved by the Treasurer and Minister for Customer Service on 3 September 2020.

2.1 Matters In Scope for the Review

- 1) ***Comprehensive organisational review of icare, having regard to issues recently raised in the media and in Parliament.***

This part of the Review will cover icare's:

- a. Operations, including claims management, the claims agent model and incentive structures, return to work performance, and the service provided to injured workers*
- b. Delivery of the recommendations of the 2019 Compliance and Performance Review of the Nominal Insurer (NI) ('the Dore Review')*
- c. Realisation of benefits that it was established to achieve*
- d. Culture*
- e. Governance*
- f. Executive remuneration*
- g. Board effectiveness and accountability*
- h. Procurement practices*
- i. Management of probity matters such as gifts, travel, & conflict of interests*
- j. Relationship with the State Insurance Regulatory Authority (SIRA)*

- 2) ***Review of the government-managed workers compensation schemes (NI and Treasury Managed Fund (TMF)) and the legislative framework that supports them.***

This part of the Review will consider:

- a. whether the workers compensation schemes are delivering on their policy objectives*
- b. financial sustainability of the two schemes*
- c. the legislative and regulatory structure of the schemes to the extent they relate to icare, the TMF, the NI, insurance, funding, or the powers, functions and independence of SIRA*

- 3) ***Statutory review required by s32 of the State Insurance and Care Governance Act 2015 (SICG Act):***

This part of the Review will assess:

- a. whether the policy objectives of the SICG Act remain valid*
- b. whether the terms of the SICG Act remain appropriate for securing those objectives*

4) Recommendations for improvements in line with parts 1-3 of the Terms of Reference:

Including in relation to:

- a. organisational effectiveness of icare
- b. financial stability and management of the workers compensation schemes
- c. any amendments to the SICG Act
- d. any amendments to the Workers Compensation Act 1987 (WC Act 1987) or Workplace Injury Management and Workers Compensation Act 1989 (WIM Act) to the extent they relate to the above Terms of Reference.

2.2 Matters Out of Scope for the Review

This review will not examine:

- the WIM Act or the WC Act 1987 other than to the extent they relate to icare, the TMF, the NI, insurance, funding, or the powers, functions and statutory independence of SIRA
- the Personal Injury Commission Act 2020
- Other schemes managed by icare such as Lifetime Care and Dust Diseases Care

The review will not determine specific cases of workers compensation or provide remediation to injured workers but may make recommendations to improve the workers compensation system generally and the organisations managing it.

3 Executive Summary

3.1 Introduction

2 Insurance and Care NSW (icare) was established to effect very substantial changes in the management of workers compensation in this State. Specifically, the legislature contemplated that icare would centralise the management of all insurance functions for the Nominal Insurer (NI), and claims management functions for the Treasury Managed Fund (TMF), thereby bringing about operational efficiencies which would deliver very substantial savings. The legislature sought to ensure that icare would be accountable for its operations by appointing the State Insurance Regulatory Authority (SIRA) as Regulator.

3.2 Terms of Reference Part 1; Report Parts 1A and 1B

3 In *Part 1A* I discuss the allegations made in the media and in the Parliament. In *Part 1B*, and by reference to my conclusions on those allegations, I undertake an organisational review of icare.

4 When icare was established, it set about an enthusiastic program of change. Although that program was well-intentioned, its execution was, in a word, sloppy. In hindsight, it is clear that icare sought to change more than was necessary to achieve its statutory purposes, and implemented its changes far too quickly and without adequate testing.

5 Although I have expressed those views with the benefit of hindsight, many of the problems that icare experienced were readily foreseeable at the time. It should have been apparent to icare's Board and management that the changes were so radical in their extent that further and more detailed pilot testing was required before the changes were introduced. In addition, the management structure that icare decided to introduce depended critically on the availability of automation through the Nominal Insurer Single Platform (NISP). However, the NISP did not become available until 12 months after operations commenced.

6 icare's desire to bring about change had other manifestations. One, of particular significance to this Report, was its disregard for establishing and following proper and prudent procurement practices. When icare undertook procurement in its own right, it was required to follow procurement practices applicable to all government agencies. However, when icare undertook procurement in right of the NI, it was not. As a result, icare used the NI exemption with excessive enthusiasm.

7 As I show in the body of this Report, the result of these shortcomings was that procurements for the NI, often involving very large sums of money, were conducted on an opaque basis, and in a way that did not ensure that the NI was obtaining value for the money (derived, of course, substantially from premiums paid by employers) that it spent.

8 I should make it clear that I found no evidence that any procurements were tainted by criminality or corruption.

9 Likewise, icare did not pay a great deal of attention to establishing and embedding, so as to ensure that they were followed, sound probity principles. icare's executives accepted gifts and benefits from time to time. Those gifts and benefits were either not recorded at all, or were not recorded promptly and appropriately. That is a dreadful

look for an organisation that manages many billions of dollars of what is in substance public money.

- 10 Again, I should make it clear that I found no evidence that these inappropriate practices were in any way associated with criminality or corruption. However, the fact is that appropriate procedures for the reporting and recording of gifts and benefits were not developed and embedded.
- 11 In both instances (procurement and probity), the defects were procedural and cultural. They reflect icare's determination to effect speedy change and its concomitant disregard for practices and procedures that might hinder this.
- 12 In a related area, icare failed to develop and embed sound principles relating to the disclosure and management of conflicts of interest. This meant that clear and obvious conflicts were not recorded formally and promptly, and in some cases were not adequately managed.
- 13 In icare's early days, it developed a 'with us or against us' mentality, whereby attempts to insist on sound practices and process were rebuffed, and those who sought to do so were ostracised. There is some evidence that in those early days, employees were discouraged from bringing cultural and operational shortcomings to senior management. However, there is no evidence of an institutional culture of bullying. icare has sought to reform its culture, and despite allegations to the contrary, I have concluded that there is no basis for a finding that icare's present culture is 'toxic'.
- 14 All the matters to which I have referred could have been avoided. If icare had taken more time to institute appropriate procedures for establishing and embedding procurement rules, probity rules, rules for the management of conflicts of interest, and the like, before rushing headlong into the program of 'transformation' (as icare liked to call it), much of the grief that has occurred over the past five and a half years could have been avoided. It is unfortunate that the zeal to implement the transformation was not moderated by the prior establishment of best practice ground rules for icare's operation.
- 15 Those failures of process have produced manifold unhappy consequences. The new model for claims management did not deliver the benefits that the legislature had intended. Return to work (RTW) rates dropped. Costs increased. Injured workers experienced very considerable difficulties in getting access to the benefits to which, by law, they were entitled.
- 16 Another issue that featured heavily in media reports and the SCLJ's hearings concerned underpayment of compensation to injured workers. The underpayments arose from incorrect calculation of pre-injury average weekly earnings (PIAWE), a statutory integer in the calculation of benefits. icare discovered the problem in 2019, and set about establishing its extent and the best way to fix it. icare's initial estimate suggested that underpayments could total from \$20 million to \$40 million, 'with a very conservative high-end estimate of \$80m'¹. Unsurprisingly, media reports focused on the highest of those figures.
- 17 There seem to have been three causes. First, the statutory formula for calculating PIAWE is complex. Secondly, employers did not always give icare correct earnings

¹ icare, Media Issues Response, 25 September 2020, Item 2 at [23]

data. And thirdly, in some cases, there was human error. icare notes, correctly, that many of the underpayments occurred before it came into existence.

- 18 icare has established a remediation program. It has also substantially revised down its estimate of the number of affected workers and the total amount underpaid. icare is also reviewing TMF files, as there is no reason to think that the errors were confined to the NI. SIRA is overseeing the remediation program, and is conducting its own investigation.
- 19 icare was slow to report the problem to SIRA, and deserves criticism for this. That delay may have reflected the uneasy relationship between icare and SIRA at the time. However, after that initial delay, icare has acted carefully to establish the extent of, and to correct, the underpayments, and appears to have cooperated with SIRA in an appropriate way to ensure that the remediation program is effective.
- 20 All those matters, and others with which I deal in this report, have been outlined in media reports and in hearings of the Standing Committee on Law and Justice (SCLJ). One could be forgiven, if all one had available was those reports and the transcripts of the SCLJ's hearings, for thinking that the icare experiment was a disaster. However, it was not.
- 21 icare has embarked upon a program of organisational reform. There has been a wholesale change in its leadership, at both top and senior executive levels and at board level. It is clear that the new management team is determined to remedy the problems of the past and to turn icare into the organisation that the legislature expected it to be. It is equally clear that the new Board is determined to oversee and, to the extent necessary, drive this process.
- 22 The numerous expert reports made available to me and to icare, and the recommendations from those reports, provide clear and consistent guidance to icare. If those recommendations, and the additional recommendations I make in this Report, are adopted and implemented, there is every reason to think that icare will be able to realise the efficiencies and savings it was established to achieve. I add, for reasons that will become apparent later in this Report, that SIRA must be involved in this process. It is pleasing to see that the once frosty relationship between icare and SIRA has thawed, and that the two entities appear to be working cooperatively to improve the functioning of the workers compensation system in this state.
- 23 There are three more points that I wish to make. The first is that icare saw an important reason for its creation as being to reduce the adversarial nature of the workers compensation system, and to make the system more neutral – that is to say, favouring neither employers nor workers. It seems clear that icare has achieved those objectives. In support of the conclusion that the system is more neutral, I note that complaints from employers and from workers appear to be evenly balanced in number and content.
- 24 The second point is that although many of the allegations featured in media reports have been substantiated, some have not. And despite the tone of some of those reports, there is nothing to substantiate a conclusion that the problems icare has faced are demonstrative of some malign or corrupt intent.
- 25 The third, and vital, point is to emphasise that despite the doom and gloom appearing in media reports and in some of the evidence given to the SCLJ, icare has not driven the NI into the ground. There is no present threat to the solvency of the NI.

- 26 Of course, icare must take steps to manage expenses properly, and to ensure premiums are set at rates that reflect appropriately the risks insured. I note that it has taken steps to do so. If those things continue to be done, there is no reason to think that the NI will cease to be financially viable in the future. It is important that employers and workers, and indeed citizens of this State more generally, understand that point.
- 27 As to the TMF, I need only note that its financial structure is entirely different to that of the NI. It is funded under Treasury's Net Asset Holding Level Policy (NAHLP). That policy is functioning as it was intended to function.
- 28 The organisational review, *Part 1B*, takes account of my conclusions in *Part 1A* on the allegations made the media and in the Parliament. I conclude that, to the extent those allegations are sustained (and many of them are in effect admitted), they do not demonstrate any fatal flaw in the structure or operations of icare. They are matters that in most cases could and should have been avoided. But, both individually and collectively, they are capable of rectification.
- 29 Accordingly, in *Part 1B* of my Report, I make recommendations intended to ensure that icare will operate efficiently to deliver the benefits of the workers compensation scheme to injured workers whilst at the same time restraining premiums charged to employers so far as possible. If those recommendations are implemented and observed, icare should be able to realise the benefits that it was established to achieve.

3.3 Terms of Reference Part 2; Report Part 2

- 30 I conclude the schemes (that is the NI and the TMF) have made substantial progress towards achieving the policy objectives laid out for them. However, there are ways in which icare's management of those schemes could be improved. I discuss this in *Part 2*, and make recommendations, additional to those made in *Part 1B*, that are intended to improve the operation of the schemes, and to improve their delivery of their underlying statutory objectives.
- 31 As to the NI, this will require that expenses are managed carefully and that premiums are set at appropriate rates. If those things are done, it should continue to operate in a financially stable way.
- 32 As to the TMF, its funding arrangements are organised under Treasury's NAHLP, and appear to be functioning efficiently. So long as the NAHLP remains in place, there should be no risk to the TMF's financial sustainability.
- 33 I recommend that there should be an overall review of all the legislation governing the workers compensation schemes in this State, with a view to consolidating the current plethora of statutes and regulations into one Act, and to eliminating the inconsistencies that from time to time appear in the present legislative structure. As I have made clear in the report, the benefits available under the schemes should remain unchanged.
- 34 As I have noted already, I conclude that there is no present threat to the schemes' financial sustainability.
- 35 I conclude that there are a number of areas in which the legislative structure that supports the schemes could be improved. I make specific recommendations to address those matters. In particular, I recommend that some limited and specific changes be made to sections relating to medical assessments and treatment, and to allow for the compromise of claims where that is not presently available.

36 Further, it became clear to me that there needs to be some clarification and enhancement of SIRA's regulatory powers in respect of the NI. In my view, that will be facilitated if the WC Act 1987 is amended to allow conditions to be placed on the NI's licence. While, as I discuss in some detail, there are practical reasons why the NI's licence cannot be revoked, such conditions may nonetheless serve a valuable purpose for ongoing regulation of the NI.

3.4 Terms of Reference Part 3; Report Part 3

37 I conclude that it is important for the *State Insurance and Care Governance Act 2015* (SICG Act) to be amended to contain clear statements of objectives, both for the SICG Act overall and for each of the bodies it creates. If that is done, it will assist in defining clearly the roles, powers and functions of those bodies and the demarcations between them.

38 I make a number of recommendations directed towards clarifying SIRA's powers, and ensuring they apply fairly and explicitly to all participants in the scheme. These recommendations are not intended to alter in any fundamental way SIRA's role or position. Rather, they address historical artefacts which result from the way the SICG Act imposed the present regulatory structure onto the pre-existing scheme legislation.

39 I conclude that the policy objectives of the SICG Act remain valid and that, with the recommendations for legislative amendment that I have suggested, the terms of the Act remain appropriate for securing those objectives.

40 The terms of my Review did not extend to a review of the operations of SafeWork NSW. However, I have come to the view that such a review is desirable. In doing so, I have taken into account submissions as to the suggested present inefficacy of SafeWork NSW's activities. I emphasise that I make no finding on those submissions, given the limitation on my Terms of Reference and the fact that I have not heard from SafeWork NSW in response to those submissions.

3.5 Terms of Reference Part 4; Recommendations

41 The recommendations that I make throughout the Report are gathered together in the following section, in this introduction. They are organised by reference to the section of the Terms of Reference to which they relate.

4 List of Recommendations

4.1 Part 1B, Terms of Reference Section 1 – organisational review of icare

Recommendation	Report section
Claims management	22.7
1 icare should continue its investment in skills and professional development through the Personal Injury Education Foundation (PIEF) or other education resources, in conjunction with the wider insurance industry, to build on icare's and Employers Mutual NSW Limited's (EML) current commitments to improving claims management capabilities.	
2 icare should examine the Internal Audit Report on EML from a major risk perspective to identify actions, timelines and responsibilities for overcoming whatever shortcomings may be identified in the report.	
3 If icare intends to seek market tenders for claims management, it should review the timing for doing so (so as to avoid exacerbating EML's staff turnover problems), and its competitive strategy, and should prioritise stability and performance outcomes.	
4 icare should reconsider whether the 12 month contract duration of its current Service Provider Agreement with EML is appropriate, or whether the duration should be extended to 24 months to allow EML sufficient time to implement the changes in claims management process and other innovations that it has agreed with icare.	
5 icare should affirm the three points of data quality, skills and capacity, and sustainability as essential priority work for management with detailed timelines for achievement.	
6 icare should: <ul style="list-style-type: none">• Retain the Customer Advocate role for a further period of 12 months• Strengthen its internal capacity to assess and understand customer views and needs, with a view to ensuring that that internal capacity is able to provide the services and insights currently provided by the Customer Advocate; and• Thereafter, if appropriate, remove the Customer Advocate roles in light of existing internal capability to support business change projects.	
7 SIRA and Treasury should stress test the assumptions in icare's NI FY21 Business Plan with icare to verify their veracity.	
8 The bodies responsible for workers compensation across Australia should consider proposing a national approach to achieving more consistency in, and application of, health costs founded on value-based health care principles.	

Recommendation	Report section
Probity and procurement	23.1.3
9 icare should appoint a Chief Procurement Officer, who will be responsible for the significant procurement process and cultural changes that are required, and to ensure their successful and sustainable permeation throughout the organisation.	
10 icare in its own right should be bound to a procurement and probity framework equal to or better than other government agencies, and should have in place robust procurement processes. These processes should align with the existing procurement obligations of government agencies and be consistent with the guidance provided by RSM.	
11 icare should establish a regular education program to demonstrate to staff how governance systems help improve performance and achieve goals, and ensure that staff understand the expected behaviours and requirements to which they must adhere under icare's policies and procedures and applicable NSW Government policies and guidelines. Probity and Procurement education should follow the guidance provided by RSM.	
12 For icare employees with authority to carry out procurement across the Business Units, a more tailored education program should be developed and delivered on an annual basis, in line with the guidance provided by RSM.	
13 After one year from the date of this Report, icare should undertake an independent review of the operation and implementation of the new probity and procurement policies.	
Culture – protection of whistleblowers and response to incidents	23.2.2
14 icare should update and implement policies and procedures in relation to wrongdoing to enable and better support speak-up. icare should ensure that reporting channels are in place to support the anonymity, safety from reprisal and independence of the wrongdoing process. Any changes should be communicated to all staff.	
15 icare's management should coordinate and report to the Audit and Risk Committee (ARC) on the complete set of material grievance and wrongdoing issues to provide oversight and an understanding of systematic themes. icare's management should implement a system of feedback to help inform future behaviours and ensure lessons are learned.	
16 icare should ensure that management takes action efficiently and effectively on all formal and informal reports of wrongdoing and other complaints, and that there is effective communication in support of this process.	

Recommendation	Report section
Culture – culture change and assessment of change	23.2.3
<p>17 icare's Board should take responsibility for ongoing oversight of icare's cultural change program</p> <p>icare should prepare and publish a plan for cultural change which addresses, at minimum, the key risk factors of inattention to process, focus on transformation at the expense of process and resistance to oversight. In doing so, the plan should take into account recommendations and qualifications 70 to 76 in the CGA Review Recommendations².</p> <p>icare should report annually to the Treasurer and publicly on its progress in executing that plan.</p>	
<p>18 There should be a further review of icare's culture by June 2023. That review should be conducted, as was the CGA Review, by an independent third party. It should address, among other topics, the progress of implementation of planned improvements to icare's cultural practices and shifts in its underlying culture.</p>	
Governance – Board effectiveness	23.3.4
<p>19 The Board of icare should include one or more members who possess extensive public sector experience and workers compensation insurance experience.</p>	
<p>20 icare should recruit people with specialist qualifications to join Board Committees, where this is necessary to ease the workload of committee members or to make up for any shortfall in expertise in any area by Board members.</p>	
<p>21 The ARC should be split into a separate Audit Committee and a separate Risk Committee.</p>	
Governance – Board terms and succession-planning	23.3.4
<p>22 That the legislature give consideration to extending the maximum term of office provided by clause 3 of Schedule 1 to the <i>State Insurance and Care Governance Act 2015</i> from three years to four.</p> <p>That there continue to be no statutory limit on the number of terms for which an individual director may be appointed.</p> <p>Exemptions from any policy limit on successive terms, if thought desirable in a particular case, should be discussed and resolved on an ad hoc basis but without any presupposition against exemption.</p>	

² PWC, *Independent Review of icare governance, accountability and culture*, February 2021, 99-101

Recommendation	Report section
23 The present Board of icare, in consultation with the Treasurer and if necessary after taking independent external advice, should develop a succession plan for the Board which will facilitate the staggering of terms and will include a program specifically designed to allow the transmission of corporate experience from a retiring to a new director.	
Governance – executives	23.3.4
24 icare's executive leadership should consider the observations and recommendations of the CGA Review with specific focus on: <ul style="list-style-type: none"> Improving information flows both to the Group Executive Team (GET) and to the Board; and Ensuring icare and the GET apply best practice risk identification and mitigation practices consistently across the whole of icare's organisation. 	
Executive remuneration	23.4.1
25 icare should continue the approach adopted in its 2019-20 annual report of providing detailed reporting on executive remuneration, including performance payments.	
26 icare's Board, on the advice of the People and Remuneration Committee (PRC), should give careful consideration to the design of remuneration and incentive structures to ensure that they are aligned to achieving the statutory objectives of the schemes that icare manages.	
Financial management, staffing and costs	23.5.7
27 icare's Board should commission an external review of the results of the extant expense savings program after two years and a summary of the results should be made public.	
28 icare should report publicly and in detail each year on its transformation expenditure and on the benefits that icare says it is producing.	
Oversight by SIRA	24.1.4
29 The Boards of icare and SIRA should ensure that they receive regular reports on the icare-SIRA relationship from their respective agencies, and that they continue to meet, without their respective management teams, to identify and discuss any continuing or new issues in the relationship.	
30 The Boards of icare and SIRA should jointly report, formally and regularly, to their respective Ministers on the state of the relationship between the agencies.	

Recommendation	Report section
Ministerial oversight	24.3
31 icare should update its board charter to include a requirement to report regularly to the NSW Treasurer in accordance with s6(3) of the <i>State Insurance and Care Governance Act 2015</i> . Governance processes should: <ul style="list-style-type: none"> • Require the Board to consider, at regular intervals, whether it should inform the Treasurer of an issue because it is a material development in icare activities; and • Require the Board to table correspondence sent to or received from the Treasurer in relation to the activities of icare. • Require the Board to include a report of correspondence and other communications with the Treasurer in the minutes of its meetings. 	
Realisation of benefits	25.2.5
32 icare should develop and report against a new set of tracking measures that compares achievement of benefits against 2020-21 as the new baseline. This should include all relevant indicators, to ensure that it shows accurately improvements (or declines) in all the targeted financial and outcome benefits. icare should publish those reports both publicly and to the Treasurer at least annually.	
Implementation	26
33 icare should report in detail to the Treasurer on implementation of the recommendations of this Report (in so far as they are directed at icare) and should report on that publicly at least annually.	

4.2 Part 2, Terms of Reference Section 2 – review of the government-managed workers compensation schemes

Recommendation	Report section
Legislative redrafting	29.2
<p>34 The government should give consideration to appointing a suitable agency or body to conduct a review and reconciliation of the <i>Workers Compensation Act 1987</i>, <i>Workplace Injury Management and Workers Compensation Act 1998</i> and <i>State Insurance and Care Governance Act 2015</i> into a single consolidated piece of legislation.</p> <p>That review should consider, among other things, the appropriate legislative response to the changing nature of work and the growth of the gig economy, and the extent to which, and ways in which, gig workers should have the benefits provided by the workers compensation scheme.</p> <p>The reviewing body should be instructed to consider the further recommendations made herein this report, and should not otherwise consider, review, or amend workers compensation benefits.</p>	
Medical costs and value-based care	29.3.1
<p>35 SIRA should take prompt action to address excessive medical fee rates in areas where no benefit exists to injured workers from the fee disparity. This work should be undertaken in consultation with the Australian Medical Association (AMA), insurers and other stakeholder groups.</p>	
<p>36 SIRA should develop an accelerated plan for implementation of the findings of its Healthcare Review, with additional resources allocated where necessary. This plan should be presented to the Responsible Minister, released publicly and reported on publicly at regular intervals.</p>	
Assessment of entitlement to weekly and medical benefits	29.3.2
<p>37 That consideration be given to a replacement threshold test for entitlement to weekly and medical benefits that more accurately reflects the need for compensation.</p>	
<p>38 That the legislature give consideration to amending the <i>Workplace Injury Management and Workers Compensation Act 1998</i> to provide for a further assessment of whole person impairment where there is a significant deterioration in a compensable injury.</p>	
Medical treatment	29.3.4
<p>39 That the legislature give consideration to amending section 60 of the <i>Workers Compensation Act 1987</i> to replace the words 'reasonably necessary' with the words 'reasonable and necessary'.</p>	

Recommendation		Report section
Commutation and settlement		29.4
40	That the legislature give consideration to expanding the powers of commutation and settlement of lump sum death benefits, subject to the approval of the Personal Injury Commission.	
Unconditional licence of the NI		30.1.4
41	That the legislature give consideration to amending section 154B of the <i>Workers Compensation Act 1987</i> by deleting from subsection (1) the words 'and as if that licence were not subject to any conditions'.	
Measurement of financial sustainability of the NI		31.1.6
42	<p>icare should consider the explicit use of an Economic Funding Ratio for the purposes of assessing the NI's capital management needs including the assessment of premium rates, and planning for the NI's long term financial sustainability.</p> <p>icare should report publicly on the financial health of the NI scheme using the new measure(s), at least annually.</p>	

4.3 Part 3, Terms of Reference Section 3 – Statutory Review of the State Insurance and Care Governance Act 2015

Recommendation		Report section
Objectives of the SICG Act and the three agencies		32.2
43	That the legislature give consideration to including in the <i>State Insurance and Care Governance Act 2015</i> a statement of policy objectives for the Act.	
44	That the legislature give consideration to amending the <i>State Insurance and Care Governance Act 2015</i> , <i>Workers Compensation Act 1987</i> and <i>Workplace Injury Management and Workers Compensation Act 1998</i> to state clearly the objectives sought to be achieved by the creation, and the roles, powers and functions, of icare, SIRA and SafeWork NSW as legally distinct entities.	
SIRA's investigative powers		35.2.1
45	That the legislature give consideration to amending the <i>State Insurance and Care Governance Act 2015</i> , <i>Workers Compensation Act 1987</i> and <i>Workplace Injury Management and Workers Compensation Act 1998</i> to extend SIRA's investigative powers to icare, to the extent necessary to enable SIRA properly to perform its functions.	

Recommendation	Report section
Clarification of SIRA's regulatory reach	35.2.2
<p>46 That the legislature give consideration to amending the <i>Workers Compensation Act 1987</i> and <i>Workplace Injury Management and Workers Compensation Act 1998</i> to state that all statutory provisions expressed to apply to a licensed insurer apply to the NI, icare and any subsidiaries (to the extent necessary for SIRA to perform its functions), SI Corp (to the extent necessary for SIRA to perform its functions) and any government self-insurer (to the extent necessary for SIRA to perform its functions), unless expressly exempted.</p>	
Ministerial directions	35.3
<p>47 That the legislature give consideration to amending section 7(3)(b) of the <i>State Insurance and Care Governance Act 2015</i> to read as follows:</p> <p>'(b) request the Board to advise the Minister whether, in its opinion, the proposed direction would be in the public interest.'</p>	
<p>48 That the legislature give consideration to amending section 20 of the <i>State Insurance and Care Governance Act 2015</i> to add a new subsection as follows:</p> <p>'Before giving a direction under this section, the Minister must:</p> <p>(a) consult with the SIRA Board, and</p> <p>(b) request the Board to advise the Minister whether, in its opinion, the proposed direction would be in the public interest.'</p>	
Review of SafeWork NSW	35.5.2
<p>49 The Responsible Minister for SafeWork NSW should conduct, or commission, a public review of that agency's performance of its regulatory and educational functions under the <i>Work Health and Safety Act 2011</i>, and that the report on that review be made publicly available once it is completed.</p>	

5 Background

43 Workers compensation insurance has been a key part of the relationship of employer and employee in this state for the best part of 100 years. The objectives of a fair and sustainable system of workers compensation could be seen to include the following:³

- a) to assist in securing the health, safety and welfare of workers and in particular preventing work-related injury,
- b) to provide—
 - i) prompt treatment of injuries, and
 - ii) effective and proactive management of injuries, and
 - iii) necessary medical and vocational rehabilitation following injuries,

in order to assist injured workers and to promote their return to work as soon as possible,

- c) to provide injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses,
- d) to be fair, affordable, and financially viable,
- e) to ensure contributions by employers are commensurate with the risks faced, taking into account strategies and performance in injury prevention, injury management, and return to work,
- f) to deliver the above objectives efficiently and effectively.

44 I add, in relation to return to work (objective (b)), that it must be both safe and sustainable.

45 In NSW, the Workers Compensation Scheme (in general, in this Report, I shall use the word 'scheme' as a catch-all word to refer to the way in which workers compensation is regulated, provided, paid for and delivered) is established by a complex and occasionally inconsistent web of statutes and regulations, amended from time to time, and on at least two occasions radically overhauled.

46 There is a complex interrelationship between the various pieces of legislation, the workers compensation schemes (by which I mean the scheme's individual components such as the NI or the TMF), and the organisations responsible for them. This section provides a brief explanation of those structures to ensure that this Review's Terms of Reference, findings and recommendations can properly be understood.

³ I quote the six objectives set out in Section 3 of the *Workplace Injury Management and Workers Compensation Act 1998*

5.1 Workers compensation scheme legislation

Figure 1: Development of workers compensation legislation in NSW



- 47 Since the introduction of the first workers compensation laws in Australia, each jurisdiction has developed its own arrangements. Early arrangements in NSW through the *Workmen's Compensation Act 1910* were limited to no-fault personal injury in defined dangerous occupations.
- 48 In 1926, eligibility for compensation widened when NSW introduced compulsory insurance and established Australia's first specialised workers' compensation tribunal (the Workers Compensation Commission of New South Wales) through the *Workers Compensation Act 1926* ('the 1926 Act')⁴. This became the model for most schemes across Australia.
- 49 The 1926 Act remained essentially unchanged until 1987. One of the problems with the 1926 Act was that the scheme for which it provided was, at its root, adversarial in nature. The result was that a lot of money was spent on litigating disputes over entitlements to, and the proper amount of, compensation benefits. Less attention was given to promoting safety at work: an oversight that did nothing to decrease the incidence of workplace injuries.
- 50 Eventually, as the costs of the scheme grew and the outcomes it produced for workers did not grow proportionately, participants in the scheme began to turn their attention to ways of reducing the cost of workplace injury, containing insurance premiums, and achieving underwriting and administrative efficiency.⁵
- 51 In 1987, New South Wales responded to stakeholders' concerns by introducing a radically different scheme through the *Workers Compensation Act 1987* ('the 1987 Act'). It incorporated public underwriting, removed the right to common law damages, and introduced expanded statutory benefits in their place. In 1989, the *Workers Compensation (Compensation Court Amendment) Act 1989* re-established common law rights.⁶
- 52 The 1987 Act followed on from earlier, but less radical, changes in 1984, which replaced the Workers Compensation Commission of New South Wales with a judicial Compensation Court of New South Wales.⁷ This remained until the enactment of the

⁴ SafeWork Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, February 2010, 8

⁵ Ibid

⁶ Ibid

⁷ *Compensation Court Act (No. 89) 1984* (NSW)

Workers Compensation Legislation Amendment Act 2000, which reconstituted the Workers Compensation Commission, but with a focus on conciliation and arbitration.

- 53 In 1998, the *Workers Compensation and Workplace Injury Management Act 1998* ('the 1998 Act') was enacted in response to the recommendations of the 1997 Grellman Report⁸. It introduced a strengthened role for occupational health and safety and rehabilitation of injured workers, and created several advisory and industry groups.
- 54 In 2003, there were very substantial changes to the arrangements for insurance and claims management. The NI was established as, in effect, the sole available insurer for the great majority of non-government employers. A Workers Compensation Insurance Fund was established, from which, among other things, claims and claims management expenses were to be paid. The WorkCover Authority of New South Wales (WorkCover) was appointed to 'act for the Nominal Insurer'⁹. The NI was given power to appoint scheme agents to manage, or assist in the management of, claims. From January 2006, scheme agents were appointed on commercial performance contracts that made them accountable for outcomes and service levels.¹⁰
- 55 Those changes were intended to drive down the cost of the scheme. They failed to realise their purpose. By 2012, the scheme was facing a major financial deficit. A parliamentary Joint Select Committee was asked to inquire and report on the scheme. The Joint Committee's report recommended a number of changes to scheme benefits to manage costs.¹¹
- 56 In 2012, in response to that report,¹² the *Workers Compensation Legislative Amendment Act 2012* ('the 2012 Act') was introduced. It made significant changes to the New South Wales scheme, including:
 - a) the introduction of work capacity decisions and the concept of minor injury;
 - b) changes to journey and other claims provisions;
 - c) time limits and step-downs for medical and weekly benefits; and
 - d) the introduction of Pre-Injury Average Weekly Earnings (PIAWE) as the basis for the calculation of weekly benefits.
- 57 The 2012 Act excluded emergency workers from the operation of those changes. Workers compensation for emergency workers continued, and continues, to operate under the pre-2012 rules.
- 58 In 2015 and since, further amendments to the 2012 Act and the scheme have refined and expanded benefits. They include:
 - a) The *Workers Compensation Amendment Act 2015* made changes to weekly benefit entitlements in relation to whole person impairment (WPI), retirement age, workers with highest needs and time limits based on WPI severity. It also authorised the making of regulations to vary the method of assessment of WPI.

⁸ R Grellman, *Inquiry into Workers' Compensation System in NSW: Final Report*, 15 September 1997

⁹ WC Act 1987 s 154C(1)

¹⁰ SafeWork Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, February 2010, 9

¹¹ NSW Parliament, *Joint Committee on the NSW Workers Compensation Scheme – Final Report*, 13 June 2012

¹² Workers Compensation Legislative Amendment Bill 2012 Second Reading Speech, NSW Legislative Assembly, 19 June 2012

- b) The *Workers Compensation Legislation Amendment Act 2018* made several amendments to PIAWE calculations. Further changes were made to PIAWE in the *Workers Compensation Amendment (PIAWE) Regulation 2019*.
- c) The *Personal Injury Commission Act 2020* abolished the Workers Compensation Commission and establishes a single commission to resolve workers compensation and motor accident disputes. The Personal Injury Commission commenced on 1 March 2021.

5.2 Pre-2015 organisational structures

- 59 WorkCover was established in 1989 to promote productive, healthy and safe workplaces in NSW. WorkCover became both insurer and regulator in the field of workers compensation in NSW. Its functions included: oversight and regulation; licensing of private insurance companies to manage claims; injury management; and oversight of the compensation fund.¹³
- 60 From 2012, WorkCover formed part of the Safety, Return to Work and Support (SRWS) Division established under the *Safety, Return to Work and Support Board Act 2012* which integrated injury prevention, rehabilitation and compensation into a single body.

5.3 2015 structural reforms

5.3.1 Standing Committee on Law and Justice report 2014

- 61 Following the passage of the *Safety, Return to Work and Support Board Act 2012*, the Upper House SCLJ was given legislative responsibility for Parliamentary oversight of WorkCover NSW. The Standing Committee released its first '*Review of the exercise of the functions of the WorkCover Authority*' in September 2014¹⁴.
- 62 The report highlighted concerns about '*the potential conflict between WorkCover's roles as both the nominal insurer through its management of the Workers Compensation Insurance Fund, and as the regulator of the workers compensation scheme*'.¹⁵
- 63 The SCLJ recommended:

*That the Minister for Finance and Services, in consultation with the WorkCover Independent Review Office and other stakeholders, consider establishing a separate agency or other administrative arrangements to clearly separate the roles of regulator and nominal insurer in the workers compensation scheme, and implement that model as soon as practicable.*¹⁶

¹³ WorkCover Authority, 2014-15 Annual Report, 6

¹⁴ Standing Committee on Law and Justice, *Review of the exercise of the functions of the WorkCover Authority*, 17 September 2014, 12

¹⁵ Ibid

¹⁶ Ibid

5.3.2 Strategic Insurance Review 2015

64 In 2015, in response to the Standing Committee's report, NSW Treasury carried out a Strategic Insurance Review (SIR).¹⁷ The SIR was governed by a Steering Committee with representatives from SRWS Division and its Board; Treasury; the Department for Premier and Cabinet; the Self Insurance Corporation (SI Corp); and the Office of Finance and Services.

65 The SIR produced five recommendations in relation to the structure of the insurance entities:¹⁸

1. *Within the current NSW Government insurance and self-insurance entities, there should be a clear structural separation of operational functions from regulatory functions.*
2. *There should be only one statutory insurance and self-insurance insurance operator in the NSW Government with the operational insurance functions currently within SRWS and SI Corp integrated within a single entity (the insurance operator).*
3. *There should be a single regulator of statutory insurance schemes in the NSW Government (the insurance regulator).*
4. *To facilitate the separation of the operational and regulatory functions, the operational statutory and self-insurance functions should be located in a discrete entity, and a new entity created within which the regulatory functions relating to insurance would be located.*
5. *The insurance operator and the insurance regulator should report to separate Ministers.*

66 In relation to the underwriting model, the SIR was clear that the Government should retain operation and underwriting of the Lifetime Care and Support and Dust Diseases Care schemes.¹⁹

67 The SIR noted, in relation to underwriting of workers compensation, that '*there is a large public interest element to the delivery of the workers compensation scheme. The Government will always have a keen interest in the delivery and effectiveness of the scheme due to this public interest*'.²⁰ The SIR recognised that private underwriting could deliver substantial benefits, and a full chapter of its report is devoted to considering how private underwriting could operate.²¹ However, the SIR's recommendation was equivocal. The report said that '*private market underwriting of the NSW workers compensation scheme is potentially viable in the future...*'.²²

68 The SIR recommended that the proposed single operator '*should operate as an integrated insurance provider...*' through centralisation of key functions and the creation of overarching strategy, policy, actuarial and analytical functions. It

¹⁷ NSW Treasury, *Strategic Insurance Review*, May 2015

¹⁸ Ibid 2

¹⁹ Ibid 4

²⁰ Ibid 3

²¹ Ibid 51-59

²² Ibid 4

recommended further that ‘*the insurance operator should enhance the management of claims by...active management of the outsourced claims management of workers compensation...*’.²³

69 The SIR recommended that the proposed insurance operator should be:
established as a Non-SOC Statutory Authority with the following governance features:

Cost recovery funding model

A governing board, with board members appointed by the relevant Minister

A CEO appointed by the Governing Board

The ability for the entity to employ staff

Financial governance oversight provided by Treasury

*A subset of the existing Board members from SICorp and SRWS with the most relevant experience be incorporated into the insurance operator Board*²⁴

70 Finally, for present purposes, the SIR recommended that ‘[t]he single insurance regulator should adopt a risk-based approach to regulation and be designed so that it can regulate any current or future operation models,’²⁵ and that:
The insurance regulator should be established as a Non-SOC Statutory Authority with the following governance features:

Cost recovery funding model (noting this is through existing levy provisions in the statutory insurance schemes)

A Board, with board members appointed by the relevant Minister

A CEO appointed by the relevant Secretary of the relevant Minister

*A subset of the existing Board members from SICorp and SRWS with the most relevant experience be incorporated into the insurance regulator Board...*²⁶

71 Most of the recommendations made by the SIR were reflected in the legislation brought forward by the government that became the SICG Act. However, the government decided not to pursue the private underwriting model.

5.3.3 Legislative reforms in 2015

72 In August 2015, the government introduced the Workers Compensation Amendment Bill 2015 and the cognate State Insurance and Care Governance Bill 2015.

73 The impacts of the Workers Compensation Amendment Bill 2015 on the scheme are described at [5.1 above](#).

²³ NSW Treasury, *Strategic Insurance Review*, May 2015, 6-7

²⁴ Ibid 7

²⁵ Ibid 8

²⁶ Ibid

74 In the Second Reading Speech, the then Minister for Finance, Services and Property stated that '*the structural separation of these insurance functions addresses the findings of the statutory review of workers compensation in New South Wales of the Legislative Council Standing Committee on Law and Justice. It also responds to the calls of stakeholders in the system.*'²⁷

75 The structural changes were described as '*an overhaul of the governance of State insurance and care schemes and the way in which those schemes are serviced in New South Wales*'.²⁸

76 The Minister further stated that '*the new structure will be far more transparent and accountable and, most importantly, lead to better outcomes for injured workers. The new organisations will be more customer-centric, streamlined and efficient, building economies of scale and focusing on clear objectives.*'²⁹

5.3.4 State Insurance and Care Governance Act 2015

77 On 21 August 2015, the NSW Parliament passed the SICG Act. The SICG Act, relevantly:

- abolished WorkCover;³⁰
- replaced it with icare³¹ and SIRA³² as new, separate, government agencies;
- set out icare's and SIRA's governance arrangements and responsibilities; and
- established Safework NSW³³ as the work health and safety regulator.

78 Further detail on the provisions of the SICG Act are contained in *Part 3* of this report, covering the Statutory Review required by s32 of the Act.

79 I note that the SICG Act refers to icare as 'ICNSW'. However, for convenience, I will refer to that body as 'icare' throughout this report.

5.4 Insurance and Care NSW (icare)

80 icare was established on 1 September 2015.

5.4.1 Functions, legislative and financial arrangements

81 icare's functions are set out in section 10 of the SICG Act. They are to:

- 'Act for' the Workers Compensation Nominal Insurer; and
- 'Provide services to' several other insurance and care schemes. Those schemes include the NSW Self Insurance Corporation, which operates the Treasury Managed Fund under which workers compensation cover is provided to NSW

²⁷ Workers Compensation Amendment Bill 2015 and State Insurance And Care Governance Bill 2015 Second Reading Speech, NSW Legislative Assembly, 5 August 2015, 3

²⁸ Ibid

²⁹ Ibid

³⁰ SICG Act sch 4 pt 2 div 1 s 3

³¹ Ibid pt 2

³² Ibid pt 3

³³ Work Health and Safety Act (No 10) 2011 (NSW) sch 2 s1

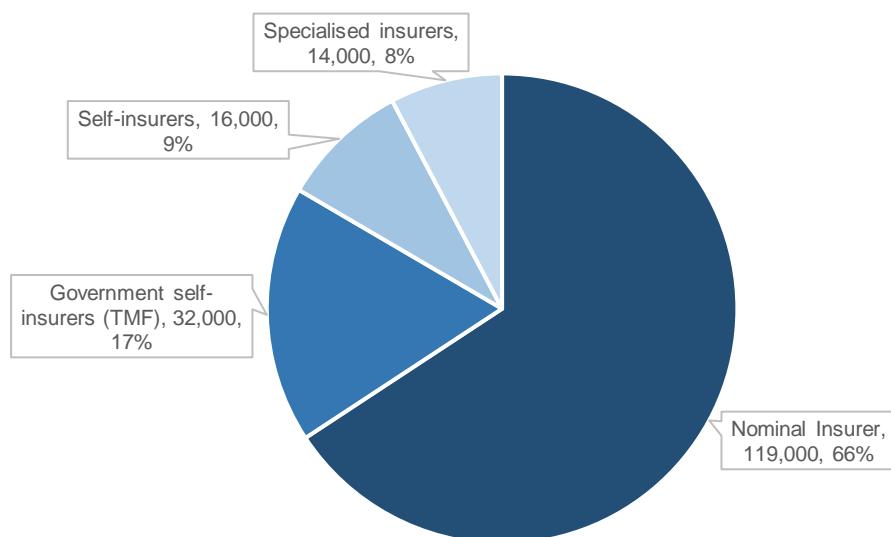
Government employees. Other schemes include Lifetime Care and Support and Dust Diseases Care.

- 82 Each of those schemes has its own establishing and governing legislation. icare as an entity is legally separate from the schemes for which it acts or provides services.
- 83 The operation of the NI and TMF schemes is further governed by the scheme rules set out in the WC Act 1987 and WIM Act (for further discussion see *Part 2*).

5.4.2 Management of workers compensation schemes

- 84 The largest part of icare's role is the management of the two workers compensation schemes – the NI for private businesses and TMF for NSW Government agencies.
- 85 icare manages around 75,000 new workers compensation claims each year: 60,000 under the NI³⁴, and 15,000 under the TMF³⁵.
- 86 icare is by far the largest workers compensation service provider in NSW. Some large private entities self-insure, and specialised schemes are available to employers in a small number of industries. For all other private employers in NSW, the NI is the only insurer, and icare is the only service provider, available. Likewise, for almost all NSW Government agencies, the TMF is the only insurer, and icare is the only service provider, available.

Figure 2: Share of NSW workers compensation market, by active claims, 2018-19



Source: SIRA, *Submission to the Independent Review*, November 2020, 14

³⁴ icare, *Annual Report 2019-20*, 57

³⁵ Ibid 69

5.4.3 Governance arrangements

87 icare is a NSW Government agency established as a body corporate.³⁶

88 The Responsible Minister for icare, who currently is the Treasurer, appoints the non-executive directors (NEDs). There may be up to eight NEDs. Together with the Chief Executive Officer, they constitute the Board of icare.³⁷

89 The SICG Act provides that '*all decisions relating to the functions of [icare] are to be made by or under the authority of the [icare] Board*'.³⁸

90 The CEO is appointed by the Board, in consultation with the Responsible Minister. The CEO is '*responsible for day to day management of the activities of [icare] in accordance with the general policies and specific directions of the [icare] Board*'.³⁹

91 The Responsible Minister retains certain additional powers and rights, to:

- a) Be kept informed by the Board on icare's work;⁴⁰
- b) Request any information from the Board;⁴¹
- c) Give the Board a direction in the public interest;⁴² and
- d) Receive an annual Statement of Business Intent from icare.⁴³

92 Put together, these arrangements give icare much greater independence than is enjoyed by most NSW government agencies and departments. They are usually 'subject to the direction and control of the Minister' in their establishing legislation. In this respect, icare's governance model most closely resemble that of the NSW Treasury Corporation (TCorp),⁴⁴ and State Owned Corporations,⁴⁵ such as Sydney Water and the Port Authority of NSW.

93 The governance arrangements for icare are similar to those of a private sector listed entity. The Board is invested by the owners – the Government, represented by the Responsible Minister – with power to manage and oversee the organisation. It exercises its power of management through the CEO and other staff.

94 Also in contrast to most government agencies, and again like a private sector entity, icare is exempted from the *Government Sector Employment Act 2013* (GSE Act).⁴⁶ This exemption allows icare to set its own rules for employment of staff, including as to their remuneration.

³⁶ SICG Act s 4

³⁷ SICG Act s 5

³⁸ Ibid

³⁹ Ibid s 8

⁴⁰ Ibid s 5

⁴¹ Ibid s 5

⁴² Ibid s 7

⁴³ Ibid s 11

⁴⁴ *Treasury Corporation Act (No 75) 1983 (NSW) ss 4-6B*

⁴⁵ *State Owned Corporations Act (No 134) 1989 (NSW)*, pt 3 div 2 and pt 4

⁴⁶ SICG Act s14

5.4.4 Public Financial Corporation

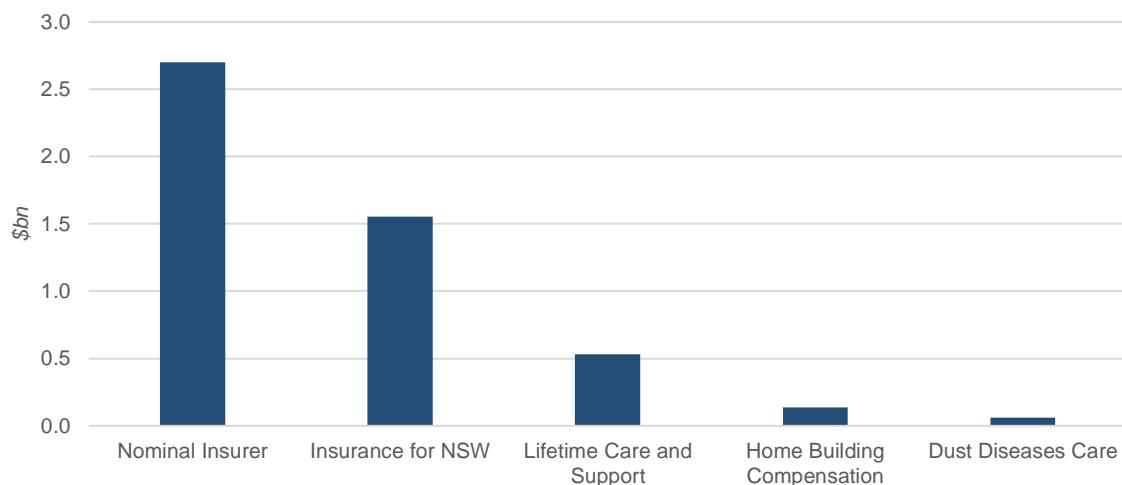
- 95 icare is often referred to as a '*Public Financial Corporation*'. This is not a legal definition, but a statistical classification under the Australian Bureau of Statistics' (ABS) System of Government Finance Statistics.⁴⁷
- 96 All Australian governments are required to use the ABS system for their financial reporting. It divides government entities into different classes.
- 97 Government entities that provide services and are predominantly reliant on tax funding are classified as '*General Government*'. This sector covers most of the NSW government, including the education and health systems.
- 98 Government entities that operate independently of government and derive a substantial part of their income from trading activity at market rates are classified as Public Corporations. Those that provide financial services are classified as '*Public Financial Corporations*'.
- 99 This classification has no bearing on icare's legal status or governance, which derive solely from its enabling legislation. Nor does it confer any rights or powers on icare. It has however, become a convenient shorthand term for the independent, corporate nature of icare.

5.4.5 Financial arrangements

- 100 For each scheme, the legislation establishes a financial fund. Premiums or contributions are paid into these funds, the costs of the schemes are paid out, and investment returns can be made on fund balances.
- 101 icare is financially separate from the schemes it manages, but it charges its costs of management to each scheme. icare as an entity makes no profit, as all of its costs are charged out to the schemes. All the schemes are operated on a not-for-profit basis.
- 102 The schemes' assets are kept separate, each from the others.
- 103 The NI is the largest scheme for which icare has responsibility. It was the focus of the 2015 reforms that established icare. However, icare has significant other responsibilities. Each of the other schemes is complex. Many are financially significant in their own right. The tables below show the financial scale of the largest schemes.

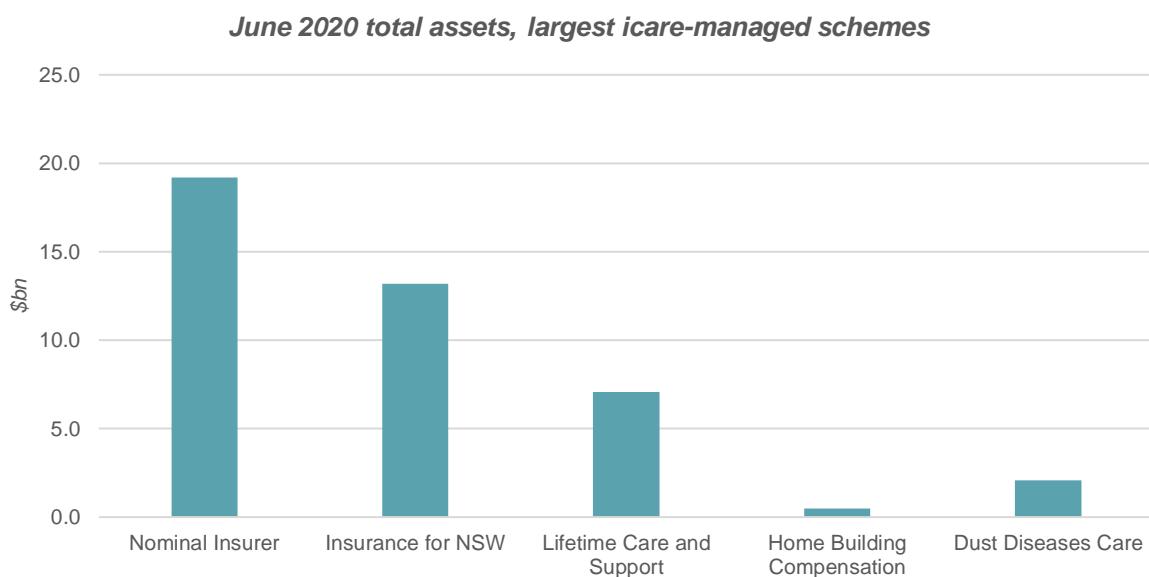
⁴⁷ Australian Bureau of Statistics, *Australian System of Government Finance Statistics: Concepts, Sources and Methods*, 2015, 5 onwards

Figure 3: Gross operational income of largest icare-managed funds, 2019-20



Source: icare, Annual Report 2019-20 and Annual Report Financials 2019-20 (written premium, contributions or fees - excluding investment returns)

Figure 4: Total assets of largest icare-managed funds, June 2020



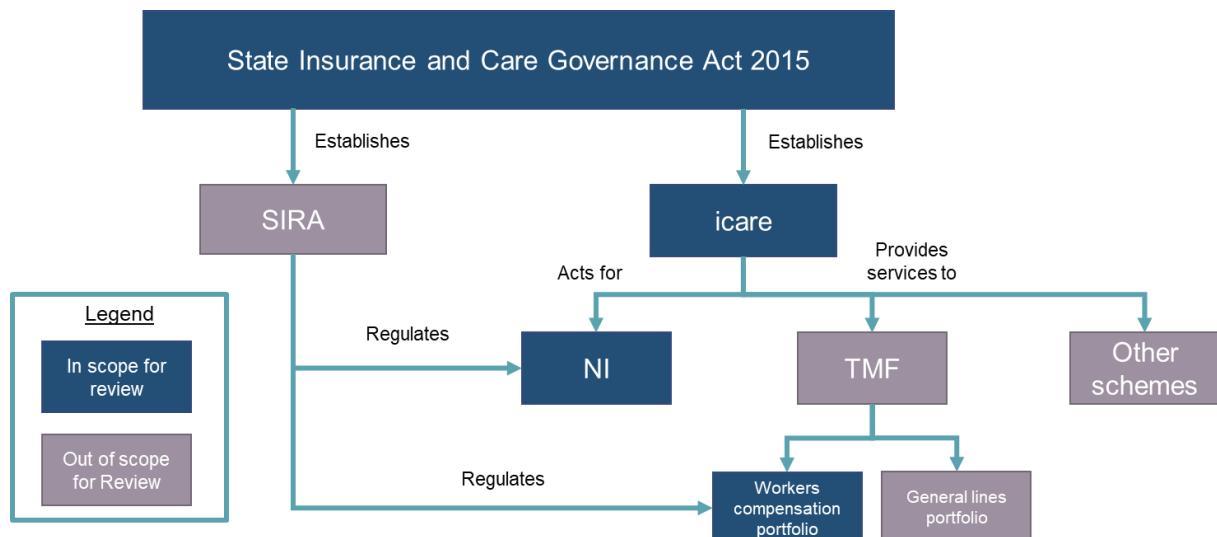
Source: icare, Annual Report 2019-20 and Annual Report Financials 2019-20

5.5 Link between legislation, organisational structures and Terms of Reference

- 104 This Review has taken a broad view, and has considered icare, the scheme, and the workers compensation system more generally as one overall, inter-related, network.
- 105 However, my Terms of Reference are explicit. I am only to make findings and recommendations relating to certain specific areas of that 'network'. It is important therefore to identify those specific areas.

106 As I have sought to explain, the SICG Act, icare as an entity, and the workers compensation schemes are all distinct concepts. The figure below depicts these relationships and their links to the Terms of Reference.

Figure 5: Relationship between SICG Act, icare, SIRA and workers compensation schemes



107 The SICG Act is covered by Section 3 of the Terms of Reference.

108 The operations of SIRA are not specifically in scope for the review. However, its functions and governance, being created by the SICG Act, are covered by Section 3 of the Terms of Reference. SIRA's role in the workers compensation system is covered by Section 2 of the Terms of Reference.

109 icare as an organisation is the subject of Section 1 of the Terms of Reference. Its role in the workers compensation system is covered by Section 2 of the Terms of Reference. Its functions and governance are covered by Section 3 of the Terms of Reference.

110 The NI and the workers compensation portfolio of the TMF are covered by Section 2 of the Terms of Reference. The General Lines portfolio of the TMF (property cover, liability cover, etc) is not in scope, nor are the other insurance and care schemes managed by icare.

5.6 Establishment of the Independent Review

5.6.1 Performance of the Nominal Insurer

111 In the years following its establishment, icare undertook a program of major change to the management of the NI scheme. This involved:

- changes to the “claims model” – the method of managing workers compensation claims. Those changes include the introduction of automated triage and segmentation of claims, and a radical change in the approach to customer service and support;
- arrangements for outsourced claims agents to manage claims on icare’s behalf; and
- supporting IT infrastructure.

112 Those changes were intended to assist in the achievement of the aims of the 2015 legislative reforms, and to improve outcomes for injured workers.

113 As those changes were implemented, SIRA and other stakeholders raised concerns about their suggested adverse impact. Their concerns were in part prompted by observations of:

- reduced RTW rates, a key measure of the scheme's performance; and
- financial losses incurred by the scheme.

5.6.2 Dore 2019 Review

114 SIRA's concerns caused it to use its regulatory powers to procure an Independent Compliance and Performance Review in 2019, conducted by independent expert Ms Janet Dore ('Dore 2019 Review').

115 The Terms of Reference for the Dore 2019 Review were to:

- assess NI compliance with the Market practice and premium guidelines (MPPGs) and identify any unintended consequences, risks and priorities for improvement in SIRA regulation of the premiums of the NI*
- identify the benefits and risks to the performance of the NSW workers compensation system arising from icare's implementation changes to the NI operating model and supporting digital platforms*
- assess the NI's performance in relation to RTW outcomes, claims management (including guidance, support and services for workers, employers and health service providers), customer experience and data quality and reporting⁴⁸*

116 The Dore 2019 Review commenced in February 2019. There was public consultation between May and July 2019. Ms Dore was supported by EY, who produced three detailed subsidiary reports: one on claims management; one on premium policy and review; and one on expenses.

117 The Dore 2019 Review reported in December 2019 ('Dore 2019 Report').⁴⁹ Ms Dore found that '*icare has pursued an ambitious model based on principles of triage, injured worker empowerment and straight through processing*'.⁵⁰ She stated that '*The new claims model, led to a significant deterioration in the performance of the NI, through poorer return to work rates, underwriting losses, no competition and therefore, concentration of risk*'.⁵¹

118 In relation to SIRA, Ms Dore found that it has had '*limited ability to oversee the NI consistently with other insurers in the scheme due to its unconditional licence. This has limited SIRA's ability to enforce guidelines and standards or to otherwise direct the NI to undertake an action or task*'.⁵²

⁴⁸ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, December 2019, 6

⁴⁹ Ibid

⁵⁰ Ibid 5

⁵¹ Ibid

⁵² Ibid

119 The Dore 2019 Review focused on the early period in the implementation of the reforms to the NI, and it took place at a time of considerable change for icare. Ms Dore noted that:

During the course of this review, icare has implemented a number of improvements to address the deteriorating performance of the NI. Although some of these initiatives may have had some benefit to the scheme and stakeholders, they have not yet abated the ongoing deterioration in the NI's performance.

Performance of the NI must improve on the basic indicators of RTW, claims management service and premium transparency.⁵³

120 Ms Dore made recommendations for both icare and SIRA.⁵⁴

121 SIRA subsequently agreed with icare on the terms of a 21 Point Plan.⁵⁵ It was intended to address and implement the Dore 2019 Report's findings and recommendations.

122 The implementation of that plan remains a work in progress. icare and SIRA continue to work together on this.

5.6.3 Media and Parliamentary interest

123 Given the importance of icare and its work to the State and its economy, it is inevitably and appropriately the subject of substantial public, media and Parliamentary interest.

124 There are formal Parliamentary Committee Reviews of many of the icare-managed schemes, typically on a two-yearly cycle. In addition, the SICG Act was the subject of a Statutory Review in 2017,⁵⁶ two years after commencement.

125 Following the release of the Dore 2019 Report, Parliamentary and media interest became heightened.

126 Starting with a Four Corners episode on 27 July 2020,⁵⁷ there was a period of intense media scrutiny with television coverage and a series of newspaper articles. That scrutiny raised concerns about the performance of the workers compensation schemes. There was a range of allegations made about icare, its management of the workers compensation schemes, and its corporate governance generally. Many, though not all, of the concerns raised reflected the findings of the Dore 2019 Report.

127 At much the same time as media scrutiny commenced, the SCLJ started its 2020 review of the Scheme. The issues explored in the SCLJ's review included those raised in the media, and from time to time ranged beyond them.

⁵³ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, December 2019, 5

⁵⁴ Ibid 78

⁵⁵ SIRA, *Response to the Dore Review and 21 Point Action Plan*, December 2020

⁵⁶ Standing Committee on Law and Justice, *Final Report - Statutory review of the State Insurance and Care Governance Act 2015*, 15 December 2017

⁵⁷ Four Corners, *The Financial Scandal and Human Cost of Australia's Failing Workers Compensation Schemes*, 28 July 2020

5.6.4 Scheduled statutory review

- 128 Section 32 of the SICG Act requires that the Responsible Minister is to review the Act '*to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.*'
- 129 That statutory review was required to be commenced as soon as possible after five years from assent of the Act, that is, as soon as possible after 21 August 2020.

5.6.5 Announcement of the Independent Review

- 130 The Treasurer and the Minister for Customer Service, in response to the concerns raised in the media and in the SCLJ, announced on 4 August 2020 that they would '*bring forward and broaden [the] scheduled statutory five-year review*'.⁵⁸
- 131 That review was to be '*expanded to include a root and branch examination of [icare] to ensure public confidence in workers' compensation in NSW*'.⁵⁹
- 132 Thereafter, the ministers established my Terms of Reference (see [2 above](#)).
- 133 My review commenced on 3 September 2020.

⁵⁸ Treasurer and Minister for Customer Service, *Retired judge appointed to lead icare review*, Media Release, 4 August 2020

⁵⁹ *Ibid*

6 Methodology

134 The activities that I undertook in the conduct of the Review are summarised below. Before turning to those activities, I should mention two drafting points.

135 The first is that anyone who has the misfortune to read the whole of this Report will observe a great deal of repetition. That is in part inevitable, given the inter-relationship of the topics covered by my Terms of Reference, and is in part a matter of choice. I decided that it was better to have some repetition than extensive cross-referencing (of which there is a surfeit in any event).

136 The second point relates to the use of the term 'stakeholder'. To a lawyer, a stakeholder is someone who holds a sum of money, or perhaps other property, to await the outcome of an event involving two or more other people; generally, a stakeholder in that sense will have no interest in either the money or the outcome. A simple example is a wager, where the agreed stake is held, to go to the winner. However, the word has acquired a wider meaning. It now generally denotes someone who has an interest in a particular topic or subject-matter. That is the sense in which, for convenience only and not from love of the usage, I have employed the word in this Report.

6.1 Interviews

137 Together with the Review Team, I conducted 34 interviews between November 2020 and March 2021. Those interviewed included a range of icare's and SIRA's executives and Board members. I also interviewed icare's former CEOs, Mr Bhatia and Mr Nagle. In addition, I conducted 19 interviews with representatives of stakeholder groups that had made submissions to the Review.

6.2 Review of documents

138 I sought and received over 600 documents from icare, as well as many documents supplied by other stakeholders.

139 Both icare and SIRA provided full written responses to the media allegations, and made additional submissions to the Review.

6.3 External expert reviews

140 NSW Treasury engaged external experts on my behalf to bring specific expertise and allow efficient in-depth exploration of certain topics. Those advisers, and the topics covered by their reviews, are set out below:

Figure 6: External advisors engaged for the Independent Review

External review	Relevant sections of Terms of Reference	Appointed advisers
Claims Management	1a and 1b	Janet Dore
Probity and Procurement	1h and 1i	RSM Australia
Board Governance	1g	Effective Governance
Financial Sustainability	2b as it relates to the NI	Cumpston Sarjeant

- 141 In each case I approved the scope of work for, and the selection of, those advisers. Procurement and contract management was conducted by NSW Treasury.
- 142 In line with their agreed scopes of work, the external advisers carried out their own interviews, and sought and reviewed documents from icare, SIRA and others. A report from each external review was presented to me and will be made available publicly.
- 143 In addition, at the outset of my Review, icare advised me that it was shortly to instigate a culture, governance and accountability review ('CGA Review') in line with the 21 Point Plan following the Dore 2019 Report. The scope of this review overlapped with my Terms of Reference. Therefore, to avoid unnecessary cost and duplication, I agreed with icare that the CGA Review would cover issues that I required to be examined (to the extent that it would not do so as part of its scope of work for icare), and would report to me as well as to icare.
- 144 icare engaged PWC to carry out the CGA Review. I conducted briefing sessions with the PWC team, without icare representatives present. As PWC's work progressed, I received updates. I was given drafts for review, to ensure that PWC's work met my needs. The CGA Review report has subsequently been made public by icare.

6.4 The SCLJ's 2020 Review of the Workers Compensation Scheme

- 145 As noted above, the statutory Review of the Workers Compensation Scheme took place, in part, concurrently with the Independent Review. Issues raised that in that Review are explicitly within my Terms of Reference.
- 146 I considered the evidence given by witnesses to the SCLJ in those hearings, and documents provided to the Standing Committee.
- 147 The Committee's report was not released at the time of writing this report and its conclusions are therefore not available to me.

6.5 Public consultation

- 148 The public consultation for my Review sought submissions relevant to my Terms of Reference through the NSW Government's 'Have Your Say' website. Members of the public were invited to make written submissions by mail or email, and to participate in a survey.

149 That process of consultation was promoted through the social media channels and websites of the Department of Customer Service, Treasury, icare, and SIRA. Stakeholders in the scheme were asked to distribute details of the public consultation to their networks.

150 Consultation started on 1 October 2020 and ended on 5 November 2020. Over 50 submissions were received from a range of stakeholders, including insurance, business and legal stakeholders as well as from the community and from workers who had direct experience with the workers compensation system. There were also 201 responses to the survey. The Review Team and I considered all submissions and survey responses.

6.6 Stakeholders' reviews of draft report

151 I provided drafts of the review report to:

- a) icare;
- b) SIRA;
- c) The two former icare CEOs, Mr Bhatia and Mr Nagle (Parts 1A and 1B only);
- d) Former icare directors, Mr Carapiet, Mr Bell and Ms Bartlett (Parts 1A and 1B only); and
- e) SafeWork (Part 3 only).

152 Most of those stakeholders provided feedback on the drafts, which I considered before preparing this final version of the report. This version does not differ in substance from the draft that I provided.

6.7 Review Team

153 I selected Ms Louise Beange as Counsel to assist me. She was engaged by NSW Treasury to act as Counsel Assisting the Independent Review.

154 A small team from NSW Treasury and the Department of Customer Service supported me with planning, management and administration of the Independent Review, and with liaison with icare, SIRA and external stakeholders.

155 I would like to thank Ms Beange and the team headed by Mr Andy Hobbs of NSW Treasury for the enormous quantity and high quality of the work that they performed for the purposes of my Review. I could not have completed the Review, let alone this Report, without them. To the extent that this Report contains flaws (and, no doubt, there will be many who contend that it does), those flaws must be attributed to me. Had it not been for the Herculean labours of Ms Beange and the team headed by Mr Hobbs, there would have been many more.

Part 1A: Review of public allegations made against icare

7 Introduction

156 The first part of my Terms of Reference requires me to undertake a comprehensive organisational review of icare, having regard to issues recently raised in the media and in Parliament.

157 I propose to deal with Part 1 in two instalments. First, in this part – *Part 1A* – I shall examine the allegations that have been raised in the media and in Parliament, to the extent that they have become known in time to enable me to enquire into, form a view, and report upon them. Having done that, and in the light of the conclusions that I reach, I shall turn in *Part 1B* to the organisational review.

158 The Dore Report was released on 1 December 2019 (Dore 2019 Report). The publication of that report appears to have aroused both Parliamentary and media interest in icare. The media coverage, at times intense, commenced with a program aired on Four Corners on 27 July 2020. At about the same time, the SCLJ of the Upper House of the Parliament of New South Wales undertook a review of the Workers Compensation Scheme.⁶⁰ The SCLJ's hearings commenced on 28 July 2020 and continued between August and December 2020.

159 The allegations raised in the media and in the SCLJ covered some 14 broad themes:

- a) The treatment of injured workers.
- b) The underpayment of injured workers.
- c) Management of the claims agent.
- d) Management of medical services and costs.
- e) Culture.
- f) Board governance and oversight.
- g) Ministerial oversight.
- h) Executive remuneration.
- i) Procurement practices.
- j) Probity issues.
- k) The relationship between icare and SIRA.
- l) The viability of the NI.
- m) Accuracy of the statement of the NI's liabilities.
- n) Financial position of the TMF.

160 There are obvious links between some of those issues, and there are recurrent themes which underpin many of them. Further, and within those 14 issues, there are a number of more specific allegations.

⁶⁰ Weblink: [2020 Review of the Workers Compensation Scheme](#)

- 161 I received many public submissions on those issues. In addition, I sought and received specific responses from icare and SIRA.
- 162 I propose to deal with each of those 14 issues individually and in doing so, to pay attention to the specific factual allegations relating to them.
- 163 It is important that any reader of this Report understand that, although I received submissions, and had the benefit of interviews with many people who would give evidence bearing on the issues, I did not have coercive powers, nor did I have the ability to take evidence on oath. Thus, although where possible I attempt to reach conclusions on the issues, those conclusions must not reach beyond the submissions and evidence that were provided to me in the course of my review; nor do they.
- 164 Finally, and before turning to the individual issues, I note that the primary focus of the first part of my Terms of Reference is on the organisational review of icare. That review is to be informed by, and thus necessarily depends upon, the conclusions that I reach (to the extent possible) on the media and Parliamentary allegations. Thus, as I read my Terms of Reference, the principal significance of those allegations lies in the extent to which my consideration of and conclusions on them enable me to perform the organisational review.

8 The treatment of injured workers

165 Unsurprisingly, the treatment and experience of injured workers was one of the prime subjects of attention, in the media reports, in the SCLJ inquiry, and in submissions to my review. The specific allegations raised in relation to this issue were:

- a) the decline in RTW rates;
- b) delays in access to treatment;
- c) lack of contact from case managers;
- d) excessive turnover of case managers; and
- e) unacceptable pressure placed on workers to return to work.

8.1 RTW rates

166 It is indisputable that RTW rates for the NI have declined from late 2017 – that is to say, coincidentally with the introduction of icare's New Claims Operating Model (NCOM, or 'new claims model'). Neither icare nor SIRA contended otherwise. The decline was identified in the Dore 2019 Report.⁶¹

167 There was some contention as to how RTW rates should be measured. icare's RTW metric was inherited from icare's predecessor WorkCover. It was based on payments. A worker was treated as having returned to work when payments of benefits ceased. By contrast, SIRA's method was based on actual return to work: the date when the worker returned to employment. icare took the view that its method was accurate because it was '*subject to audit, increasing confidence in its accuracy.*'⁶² icare also submitted that there were difficulties in reconciling the data so as to enable it to adjust its system to calculate RTW rates using the SIRA methodology. That is understandable, but does not explain why icare opposed doing so for so long.

168 Frankly, I do not understand either the point of this dispute or why it should have continued. It seems to have been a by-product of the dysfunctional nature of the relationship between icare and SIRA at the time (a question to which I return at [17 below](#)). As I say at [17.2 below](#), there does not seem to have been any justification for icare's preferring its methodology to SIRA's, nor any reason for icare's not agreeing to accept SIRA's methodology.

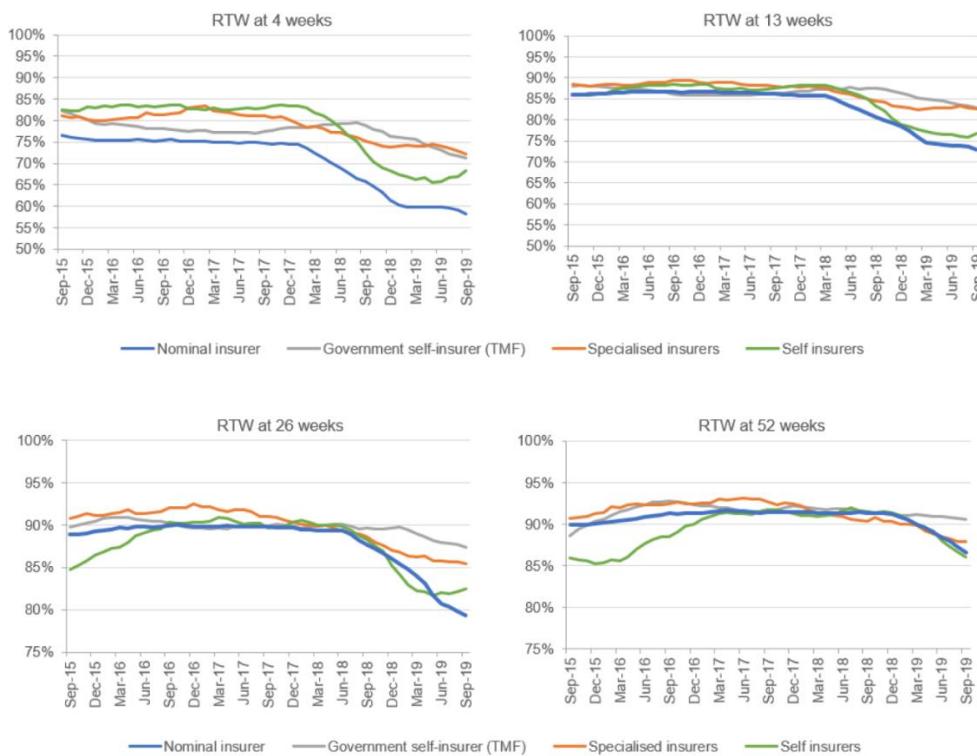
169 I note, in passing, that icare's measurement of RTW performance included workers who had not taken days off work (that is to say, workers whose claims were only for medical expenses). The inclusion of those claims does not falsify the conclusion that there was a significant decline in RTW rates from the beginning of 2018.

170 The dispute between icare and SIRA, regrettable as it may have been, is to an extent a side issue. It should not be allowed to obscure the reality of the decline in RTW rates. The point is starkly illustrated in graphs contained in the Dore 2019 Report.

⁶¹ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, December 2019, 33-35

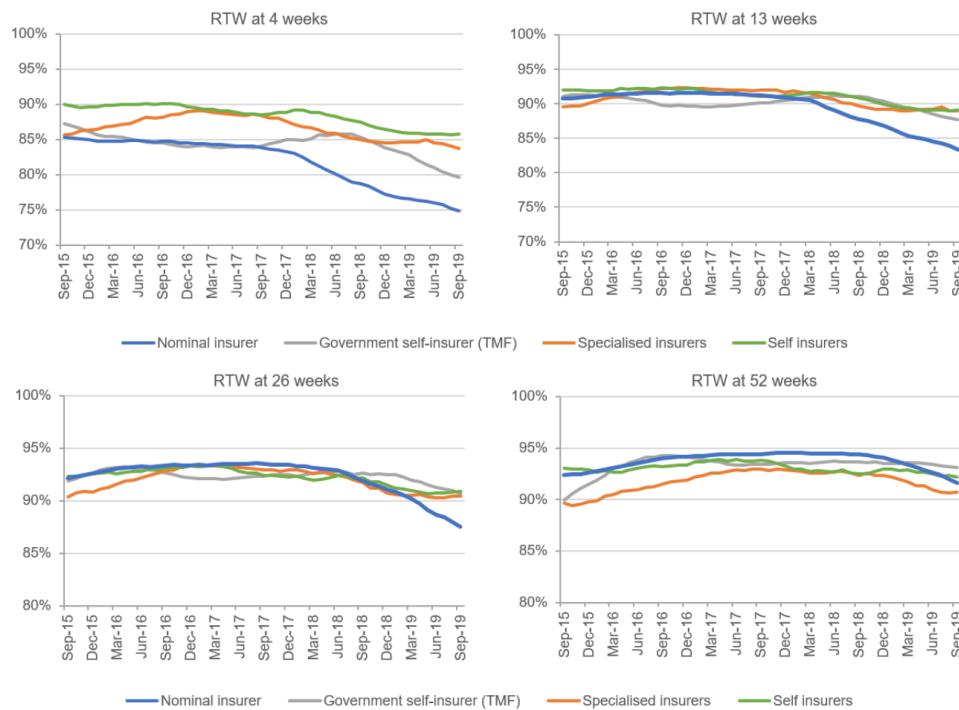
⁶² *icare's Media Issues Response*, 25 September 2020, at Item 11 [18]

Figure 7: RTW rates as measured by SIRA



Source: Janet Dore, *Independent Reviewer Report into the Nominal Insurer*, December 2019, at Figure 15 [5.5.1] 41-42

Figure 8: RTW including medical claimants' rate (as measured by icare)

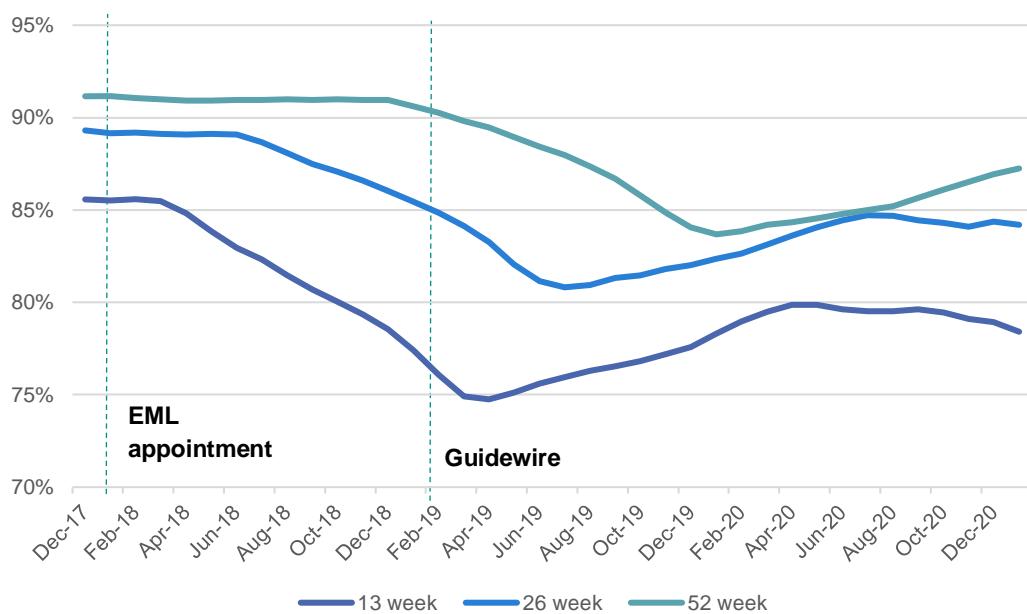


Source: Janet Dore, *Independent Reviewer Report into the Nominal Insurer*, December 2019, at Figure 16 [5.5.2] 42

171 The decline in RTW rates continued after the introduction of the NISP in February 2019. That is apparent from the graphs set out above.

172 In a report dated 19 August 2020 entitled *RTW Rates for the Nominal Insurer* (the Trowbridge Report), prepared using data from both icare and SIRA, independent expert Mr John Trowbridge observed that, although the RTW rates fluctuated, they were reasonably stable from March to mid-2019, although with a marked decline in February 2019 around the time of the introduction of the NISP. Mr Trowbridge concluded that RTW rates began to improve later in 2020. The following graph taken from RTW data supplied by SIRA illustrates this.

Figure 9: RTW data for the NI to January 2021



Source: SIRA, *Submission to Operational Review & Delivery of Recommendations of the Dore Report*, February 2021

173 Safe and prompt return to work must be one of the key objectives of any workers compensation scheme. The personal and economic benefits of return to work are universally recognised. Conversely, the personal and economic detriments of delayed return to work are obvious. The worker's overall recovery may be hindered; consequently, the duration and hence the cost of treatment may be extended; and there is a very real likelihood of secondary psychological injury arising. It is obvious that the longer a person is off work for a compensable cause, the greater will be the quantum of weekly payments.

174 Of course, return to work is not possible in every case of workplace injury. It is difficult to state what might be a desirable RTW rate. However, it is unnecessary to undertake further exploration of that question, given that there appears to be universal agreement that the RTW rates for the NI, since the commencement of the NCOM on 1 January 2018, are unacceptable.

175 I said above that the decline in RTW rates was temporally coincident with the commencement of operation of the NCOM. The Trowbridge 2020 Report concluded that there was more than temporal coincidence:

...there is clear evidence that RTW rates for the NI suffered material declines for claims occurring in the period November 2017 to February

*2018... these reductions are clearly material and occurred rapidly. There is little doubt now that they are largely attributable to poorer claims management performance at the time following the transition to EML as the primary manager of NI claims although data errors may have also played some part in the measurements.*⁶³

176 icare's response on media issues identified a range of factors that it said contributed to decline in RTW rates. It also acknowledges that the NI 'experienced a significantly greater rate of decline in RTW rates than the TMF due to a number of operational challenges in 2018 and 2019.'⁶⁴ icare identified those operational challenges as:

- a) a significant drop in claims performance consequent upon icare's reduction of the number of providers, one result of which was moving claims from one scheme agent to another; and
- b) a prolonged period of operational instability within EML.

177 I discuss that operational instability, which included unexpectedly high caseloads, high staff turnover within EML, and tensions arising between icare and EML, at [10.3 below](#).

178 EML did not demur from icare's analysis. It stated, in a submission to my inquiry:

*From January 2018 until April 2020, the high caseloads, the claims model, new system launch, the lack of decision rights at the case manager level and amount of administrative burden placed on the claims service providers has [sic] contributed to the Scheme not achieving its legislative purpose.*⁶⁵

179 icare's acknowledgement of operational instability glosses over the likely impact on RTW rates of the NCOM itself. That model introduced very significant changes to case management practices (see at [22.1 below](#)). Those changes include an automated triaging system. The operation of that system produced, among other results, a cohort of claims that did not have a dedicated case manager, and a further cohort of claims that did not receive dedicated case management in their early weeks. It is very likely that the delayed access to personal management of claims itself contributed to the decline in RTW rates. This point was raised with Ms Dore in her 2019 review,⁶⁶ and has been raised with this Review.⁶⁷

180 There are other likely causes for the decline in RTW rates. There were, for example, operational issues attending the introduction of the NCOM. They included: lack of automation (the NISP was not introduced until a year later); the under-forecasting of claims volumes; the consequential increase in caseloads; and the higher than expected attrition rates in claims management staff. There is an obvious causal relationship between that last factor and the preceding ones. In addition, the contractual structure, including as it did the reservation of decision rights to icare, was a likely source of confusion and poor performance.

181 I do not suggest that this list of causal factors is comprehensive.

⁶³ John Trowbridge, *RTW Rates for the Nominal Insurer*, 19 August 2020, 6

⁶⁴ *icare, Media Issues Response*, 25 September 2020 at Item 1, [29]

⁶⁵ EML, *EML Submission - Independent review of icare and SICG Act submission*, 30 October 2020, 6

⁶⁶ Janet Dore, *Independent Reviewer Report into the Nominal Insurer*, December 2019, 23

⁶⁷ For example: *Submissions to the Independent Review: Australian Federation of Employers and Industries*, November 2020; *Interview with Insurance Council of Australia*, 11 December 2020, 7; *Anonymous Stakeholder Group*

182 The precise contributions made by each of those factors to the decline in RTW rates cannot be assessed. It is not necessary to do so, in particular because there have been very significant changes to the claims management model and the contractual relationship between icare and EML. There are some, although undeveloped, indications that the operational instability to which icare referred has begun to diminish. icare and EML are cooperating in a number of steps that include raising claims management skills, implementing improved processes for review of claims, and paying closer attention to delayed decisions on liability. Those changes are aimed at improving RTW rates. In addition, there have been changes to the contractual model under which EML operates – specifically as to decision rights and as to incentives. I discuss those changes in more detail at [22.2 below](#).

183 It is not possible, at the date of this report, to identify the impact of those changes on RTW rates. However, if those changes are achieved and properly implemented, they may have the consequence of improving those rates. Indeed, Mr Trowbridge thought that he perceived some sign of improvement from August 2019. Unfortunately, the data from 2020 suggest that RTW rates have not continued to improve. That is hardly surprising, given the very significant impact of the COVID-19 pandemic on almost every aspect of Australian life.

184 Further, and before leaving this section of the media issues, I should state, by way of preface to what I say at [8.4 below](#), that in my view, the most important change required to the claims management process relates to the claims managers themselves.

185 icare, EML and perhaps SIRA as well must work together to increase the skill sets of claims managers, to assist them to deliver better outcomes for injured workers and to improve management of claims. icare and EML must also ensure that there are sufficient claims managers to handle the workload without burnout, and to reduce what still remains the excessively high rate of churn, or employment turnover, among claims managers.⁶⁸ Unless EML (and for that matter any other scheme agent) is able to maintain a stable and adequate workforce of appropriately skilled claims managers, there will be a continuing and fundamental drag on improvements in performance and improvements in RTW rates.

8.2 Delays in access to treatment

186 Delays in medical⁶⁹ treatment featured heavily in the media issues, in issues raised in the SCLJ, and in submissions to this Review. They are also frequently the subject of complaint to Workers Compensation Independent Review Office (WIRO), although those complaints include delays in decisions on liability generally and as to the making of payments. It is worthy of note that WIRO's submission did not identify any significant rise in complaints about delays in medical treatment, relating to icare or the NI, over the period of time with which this Review is concerned.

187 icare contended that there were no conclusive data to support the proposition that there were systematic delays in the approval of medical treatment.⁷⁰ icare did however acknowledge that the operational challenges established by the move to the NCOM,

⁶⁸ Janet Dore, Operational Review of Insurance and Care NSW and delivery of recommendations of the Dore Report, 5 March 2021, 12

⁶⁹ I use this as a compendious term to comprehend all treatments of the kind comprehended in Part 3 Division 3 of the 1987 Act, and related or ancillary treatments.

⁷⁰ icare, *Media Issues Response*, 25 September 2020 at Item 1, [2]

(and I add, by the introduction a year later of the NISP) did have an adverse impact on delays in approval of medical treatment. However, icare submits that this was not systemic '*in the sense of being attributable to scheme agent performance and/or the claims service model for the Nominal Insurer Scheme*'. It reaches that conclusion on the basis of a number of proxy measures which do not show significant changes between 2015-2020.⁷¹

- 188 There is a lack of appropriate data that would enable tracking of the time taken to approve medical treatment. icare tracks the approval rates (approval within the timeframe set by legislation) as a compliance metric. EML has shown a high level of compliance, with an average of less than five days to approve treatment for each month of 2020. However, it is unclear to me how this information is tracked or verified. Neither icare's current system nor the legacy system in place prior to February 2019 capture the date of the request for treatment. That legacy system, the Central Data Repository, captured neither the request date nor the approval date. Neither does SIRA collect any direct data on delays in treatment approvals. The responsibility for that rests with the insurers themselves.
- 189 I note that the various proxy metrics provided to my Review (each of which is imperfect in some way) do not suggest that there has been any particular increase in delays in accessing medical treatment, nor that the NI and TMF experiences in this respect differ significantly from that of self-insurers.
- 190 It therefore appears to me impossible to draw any evidence-based conclusion about whether there are widespread delays, or the potential causes of delays. However, there can be no doubt that delay remains a matter of concern to injured workers.
- 191 It is, I think, possible to identify at least two factors, external to icare, that may have a systemic impact on delay in approval of medical treatment. The first arises from section 279 of the WIM Act. That section provides:

279 Liability to be accepted within 21 days

- (1) Within 21 days after a claim for medical expenses compensation is made the person on whom the claim is made must determine the claim by accepting or disputing liability.

Note—

Section 283 makes failure to comply with this section an offence. Section 78 requires notice of a dispute to be given.

- (2) An employer is not required to determine a claim as provided by this section if—

- (a) the employer has duly forwarded the claim to an insurer who the employer believes is liable to indemnify the employer in respect of the claim, and
- (b) the employer has complied with all reasonable requests of the insurer with respect to the claim.

Note—

A claim forwarded to the insurer is taken to have been made on the insurer.

- 192 It is not unreasonable to conclude that a 21 day period for consideration and approval may be excessive when there is an urgent need for medical treatment. The Australian

⁷¹ icare, *Medical Treatment Approvals – explanatory note*, 24 Feb 2021, at [20]-[23]

Medical Association (AMA) submitted as much, although in this respect, as in others, its submission was in the form of a conclusory assertion, unaccompanied (despite requests) by any evidence to indicate the extent of the problem. icare has cautioned against reducing the 21 day period, on the grounds that to do so may have unintended consequences.⁷²

193 In any event, the WIM Act itself provides a partial solution, in section 280:

280 Provisional acceptance of liability

(1) An insurer can accept liability for medical expenses compensation on the basis of the provisional acceptance of liability for an amount of up to \$5,000 or such other amount as may be specified by the Workers Compensation Guidelines.

(2) The acceptance of liability on a provisional basis does not constitute an admission of liability by the employer or insurer under this Act or independently of this Act.

194 The current limit, for the purposes of sub-section 1, is \$10,000.⁷³ It is obvious that if there is an identified need for urgent medical treatment, the cost of which will not exceed that limit, it would be appropriate for the insurer (in this case, icare either in its own right as agent for the NI or EML pursuant to the contract between it and icare) to consider the exercise of the discretion to make a provisional acceptable of liability. Of course, if the estimated cost exceeds the statutory limit, the discretion conferred by section 280 is unavailable.

195 In addition to this, Guidelines issued by SIRA exempt certain treatments, often referred to as preapproved treatment, from approval requirements.⁷⁴ They include obvious exemptions such as initial treatment and ongoing visits to a treating doctor. They also include, for example, that an injured worker may obtain a certain number of treatments from an allied health professional without seeking prior approval. It appears obvious that preapprovals, where they are available, may assist in managing delays, although no evidence to that effect was presented to me.

196 The other possible systemic cause of delay in approval of treatment is delay arising from referral to an Independent Medical Examiner (IME). It is understandable that the time involved in such a referral, including for the IME to consider the matter and report, will cause delay in the provision of medical treatment. Unfortunately, that delay is an unavoidable consequence of the need for a resolution mechanism to decide disputes as to what is reasonably necessary medical treatment.

197 It is difficult to see how there could be a statutory solution to this problem, except one that abdicated entire responsibility for deciding the necessity (and the cost) of treatment in favour of the medical practitioner concerned. I accept, without reservation, that in very many (if not all) cases, medical treatment should be provided as quickly as possible. I accept that delays in treatment may at best hinder recovery, and in many cases may make full recovery impossible. However, given that the costs of medical treatment comprise about 30 per cent of the total costs of the NI Scheme,⁷⁵ and given that medical cost inflation has occurred at a higher rate than inflation of other costs in

⁷² icare, *Medical Treatment Approvals – explanatory note*, 24 Feb 2021, 28

⁷³ SIRA, *Workers Compensation Guidelines*, 1 March 2021, at [2.2] 9

⁷⁴ The power for which is found in the Workers Compensation Act, s 60(2A)

⁷⁵ *Finity, Insurance Liabilities as at 30 June 2020 – NSW Nominal Insurer*, September 2020, 5

the Scheme (and indeed, inflation of medical costs in other schemes nationwide), some control is necessary.

198 icare provided detailed submissions on its Medical Support Panel (MSP), an initiative introduced in March 2017 ‘*to help address the significant delays in treatment requests and medical assessments*’. The MSP is a panel of independent medical specialists available to provide medical recommendations to case managers to assist decision-making where liability for injury is not in dispute.⁷⁶ The aim, and apparent effect of this panel is to avoid the need for an IME referral and consequent delays, as well as improve decision-making.

199 icare acknowledges that this initiative has not always been successful in reducing delays (a complaint which was also raised with me during my review).⁷⁷ In some cases, referral to the MSP can take longer than the expected 5 days, and provide a further source of delay while the case manager awaits the MSP’s response. icare ‘*is aware that the current processes do not support quick transfer of information to and from case managers and intends to re-evaluate our processes*’.⁷⁸

200 The AMA submitted, in substance, that there should be greater empowerment for treating doctors to make decisions as to necessary treatment.⁷⁹ Unless and until it can be demonstrated to a high degree of satisfaction that any such empowerment would not result in a further blow-out in medical treatment costs, that does not appear to me to be practicable.

201 In short, whilst I accept that there have been delays, including unacceptable delays, in approving medical treatments, I do not think that there are systemic reasons within icare or EML that are responsible. Nor do I think that the statutory regime for approval should be modified without very careful consideration. Such consideration is beyond the scope of this review.

8.3 Lack of contact from claims managers

202 icare did not dispute the proposition that an unacceptably high number of claimants had experienced a lack of contact from claims managers. Nor did icare dispute the proposition that this was a consequence of the introduction of the new claims management model on 1 January 2018. There are at least two possible explanations for the failure to provide appropriate contact.

203 The first relates to the triage process that was an inherent part of the NCOM. As designed and first implemented, that triage engine (as icare called it) assigned claims to one of the following segments:

- Guide: for claims seen to be of the lowest complexity. Claims within this segment are assigned to a team within the Support Centre. They do not have a dedicated claims manager. Initially, any claims where return to work within 6 weeks was expected were assigned to this segment.
- Support: this segment comprises more complex injuries with a greater likely time off work than claims in the Guide segment, or claims where there are biosocial

⁷⁶ icare, *Media Issues Response*, November 2020, at Item 1 [43]-[44]

⁷⁷ Two Anonymous submissions

⁷⁸ icare, *Media Issues Response*, September 2020, Item 1 at [47]

⁷⁹ AMA submission, 30 October 2020, 3

factors which are perceived to increase the risk of delayed return to work. Claims in this category have a dedicated claims manager. The target maximum case load for each manager is 65 claims.

- c) Specialised: this segment comprises more complex claims which require greater support. They include claims for medically complex injuries and for psychological injuries. Claims in this segment have a dedicated claims manager. There is a target case load for each manager of 35 claims.
- d) Care: for the most severe injuries likely to require lifetime care and support.

204 The six week timeframe referred to in (a) above – the Guide segment - has been progressively revised down, first to four weeks, then to two weeks, and finally, to where it now rests, to one week.

205 The view is open that, at least as the triage engine first operated, the assignment of workers who might be off work for six weeks was inconsistent with section 45 of the WIM Act. That section provides:

45 Injury management plan for worker with significant injury

- (1) When it appears that a workplace injury is a significant injury, an insurer who is or may be liable to pay compensation to the injured worker must establish an injury management plan for the injured worker.
- (2) The injury management plan must be established in consultation with the employer (except when the insurer is a self-insurer), the treating doctor and the worker concerned, to the maximum extent that their co-operation and participation allow.
- (3) The insurer must provide both the employer and the injured worker with information with respect to the injury management plan.
- (4) The information that the insurer must provide to the injured worker includes a statement to the effect that the worker may have no entitlement to weekly payments of compensation if the worker fails unreasonably to comply with the requirements of this Chapter after being requested to do so by the insurer.
- (5) The insurer must keep the employer of a worker who has received a significant injury informed of significant steps taken or proposed to be taken under the injury management plan for the worker. This subsection does not apply when the insurer is a self-insurer.
- (6) An insurer must as far as possible ensure that vocational retraining provided or arranged for an injured worker under an injury management plan is such as may reasonably be thought likely to lead to a real prospect of employment or an appropriate increase in earnings for the injured worker.
- (7) An insurer must give effect to an injury management plan established for an injured worker and for that purpose must comply with the obligations imposed on the insurer by or under the plan.

206 A ‘*significant injury*⁸⁰ is one that is ‘*likely to result in the worker being incapacitated for work for a continuous period of more than 7 days*.’⁸¹ The suggested inconsistency with section 45 would arise if and to the extent that an injury that was foreseen to cause up to six weeks’ time off work should be regarded as significant.

207 There does seem to be force in that argument. However, given the successive revisions to the operation of the triage engine to which I have referred, it is unnecessary for me to express a concluded view.

⁸⁰ WIM Act s 42

⁸¹ Ibid

208 The second possible cause for lack of contact is that it was related to the operational performance issues that arose following the introduction of the NCOM and, thereafter, the NI issues, including as they did the excessively high turnover of staff and the difficulty of locating and employing adequately trained and experienced claims managers.

209 icare submitted that there has been a significant improvement in claims management:

Recently, EML has focussed on improving compliance in initial contacts, initial liability decisions and initial calculations of weekly payments. From October 2019 there has been greater than 95% compliance in initial contacts and liability decisions, within the prescribed time. From November 2019, the initial weekly payment to workers has also been above 95% and both measures continue at this level.⁸²

210 There is nothing in the material before me to controvert that submission.

8.4 Excessive turnover of claims managers

211 There is no doubt that when the NCOM was introduced, injured workers⁸³ found that the identity of their dedicated claims manager changed frequently. It is understandable that this caused uncertainty, and in some cases distress. More generally, the Dore 2019 Report noted that there had been a high rate of churn in claims managers employed by EML. The potential for high churn to have an adverse impact on the provision of appropriate skilled claims management services is obvious. That flows from the loss of skilled and experienced workers, which has at least two consequences. Firstly, there is the loss of the services of the individual. Secondly, there is the loss of the guidance that the experienced managers could provide to less experienced managers.

212 It should be noted that references in the Dore 2019 Report to a turnover rate of 22.7 per cent per month⁸⁴ were incorrect. That incorrect figure was picked up in the SCLJ hearings. 22.7 per cent was an annualised turnover figure, not a monthly turnover figure.

213 That having been said, neither icare nor EML disputed that the churn rate in EML's claims management staff was unacceptably high. There was general agreement between them that a number of factors contributed to this:

- competition in the market for experienced claims managers arising from changes in the Compulsory Third Party (CTP) Scheme that coincided with the introduction of the NCOM;
- The emphasis on customer service skills, rather than claims management skills, as a priority in hiring staff;⁸⁵

⁸² icare, *Submission to the Independent Review - Part 1b*, 18 November 2020, at [22]

⁸³ Except for those in the Guide segment.

⁸⁴ Janet Dore, *Independent reviewer report on the Nominal Insurer of NSW workers compensation scheme*, December 2019, at [7.4.7] 68

⁸⁵ Although note Mr Nagle's comment on this at Part 1B.

- c) The under-forecasting of claims volumes. This meant that EML did not employ enough claims management staff, and those that were employed had excessively high caseloads. I return to this at [22.2 below](#); and
- d) the operational instability that accompanied the introduction of the NCOM. That, coupled with the preceding factor, created the perception of a poor working environment.

214 Although there was some difference between icare and EML as to the relative causal contributions of those matters, and as to the responsibilities of icare and EML in respect of them, it is not necessary to resolve those disputes given the agreement to which I have referred already.

215 As I have said already, there is an imperative need for EML to have a stable and skilled workforce in the area of claims management. However, the evidence shows that the rate of staff turnover has not stabilised; on the contrary, it has increased above the level of 22.7 per cent annual turnover that Ms Dore noted in her 2019 Report.

216 EML suggested⁸⁶ that 20 per cent was an industry-accepted figure for annual turnover in claims management staff. If indeed that figure is accepted in the industry, it suggests that there is something seriously dysfunctional in that industry.

217 In any event, the most recent figures on turnover suggest that EML's rate is above the 20 per cent mark.⁸⁷ I do not understand how EML can provide an appropriate service when it is losing a fifth of its claims management staff each year. The loss of skills and experience, coupled with the time it takes to bring new claims managers to an appropriate level of skill, inevitably point to the law of diminishing returns. Figures cited by Ms Dore in her 2021 Report⁸⁸ suggest that it takes two to three years to train fully capable claims management staff. EML suggested that three months is sufficient to allocate caseloads.⁸⁹ I do not know the basis on which EML makes that assessment, but even if it be correct, it would make it difficult for EML to replace departed staff with appropriate staff at the rate necessary to maintain case loads at their appropriate settings with fully capable staff.

218 I shall return to this topic, but conclude for the present by saying that unless the question of retention of appropriate numbers of appropriately skilled staff is addressed in a satisfactory way, it is unlikely that the current model can be made to work. In this context, it is worth noting (a point made in the Dore 2021 Report)⁹⁰ that the 12 month duration of EML's new contract is not sufficient to enable the changes that it introduces to be adequately assessed.

⁸⁶ EML, *Feedback on A & B of Independent Review Report*, 9 April 2021, 1

⁸⁷ EML, *Monthly Operational Performance Report*, October 2020

⁸⁸ Janet Dore, *Operational review of Insurance and Care NSW and delivery of recommendations of the Dore Report*, 5 March 2021, at [3.3] 14

⁸⁹ Ibid

⁹⁰ Ibid

8.5 Allegedly unacceptable pressure to return to work

219 There were two specific matters raised.

220 The first related to an allegation that in 2020, icare proposed to take aggressive action to remove the number of injured workers receiving benefits. That was said to involve targeting some 13,000 workers.

221 The second matter concerned inappropriate conduct involving icare, its scheme agent QBE Insurance, and the Department of Corrective Services directed at putting inappropriate pressure on three Corrections staff to return to work.

222 The first aspect of this issue arises from the operation of section 38 of the WC Act 1987. That section provides:

38 Weekly payments after second entitlement period (after week 130)

(1) A worker's entitlement to compensation in the form of weekly payments under this Part ceases on the expiry of the second entitlement period unless the worker is entitled to compensation after the second entitlement period under this section.

(2) A worker who is assessed by the insurer as having no current work capacity and likely to continue indefinitely to have no current work capacity is entitled to compensation after the second entitlement period.

(3) A worker (other than a worker with high needs) who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if—

- (a) the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period, and
- (b) the worker has returned to work (whether in self-employment or other employment) for a period of not less than 15 hours per week and is in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least \$155 per week, and
- (c) the worker is assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings.

(3A) A worker with high needs who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period.

(4) An insurer must, for the purpose of assessing an injured worker's entitlement to weekly payments of compensation after the expiry of the second entitlement period, ensure that a work capacity assessment of the worker is conducted—

- (a) during the last 52 weeks of the second entitlement period, and
- (b) thereafter at least once every 2 years.

Note—

An insurer can conduct a work capacity assessment of a worker at any time. The Workers Compensation Guidelines can also require a work capacity assessment to be conducted.

(5) An insurer is not to conduct a work capacity assessment of a worker with highest needs unless the insurer thinks it appropriate to do so and the worker requests it. An insurer can make a work capacity decision about a worker with highest needs without conducting a work capacity assessment.

(6) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled under this section after the second entitlement period is to be at the rate of 80% of the worker's pre-injury average weekly earnings.

(7) The weekly payment of compensation to which an injured worker who has current work capacity is entitled under this section after the second entitlement period is to be at the lesser of the following rates—

(a) 80% of the worker's pre-injury average weekly earnings, less the worker's current weekly earnings,

(b) the maximum weekly compensation amount, less the worker's current weekly earnings.

(8) A worker's entitlement to compensation under this section may be reassessed at any time.

223 It can be seen that where section 38 applies (that is to say, after the worker has been in receipt of compensation for 130 weeks – see the definitions of first entitlement period and second entitlement period in section 32A), the entitlement to any further compensation depends on the conduct of a work capacity assessment (section 38(4)). To put it another way, an insurer cannot decide that a worker has no current work capacity, and thus is entitled to continue on benefits (section 38(2))⁹¹, unless the insurer has conducted an assessment in accordance with sub-section (4).

224 The alternative to conducting a sub-section (4) assessment would be to take the worker off benefits at the expiry of the 130 weeks. Absent such an assessment, the entitlement to benefits would cease; conversely, the entitlement to benefit could only continue if the assessment were conducted.

225 It is a matter of fact that between February and June 2020, icare and EML reviewed in excess of 17,500 claims which had a not working status. In about 15 per cent of cases, the assessment of work capacity resulted in a reduction in or loss of benefits. To the extent that those consequences followed and were factually justifiable, they represented the working out of the operation of the statutory scheme.

226 By necessary inference, for the remaining 85 per cent of cases, the result of the assessment must have been that the worker either continued to be entitled to receive benefits, or returned to work.

227 In my view, the criticisms that have been made involve a basic misunderstanding of the operation of section 38. Better considered, or more informed, reporting might have demonstrated the misunderstanding.

228 In both its answers to the SCLJ and in its response to my Review, icare stated that it had commenced a series of reviews of claims in the tail portfolio of GIO. That review related to the management of claims between 130 and 200 weeks (under section 38), and involved correspondence between icare and GIO to identify potential claims that may require a change in management strategy.⁹² There is no suggestion that GIO acted inappropriately in participating in claims reviews requested by icare.

229 There is no evidence to suggest that the work capacity assessment that resulted in 15 per cent of workers within the surveyed cohort losing their benefits were legally or factually erroneous, let alone that they were motivated by some malign purpose. Neither do I perceive any unreasonableness in icare's undertaking reviews of tail

⁹¹ Subject of course to any applicable limit on benefits.

⁹² icare, *Media Issues Response*, November 2020, at Item 1 [69]-[76]

claims. This, I think, is one of the allegations that could most kindly be described as a “beat-up”.

- 230 The same cannot be said of the second matter raised. An independent review of the incident has confirmed that what happened was unacceptable. icare, QBE and the Department of Corrective Services have undertaken to implement measures to ensure that the situation will not recur. They include icare’s new Conduct Risk Review Process, implemented in December 2020. It aims to *‘investigate and respond to incidents, allegations or issues relating to material conduct risk in icare’s services and processes...’*⁹³ The Conduct Risk Review Process will also notify SIRA or other regulators of conduct risk issues where necessary, and provide regular reports to the Audit, Risk and Compliance Committee (ARC) and the Board.⁹⁴
- 231 The incident was also investigated by SIRA. SIRA likewise concluded that what happened was inappropriate and unacceptable.⁹⁵ I agree.
- 232 SIRA has confirmed that the behaviour of QBE and the Department of Corrective Services in that case does not appear to be systemic or widespread.
- 233 It is to be hoped that nothing like this will occur again.

⁹³ icare, *Annexure D – Conduct Risk Review Process*, December 2020, at [1], 3

⁹⁴ icare, *McDougall Review – Response to Draft Parts A and B of McDougall Report*, 9 April 2021, at [43] 10

⁹⁵ SIRA, *Report on the SIRA investigation into three Corrective Services workers compensation claims*, at 12-16

9 Underpayment of injured workers

234 Media reports on the underpayment issue raised two principal concerns:

- the fact of underpayment; and
- the manner in which icare has responded to the issue.

235 As to the fact of underpayment, media reports suggested that some 52,000 workers had been underpaid an estimated \$80 million in benefits.⁹⁶ Subsequent reports scaled those figures down, suggesting that the underpayment issue may have affected 5,000 to 10,000 workers and that the total amount underpaid may have ranged from \$5 million to \$10 million.⁹⁷

236 icare's latest estimate is that fewer than 0.2 per cent of injured workers in the NI Scheme, that is around 500 workers, who were eligible for benefits between October 2012 and 2019 will have a quantifiable underpayment.⁹⁸

9.1 The legislative background

237 icare's response has confirmed that some underpayments occurred. icare's position is that these were results of determinations based on insufficient information in the calculation of PIAWE.

238 PIAWE was introduced into the WC Act 1987, as a determinant of the amount of weekly compensation payable, in 2012.⁹⁹ The way in which PIAWE feeds into that calculation can be seen from sections 36 and 37 of the WC Act 1987:

36 Weekly payments during first entitlement period (first 13 weeks)

- The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the first entitlement period is to be at the rate of 95% of the worker's pre-injury average weekly earnings.
- The weekly payment of compensation to which an injured worker who has current work capacity is entitled during the first entitlement period is to be at the lesser of the following rates—
 - 95% of the worker's pre-injury average weekly earnings, less the worker's current weekly earnings,
 - the maximum weekly compensation amount, less the worker's current weekly earnings.

37 Weekly payments during second entitlement period (weeks 14–130)

- The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the second entitlement period is to be at the rate of 80% of the worker's pre-injury average weekly earnings.
- The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for not less than 15 hours per week is entitled during the second entitlement period is to be at the lesser of the following rates—

⁹⁶ Four Corners, *The Financial Scandal and Human Cost of Australia's Failing Workers Compensation Schemes*, 28 July 2020

⁹⁷ Sydney Morning Herald, *NSW Treasurer stands by icare after millions in after payment revealed*, 27 July 2020

⁹⁸ icare, *Submission to the Independent Review Response to Draft Parts Part A & B*, 9 April 2021, 1

⁹⁹ See the *Workers Compensation Legislation Amendment Act 2012* (NSW).

(a) 95% of the worker's pre-injury average weekly earnings, less the worker's current weekly earnings,

(b) the maximum weekly compensation amount, less the worker's current weekly earnings.

(3) The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for less than 15 hours per week (or who has not returned to work) is entitled during the second entitlement period is to be at the lesser of the following rates—

(a) 80% of the worker's pre-injury average weekly earnings, less the worker's current weekly earnings,

(b) the maximum weekly compensation amount, less the worker's current weekly earnings.

239 If an injured worker remains entitled to compensation after the second entitlement period, PIAWE remains relevant by reason of section 38(7). It is not necessary to set out that section.

240 The calculation of PIAWE is also addressed, in a way that cannot be said to be straightforward, in Schedule 3 to the WC Act 1987. The subjects covered by Schedule 3 include a definition of PIAWE (clause 2); provision for agreements as to PIAWE (clause 3); provisions dealing with PIAWE calculations for short term workers, apprentices, trainees and young people (clauses 4 and 5) and other, no doubt necessary but far from simple, matters.

241 PIAWE is also dealt with in parts 3 and 4 of the *Workers Compensation Regulation 2016*. Among other things, those parts make differential provision for injuries occurring before or on or after 21 October 2019. Again, their provisions are by no means simple.

242 Finally, for present purposes, it is necessary to notice that the Workers Compensation Guidelines issued by SIRA also bear on this question. These Guidelines are issued by SIRA to '*provide claims administration and conduct expectations for insurers*'¹⁰⁰. They include some guidance on PIAWE.

243 Although the legislature has intervened in an attempt to simplify the calculation of PIAWE,¹⁰¹ that calculation is still a difficult and complex process. There are at least two reasons for this. The first is that the calculation is intensely fact-dependent. It cannot be carried out unless and until the employer (more usually, the insurer) has all the necessary information that must be considered in making the calculation. Secondly, because the legislation makes provisions for different approaches to the assessment of PIAWE for different categories of workers (and for different periods of time, specifically before or on or after 21 October 2019), there is no single correct method of calculation.

244 Of course, it would be possible to automate the calculation. That could be done, for example, by having a program that responds to each possible permutation (date of injury, specific characteristics of worker, and the like). However, even if that were done and were shown by adequate testing to be accurate, it could not supplement any lack of or deficiency in the information input into the program to produce the calculation of PIAWE in any given case.

¹⁰⁰ SIRA, *Workers Compensation Guidelines*, 1 March 2021, 4

¹⁰¹ See the *Workers Compensation Legislation Amendment Act 2018* (NSW) and the *Workers Compensation Amendment (Pre-Injury Weekly Earnings) Regulation 2019* (NSW).

245 The difficulties that undoubtedly attend a proper calculation of PIAWE are magnified by the fact that, in general, provisional weekly payments of compensation are to commence within seven days of notification. See section 267 of the WIM Act, which provides:

267 Duty to commence weekly payments following initial notification of injury

(1) Provisional weekly payments of compensation by an insurer are to commence within 7 days after initial notification to the insurer of an injury to a worker, unless the insurer has a reasonable excuse for not commencing those weekly payments.

(2) A person does not have a reasonable excuse for not commencing those weekly payments unless the person has an excuse that the Workers Compensation Guidelines provide is a reasonable excuse.

(3) The payment of provisional weekly payments of compensation under this section is on the basis of the provisional acceptance of liability by the insurer for a period of up to 12 weeks determined by the insurer having regard to the nature of the injury and the period of incapacity.

(4) The acceptance of liability on a provisional basis does not constitute an admission of liability by the employer or insurer under this Act or independently of this Act.

(5) An insurer who fails to commence weekly payments of compensation as required by this section is guilty of an offence.

Maximum penalty—50 penalty units.

246 Further, and as I have noted already, section 274(1) of the WIM Act allows only 21 days within which an employer (or insurer) must either accept liability and commence payments or dispute liability. That having been said, section 274(2) provides for provisional weekly payments for a period of up to 12 weeks, and sub-section (3) extends the provisional acceptance of liability accordingly.

9.2 icare's discovery of incorrect PIAWE calculations

247 This is summarised accurately in icare's Media Issues Response provided to this Review, at Item 2 paragraphs 18-22. I set out those paragraphs:

18. In 2019, icare conducted a PIAWE Risk Discovery Review of the Nominal Insurer (2019 Review) to explore the nature and extent of the PIAWE calculation risk. The 2019 Review assessed 3,037 files, representing approximately 1.4% of all Nominal Insurer files with weekly benefits entitlements for a period greater than four weeks between 2013 to 2018.

19. The 2019 Review recalculated the initial PIAWE (noting that there could be multiple PIAWE calculations performed over the life of a claim) using solely the available case file records and documentation. The results of the 2019 Review indicated:

777 (approximately 26%) of files reviewed were potentially incorrect, with both over and underpayment of weekly benefits to injured workers. The number of over-calculations identified was roughly equivalent to the number of under-calculations (396 over compared with 380 under, 1 still to be determined);

786 (approximately 26%) of files reviewed appeared to have the correct PIAWE; and

1,471 (approximately 48%) files had insufficient information to support the initial PIAWE calculation, such as incomplete PIAWE

forms or missing payslips, and no additional information to improve the calculation in the file. This did not necessarily mean that the calculation was incorrect, but rather that without further information no improvement to initial PIAWE calculation would be possible.

20. *Based on icare's review of the files, roughly 40% of the errors related to injuries that occurred prior to the establishment of icare on 1 September 2015.*

The 2019 Review did not examine whether:

The initial PIAWE calculations were rectified through the later provision of additional information, subsequent PIAWE calculations, dispute processes or other corrective measures; or

There were actual incorrect weekly benefit entitlement payments.

icare's view was that the findings were still a hypothesis that required further consideration and testing to understand the full impact.

22. *icare advised SIRA of its 2019 Review findings in meetings dated 27 and 28 February 2020 and in its letter to SIRA dated 4 March 2020... This letter clarifies that [s]hould an underpayment hypothesis prevails in line with the sample tested, the hypothesis has an estimate range of \$20m to \$40m, with a very conservative high-end estimate of \$80 million. For simplicity we have taken a reasonable estimate of potential \$40m.' It also notes that icare has a 'moral and legal obligation to attempt to rectify any potential underpayment.*

248 It will be noted that the figure of \$80 million that was initially seized upon by the media was one that icare, in its letter to SIRA of 4 March 2020, had described as 'a very conservative high-end estimate'.

9.3 Subsequent actions

249 icare established a PIAWE Remediation Program in early 2020. That program was focussed on claims where the injury date fell within the range 1 October 2012 to 20 October 2019 (the earlier date representing the introduction of PIAWE into the calculation of weekly benefit, and the later date representing the introduction of legislative simplifications to the calculation).

250 The starting point of the remediation program was a more comprehensive review of some of the NI claims files that had been reviewed in 2019. That review, covering 100 files, showed that:

- a) for 58 files, there was insufficient information to verify (or falsify) the PIAWE calculation;
- b) for another 22 files, there appeared to be an underpayment by reference to PIAWE; in four of those cases the underpayment had been resolved by other means;
- c) the range of underpayments was from \$1 to \$358 per week; the average was \$94 per week; and
- d) PIAWE had in fact been over-calculated in 13 cases.

251 The next step has commenced with a review of 1,000 NI files and 500 TMF files. Those selected are the highest valued claims in each category. There are two reasons for that review. The first is to attempt to identify inaccurate calculations of PIAWE. The second is to attempt to identify characteristics that will assist in a selective but nonetheless thorough review of all claims files (excluding claims where only medical benefits were sought and paid) over the relevant period.

252 In relation to the NI scheme, icare's current best estimate is that about 0.2 per cent of injured workers who were eligible for weekly benefits during the relevant period were underpaid.¹⁰² The great majority of claims (around 80 per cent) had a duration of benefit payments that averaged five weeks. In some of those cases, the monetary impact of any miscalculation of PIAWE may be low - given that it may involve what is, objectively, a small amount of money. That does not mean, and I do not intend to suggest, that the underpayments are unimportant to workers or their families. On the contrary, I accept that for many families with carefully and closely budgeted expenditure, even a small amount of money is likely to be very significant. Nor do I mean to suggest that the mistakes and the delay can be excused on that account.

253 icare has also commenced a review of TMF claims for PIAWE underpayments. It has found, after an initial review of 500 TMF claims, that government agencies do not always provide complete earnings data to their claims management providers. A more recent and deeper review of 47 initial determinations made by seven larger government agencies who conduct their own PIAWE calculations found that 40 were incorrect.¹⁰³ The errors included both under and overpayments, although SIRA has said that 25 of them were underpayments.¹⁰⁴

254 icare has reaffirmed its commitment to ascertaining and (where possible) rectifying underpayments, and to paying workers their entitlements in accordance with the legislation as it stands from time to time. Its position is that the work it is now undertaking will enable a more precise identification to be made of the characteristics of the files that may contain inaccurate PIAWE calculations. That, in turn, should enable icare to narrow down very substantially the number of files that must be reviewed. It is obvious that the review should be conducted as efficiently, and therefore as quickly, as possible.¹⁰⁵ It is equally obvious that it should be conducted in such a way that no underpaid worker is left uncompensated where this is possible. In my view, icare's approach is consistent with the achievement of those objectives if the work is carried out thoroughly by appropriately trained and supervised staff.

255 SIRA has, very recently, commissioned KordaMentha¹⁰⁶ to carry out a review of icare's PIAWE assessments and calculations and to evaluate icare's PIAWE remediation program.¹⁰⁷ The results of that review were not available at the time this report was written.

¹⁰² icare, *Submission to the Independent Review Response to Draft Parts Part A & B*, 9 April 2021, 1

¹⁰³ icare, *Submission to Independent Review- 1a Claims Operations*, November 2020, at [255]

¹⁰⁴ SIRA, *SIRA response to draft parts A and B McDougall Report*, 13 April 21, 1

¹⁰⁵ SIRA has belatedly made the suggestion in its response to my draft report that icare has not set out a clear path to repayment of everything owing and has not acted swiftly enough in its response. Given that SIRA is the regulator and has been overseeing the process, if it had those concerns it should raise them with icare. See: SIRA, *SIRA response to draft parts A and B McDougall Report*, 13 April 21, 1.

¹⁰⁶ Under WC 1987 Act s 202A

¹⁰⁷ SIRA, *Scope and Term of Reference of KordaMentha Review*, April 2021, 1

256 icare may be criticised justly for its delay in reporting the findings of its 2019 Review to SIRA. The excuse given – that further testing and review was required – does not excuse the failure to provide a report to SIRA as soon as the existence of the underpayment problem had been verified.

257 There is a difference of opinion between icare and SIRA as to the extent of icare's responsibility for the PIAWE underpayments. icare suggested that incorrect payments resulted from determinations that were based on insufficient information, many of which pre-dated its creation. SIRA, whilst not disputing that proposition, has made the point that the rate of incorrect PIAWE determinations has increased from the time icare took over the management of NI and TMF claims. That difference seems to me to be of historical interest only, given icare's acknowledgment of the problem and its commitment to resolving it.

10 Management of the claims agent

258 There are two specific allegations:

- icare had appointed EML as the sole claims management agent, despite EML's alleged lack of capability and capacity to perform that role; and
- EML's alleged poor performance of its role had contributed to the poor service given to injured workers and the decline in RTW rates.

259 The two themes are interlinked, in the sense that an acceptance of the second criticism would be facilitated if the first criticism were accepted.

260 Before I turn to the two criticisms, there are two points to be made. The first is that icare and EML both acknowledge that the NCOM has not delivered the outcomes that were expect of it, and that there are significant areas where its performance must be improved. The second is that in my view, many of the operational deficiencies that have arisen illustrate a theme that recurs all too frequently in this part of my review. That theme is that icare prioritised delivery, or as it frequently called it transformation, over process.

261 In the early days of icare's operations, the activity undertaken to deliver change was not backed up by appropriate management and governance processes. That led, in my view, to inadequate testing of the NCOM. In consequence, the operational challenges that were experienced on its introduction on 1 January 2018 came as a surprise to all. The introduction of the NCOM without the benefit of the automation (the NISP) that Guidewire was to provide meant that one of the key operational underpinnings of the model was lacking when EML started work.

10.1 Background

262 It is necessary to bear in mind that icare, under Mr Bhatia's leadership, had decided to implement a claims management process that was fundamentally different to what had hitherto existed – the NCOM. There were three key parts of the NCOM. The first was the move to appoint a single agent for handling all new claims (existing claims were to be handed by other claims agents). The second was the introduction of a new automated claims management system. The third was a new claim management model which governed the approach to claims handling. The NCOM, and its associated claim management is discussed at length elsewhere in this report in [22.1 below](#).

263 There were several of considerations that underpinned the decision to move to a single claims manager for new claims. icare perceived, rightly or wrongly, that the existing claims management system was biased in favour of employers and insurers (that suspicion being fuelled by the fact that insurers managed the claims). icare also perceived that the system was excessively adversarial. It was determined to create a claims management system that was neutral – biased neither in favour of employers or insurers, nor in favour of employees. That seems to me to be consistent with the

objectives expressed by the then Minister for Finance in his Second Reading Speech on the State Insurance and Care Governance Bill.¹⁰⁸

264 I do not think that the decision to move to a single claims manager for new claims was inherently flawed. On the contrary, I think that it was a decision that was reasonably open to icare on the facts existing at the time. However, it is self-evident that successful design of the new model was one thing, but that for the new model to work, its implementation had to be managed appropriately.

265 Unfortunately, the implementation of the NCOM was not appropriately managed. It must have been apparent, when the new claims management model was under consideration, that it could not deliver the expected level of service unless whoever were chosen as the claims agent had sufficient experienced and capable claims managers to deal with the likely volume of claims. That in turn involves at least two elements:

- a) a consideration of the adequacy of the existing staff of the proposed single claims agent and its capacity to recruit as needed; and
- b) the likely volume of claims.

10.2 Appointment of EML as sole claims agent

266 icare's submission in response to the media issues set out the appointment process as following:¹⁰⁹

9. EML was appointed as the default provider of claims management services for new claims to the Nominal Insurer pursuant to a Service Provider Agreement (EML SPA) on 1 January 2017. Nearly 2,000 lodgements per year continued to be received from large employers lodging with GIO and Allianz.

10. EML's appointment followed a robust closed market tender process which included a well-defined selection process and was preceded by a careful consideration by the icare executive and Board of the benefits of reducing the number of scheme agents in the Nominal Insurer scheme. A timeline of the scheme agent selection process, which commenced in December 2016 (Selection Process) is [provided]

11. The Selection Process was managed by icare on behalf of the Nominal Insurer and was structured to support the goals of the SICG Act to reduce adversarial interactions and improve outcomes for the injured workers and employers of NSW.

12. One of the key objectives of the Selection Process was to reduce the number of scheme agents to the Nominal Insurer. At the inception of icare in 2015, there were five scheme agents provided services to the Nominal Insurer, each with their own technology platform and processes which resulted in varying and at times sub-optimal outcomes for injured workers and employers.

¹⁰⁸ NSW Parliament, *Second Reading Speech – Workers Compensation Legislation Amendment Bill 2015 State Insurance and Care Governance Bill 2015*, 5 August 2015

¹⁰⁹ *icare, Media Issues Response*, 25 September 2020, at Item 3 [9] to [29]

13. *The key assumptions that underpinned the service model focused on icare having ownership or control over the following elements:*

- a) *customer experience design;*
- b) *IT system design and process related design*
- c) *Development and embedding of the culture (for example values, symbols, reward mechanisms etc); and*
- d) *Financial management to ensure budgets are maintained and benefits achieved.*

14. *The Selection Process was developed with the support of AT Kearney Consulting and was open to all existing scheme agents: CGU, Allianz, EML GIO and QBE.*

15. *On 21 December 2016, a selection document was sent to each of the scheme agents. In this document, scheme agents were required to:*

- a) *Confirm their intention to participate in the process by executing and returning a Process Deed Poll;*
- b) *provide a written submission responding to a list of questions; and*
- c) *provide three different pricing models requested for 33%, 50% and 100% of the portfolio.*

16. *All of the scheme agents participated in this initial stage; however, in February 2017, CGU advised the Nominal Insurer of its intention to withdraw from the Selection Process.*

17. *Final submissions were received from Allianz, EML, GIO and QBE on 27 February 2017.*

18. *There were three tiers of decision-making embedded in the Selection Process – Management Advisory Committee, Selection Committee and icare Board. The Selection Process was supported by an external probity advisor, an internal probity officer and EY was engaged to provide independent facilitation of the documentation and scoring activities up to the conclusion of the Advisory Committee stage...*

19. *Assessment was undertaken based on information available at the time covering:*

- a) *past performance (performance data used against criteria) – 30%;*
- b) *NPS (customer experience), (performance data used against criteria) – 30%;*
- c) *future needs of Nominal Insurer – 30%; and*
- d) *pricing – 10%.*

20. Overall scores were as follows:

Figure 10: Post consensus Meeting (Weighted Score)

Element	ALZ	EML	GIO	QBE
Past Performance (Contract) - 30%	1.64	1.54	2.48	1.12
Net Promoter Score (NPS) - 30%	1.95	1.95	1.05	1.32
Future Requirements - 30%	1.81	2.15	1.96	1.60
Pricing – 10%	0.39	0.60	0.63	0.59
Total /10	5.79	6.24	6.12	4.62
Natural Ranking	3	1	2	4

21. With regard specifically to the Future Requirements section of the assessment, the following scores were recorded:

Figure 11: Post consensus meeting (Weighted Score)

Element	ALZ	EML	GIO	QBE
Customer framework	0.93	1.10	0.95	0.88
One scheme approach	1.02	1.26	1.10	0.83
Operating flexibility	1.00	1.31	1.12	0.93
Value creation	1.14	1.24	1.19	0.83

Figure 12: Post consensus meeting (Weighted Score)

Element	ALZ	EML	GIO	QBE
Accountability	0.95	1.14	1.05	0.86
Continuous improvement	1.00	1.12	1.14	1.00
Score /10	6.05	7.17	6.55	5.33
Weighted (30%)	1.81	2.15	1.96	1.60
Rank	3	1	2	4

22. EML (17% market share) and GIO (15% market share) were ranked first and second respectively in the assessment. As they both had the smallest Nominal Insurer market share, they were required to demonstrate the ability to scale up.

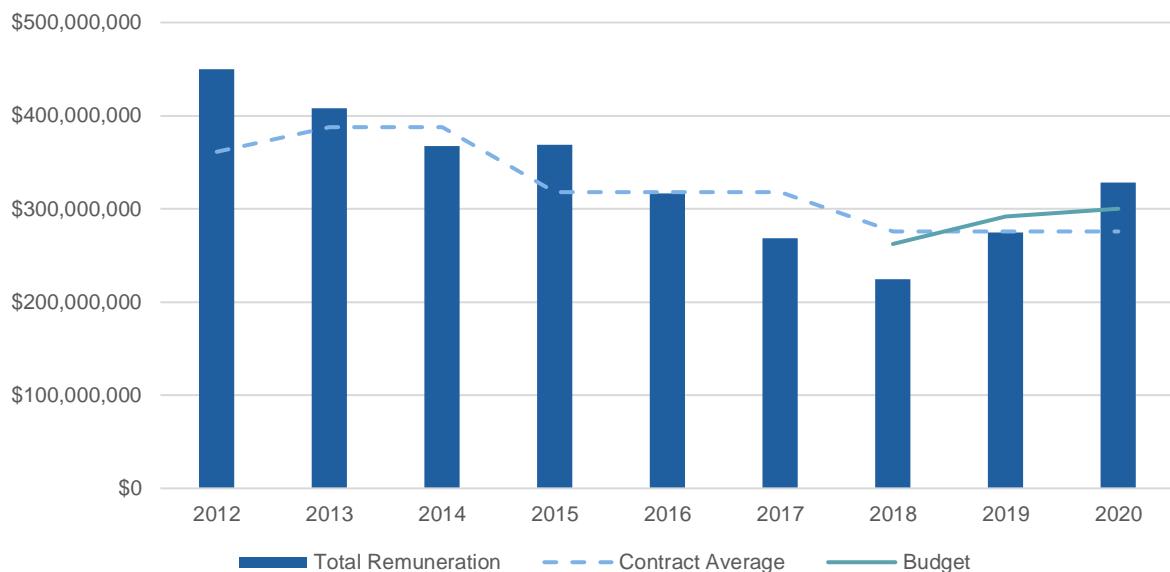
23. The Advisory Committee noted that EML had significant operations in NSW beyond the Nominal Insurer scheme and therefore greater capacity. EML had also recently undertaken a successful ramp-up in Victoria following their appointment by Worksafe Victoria.

24. The Selection Committee supported the recommended ranking of scheme agents made by the Advisory Committee. They considered a number of options with regard to the future needs of the Nominal Insurer scheme, and the optimum number of scheme agents involved. These options included in-housing the claims case management, a 1-agent model and a 2-agent model.

25. The Selection Committee arrived at the recommendation of a single agent model for new claims with a separate agent managing tail claims. It was expected that the variable cost per claim would reduce considerably as a result. The new operating model would enable additional claims handling

cost reductions through addressing synergies of scale, effective triaging and achieving automation.

Figure 13: Total remuneration excluding projects, reforms disengagement and temporary costs



26. The decision to appoint a single provider was made concurrently with the Selection Process, meaning that the information from the Selection Process was available to those making the decision on the Service Model.

27. Recommendations were put to the icare Board in a briefing paper, which included seeking approval for the CEO or his delegate to commence negotiations with EML as a single provider to provide 'NewClaims' service for the period 1 January 2018 to 31 December 2020. This was to maximise icare's ability to deliver quickly on its customer experience objectives and ramp up the Service Model, whilst maintaining control of customer experience design, triaging, IT systems and processes, financial management and culture. It also allowed icare optionality to bring NewClaims in-house in the longer term. The paper canvassed the risks and benefits of a 1, 2 or 3-Agent model.

28. Board approval was given to proceed with the recommended actions on 27 March 2017. The net effect was that icare adopted a 'NewClaims' / 'OldClaims' model, i.e. one provider managing new claims while another provider managed the tail portfolio.

29. EML was subsequently appointed to manage the NewClaims, and GIO was appointed to manage the OldClaims. Prior to the go-live date on 1 January 2018, PwC performed a comprehensive due diligence study to assess EML's readiness for go-live, with positive results.

267 That summary, with the exception of the implicit conclusion in paragraph 29, is supported by all the evidence that has been given to this Review, and I accept it as being substantially accurate. It follows, as I have said, that the decision to move to a single agent claims model for new claims, and the decision to appoint EML to perform that role, were not inherently flawed.

268 I do not agree with the conclusion expressed in the last paragraph of that summary. The testing was not adequate. It may have been '*comprehensive*' in that PwC performed the task that was given to it, but that task was not adequate to assess the extent to which EML could handle the ultimate volume of claims without the support of the Guidewire system. That cannot be a criticism of PwC, because the quality of PwC's performance can only be assessed against the instructions that it was given.

10.3 EML's performance of its role

269 It is clear, in hindsight, that EML did not have sufficient experienced claims management staff to enable it to provide the required level of service for the number of claims actually received. In fairness, that was known at the time; the expectation was that EML would be able to recruit the additional staff that it needed. Unfortunately, that expectation was not realised. The reasons have been discussed in connection with the first issue, above.

270 That failure was compounded by inadequate forecasting of claims volumes. The forecast of claims volumes produced by an independent consultant was arbitrarily reduced by icare. icare does not now seek to justify that arbitrary reduction (it may be noted that the person who was responsible for the decision to reduce the forecast claims volumes is no longer employed by icare). Nor is there anything in the material made available to my Review that could be regarded as justificatory of it.

271 Finally, for present purposes, the model assumed that the benefits of automation through the Guidewire system would be available either when the NCOM was introduced or very shortly thereafter. In other words, the decision taken by icare and EML as to the extent of the human resources required by EML assumed that the Guidewire system would be in operation and functioning as intended when EML started in its role as claims manager for new claims. That expectation was not realised. While some adjustments were made (including shortly before 1 January 2018), those adjustments were not sufficient to compensate for that absence.

272 In summary, two of the critical factors that had underpinned the decision to move to the NCOM and the selection of EML as the single claims agent for new claims, did not materialise in fact as at 1 January 2018.

273 The obvious consequence of the excessive burden placed on claims managers is burnout, leading to high rates of staff turnover. That is indeed what happened. EML was placed in the situation of seeking to recruit staff not only to reach the staffing levels necessary to handle the actual claims load but also to replace those who, through burnout or for other reasons, had left EML's employ.

274 The remuneration model under the Service Provider Agreement (SPA) dated 1 January 2018 between icare and EML was a cost plus model. icare commented on this model as follows:¹¹⁰

The EML SPA currently has a 'cost plus' remuneration model. icare has designed this model to address the findings of the Standing Committee inquiry into workers compensation and perverse remuneration incentives which found unacceptable pressure on injured workers. However, the model drove unintended behaviours. For example, resources were modelled based

¹¹⁰ icare, *Media Issues Response*, 25 September 2020, at Item 3 [34]

on caseloads and workloads. A ‘cost plus’ model meant there were disincentives to drive efficiencies or to cost claims.

- 275 The remuneration model did not prioritise return to work as a key objective. Indeed, incentive payments generally played a very small part in the remuneration model.
- 276 A new SPA has been negotiated between icare and EML. It commenced operation on 1 January 2021.¹¹¹ The remuneration model has been restructured to provide greater incentives to EML to achieve the primary objectives of the claims management scheme, namely, providing a level of service that meets the justified expectations of employers and employees and, whilst doing so, manages claims so as to ensure that safe and sustainable return to work is prioritised. In my view, that is appropriate at the level of principle. I have a concern that the 12 month period of the new contract with EML may be insufficient to enable a thorough assessment of the operation of its provisions and of the ability of EML to perform its obligations.

¹¹¹ EML, *Submission to the Independent Review*, 30 October 2020, 5

11 Management of medical services and costs

277 This issue relates to icare's management of medical costs. Media and parliamentary reports have alleged that icare, by failing to manage medical providers properly, has allowed the NI to be over-charged, and has not reined in alleged over-servicing.¹¹² These matters are said to have led to large increases in expenditure on medical costs, which in turn are said to have had an adverse impact on the financial viability of the workers compensation scheme.

11.1 Background

278 Medical costs make up approximately 30 per cent of the NI's total costs.¹¹³ icare¹¹⁴ and SIRA¹¹⁵ acknowledge that the NI's medical costs have increased materially in recent years. Medical cost inflation for the NI scheme exceeded levels of inflation in the economy generally by 8, 13 and 4 per cent respectively in 2016-17, 2017-18 and 2018-19 (although medical cost inflation was below the level of general inflation in 2019-20).¹¹⁶

279 icare accepts that there is some work it can do to improve the accuracy and control of medical payments. However, it submits that the great bulk of medical expense is driven by matters outside its control, including factors relating to the structure of the scheme. Those structural factors, and submissions for reform of medical expenses in the scheme, are dealt with in more detail in *Part 2*.

280 However, it must also be noted that the increase in medical costs has coincided with the period when return to work outcomes deteriorated. The Dore 2019 Report identified rising medical costs as one of the consequences of the widespread case management deficiencies identified in the Report.¹¹⁷ Ms Dore stated in that Report that *'It is clear that the medical inflation experienced by the NI is the result of medical utilisation by icare. This increase in utilisation and medical spend coincides with the introduction of the new claims model.'*¹¹⁸

11.2 Identifying the drivers of medical cost increases

281 Since July 2019, there have been a number of reports attempting to shed light upon the drivers of medical cost increases. They include:

- A July 2019 Ernst & Young (EY) Report (commissioned by SIRA), which found utilisation was the principal driver of the cost increase between 2016-17 and 2017-18, accounting for 60 per cent of the total increase.
- The Dore 2019 Report, as noted above.

¹¹² Sydney Morning Herald, *icare's systemic failures costing compensation giant billions*, 17 August 2020

¹¹³ Finity, Insurance Liabilities as at 30 June 2020 – NSW Nominal Insurer, September 2020, 5

¹¹⁴ icare, *Media Issues Response*, September 2020, 4 at [2]

¹¹⁵ SIRA, *Submission to the Independent Review*, November 2020, 18

¹¹⁶ icare, *Media Issues Response*, 4 at [2]

¹¹⁷ Janet Dore, *Independent Reviewer Report into the Nominal Insurer*, December 2019, at [10.1.2]

¹¹⁸ *Ibid* at [8.1.1]

- c) In late 2019, a Synapse Medical Services review (commissioned by SIRA ‘to understand scale of inappropriate health care payments in the workers compensation scheme.’¹¹⁹), which found that leakage throughout the system was 25 per cent compared to a global average for health system leakage of seven to nine percent.¹²⁰ These conclusions are disputed by icare, so far as they pertain to the schemes it manages.
- d) An April 2020 report by Quantum Health, commissioned by icare to help understand the drivers of medical cost increases. That Report’s finding was that 78 per cent of the increase in medical spend from 2015-16 to 2018-19 was due to ‘noncontrollable, systemic factors including growth in workers covered, longer claim durations and changes in injury mix’.¹²¹ It also identified some \$67 million of expenditure that was ‘potentially controllable’ through better claims management and systems controls on icare’s part.¹²²

282 Those Reports have now, to some extent, been overtaken by a more comprehensive review conducted by SIRA in May 2019 (the Healthcare Review).¹²³ That Review considered the findings of the EY and Synapse reports, and submissions from interested parties. SIRA now proposes to conduct further work, based on the findings of that Review, in an effort to address a number of the issues identified in that Report. This topic is explored in more detail at *Part 2*.

283 The Healthcare Review found evidence of healthcare cost leakage through:

- a) ‘over-servicing, payments for non-coverage, non-investigation of anomalous claims, overcharging and weaknesses in payment management’;¹²⁴ and
- b) breach of SIRA’s maximum fee levels and guidelines and ‘an anomalous provider and insurer behaviour when compared to peers (with potential over-servicing in the allied health services)’.¹²⁵

284 The Healthcare Review concluded that the primary drivers of rising healthcare costs were the extent of service utilisation, and the increasing number of claims in which the injured worker needed to access healthcare.¹²⁶ It noted there had been no contemporaneous improvement in RTW rates.¹²⁷

285 The Healthcare Review concluded:

Healthcare leakage, variation in administrative and billing practices and low-value care are several concerns that have been highlighted through the Healthcare Review.

¹¹⁹ SIRA, *Submission to the Independent Review*, November 2020, 19

¹²⁰ Ibid

¹²¹ Quantum Health, *Medical Costs Analysis*, April 2020, 2

¹²² Ibid

¹²³ The review was designed to determine how SIRA could: ‘better measure, monitor and regulate healthcare in the schemes; examine a value-based approach to healthcare; deliver, through SIRA’s regulatory powers, a financial sustainable, integrate healthcare approach across two systems, with improved health and return to work outcomes for people injured in workplaces and on the road.’ See State Insurance Regulatory Authority, *Healthcare Review Final Report*, December 2020, 3.

¹²⁴ State Insurance Regulatory Authority, *Healthcare Review Final Report*, December 2020, 10

¹²⁵ Ibid

¹²⁶ Ibid 14

¹²⁷ Ibid 10

The Nominal Insurer has experienced the highest growth in service utilisation of the insurer groups, however the growth rate in service utilisation for all insurer groups was notably higher than growth benchmarks from other healthcare funders.

This suggests that although the new claims model implemented by icare likely influenced growth trends in healthcare service utilisation and expenditure in the case of the Nominal Insurer, SIRA's analysis throughout the Healthcare Review has identified broader scheme-wide healthcare challenges outlined throughout this report which must be addressed to improve value in healthcare expenditure across the scheme and to promote the long-term sustainability and viability of the schemes.

In response to this, SIRA has increased monitoring and supervision of providers and claims, revised and tightened guidelines, and implemented webinars on good and best practice for the provision of certain services.¹²⁸

- 286 Consequently, SIRA identified a need to improve billing practices across insurers and providers, to strengthen controls over billing, and to simplify medical billing rules.¹²⁹
- 287 SIRA has commenced making changes to workers compensation fee regulation and approaches to fee setting. Those changes are intended to reduce the potential for billing errors, and to align fees to AMA rates.¹³⁰ Most recently, SIRA has proposed changes to the gazetted maximum surgical fees in the NSW workers compensation scheme, which presently exceed significantly maximum fees in other jurisdictions. SIRA proposes that these changes will take effect from 1 July 2021.¹³¹
- 288 The Healthcare Review's fee benchmarking exercise also identified that, for most medical services, the fees being paid in NSW for WC healthcare services were substantially higher than for other schemes, including WC and accident compensation schemes, in Australia. It follows, as SIRA has concluded, that there is a need for a comprehensive review of the NSW WC healthcare fee schedules.¹³² SIRA does however note that fee schedules represent maximum rates, and that in practice it is open to insurers to negotiate lower rates.¹³³

11.3 icare's actions to address medical cost increases

- 289 icare has advised this Review that it has '*taken steps to address service over-utilisation and has committed to increased oversight of health providers with particularly high spend or utilisation.*'¹³⁴ Those actions include:
 - a) improving the integrity of icare's payments system;
 - b) improving treatment approval systems, and procedures;

¹²⁸ SIRA, *Healthcare Review Final Report*, December 2020, 14.

¹²⁹ Ibid 16.

¹³⁰ SIRA, *Response to Part A and B McDougall report*, 13 April 2021, 5

¹³¹ Ibid

¹³² SIRA, *Healthcare Review Final Report*, December 2020, 18

¹³³ SIRA, *Response to Part A and B McDougall report*, 13 April 2021, 5

¹³⁴ icare, *Media Issues Response*, September 2020, 4 at [12]

- c) increasing the quality and extent of the training given to claims management staff on the management of medical and other healthcare services; and
- d) undertaking increased, targeted oversight of medical providers.¹³⁵

290 icare accepts there are some matters that are partly within its control to reduce medical expenditure. They include matters such as negotiating fees for medical and allied health services, and managing medical and allied health provider performance. However, icare also states that there are significant limitations on the extent to which, in practice, it can influence these matters.¹³⁶

291 I address the questions of regulatory and legislative change in *Part 2*.

292 It is clear that icare must bear some of the responsibility for the increase in medical costs that have affected the NI. As noted at above, the Quantum analysis shows that more effective action by icare on costs leakage could achieve significant savings (\$67 million in a single year being potentially controllable). It is also likely, as the Dore 2019 Report found,¹³⁷ that the broader deficiencies in the claims management operation from 2018 onwards will have been a contributing factor.

293 As is the case in some other areas considered in this Report, it is unclear what, if anything, icare did to control these issues as they became apparent. For example, it is not apparent whether any action was taken prior to 2019 to address potential medical costs leakage. I accept that the NISP, once operational and functioning properly, is likely to assist in managing some of the issues. However, it alone is not sufficient. It is, in my view, likely that icare's focus on external factors driving increase in medical costs has meant that it failed to give appropriate consideration to the management of factors within its own control.

294 Nevertheless, action is now being taken. In addition, there is a strong case in support of the proposition that there are areas where regulatory and legislative reform could achieve significant benefits, in terms of both outcomes for injured workers and financial sustainability. This is explored in *Part 2*.

¹³⁵ icare, *Media Issues Response*, September 2020, 4 at [19-30] and icare, Medical Costs Submission – Final, February 2021, 9-13

¹³⁶ icare, *Media Issues Response*, September 2020, at [38]

¹³⁷ Janet Dore, *Independent Reviewer Report into the Nominal Insurer*, December 2019, at [8.1.1]

12 Culture

295 icare's organisational culture has been subject to substantial media and parliamentary coverage. It has also become a particular subject of my Review. This is, at least in part, due to the identification of concerns about culture arising from the Dore 2019 Report, and icare's commitment, pursuant to SIRA's 21 Point Plan (which was responsive to the Dore 2019 Report), to conduct a culture, governance and accountability review.

296 In late 2020, icare commissioned PwC to conduct that review (the CGA Review), and it was conducted concurrently with my Review. While commissioned by icare, it was agreed that PwC would consult with and report to me (separately to icare), and that the results would be available to my Review.

297 The allegations in relation to icare's culture were made in broad terms, and include:

- a) The mistreatment of whistleblowers, in particular Mr McCann;
- b) That icare was resistant to oversight from Treasury and SIRA; and
- c) That icare has a toxic culture more generally.

298 For reasons of convenience, I will address the last of these first.

12.1 Alleged toxic culture

299 Before I examine this allegation, it necessary to set out what I mean by the term culture in this context.

300 The concept of organisational culture is somewhat diffuse. At a general level, it may be described as the values and behaviours that help to make the organisation unique. It includes, of course, explicit statements and values such as mission statements and the like, but it will go beyond this to include unwritten but shared attitudes, beliefs, customs and values. Organisational culture will be expressed in the way an organisation conducts its business and treats its employees, customers and the wider community; the way it allocates decision making rights and encourages personal expression; manages information flows; and the extent to which employees are committed towards the organisation's collective objectives.

301 The meaning of the expression toxic culture is self-evident: it is simply an organisational culture that, among other things, encourages or at least tolerates poor behaviours such as bullying, unjust and unlawful discrimination, disdain for rules and process, and unethical behaviour more generally.

302 The allegation that icare currently has a toxic culture, so understood, is not borne out by the evidence before me.

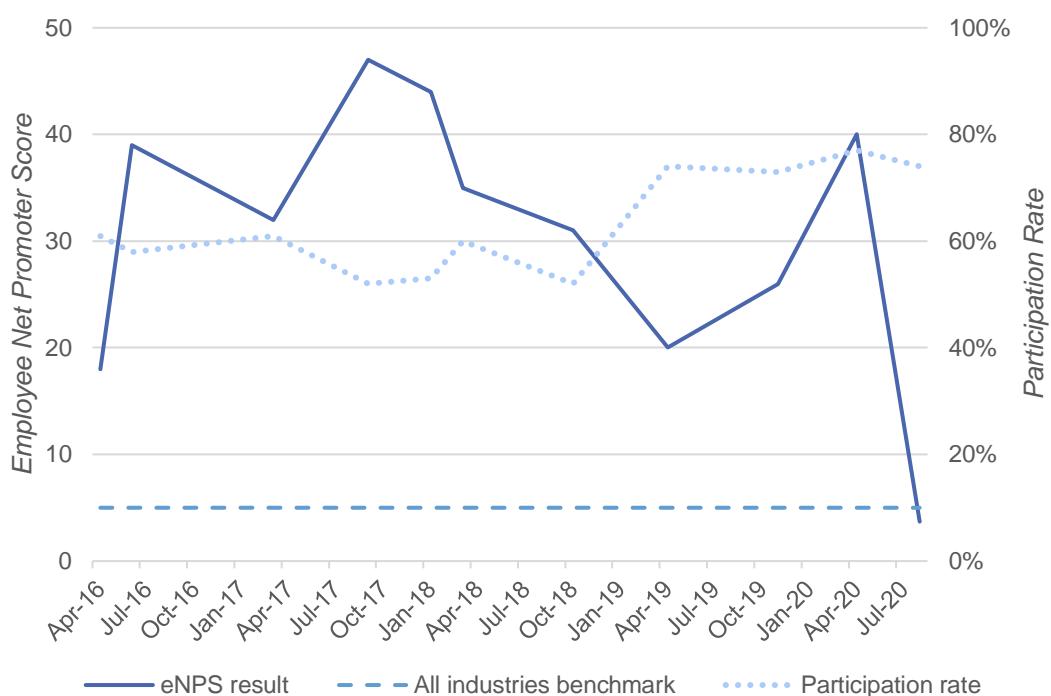
303 I received only four submissions from current or former employees at icare, including Mr McCann. To the extent that those submissions provided information as to, or commented upon, icare's culture, they referred to the early days of icare's existence. Those submissions were consistent as to the issues they raised. The existence of those cultural issues is supported by the findings of the CGA Review. However, those submissions do not provide any evidence to support a finding of the current existence of a widespread toxic culture.

304 The lack of submissions to my Review may reflect an unwillingness to come forward. I note that Unions NSW indicated that it was aware of employees within icare who had raised concerns about its culture, but were not able, or prepared, to provide further detail.¹³⁸ It should be self-evident that I am unable to draw any conclusions from an absence of evidence.

305 icare conducts eNPS (Employee Net Promoter Score) surveys and PMES (People Matter Employee Survey) surveys of its staff on a regular basis. These surveys are anonymous and include questions checking icare's culture. One would expect that if there were an ongoing toxic culture within icare, it would be reflected in the results of those surveys. It is not.

306 The eNPS survey is brief, but includes a simple question as to whether employees would recommend icare as a place to work. icare's results in the period April 2016 to August 2020 are consistently above average according to comparisons by the eNPS provider.¹³⁹ I note that the drop in July to August 2020 is an outlier, and may well reflect the impact of the adverse publicity then occurring.

Figure 14: icare Employee Net Promoter Score 2016-2020



Source: icare, *Media Issues Response - eNPS Survey Results*, 25 September 2020, at Annexure 5A

307 The PMES survey is more comprehensive, and is conducted across NSW government agencies. icare's overall scores between June 2016 and June 2019 were consistently above those of the public sector benchmark.¹⁴⁰

308 Specific scores for key areas of interest were perhaps more mixed but not, overall, particularly concerning. icare's 2019 PMES results show some low scores in relation to

¹³⁸ N Flores, *Interview with Unions NSW*, 16 December 2020, at Notes 4

¹³⁹ icare, *eNPS Survey Results - Annexure 5A to icare Media Issues Response*, 25 September 2020

¹⁴⁰ icare, *PMES Results 2019 - Annexure 5B to icare Media Issues Response*, 25 September 2020, 3

performance management and team co-operation.¹⁴¹ A lower than average proportion of respondents considered they had received appropriate training and development to do their job well,¹⁴² but a majority considered they had the support they needed to do their best.¹⁴³ More concerningly, however, in light of the need for changes, there appears to have been lowered confidence in the ability of managers to manage change.¹⁴⁴

- 309 Engagement scores were higher than or comparable to those of other public sector agencies.¹⁴⁵ 82 per cent of respondents agreed they could speak up and share differing views to colleagues and managers.¹⁴⁶
- 310 It is concerning that some employees said that they had witnessed wrongdoing at work, or did not know if they had, but notably 61 per cent who did witness wrongdoing had reported it.¹⁴⁷ Further, reported rates of bullying were lower than the public sector average (and comparable to the parent cluster average).¹⁴⁸ While there may be room for improvement, these results do not suggest that there is at present widespread toxic culture within icare.
- 311 The PwC CGA Review did not identify an inherently toxic culture within icare as a whole. The findings of that review do confirm the existence of cultural issues similar to those raised in submissions to this Review, and relevant to the broader organisational issues.
- 312 By way of example, the CGA Review noted that icare's '*commitment to vision*'¹⁴⁹ had contributed to the creation of blind spots in delivery and a '*prioritisation of speed over outcomes, process compliance and execution excellence*'.¹⁵⁰ It also led to staff becoming uncomfortable in raising timely challenges to, and '*complacency*'¹⁵¹ around, risks or issues. Similarly, '*[a]lignment seeking*'¹⁵² contributed to what was described as '*incestuous group-think*'¹⁵³ and avoidance of confrontation. PwC also concluded that staff within icare demonstrated '*tribe-like*' behaviours¹⁵⁴ and combative or poor behaviours which could limit the willingness of staff to speak up.¹⁵⁵
- 313 The CGA Review also confirmed a '*positive news bias*'¹⁵⁶ within icare, with a number of staff highlighting instances where challenges were raised with managers and

¹⁴¹ Icare, *PMES Results 2019 - Annexure 5B to icare Media Issues Response*, 25 September 2020, 5-6

¹⁴² Ibid 15

¹⁴³ Ibid 23

¹⁴⁴ Ibid 9

¹⁴⁵ Ibid 11

¹⁴⁶ Ibid 14

¹⁴⁷ Ibid 33

¹⁴⁸ Ibid 34

¹⁴⁹ PwC, *Independent review of icare governance, accountability and culture*, February 2021, 94

¹⁵⁰ Ibid 88

¹⁵¹ Ibid 96

¹⁵² Ibid 86

¹⁵³ Ibid 90

¹⁵⁴ Ibid 92

¹⁵⁵ Ibid 94

¹⁵⁶ Ibid 95

executive, but were downplayed or ignored.¹⁵⁷ This is consistent with the experience of Mr McCann discussed below, and suggests that icare has significant work to do to shift the culture and practices of the organisation.

314 There may still be areas within icare (as for any organisation) where staff experience inappropriate behaviour or difficult cultures. As I have noted, while I cannot and do not comment on specific instances raised in anonymous submissions, the existence of similar behaviour and cultural issues is supported by the CGA Review. Nothing that I have said so far diminishes the very significant cultural challenges identified by the CGA Review and elsewhere in this Report. However, there is no evidence before me to suggest that icare has a widespread or inherently toxic culture.

12.2 Treatment of whistleblowers

315 I turn to consider the more specific allegations in relation to the treatment of Mr McCann.

316 Mr McCann was employed by icare from July 2016 to August 2018 in the position of General Manager, Compliance. Mr McCann has given evidence to the SCLJ and to my Review that he identified or was informed of multiple concerns with probity, procurement and risk management, which he attempted to report to senior staff. Mr McCann says his concerns were neither addressed nor escalated to more senior management or to the Board. On the contrary, Mr McCann says, he was discouraged from investigating those concerns further.

317 A number of the concerns raised by Mr McCann have since been shown to have a basis in fact. They include concerns about the connection between Mr Tony Pescott and a company known as Perceptive; management of the Guidewire/Capgemini tender; and the occurrence of a number of thefts from icare in 2016 and 2017.

318 icare has been unable to confirm from its own records the occasions on which Mr McCann says he raised issues with senior staff. It could be said that the lack of records indicates that Mr McCann did not raise issues as he said he did. However, Mr McCann, who I note is an experienced former police officer, said that his practice was to keep contemporaneous diary notes of important matters. He has produced those notes. There is no reason to disregard them, and I do not. In my view, they provide strong confirmation of Mr McCann's evidence.

319 icare's lack of records, coupled with the apparent lack of any meaningful response to the concerns raised by Mr McCann, is troubling. It is of fundamental importance that any concerns of the kind raised by Mr McCann are recorded, referred to the proper area for investigation and (if substantiated) addressed appropriately. Mr McCann's experience shows that icare failed to record the concerns he raised or to treat them with the seriousness they deserved.

320 It ought to be made clear that the staff involved (i.e., those with whom Mr McCann says he raised his concerns) have since left icare. They have not had an opportunity to respond to my Review as to the issues that have been raised. Without that response it is neither possible nor appropriate to reach any conclusion as to why Mr McCann's concerns were not followed up. However, it remains the fact that, accepting as I do

¹⁵⁷ PwC, *Independent review of icare governance, accountability and culture*, February 2021, 94

that Mr McCann did act as he said he did, there is no record to show what was done in response.

- 321 The result, again accepting as I do the substance of Mr McCann's allegations, is that there was a delay in addressing his concerns, sometimes of several months and in some cases of years.
- 322 Further, icare missed opportunities to investigate Mr McCann's concerns when, subsequently, formal investigations were conducted. For example, in 2018 Mr McCann's broader allegations about practices at icare were brought to the attention of WorkDynamic, the independent investigators investigating his workplace complaints (see at paragraph [160 below](#)). However, icare excluded these broader concerns from that investigation. While icare took some steps to review and consider those allegations itself at that time, a number were not investigated fully. Some were closed, apparently due to a misperception of what had already been investigated.
- 323 I conclude that there was, in the period 2016-2018, an insufficient focus on complaint handling processes, record keeping and the importance of strict governance of procurement and probity practices (as to which see further at [16 below](#)).
- 324 icare has since commissioned a review of its response to the allegations made by Mr McCann. This is a positive step. It will assist icare to identify weaknesses in its systems, and to ensure that any errors are not repeated. That will require icare to ensure that its processes are effective in practice. This is of particular importance, given that icare had reporting arrangements during Mr McCann's period of employment that were clearly ineffective.
- 325 There have been a number of changes to icare's policies and procedures since Mr McCann left, as well as ongoing reviews and improvement programs. Key staff have since left. On 1 February 2021, icare launched a dedicated outsourced 'Speak Up' hotline to enable staff to report matters of this nature, and a system for feedback following an investigation to inform future behaviours and to ensure that lessons are learned.¹⁵⁸ If those improvements are utilised and maintained, and icare continues with its commitment to preventing the recurrence of the failures in process demonstrated by Mr McCann's evidence, there is reason to hope that icare may avoid repetition of those failures.
- 326 I turn to another very troubling topic involving Mr McCann. In 2017 and 2018, Mr McCann was subjected to a number of incidents of bullying and harassing conduct of a particularly outrageous nature. icare does not dispute that these events occurred, and in the interests of Mr McCann's privacy there is no need to set out their details here. Mr McCann alleges that these incidents commenced after he had made a Protected Interest Disclosure (PID), and that they were related to the efforts he had made to bring issues within icare to light.
- 327 Mr McCann also alleges the existence of more systemic bullying, exclusion and isolation at icare. These allegations were subject to an independent investigation by Workdynamic at the time, which found that there was insufficient evidence to substantiate them. Mr McCann did not participate in that investigation, although the circumstances in which he did not are disputed between him and icare.¹⁵⁹ It is neither appropriate nor possible for me to determine the truth of these allegations in the

¹⁵⁸ icare, *Response to Draft Parts Part A & B*, 9 April 2021, [37]

¹⁵⁹ icare, *Media Issues Response*, 25 September 2020 at Item 5, [38]

absence of a detailed investigation and response from those allegedly involved. However, I do note that such conduct is unacceptable. It is therefore necessary that icare ensures it has proper processes in place to guard against it.

- 328 It appears from the evidence before my Review that icare treated Mr McCann's organisational complaints as wholly separate to his workplace complaints. icare considered that harassing conduct to be '*unrelated to his PID*',¹⁶⁰ or more generally to the complaints he had raised. I must say that I do not understand how icare came to be convinced that these issues were unrelated.
- 329 Those points having been made, it remains the case that Mr McCann's experiences appear to be isolated. I have received suggestions that icare routinely moved on or paid out staff who raised complaints. There is no evidence to substantiate those suggestions, despite an independent investigation into the allegations.

12.3 icare's review of actions of QBE and Corrective Services

- 330 It is also relevant here to note icare's approach to the review of the actions of QBE and the Department of Corrective Services (discussed at [8.5 above](#)). Complaints about the management of the claims by QBE and the Department were lodged with icare in 2017. Those complaints alleged collusion and other serious misconduct by QBE and the Department. icare's response to those complaints has since been criticised, both in the media, and by SIRA's review of it.
- 331 On receiving the complaints, icare commissioned KPMG to carry out an independent review of the claims files. When KPMG was preparing drafts of and finalising its report, icare's employees had direct input into the report's contents and conclusions.
- 332 The changes made between various versions, apparently as a result of icare's input, had the effect of weakening some of the conclusions that had been expressed into the draft. Most notably, the report moved from a finding that QBE was complicit with the Department (the employer) to a finding of no evidence of fraud or collusion. SIRA noted, in its report, that icare '*may have compromised KPMG's independence and therefore impacted the findings of its investigation.*'¹⁶¹
- 333 icare, for its part, notes that the claim review was intended to be independent of QBE, not independent of icare, and that it was appropriate that its employees had input into the report. Mr Nagle stated that the changes arose because icare asked for matters of '*conjecture*' (which as I understood to him meant hearsay) to be disregarded.¹⁶² icare has since commissioned an independent review of the actions of its employees. That review found no breach of icare's code of conduct.
- 334 icare also conducted an internal review. That review found a number of deficiencies in claims management, including poor record keeping and evidence which could suggest that the employer was directing the investigation. icare did not disclose that review to either the workers concerned or to SIRA at that time. SIRA states that this hampered its ability to take appropriate regulatory action.¹⁶³

¹⁶⁰ icare, *Media Issues Response*, 25 September 2020, at Item 15 [34]

¹⁶¹ SIRA, *Report on the SIRA investigation into three Corrective Services workers compensation claims*, at 8

¹⁶² J Nagle, *Interview on 3 March 2021*, Transcript at 15

¹⁶³ SIRA, *Report on the SIRA investigation into three Corrective Services workers compensation claims*, at 8

335 Leaving to one side the behaviour of QBE and the Department, which I have already addressed, icare's handling of the complaint itself leaves much to be desired. In particular, when presented with an independent assessment which considered that there was evidence of possible collusion or other wrongdoing, the appropriate response ought to have been to notify the Board and SIRA, and to ensure that further investigations were open to both the regulator and to the workers concerned. That icare's employees did not do so is troubling. For icare to take no further action on KPMG's initial findings was a misjudgement of its moral obligations to the workers involved, and its duty to ensure that SIRA was fully informed.

336 It is not necessary for me to say anything further on this. SIRA has indicated that it intends to conduct a review into icare's complaints handling procedures for government self-insurers.¹⁶⁴ icare has stated that it has made changes to its contractual structures and oversight of scheme agents, although it is not clear if icare has changed its own approach to handling complaints of this kind.

337 SIRA's report also noted a concern that the structure of SI Corp and the arrangements between the TMF and the agencies created some ambiguity about the roles of various parties in a given claim. This ambiguity is addressed further in *Part 2*.

12.4 Alleged resistance to oversight

338 icare '*understands and acknowledges that there is a perception of resistance to regulatory oversight. To some degree, this perception is correct. icare has adapted, albeit slowly, to the role of the regulated entity...*'.¹⁶⁵ It described its relationships with NSW Treasury and SIRA as '*professional but complex*'.¹⁶⁶

339 icare accepts that its relationships with Treasury and SIRA have been historically difficult, although there is evidence they are now moving to a more productive approach.¹⁶⁷ I note that Mr Nagle¹⁶⁸ and Mr Carapiet¹⁶⁹ both say that they were unaware of any difficulty in the relationship with Treasury, but I accept icare's assessment of that relationship.

340 icare suggested that the legislative regime applying to it may have contributed to those difficulties. It submitted that:

- icare is a NSW government agency which does not fall within the purview of any one NSW department,¹⁷⁰ and
- as between SIRA and icare, many of the statutory functions contained in the enabling legislation were either not clearly articulated, or were assigned without amendment in other relevant legislation, resulting in a lack of common understanding of the actual functions of each entity.

¹⁶⁴ SIRA, *Report on the SIRA investigation into three Corrective Services workers compensation claims*, at 18

¹⁶⁵ icare, *Media Issues Response*, 25 September 2020, at Item 5, [5] and [47]

¹⁶⁶ *Ibid* at Item 5, [42]

¹⁶⁷ NSW Treasury, *Response to Independent Review*, 22 February 2021, 1; PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 83

¹⁶⁸ J Nagle, *Feedback on A & B of the Independent Review*, 13 April 2020

¹⁶⁹ M Carapiet, *Feedback on A & B of the Independent Review*, 13 April 2020

¹⁷⁰ icare, *Media Issues Response*, 25 September 2020, at Item 5, [43]

341 The operation of the SICG Act is addressed in detail at *Part 3*. The relationship between SIRA and icare is addressed in more detail at *17 below*.

342 I do not agree with the proposition that that icare is not '*within the purview of any one NSW department or cluster*'.¹⁷¹ While it is true that there is no legislated role for Treasury, icare is a NSW government agency under the oversight of the Treasurer. It is an unusually strict reading of the legislation to conclude that icare, an agency overseen by the Treasurer, is not, as a matter of practice if not of law, required to engage with the Treasurer's department. That is so if only because icare manages funds which are clearly within the purview of Treasury, such as the TMF.

343 It is of course possible that this is a further manifestation of a continuing theme of my review – that icare placed undue emphasis on commerciality at the expense of process. While there is no doubt that icare was intended to operate in a commercial way, separate from government, there must be some limits on how independent icare ought to be given its role within the workers compensation system.

344 icare now seems to accept that. In July 2020, icare agreed an engagement model with Treasury.¹⁷² Treasury considers that it now has a collaborative relationship with icare and that information flows have improved.¹⁷³

345 Media reports have referred to statements in Treasury documents (substantiated in evidence to this Review) to the effect that icare was '*resistant to the idea that a review [by Treasury was] needed*'.¹⁷⁴ It has been reported that Mr Carapiet had queried SIRA's budget and the reasonableness of the levy for it paid by icare at a time when icare was under pressure from the Dore 2019 Review. Mr Carapiet rejects the assertion that there was a link between the timing of his raising the matter with Treasury and the timing of the Dore 2019 Report. Rather, he has submitted to this Review, the matter was raised with Treasury following his unsuccessful¹⁷⁵ attempt to raise the matter with SIRA directly.

346 I accept that the functional independence of icare is important. I accept also that icare has a legitimate interest in ensuring that expenses paid out of the Workers Compensation Insurance Fund (WCIF) are reasonable. That having been said, these matters could be seen as consistent with icare's own acknowledgment that it has been resistant to oversight, and that it has taken time to adjust to being a regulated entity. It is to be hoped that the new approach that icare is taking to Treasury and SIRA will ensure that such concerns are handled differently in future.

¹⁷¹ icare, *Media Issues Response*, 25 September 2020, at Item 5, [43]

¹⁷² *Ibid* at Item 5, [5]

¹⁷³ Treasury, *Response to Independent Review*, 22 February 2021, 1

¹⁷⁴ Sydney Morning Herald, *Treasury ditched probe after CEO's gripes*, 29 July 2020

¹⁷⁵ M Carapiet, *Feedback on A & B of the Independent Review*, 7 April 2021, 1

13 Board governance and oversight

347 The effectiveness of the icare Board's governance and oversight is a recurrent theme in both the SCLJ hearings and in my Review. This theme comprises three more specific issues:

- poor oversight generally, given the volume of issues raised;
- failure to consider properly the Dore 2019 Report¹⁷⁶; and
- the Board's support for the former CEO, Mr Nagle, despite his failure to disclose a conflict of interest in the employment of his spouse.¹⁷⁷

13.1 Alleged poor oversight generally

348 Some reports have implied¹⁷⁸ that the very volume of issues now raised about icare is evidence that the Board did not effectively discharge its role in overseeing icare's management. It has been suggested, both in the media and directly to me,¹⁷⁹ that the Board lacked workers compensation experience and public sector governance experience,¹⁸⁰ and that this has hindered the Board's capacity to challenge management and hold it to account.

349 In considering these issues, I have had the benefit of considering a number of reports prepared over the years on the Board. icare commissioned two external reports on the Board: one in June 2017 by the Australian Institute of Company Directors (AICD), and one in 2020 by Challis & Company (Challis). Treasury commissioned Effective Governance (EG) to prepare a report on board and governance matters for the purpose of my Review. PwC's CGA Review also examined the role of Board.¹⁸¹

350 The AICD review made several positive findings about icare's governance, including:

- 'icare's governance accords with accepted standards of good governance practice', and 'there are no significant issues arising from this evaluation that would indicate the requirement for immediate remedial action by the board at this time'*¹⁸²; and
- In relation to board culture, the AICD found that '*there is a clear focus on outcomes with good challenge. Directors are observed at peer-level to be hard working and hands on. The group is described as displaying qualities of an effective team with compatible and complementary backgrounds and experience'*.¹⁸³

¹⁷⁶ Sydney Morning Herald, *icare needs a root-and-branch renewal*, 4 August 2020

¹⁷⁷ The Sydney Morning Herald, *icare needs a root-and-branch renewal*, 4 August 2020; The Sydney Morning Herald, *NSW Treasury received company's internal query before investigation*, 5 August 2020

¹⁷⁸ The Sydney Morning Herald, *icare needs a root-and-branch renewal*, 4 August 2020

¹⁷⁹ Effective Governance, *icare Governance Review*, December 2020, 19

¹⁸⁰ I should make it clear now that the latter comment is incorrect, as to icare's early years.

¹⁸¹ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, at 19

¹⁸² AICD, *Governance Review Report – icare*, June 2017, 1

¹⁸³ *Ibid* [4.1.1] 5

351 The AICD commented that '*the Chair's relationship with the CEO is observed to have a level of healthy tension*'. However, it also noted that '*...the Chair is seen by some to let the CEO run with matters that might otherwise be further challenged, however this needs to be balanced with the need to engender trust and demonstrate that the Chair and the board has confidence in management...*'.¹⁸⁴

352 The AICD report provided thirteen key recommendations for continuous improvement.¹⁸⁵ Four of those related to risk management, including a recommendation to split the single ARC into two separate committees. The AICD found that '*the risk management framework and supporting policies and procedures was rated amongst the lowest scoring statement by the board in the Board Review survey*'.¹⁸⁶ Other recommendations related to managing skills gaps on the board, and succession planning for the CEO.

353 In 2020, Challis found that the Board was '*effective ... in steering icare through substantive performance issues, which have justifiably necessitated the Board be operationally focussed*'.¹⁸⁷ icare's performance challenges were recognised, but in relation to the Board, Challis noted that '*with a strong diversity of industry experience, functional expertise and thought, the [Board] have been deeply committed to [icare] and have worked cooperatively, tirelessly and effectively on its behalf*'.¹⁸⁸

354 The CEO's position was highlighted as the most significant area of difficulty, with Challis stating that '*while the [CEO] has strong support from his direct reports, [the Board] no longer regard him as the right leader over the medium-term*'.¹⁸⁹ The CEO in question was Mr Nagle. Mr Nagle says that no member of the Board ever expressed that view to him, and that it was a total and shocking surprise when he learned of this allegation from media reports in 2020.¹⁹⁰

355 Challis also commented on risk management, with five of its twenty recommendations focusing either on risk or on the ARC.¹⁹¹ The skills of the Board were also covered in depth, with Challis recommending that '*the Chair should advocate for the appointment of a [director] with deep experience in workers compensation, particularly claims management*'.¹⁹² There were also four recommendations about improving the information flows to the Board.¹⁹³

356 icare's relationship with SIRA was recognised as problematic. Challis recommended that '*the executive should propose a way to improve – if not reboot – the relationship with [SIRA], based on an operational uplift in performance and recasting the dramatis personae who interface with the Regulator*'.¹⁹⁴

¹⁸⁴ AICD, *Governance Review Report – icare*, June 2017, at [4.1.2]-[4.1.3] 5

¹⁸⁵ *Ibid* at 2

¹⁸⁶ *Ibid* at [4.1.2]- [4.1.3] 23

¹⁸⁷ Challis and Company, *icare Board effectiveness review*, May 2020, 2

¹⁸⁸ *Ibid*

¹⁸⁹ *Ibid*

¹⁹⁰ J Nagle, *Feedback on A & B of the Independent Review*, 13 April 2021

¹⁹¹ Challis and Company, *icare Board effectiveness review*, May 2020, at Recommendations 1-3 and 18-19, 3

¹⁹² *Ibid* at recommendation 6, 3

¹⁹³ *Ibid* at recommendations 14-17, 3

¹⁹⁴ *Ibid* at recommendation 12, 3

357 The themes evident from these reports recur in the report prepared by EG for the purpose of my Review. Although that report was focussed on the present state of the Board, EG detected a number of historical concerns, including that:

- a) the Board's governance of the CEO has been deficient, and it has not always held past CEOs to account;¹⁹⁵
- b) the management of the CEO and senior management team is at a level which is surprising (and, I interpolate, not in a positive way) for an organisation of icare's size, complexity and importance;¹⁹⁶
- c) information flows have been dependent on the CEO at the time, including periods where information was "carefully managed";¹⁹⁷ and
- d) deficiencies in information flows to the Board have limited the Board's capacity to challenge management.¹⁹⁸

358 I note, in relation to sub-paragraphs (c) and (d) that Mr Nagle denied that information flows to the Board were managed or deficient. On the contrary, he said, icare's management made every endeavour to ensure that the Board and its committees were fully informed. Mr Nagle said that he received many comments from the Board about the quality of board papers following his appointment as CEO¹⁹⁹. I do not think this proposition can be accepted without serious reservation. Many directors have said, either to Challis or to me, that they did not think they were getting the full picture in management's reports; and some senior managers confirmed this to Challis.

359 Another point emerging from the various reports, and corroborated by other evidence, is the existence of a good news bias. That bias affected both reporting within management and reporting by management to the Board.

360 The CGA Review also observed a number of weaknesses in the Board's governance of icare. In PwC's view, the Board did not set a clear or strong enough '*tone from the top*'²⁰⁰ on: matters of risk; the importance of meeting NSW government agency compliance requirements; or on the need to build a co-operative and open relationship with the regulator. PwC also identified weaknesses in reporting that meant, in its view, that the Board had not always been properly informed, so as to enable it to provide strong oversight of management.²⁰¹

361 It is self-evident that the comment reported in [348 above](#) is justified. The number and nature of the issues identified in this Review suggest that, historically, Board oversight has been less than fully effective. I agree, therefore, with PwC's conclusion that, until about mid-2020, the Board did not set a strong enough tone from the top.

362 However, I stress that there is no evidence to suggest any wrongdoing by the Board. The Board's ability to take more appropriate, more timely or firmer action was undoubtedly hindered by the deficiencies in information flow that I have identified.

¹⁹⁵ Effective Governance, *icare Governance Review*, December 2020, at 25

¹⁹⁶ *Ibid*

¹⁹⁷ *Ibid* at 27

¹⁹⁸ *Ibid* at 28

¹⁹⁹ J Nagle, *Feedback on A & B of the Independent Review*, 13 April 2021

²⁰⁰ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, at 32

²⁰¹ *Ibid* at 19

Further, the scope of the work being undertaken by icare – the extent of the transformation it set out to accomplish - was in itself a challenge.

363 The good news bias to which I have referred appears to have been a significant factor affecting the Board's approach to a number of issues, including most particularly the implementation of the NCOM and the developing concerns over RTW.²⁰² I note that Mr Nagle²⁰³ and Mr Bhatia²⁰⁴ did not agree that there was any inappropriate good news bias. Mr Nagle contends, in relation to return to work, that the Board was kept informed through a number of regular reporting channels.²⁰⁵ I note, in contrast, that Board members at the time have informed me that they were not kept sufficiently informed of the cause or extent of the issues. The denials of Mr Nagle and Mr Bhatia fly in the face of a large body of evidence, and are not persuasive. I do not accept them.

364 In their interviews undertaken in the course of my Review, existing and former Board members stated that the Board would have benefited from the inclusion of members with more experience in the field of workers compensation insurance. Some considered that this was not a major gap. I note that until recently, the Board did have the benefit of Mr Lennon's experience in the area of workers compensation.

365 The Board had, but did not take, an opportunity to encourage management to take a more cautious approach to introduction of a new claims model. Although the Board was briefed on and approved the transformation, it is not clear that the Board was apprised of the scale of change from the existing practice, including specifically the new triage system, and the strict control and decision rights framework put into place. It is also unclear whether the Board was informed of the limits to the pilot testing that had been performed. If the Board was so informed, there is no indication of the basis on which it satisfied itself with the approach being taken.

366 It is generally accepted that workers compensation is a unique area of insurance. It involves a mandatory scheme governed by labyrinthine, complex and not always consistent legislation. The operation of that legislation has been the subject of frequent amendments. The details of practice and procedure are governed by regulations, guidelines and the like. It seems to me to be essential that the Board of icare should have at least one member with experience of workers compensation in particular, and not merely experience (important as it may be) of general insurance.

367 The system of workers compensation is important because of the obvious public interest in its effective operation. The stakeholders in the system include employers and employees. The latter category in particular are often ignorant of the details of the operation of the scheme; often bereft of practical or professional assistance in navigating their way through the scheme; and frequently vulnerable.

368 It seems to me that if there had been on the Board, at the inception of icare, at least one member with direct experience of workers compensation insurance and law and practice, the Board would have been in a better position to challenge and oversee the activities of management, particularly in relation to the implementation of the NCOM. Similarly, in my view, it is essential for the Board to have at least one member with substantial experience of public sector governance. I note that on icare's inception,

²⁰² PWC, *Independent Review of icare governance, accountability and culture*, February 2021, at 25

²⁰³ J Nagle, *Interview on 4 March 2021*, Transcript at 16

²⁰⁴ V Bhatia, *Interview on 1 February 2021*, Notes at 9

²⁰⁵ J Nagle, *Feedback on A & B of the Independent Review*, 13 April 2020

several board members had either direct public service experience or experience serving on public sector boards.²⁰⁶

369 icare has recognised the need for improvement. In a number of areas, such as procurement and probity, the Board has taken active steps and a more formal oversight role. I discuss the potential for further improvement in *Part 1B*.

13.2 Response to the Dore 2019 Report

370 A further allegation was that the Board did not respond quickly enough in considering and directing the implementation of the recommendations of the Dore 2019 Report.

371 Both management and the Board of icare were aware, from 2018,²⁰⁷ of SIRA's intention to conduct a review. They received updates on the progress of that review throughout 2019.²⁰⁸ The draft Report was made available to, and discussed with, the ARC as well as with icare's management.²⁰⁹

372 There is no doubt that icare's Board considered the findings of the Dore 2019 Report. There is no doubt that the Board has, for the most part effectively, monitored icare's progress in responding to SIRA's 21 Point Plan. There is however an exception: namely, the delay in commencing the culture review required by that Plan. Although it is clear that responsibility for implementing the review lay with management, the Board had an obligation to satisfy itself that management was responding to the requirement fully, appropriately and promptly.

373 There is a dispute between management and the Board as to where responsibility for the delay in implementing this aspect of the Review lies. I am unable to resolve that dispute or indeed to say anything other than that the existence of such disputes is unacceptable, and reflects adversely on both parties to it.

13.3 Response to Mr Nagle's conflict of interest

374 The issue raised is this. icare engaged Mr Nagle's wife as a contractor in early 2016. An independent investigation commissioned by icare in 2019 found that Mr Nagle was not involved in her engagement. She did not then report to him directly. There is no basis, in anything I have heard or seen, for a suggestion that there was even a scintilla of impropriety in her engagement.

375 As set out in more detail at *16.2.5 below*, Mr Nagle consulted with Mr Bhatia before his wife accepted the contract position. He received Mr Bhatia's approval for that appointment to proceed. However, Mr Nagle did not provide a written disclosure of the conflict of interest, nor record on a central register the steps taken to manage it. In part, this seems to reflect the incomplete state of development of policies and procedures at that time. I discuss this at *16.3 below*.

376 It was necessary for Mr Nagle to reassess the conflict when he was appointed interim CEO, if only because at that time, everyone in the organisation fell under his direct or indirect control. Although Mr Nagle made a number of declarations in 2018 in

²⁰⁶ icare, *Annual Report 2015-16*, 31 October 2016, 32-38

²⁰⁷ icare, *Submission to Independent Review– Board's consideration of the Dore Review Report*, September 2020, 1

²⁰⁸ In April 2019, May 2019 and June 2019. icare, *Submission to Independent Review– Board's consideration of the Dore Review Report*, September 2020, 2-3

²⁰⁹ icare, *Submission to Independent Review– Board's consideration of the Dore Review Report*, September 2020, 2

connection with his eventual appointment as CEO, he did not expressly inform the Board, or obtain its express consent for his wife to continue in her position. Nor did he confirm that his declarations had been brought to the attention of the Board by any other person. As it happened, the Board was not aware of the situation.

377 In 2019, the Board became aware, through two PIDs, that Mr Nagle's wife was a party to a contract with icare. The Board referred the matter to independent external investigation. That investigation concluded that that:

- a) there was no indication that Mr Nagle had been improperly involved in his wife's engagement as a contractor;
- b) the steps taken to structurally separate Mr Nagle from his wife's contract had not been formally documented and had not been wholly successful in ensuring full separation, although there were no findings of any intentional wrongdoing;
- c) there was no indication that Mr Nagle had intentionally misled the Board, and he had believed the Board was aware. However, he had failed to ensure it had come to the Board's attention; and
- d) the conflict had not been properly disclosed or recorded, in part due to decisions made by two other staff of icare to whom Mr Nagle had provided disclosures.

378 As a result, Mr Nagle and two others received sanctions from the Board. In Mr Nagle's case, this consisted of significant financial penalties through the loss of various bonus entitlements. He retained his position as CEO.

379 I consider that the Board's approach to this matter was within the range of appropriate responses. There was no evidence of any attempt to deceive; on the contrary, I accept that Mr Nagle genuinely believed the Board was aware. His duty, however, required him to ensure that the Board knew. His failure to do so was ground for sanction. Nonetheless, in the absence of deliberate wrongdoing, it was well within the Board's discretion not to terminate Mr Nagle's employment.

380 I accept also that the Board had good reason not to terminate Mr Nagle's employment. At that time, icare had experienced the disruption flowing from Mr Bhatia's resignation the previous year. The Dore 2019 Review was ongoing. icare was attempting to manage the significant difficulties arising from the introduction of the NCOM. The Board was entitled to have regard to the need for stability in leadership. In my view, it was open to the Board to conclude at the time that icare's best interests justified the retention of Mr Nagle as CEO.

381 I also note that the discovery and outcome of the investigation appears to have had an impact on the Board's confidence in Mr Nagle. By May 2020, Challis identified that '*while the [CEO] has strong support from his direct reports, [the Board] no longer regard him as the right leader over the medium-term*'.²¹⁰ Mr Nagle informed me that he was unaware of the alleged Board sentiment until it was reported in the media.²¹¹ Mr Carapiet has indicated that the views were not universally held by all Board members, although he said that '*some of the board members had lost more confidence than*

²¹⁰ Challis and Company, *icare Board effectiveness review*, May 2020, at 2

²¹¹ J Nagle, *Feedback on A & B of the Independent Review*, 13 April 2020

others ... Mr Nagle, I think, was keen to continue but I think some of the directors – and I think a majority of directors – wanted a change’.²¹²

²¹² M Carapiet, Standing Committee on Law and Justice, Legislative Council, Sydney, 1 December 2020, 4 and 6-7

14 Ministerial oversight

382 In contrast to the relationship with Treasury, icare has been accused of having an inappropriately close relationship with the Treasurer and his office.

14.1 Relationship between icare and the Treasurer

383 The Challis review commented on the close relationship between icare's then Chair, Mr Carapiet, and the Treasurer.²¹³ This, of itself, is not a matter of particular concern. The icare Board is required by its constituting legislation to report directly to the Treasurer. In doing so, it seems to me to be a matter of good governance that the Chair maintains a positive relationship with the Treasurer. The evidence before my review, limited as it is, does not identify any examples where that good relationship resulted in an improper outcome.

384 The Treasurer declined an invitation to be interviewed for the purpose of my Review. Accordingly, I do not have his insights into the quality of the reporting from icare, or as to the relationship between him, his office, and the Board and CEO of icare.

385 I requested and was provided with a sample of briefings to the Treasurer over the years of icare's operation. Those briefings are consistent with the good news approach identified elsewhere in this report. It is impossible to know what more might have been raised verbally during reporting sessions, and the extent to which (if at all) the Treasurer or his office challenged icare on its reporting.

386 PwC's CGA Review found that the briefings to the Treasurer were not routinely tabled at meetings of icare's Board.²¹⁴ PwC recommended that, in future, this should be done. I agree. The Board must know what is being reported to the Treasurer, so that it can be satisfied of the accuracy and adequacy of that reporting.

387 The contrast between icare's relationship with the Treasurer and its relationship with other oversight bodies is stark. It is however consistent with what I have found elsewhere, and what icare has admitted: that icare was resistant to oversight outside of what it saw as its strict legislative responsibilities.

388 Some media reports²¹⁵ suggested that Liberal party interests were over-represented in icare's Board and senior leadership. The implication apparently being either that Liberal party interests were being advanced, or that icare was receiving favourable treatment, as a result of those connections. No evidence was presented to me to substantiate those implications.

14.2 Secondment of Mr Yap

389 Questions have been raised as to the appropriateness of some secondments of icare's staff to the Treasurer's Office, most notably that of Mr Ed Yap. icare accepts that it did

²¹³ Challis and Company, *icare Board effectiveness review*, May 2020, at 26

²¹⁴ PwC, *Independent review of icare governance, accountability and culture*, February 2021, at 29

²¹⁵ Sydney Morning Herald, *icare awards \$18m in contracts to firm with extensive Liberal Party ties*, 7 September 2020

not properly manage Mr Yap's secondment. That was the result, icare says, of a 'lack of procedural awareness'.²¹⁶

390 icare has accepted that:

- a) the secondment was not compliant with the relevant requirements, particularly because Mr Yap was a contractor to icare, not an employee;
- b) this was the apparent result of a failure of icare's processes, which did not reflect the legal position; and
- c) icare has not been able to identify, from its own records who it was that had authorised the secondment.²¹⁷

391 icare admitted that it has never had a policy on secondments.²¹⁸ Despite this, icare identified some 16 employees and contractors²¹⁹ who had been placed on secondment: 11 to Treasury, and five to DFSI.²²⁰

392 icare was also unable to identify any documents which explained how Mr Yap's secondment came about. This again – the lack of records – reflects a pattern that became evident throughout this Review. Records are not available. Policies do not reflect a proper understanding of icare's legislative responsibilities. Although those issues appear to have arisen early in icare's existence, they were not corrected in later years.

393 Since icare was unable to explain from its own records the circumstances relating to Mr Yap's secondment, it directed my attention to the evidence of the Treasurer's then chief of staff, Mr Freitas, given to the SCLJ on 23 November 2020. What follows is taken from that evidence.

394 In October 2015, Mr Yap began working for the Treasurer's office as a policy adviser. At that time, he was directly employed in that position.²²¹ In his duties with the Treasurer's office, Mr Yap worked on issues relating to icare. Mr Freitas said that Mr Yap became interested in the idea of working for icare.²²²

395 In around August 2017, Mr Yap expressed that interest to Mr Freitas. Mr Freitas informed Mr Bhatia of Mr Yap's interest. Subsequently, Mr Yap was contracted by icare to work as a 'strategy manager'.²²³ That contract commenced on 1 August 2017. icare was responsible for Mr Yap's remuneration, and also paid for an iPhone and an iPad to be provided to and used by him.²²⁴

396 At Mr Freitas' request, once that contract was made Mr Yap was seconded back to the Treasurer's office as a Departmental Liaison Officer in order to complete some work

²¹⁶ icare, *Media Issues Response*, 25 September 2020, at Item 7 [17]-[18]

²¹⁷ NSW Treasury, *Supplemental Report on audit of staff hiring arrangements in Minister Perrottet's Office between 1 Sept 2015 – 10 Aug 2020*, 7 September 2020, 12 and icare, *Media Issues Response*, 25 September 2020, at Item 7 [16]-[18]

²¹⁸ icare, *Covering letter on "Ministerial engagements and secondments"*, 14 December 2020

²¹⁹ 2 contractors, Mr Yap and another already identified in media.

²²⁰ icare, *Letter from icare to Treasury – Spreadsheet Attachment*, 17 August 2020

²²¹ N Freitas, Standing Committee on Law and Justice, Legislative Council, Sydney, 23 November 2020, 6-7

²²² Ibid 9

²²³ Ibid at 10; icare, *Email*, 31 July 2017

²²⁴ icare, *Email*, 27 July 2017

then under way.²²⁵ That arrangement was expected to be temporary. It is said that a briefing note was prepared and exchanged between icare and the Treasurer's office. That document, if it ever existed, has not been located.²²⁶

397 Mr Yap did not in fact return to icare. In April 2019, his secondment was extended.²²⁷ It was extended again in early 2020 due to the impact of bushfires and the COVID-19 pandemic. icare did not provide any documents in relation to these extensions, other than a renewal of Mr Yap's contract in 2019.

398 In August 2020, Mr Yap ceased that secondment and resigned from icare,²²⁸ after his employment was questioned in the media and in a SCLJ hearing.

399 The matters of relevance to my review are threefold.

400 Firstly, icare lacked a policy in relation to secondments. I am informed that it suspended secondments until a policy was put in place.

401 Secondly, there is a question as to the extent to which secondments are an appropriate use of icare's funds. I accept icare's evidence that secondments can have value for it, as they do for other agencies, because they can work to strengthen appropriate connections between icare and relevant government. Of course, any such value assumes that the work being done has some connection to icare, and is not merely political work.

402 icare should ensure that any secondment policy assesses the value to it of any secondment. icare must also ensure that appropriate records are kept, and that any secondment complies with applicable rules or policies. icare has advised that the Board approved a new Secondments Policy on 29 March 2021. icare intends it to address the two matters that I have just emphasised.²²⁹

403 The third matter of concern is that icare continued to pay for an ongoing secondment for two years, under an otherwise temporary arrangement, without any apparent attempt to evaluate the situation or to ensure that the secondment had value for icare. This situation is unacceptable. It remains unexplained by icare.

²²⁵ N Freitas, Standing Committee on Law and Justice, Legislative Council, Sydney, 23 November 2020, 7, 11-12

²²⁶ Ibid

²²⁷ Ibid, 16

²²⁸ E Yap, *Resignation letter*, 17 August 2020

²²⁹ icare, *McDougall Review – Response to Draft Parts A and B of McDougall Report*, 9 April 2021, [49] 12

15 Executive Remuneration

404 Media and public scrutiny include claims of:

- substantial increases in executive remuneration in recent years;
- excessive executive remuneration generally, beyond the norms of the NSW public sector; and
- payment of substantial bonuses in years when performance of the organisation has appeared to be poor.

15.1 icare's remuneration policies and procedures

405 As icare points out, the provisions of the GSE Act do not apply to it.²³⁰ Instead, the CEO and GET are employed under contract, and there are no statutory limits on salaries payable to icare senior executives.²³¹ The Board is responsible for fixing the CEO's remuneration.²³²

406 icare makes remuneration decisions in accordance with its Executive Remuneration Policy. That policy is endorsed by the Board's People and Remuneration Committee (PRC), for approval by the whole Board.²³³

407 Staff other than senior executives are similarly not subject to the GSE Act. Since 2017, they have been employed either under individual employment agreements or under the *Insurance and Care NSW Award 2017*, a specialised award for icare employees which, according to icare, mirrors the relevant Crown employee awards.²³⁴

15.2 Increases in executive remuneration in recent years

408 Allegations in the media suggest that there has been a substantial increase in executive remuneration across icare's history.

409 An examination of figures reported in icare's explanatory note on transformation and staffing costs shows the following:

- The number of senior executives, including the CEO, GET and the Senior Leadership Team, increased from 38 in 2015-16 to 50 in 2016-17, increased further to 61 in 2017-18 but dropped subsequently and remained stable, with 51 in 2018-19 and 53 in 2019-20 (see figure below).

²³⁰ SICG Act, s 16; icare, *Media Issues Response*, 25 September 2020 at Item 8, [7] and [11]-[15]

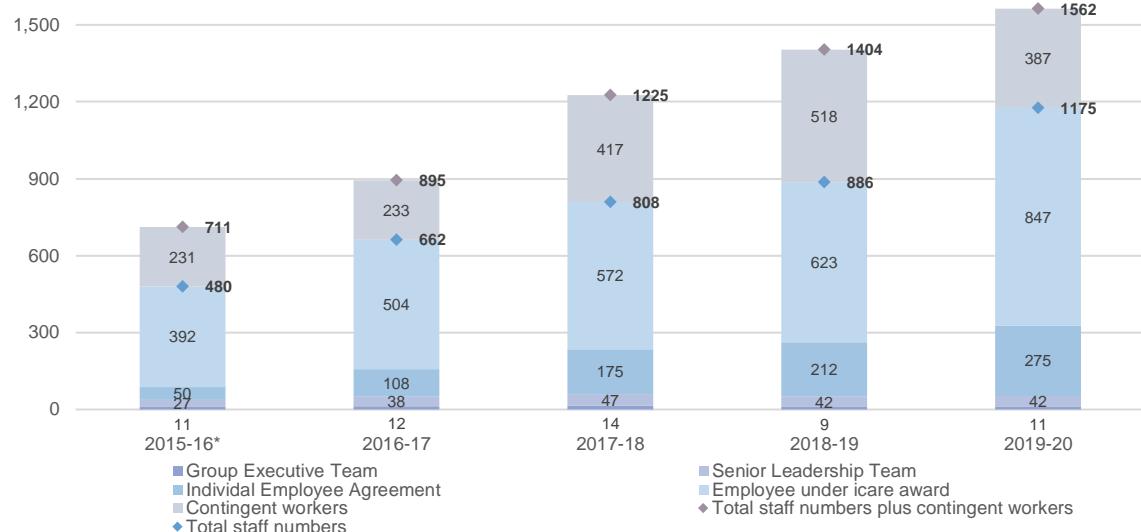
²³¹ icare, *Media Issues Response*, 25 September 2020, at Item 8, [7] and [11-15]

²³² SICG Act s 2(2)

²³³ icare, *Media Issues Response*, 25 September 2020, at Item 8 [14]

²³⁴ Ibid at Item 8 [10]

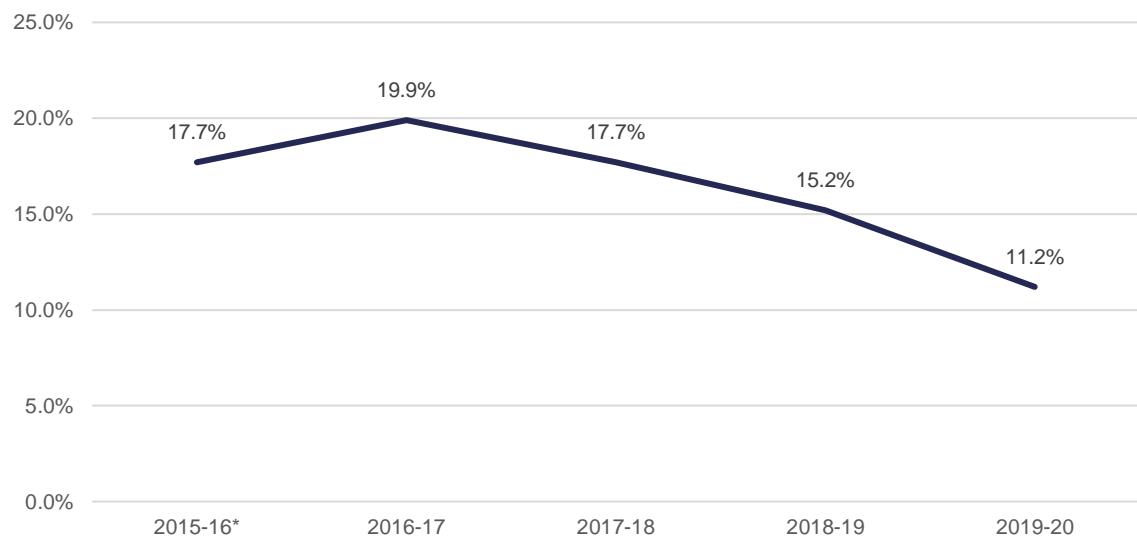
Figure 15: icare staff costs and staff numbers 2015-16 to 2019-20



Source: icare, *explanatory note on transformation and staffing numbers*, 24 February 2021, at [25] 7

b) Executive remuneration as a percentage of total staff costs has remained largely stable, with a slight increase in 2016-17 but falling to a low of 11.2 per cent of total staff costs in 2019-20. However, this reduction is mainly as a result of the substantial increase in staff numbers (see figure below).

Figure 16: Senior executive remuneration as a percentage of staff costs 2015-16 to 2019-20



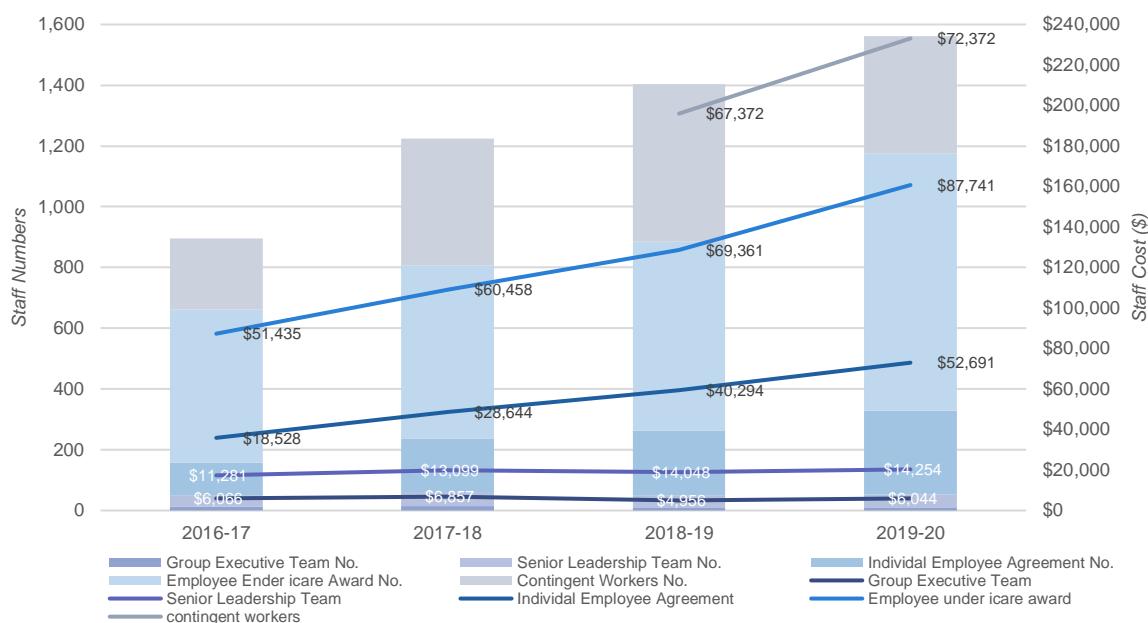
Source: icare, *explanatory note on transformation and staffing numbers*, 24 February 2021, at [24] 6-7

*2015-16 figures have been sourced from icare's 2015/16 Annual Report. ²³⁵ Note that staff costs does not include contingent workers.

²³⁵ icare, 2016-17 Annual Report, 31 October 2016, 54

c) The number of non-executive staff in icare has more than doubled, from 442 in 2015-16 to 835 in 2018-19, with a significant jump to 1,122 in 2019-20 (see figure).

Figure 17: icare staff costs and staff numbers 2016-17 to 2019-20



Source: icare, *explanatory note on transformation and staffing numbers*, 24 February 2021, at [24] 6-7. Note that 2015-16 figures have not been included in this graph as comparable figures were not available. However, 2015/16 total staff costs were \$63.6 million²³⁶ and executive staff costs are estimated to be \$16.7 million base of figures from icare's 2015/16 Annual Report.²³⁷ Costs of contingent workers were only provided for 2018-19 and 2019-20.

410 There were specific allegations in the media that:

- icare's 'total executive remuneration has increased from \$611,000 in 2015, to now almost \$18 million...';²³⁸
- in 2015, before icare was created, there were two people who had an average salary of \$305,000, whereas 'They [icare] now have 45 people, which is a 22-fold increase in the number of executives who receive on average, \$300,000';²³⁹ and
- the salaries of icare's top seven executives average around \$660,000.²⁴⁰

411 The quoted figure for the total amount of icare's executive remuneration is largely correct (icare's senior executive remuneration was \$19.0 million in 2018-19 and \$20.3 million in 2019-20).²⁴¹ However, the comparison made is not – it purports to compare icare to WorkCover only.

²³⁶ icare, *2015-16 Financial Statements*, 26 September 2016, 6

²³⁷ icare, *2015-16 Annual Report*, 31 October 2016, 54

²³⁸ Four Corners, *The financial scandal and human cost of Australia's failing workers compensation schemes*, 27 July 2020

²³⁹ The Sydney Morning Herald, 'Snouts in the trough' circle \$60b workers' compensation system, 27 July 2020

²⁴⁰ Ibid

²⁴¹ icare, *Explanatory note on transformation and staffing numbers*, 24 February 2021, at [24] 6-7

412 Precise comparison with remuneration levels in the predecessor organisations is not possible because icare was formed from several different organisations, for which complete salary reporting is not available. As noted by icare, a number of the predecessor organisations were NSW government departments subject to the limitations of the GSE Act.²⁴² This also limits the utility of comparisons of remuneration levels.²⁴³ Further, the new organisations created in 2015 are different in structure and purpose to their predecessors. As such, it would not be surprising in itself if there were differences in staffing numbers or remuneration.

413 In 2018-19, there were 45 senior executives in the equivalent of the public sector Band 2 or above.²⁴⁴ They had an average remuneration of \$302,517. This was substantially unchanged in 2019-20. In 2015-16, there were 33 senior executives equivalent to Bands 2 and above. Those equivalent to Band 2 had an average remuneration of \$295,123.

414 It is correct that in WorkCover, there were only two staff members who earned over \$300,000 in 2014-15²⁴⁵. However, there were 69 other senior executives.

415 In 2018-19, 7 senior executives were paid more than \$441,201, with an average of \$660,000. This dropped to 3 executives in 2019-20 who were paid more than \$487,051, with an average of \$579,413. The drop is attributable to non-payment of performance payments. In comparison, in the first year of icare's operation (2015-16), there were 3 executives earning more than \$441,201, with an average of \$706,333.²⁴⁶

416 icare submitted that since 2015, the organisation has significantly grown, requiring the creation of new senior executive roles which were not necessary in predecessor organisations. The information in icare's annual reports suggests that executive numbers and executive remuneration overall have remained comparatively stable.

417 Any comparisons to icare's predecessor organisations ought also to consider the approach to remuneration taken by icare, addressed below.

15.3 Alleged excessive executive remuneration, beyond the norms of the public sector

418 icare accepts that the remuneration of 'its Chief Executive and Group Executive Team (GET) is at the higher end of the NSW Government spectrum'.²⁴⁷ icare seeks to justify this by saying that '*[i]n order to stay viable in the insurance market and attract appropriate talent, icare offers competitive remuneration packages within its budget and Executive Remuneration Policy*'.²⁴⁸ In effect, icare aims to offer salaries which sit between public sector and comparable private sector organisations.²⁴⁹

²⁴² icare, *Media Issues Response*, 25 September 2020, at Item 8, at [20]

²⁴³ *Ibid* at Item 8, at [21]

²⁴⁴ icare is not required to pay executives in accordance with these bands, however they are required for reporting purposes.

²⁴⁵ WorkCover Authority, *Annual Report 2014-15*, at 138

²⁴⁶ icare, *2015-16 Annual Report*, 31 October 2016, 54

²⁴⁷ icare *Media Issues Response*, 25 September 2020, at Item 8 [1]

²⁴⁸ *Ibid* at Item 8 [16]

²⁴⁹ *Ibid* at Item 8 [16] – [21]

419 icare recently commissioned PwC to carry out an external benchmarking exercise for its executive remuneration. The results of that exercise were provided to my Review. PwC found that the fixed remuneration levels of icare's Group Executives were '*positioned towards the upper end of the market*' when compared with Government Business Enterprises (GBEs) and Government Owned Corporations (GOCs). Conversely, PwC found that icare's executive remuneration was '*typically ranked at the bottom of the role match group*' when compared with ASX300 listed insurance peers and ASX200 similar sized peers.²⁵⁰

420 Similar results were found in PwC's analysis of icare's total target remuneration. The report noted that there was '*a widening gap in competitive positioning against the listed organisations*,' which PwC attributed to limited short term incentives opportunities and lack of long-term incentives.²⁵¹ However, icare continued to be more competitive against the GBE and GOC peer group.

421 The position taken by icare is consistent with the analysis undertaken by this Review.

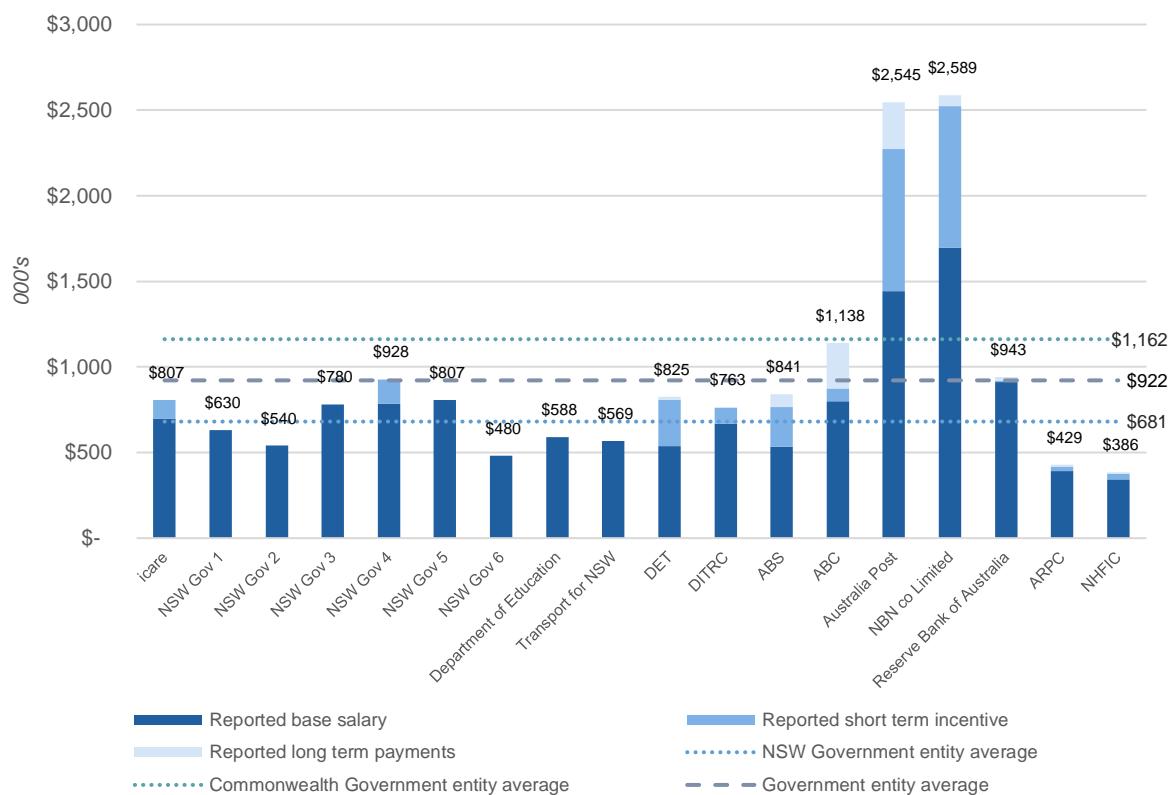
422 In considering whether icare executives are overpaid, the Review compared icare's senior executive remuneration packages from 2018-19 against three Australian private insurance organisations, and 17 public sector entities. It included both the CEO and second top paid executive for comparison.

423 The comparison of CEO remuneration packages carried out by this Review (see Figure below) found that icare was above the average NSW Government CEO remuneration package, which was \$681,000. However, it did not surpass the average public sector (Federal and NSW) remuneration package of \$922,000.

²⁵⁰ PWC, *icare executive remuneration benchmarking*, 15 December 2020, 4

²⁵¹ Ibid

Figure 18: CEO remuneration of selected Public Sector organisations (2018-19 actuals)



- 424 The comparison of second highest remuneration packages found that the package of one - Mr Craig - was significantly above the public sector average of \$589,000.
- 425 The potential bonuses available to icare's executives were significantly higher compared to other public sector incentive levels. Most public sector entities had either no incentive program or had an incentive program below 30 per cent of base salary. icare's bonus program had a potential of 50 per cent of base salary.
- 426 This overall conclusion continues to hold even when icare is compared on the basis of size of organisation. By proportion of revenue, icare's remuneration is comparatively low although this is likely to be due to the number of schemes operated by icare that have a large cumulative revenue stream.

Figure 19: Ratio of actual CEO remuneration to average employee related expenditure

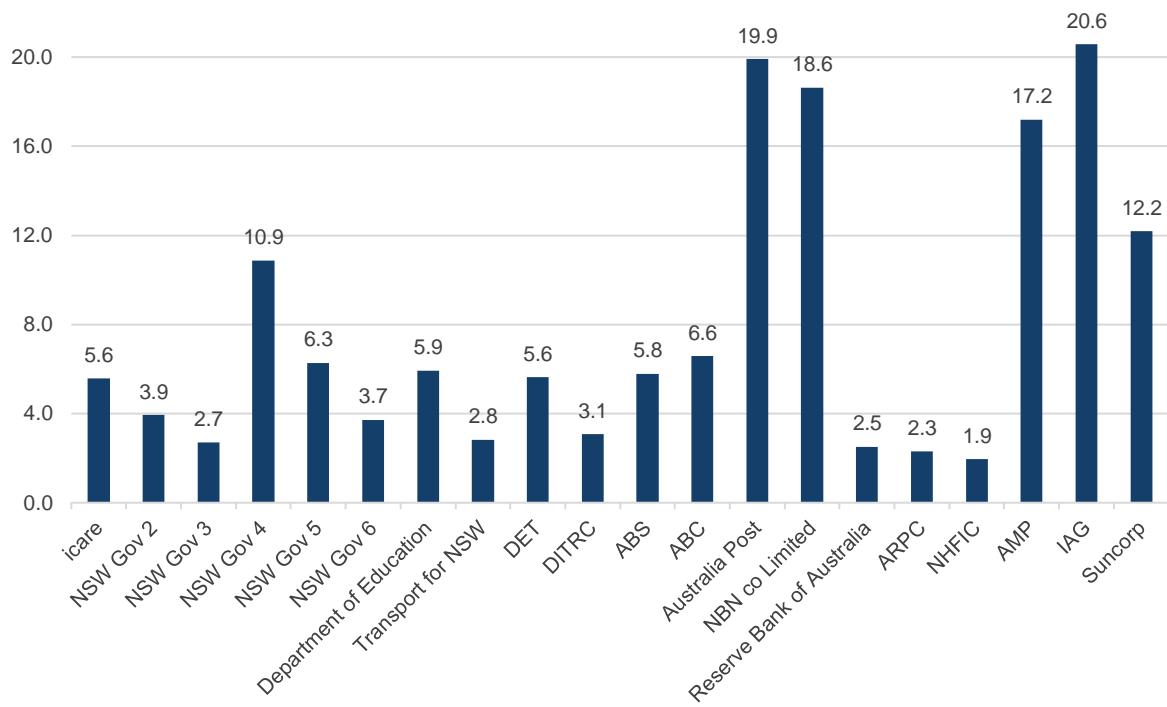
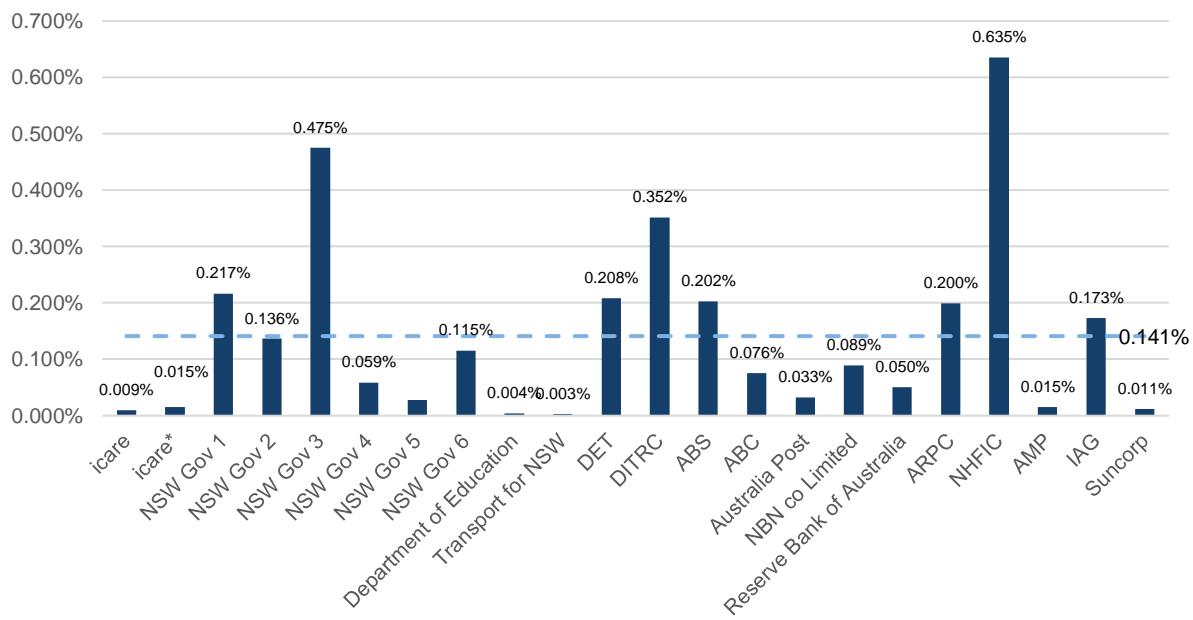


Figure 20: CEO reported remuneration as a percentage of their organisation's total revenue 2018-19



427 It is clear that icare's senior executives are paid above the average remuneration rate for the NSW public sector. However, the remuneration packages are not outliers. They are far below those for private sector insurance companies and some Commonwealth government entities. When one considers the size and purpose of icare and its responsibilities, icare's executive remuneration packages sit appropriately within the range of other public and private sector organisations.

428 This analysis does not include an assessment of executive remuneration in relation to its performance. It is difficult to compare performance, which is unique to each organisation. However, this factor should be considered by the PRC and Board when determining senior executive remuneration packages.

15.4 Payment of bonuses

429 The media have raised concerns regarding the payment of substantial bonuses in years when performance of the organisation has appeared to be poor. That alleged poor performance specifically relates to years in which RTW rates declined, and the solvency of the NI and the TMF suffered.

430 The issues of return to work rates and solvency are dealt with in more detail in [8.1 above](#), [18 below](#) and [19 below](#) respectively.

431 icare's remuneration structure involves both short term and long term performance payments. These are set, as discussed above, below bonus levels available in the private sector.²⁵² The bonuses paid by icare in each year are set out in the table below:

Figure 21: Percentage of the total potential annual performance payments paid to the CEO and GET, 2016-17 to 2019-20

	2016-17	2017-18	2018-19	2019-20	LTPPs ¹
%	90.5%	81.5%	62.3%	Nil.	\$386,667

¹Note: Long term Performance Payments (LTPPs) represents total payments awarded to executives in Group Executive roles at icare since 2015 or 2016. icare made its first LTPP in 2019 based off performance in 2016-17, 2017-18 and 2018-19. LTPPs were not awarded in 2020.

432 icare's approach to bonuses was stated as follows:

*icare has attracted media attention for paying bonuses when its organisational performance has appeared to be poor. However, the financial performance of each of icare's many schemes is not the only factor that determines whether [annual performance payments] are paid. icare takes a balanced scorecard approach to enterprise objectives and key performance indicators (KPI's), which cover not only it's [sic] many schemes and functions, but also matters such as employee engagement, customer satisfaction, collaboration and risk management.*²⁵³

433 Yearly performance payments are measured against the pre-set performance objectives 'and adherence to icare's values of integrity, courage, accountability, respect and empathy'.²⁵⁴ Long-term performance payments, which apply only to specific group executives, involve objectives over a three year period, as well as minimum risk management and behaviour expectations.²⁵⁵

²⁵² icare, *Media Issues Response*, 25 September 2020, at Item 8 [31]

²⁵³ Ibid

²⁵⁴ icare, *Submission to the Independent Review - 1(f) Executive Remuneration*, November 2020, at [28]

²⁵⁵ Ibid at [33]

434 The ‘objectives’ for the ‘scorecards’ are set at three levels:²⁵⁶

- a) Enterprise, which includes targets that reflect the whole of the organisation’s performance and apply to all executives;
- b) Functional, which reflect and apply to a particular section of the business (such as Workers Insurance); and
- c) Individual, which apply to an individual’s performance and a lower level of the organisation.

435 My Review was provided with the scorecards for each of 2016-17, 2017-18, 2018-19 and 2019-20 at the icare and service line levels, equivalent to the Enterprise and Functional levels referred to above.

436 In 2016-17:²⁵⁷

- a) The scorecard included measures of customer and employee satisfaction, both measured using NPS or eNPS scores.
- b) Financial measures were measured in expenditure compared to budgets, not scheme viability.
- c) RTW rates were neither an Enterprise level score, nor a service line score for Workers Insurance.
- d) In contrast, delivery of transformation milestones was an icare level objective. Of that, 50 per cent of the KPI was measured by delivery of the NISP. The milestones reached included, but were not limited to, the NISP and new claims operating model.
- e) Service line objectives included design of a new claims operating model and ‘*selection of a new partner for claims management*’²⁵⁸, as well as improvements in timeliness for medical treatment and meeting a target solvency ratio of 110 per cent.

437 In 2017-18²⁵⁹ (that is, the year of commencement of the new model):

- a) Transformation was again an icare level objective, and again 50 per cent weighted to the delivery of the “*claims NISP releases*” – that is, the completion of key phases of the NISP IT implementation project.
- b) The Workers insurance service line goals included ‘*reduction in return to work incidence by more than 5 per cent*’ and ‘*Improvement in sustainable return to work*’ by 5 per cent.

438 In 2018-19²⁶⁰, RTW rates were made a specific target for the Personal Injury service line, with a target of 80 per cent. In 2019-20, this became an icare target.

439 It is also relevant to note that ‘*the PRC also considers external market conditions and public expectations*’²⁶¹ when approving bonuses. icare gave the example that in 2019,

²⁵⁶ *icare Media Issues Response*, 25 September 2020, at Item 8 [30]

²⁵⁷ *icare, Performance Scorecard FY17*, 25 September 2020

²⁵⁸ *Ibid*

²⁵⁹ *Ibid*

²⁶⁰ *Ibid*

²⁶¹ *icare, Submission to the Independent Review - 1(f) Executive Remuneration*, November 2020, [31]

a number of senior executives did not receive a significant portion of a performance payment. That reflected what the PRC considered to be their failure to manage in a proper way the conflict of interest relating to Mr Nagle's wife's contract. Similarly, bonuses were not awarded in 2019-20 in recognition of the impact of COVID-19.

440 It was open to the PRC and Board to consider broader factors in years when enterprise scorecard results were positive but when there were more fundamental performance problems, particularly in relation to Workers Insurance. By the end of 2018-19, it either was or should have been apparent that performance in the NI, particularly in relation to RTW, had materially deteriorated. No information has been presented to this Review that suggests that the Board considered this when awarding 62.3 per cent of available annual performance payments and substantial long-term performance payments.

15.5 Comment on executive remuneration

441 The SICG Act gives icare significant control over executive remuneration. Section 14 of the SICG Act provides that:

ICNSW is authorised to employ such staff as it requires to exercise its functions. The provisions of the Government Sector Employment Act 2013 relating to the employment of Public Service employees do not apply to the staff employed by ICNSW.

442 icare is not unique in having this exemption from the GSE Act. State Owned Corporations and TCorp have the same exemption.²⁶²

443 It is logical to conclude, as icare suggests,²⁶³ that the exemption embodies a deliberate policy decision to allow icare significant control over its executive remuneration policies, and to allow it to pay remuneration that exceeds public service levels. Once that is accepted (as I think it should be), the analyses set out above show that icare's executive remuneration is not excessive.

444 However, as in other aspects of this Review, there is a clear tension between the policy decision to allow icare to operate outside of the constraints of the public sector, and the circumstance that it administers public benefits schemes and is funded entirely through a combination of premiums from government-mandated insurance (for example, in the NI and Lifetime Care and Support schemes) and general taxation (in the TMF, provided indirectly through agency contributions).

445 icare submits that it has increased the transparency of its executive remuneration through:

- itemised disclosure in its annual report for the CEO and each of the GET; and
- publication of the remuneration of the CEO and GET on its website.²⁶⁴

²⁶² *Government Sector Employment Act (No 4) 2013 (NSW)*, sch 1

²⁶³ icare, *Media Issues Response*, September 2020, Item 8 at [8]

²⁶⁴ *Ibid* at Item 8 [38]-[39]

446 That reporting approach, which was adopted in icare's 2019-20 Annual Report²⁶⁵, goes beyond the strict legal obligations imposed on icare²⁶⁶. It is an encouraging sign of greater transparency and accountability. icare is now one of the very few government agencies that go beyond those strict legal obligations.

²⁶⁵ icare, 2019-20 Annual Report, at 123

²⁶⁶ Set out in the *Annual Reports (Statutory Bodies) Act (No 87) 1984* (NSW)

16 Procurement Practices and Management of Probity issues

447 Given the similarity and substantial overlap of these issues and their causes, it is convenient to deal with them together.

448 Many allegations in the media, and many issues raised by the SCLJ, related to icare's procurement practices and management of probity issues. Those allegations can be grouped under the following broader themes:

- a) Poor or ineffective management of conflicts of interest, such as
- b) Awarding of contracts to companies where icare staff or board members have conflicts of interest;
- c) Use of outsourced providers to procure services, so as to avoid disclosure of conflicts of interest;
- d) Failures to document conflicts of interests in relation to procurement exercises;
- e) Failure to declare conflicts of interests in relation to the employment of related parties; and
- f) Failures to disclose and manage conflicts of interest generally.
- g) Poor or ineffective management of gifts and benefits, including
- h) Accepting gifts, in the form of travel, from suppliers; and
- i) Failures properly to declare gifts.
- j) Insufficient thoroughness and robustness of procurement exercises for large contracts, including in managing conflicts of interest; and
- k) failure to comply with *Government Information (Public Access) Act 2009* (GIPA Act) requirements to disclose contract awards in a timely manner
- l) Excessive use of the NI's exemption from NSW Procurement rules to avoid procurement controls; and
- m) Publicly endorsing suppliers when their performance might not have been satisfactory.²⁶⁷

449 A number of more specific allegations were made under these general themes. Those allegations were numerous, and I do not propose to deal with them all in the body of this report. A table of them and of icare's responses is annexed at [Appendix 1](#).²⁶⁸

450 For the most part, icare does not dispute that the specific events or process failures, the subject of the allegations, occurred. In general, icare acknowledges that its procurement practices in respect of these matters were inadequate, even if strictly within icare's powers. The relevant point for my review is what, if anything, these

²⁶⁷ There is no dispute this endorsement was given – see icare, *Media Issues Response*, September 2020, Item 9 [59-63]. icare, and Mr Nagle, have told me that they considered Guidewire's performance to be satisfactory. While the giving of the endorsement was ill-advised and serves as an example of icare's application of a 'commercial mind', it does not otherwise add to my comments on icare's approach to probity and procurement

²⁶⁸ Each of these issues has been considered in the course of my review. Where the issues do not assist in understanding the historical or contemporary organisational concerns of icare, I have not dealt with them in detail in this report.

matters say about icare's past approaches to procurement and probity, and whether the causes of any failings have been addressed.

- 451 A number of the allegations, although of considerable interest to the public and to parliament, did not reflect on icare's practices generally. As I have done elsewhere, I propose to address only those matters which shed light on the organisational aspects of icare. Each of the matters raised in the media has been considered, but to the extent they do not contribute anything more to the understanding of systemic issues, I do not deal with them in detail.
- 452 The facts in relation to the relevant allegations demonstrate that icare historically lacked effective focus on the proper governance of procurement and probity. There is a consistent pattern of poor recordkeeping in relation to procurement and probity matters. That has made it difficult for icare to demonstrate that it followed good practice, and achieved sound outcomes.
- 453 I accept, as I have said elsewhere, that there was an organisational focus on getting things done; what icare have termed a '*transformational*' approach. That focus was accompanied by, and indeed is likely to have induced, an understanding within icare that the NI exemption meant that icare did not need to follow sound procurement practices. In my view, this attitude contributed to a failure to ensure that sound practices and procedures were embedded within icare.
- 454 Most of the matters brought to the attention of my Review arose during the early part of icare's existence. However, there was little change in attitude in later years even though processes had been put in place. The involvement of the CEO and other senior officers of icare ought to have ensured that appropriate practices were instituted and observed. It did not do so. Those people appear to have drunk too deeply of the Kool-Aid of '*transformational focus*', and as a result to have paid wholly inadequate attention to process.
- 455 Mr Nagle asserted that icare undertook constant reviews and efforts to address its probity and procurement practices, and to develop better practices. For the reasons that I have given, and for the reasons that I give in *Part 1B*, I do not think that this assertion can be taken at face value. The breakdowns in process that recurred all too frequently during the first four years of icare's existence tell otherwise.
- 456 icare now accepts the value and importance of sound procurement and probity management systems and practices.²⁶⁹ These matters have in part been addressed by a new set of policies and procedures, and by a renewed focus on training and cultural change as discussed in *23.1 and 23.2 below*. However, as noted there, some concerns remain. There is a significant amount of work still to be done to embed these new systems and to ensure that icare's culture properly supports them.

16.1 Guidewire/Capgemini procurement

- 457 On icare's establishment in September 2015, it was (in icare's own words) '*an immature organisation without adequate risk and procurement practices embedded. As a result, its procurement practices were inconsistent.*'²⁷⁰

²⁶⁹ icare, *Media Issues Response*, 25 September 2020, at Item 10 [30]

²⁷⁰ *Ibid* at Item 9 [5]

458 The process of developing and formally approving policies and practices took a number of months. icare's first Gifts and Benefits policy, Travel policy and Procurement policy were approved in May 2016,²⁷¹ and its Conflict of Interest policy was approved in November 2016. When developing those policies, icare deliberately, and to the knowledge of the Board, took steps to transition to becoming what it called '*principles-based organisation*',²⁷² rather than to use prescriptive policies. As will be seen, this did not result in the adoption and observation of sound and proper practices. icare has since attempted to move away from that approach.

459 It is unsurprising that the development of policies took some time after icare's was established, given the short timeframe provided for icare to devolve from SRWS to operating as a stand-alone organisation. However, as a result, a number of significant contracts were let before appropriate procurement policies were in place.

460 The tender process which led to the contracts with CapGemini and Guidewire for the NISP is of particular significance, both in its demonstration of a deficient approach to procurement in icare's earliest stages, and because it is so closely linked to the introduction of the NCOM.

461 That process commenced, and was largely completed, under the auspices of SRWS. It should be remembered that a number of key icare personnel, including Mr Bhatia and Mr Nagle, had held positions in SRWS similar to those which they held in icare when it commenced operations.

462 The process by which Capgemini was appointed was as follows:

- a) In 2014, SRWS commenced work on technology options which would eventually lead to the NISP project.
- b) In March 2015, SRWS engaged Capgemini to develop the business case and identify potential vendors.
- c) In June 2015, PwC's Strategy& [sic] prepared a procurement strategy including identifying potential vendors.
- d) In July 2015, an Invitation to Register Interest was published. It remained open for five days. Seven responses were received. Four respondents were shortlisted.
- e) In August 2015, three respondents were issued with a Request for Proposal and provided 14 days to respond (later extended to 17 days).
- f) Of the three, only one submitted a response to the Request for Proposal (RFP). One stated explicitly that it was not responding because insufficient time had been provided for response.²⁷³
- g) By October 2015, icare's Board approved the business case, and was aware that icare intended to proceed with the Capgemini and Guidewire proposal.

²⁷¹ icare, *Media Issues Response*, 25 September 2020, at Item 10 [1]; icare, *Submission to the Independent Review - 1(h) Procurement Practices*, November 2020, [11]

²⁷² icare, *Board minutes*, 30 November 2015, 1.2.5 at 5; icare, *Briefing for RCAC meeting*, 24 May 2016, 1

²⁷³ Fineos, *Director Sales and Marketing letter to Don Ferguson*, 5 August 2015

463 NSW Treasury engaged RSM to assist my Review by advising on a number of probity and procurement matters, including by conducting a deep dive into the Guidewire/Capgemini procurement and others.

464 RSM expressed material concerns about the procurement process for this contract, particularly the inadequate time allowed for tenders. RSM said that '*This fundamentally compromises the probity and integrity to the transaction and ability for icare to obtain a value for money outcome*'.²⁷⁴

465 RSM concluded that the tender was not competitive, had '*inadequate documentation around how conflicts were managed*' and that there was generally a lack of overall documentation.²⁷⁵ I note that icare relied on the NI exemption to conduct this procurement. I discuss that exemption at [16.5 below](#).

466 These problems were known to icare at the time. It had engaged Procure Group to conduct a '*health check*' on the procurement process.²⁷⁶ In August 2015, Procure Group raised several issues, including:

- a) that the time in the market for the RFP was 'exceptionally short';
- b) that '*vendors had commented to the NI that the tender period was challenging*'; and
- c) that there was a need to ensure that the CEO's role in the decision-making process did not affect the accountability of the evaluation committee and steering committee as set out in the Evaluation Plan.²⁷⁷

467 A further report by KPMG at the close of the tender process also highlighted a number of risks and issues.²⁷⁸

468 icare's response on this issue said that:

- a) the issue was considered in a review conducted by Procure Group, which noted that '*[t]he RFP period is very short (2 weeks) when compared to other procurements of complex systems of high value. In discussions with the [Nominal Insurer], it has been advice that the software solution is likely to be predominantly "off the shelf" and already in operation in the marketplace*'; and
- b) a principles-based policy that was in place at the time (and until December 2018) did not include guidance on tender response times.²⁷⁹

469 Neither of these responses addresses the fact that only a single response to the RFI was received. That was a matter which ought to have put icare on notice that the timing was inadequate. Nor do those responses address the concerns identified by Procure Group.

470 Mr Bhatia, the former Chair Mr Carapiet, and the former Deputy Chair Mr Bell, said that the NI was not required to comply with any specific tender timelines;²⁸⁰ that the

²⁷⁴ RSM, *Independent Review of icare – Probity and Procurement*, March 2021, 4

²⁷⁵ Ibid

²⁷⁶ Ibid 21

²⁷⁷ Ibid 22-25 and Procure Group, *Insurance Platform Contract – Health Check Review of Procurement Documents*, 2 September 2015

²⁷⁸ RSM, *Independent Review of icare – Probity and Procurement*, March 2021, 22

²⁷⁹ icare, *Media Issues Response*, 25 September 2020, at Item 9 [73]-[74]

²⁸⁰ G Bell, *Interview*, 24 November 2020, Transcript at 12: Q47; V Bhatia, *Interview*, 1 February 2021, Notes at 6

market had been aware that the tender was coming; and that there were advisers appointed to manage the process. Mr Bhatia and Mr Carapiet went so far as to say that, ultimately, the result would have been the same.²⁸¹

471 I do not accept, let alone agree, that the result would necessarily have been the same had the market been properly able to respond. After all, the whole purpose of a properly conducted tender process is to assess the market: to compare products, prices, and other relevant criteria. RSM's comments support my view. RSM said that the result of the tender process was that '*the baseline or starting value was never market tested due to the lack of alternative submissions*'.²⁸² Thus, RSM concluded that it was '*unable to determine whether the procurement achieved value for money*'.²⁸³

472 That the timelines were '*exceptionally short*'²⁸⁴ ought to have been obvious to all involved. It is entirely unclear why icare continued with the tender despite the concerns raised by Procure Group and the withdrawal of other tenderers. While Mr Carapiet and Mr Bell were briefed on the NISP, RSM could not confirm from the records available whether the Procure Group report, or any other matter raised by the external advisors, was provided to the Steering Committee, the CEO or the Board. RSM was also unable to conclude whether the procurement followed the processes set out in the documents prepared by those advisers.²⁸⁵

473 Overall, the procurement process adopted for the Guidewire/Capgemini tender, and the attitude expressed by former senior leaders of icare, demonstrate an issue that recurs throughout this Report: that the outcome was of primary importance, and that process was at best secondary. Indeed, it is open to conclude that, in this case, process was seen as an impediment to achieving a predetermined outcome. Mr Bhatia denied that was the case. However, in my view the totality of the evidence is sufficient to support that conclusion.

16.2 Conflicts and gifts and benefits

474 Another recurrent theme in media reports and in the SCLJ was that of managing probity matters, such as conflicts of interest and gifts and benefits. Again, it appears that there were clear failings in process, particularly prior to 2019.

16.2.1 Guidewire/Capgemini procurement

475 There was a process in place to declare conflicts of interest in respect of the Guidewire/Capgemini procurement. However, when RSM considered this procurement, it said that '*due to a lack of documentary evidence, [it was] unable to conclude whether any conflicts were declared or recorded or if declared how they were managed*'.²⁸⁶

²⁸¹ G Bell, *Interview*, 24 November 2020, Transcript at 12-13: Q49-53; M Carapiet, *Interview*, 24 November 2020, Transcript at 3: Q53; V Bhatia, *Interview*, 1 February 2021, Notes at 6

²⁸² RSM, *Independent Review of icare – Probity and Procurement*, March 2021, 23

²⁸³ Ibid

²⁸⁴ Ibid 25

²⁸⁵ Ibid 24

²⁸⁶ Ibid 25

476 Mr Bhatia had a potential conflict of interest. He accepted that he had a friendship with the head of Capgemini. He stated that he managed this by avoiding involvement in decisions in relation to the choice of Capgemini.²⁸⁷ However, both he and icare accept that no record has been located that declares his conflict of interest, nor its management.²⁸⁸ That may be explained by the change from SRWS to icare at that time. However, for a procurement of this size and significance, I would expect good record keeping to have been a matter of priority. Clearly, it was not.

16.2.2 Perceptive

477 Similarly, there are no records of any management of the conflict of interest involving Mr Pescott (a contractor to icare) and Perceptive (which provided NPS services). Mr Pescott was engaged by the NI prior to icare's formation. That engagement continued under icare until after icare's contract with Perceptive was signed in March 2016.²⁸⁹ icare accepts that it was aware of Mr Pescott's relationship with Perceptive. It said that it '*took steps to manage it*'.²⁹⁰ While staff recall that a conflict of interest declaration was signed at the time, it has not been located. No conflict was recorded until after KPMG's review of procurement practices in May 2017.²⁹¹

478 icare did not offer an explanation as to why this conflict was not recorded. It may be, again, that the change from SRWS to icare and the absence of a formal policy contributed to the failure. It does not appear there was any attempt to revisit existing contracts once a policy had been put in place. There was no process for annual declarations of conflicts of interest until 2018. icare did conduct further investigations in 2018 following enquiries by ICAC. icare ultimately terminated Mr Pescott's involvement, conducted an external review of the relevant program, and ultimately changed service providers.²⁹²

479 icare now accepts that the management of the Perceptive contract, and Mr Pescott's conflict of interest, was inadequate. In particular:

- a) an open tender process was not undertaken (again, perhaps, in reliance on the NI exemption); and
- b) the conflict of interest was not recorded, nor was its management (if in fact there were any).

480 This was not a small matter. icare's total expenditure under the contract was in excess of \$11 million.²⁹³ It is not possible to conclude that icare or the NI obtained value for that large amount of money.

16.2.3 Other specific concerns

481 The media allegations raised three specific matters relating to the management of probity concerns. They were Mr Craig's interests in businesses outside of icare, the

²⁸⁷ V Bhatia, Standing Committee on Law and Justice, Legislative Council, Sydney, 13 November 2020, at 4-13

²⁸⁸ icare, *Media Issues Response*, 25 September 2020, at Item 9 [25]

²⁸⁹ Ibid at Item 9 [15]

²⁹⁰ Ibid at Item 9 [17]

²⁹¹ Ibid at Item 9 [19]

²⁹² Ibid at Item 9 [20]-[21]

²⁹³ Ibid at Item 9 [18]

employment of Mr Nagle's wife and declaration thereof, and delays in declaring gifts and benefits.

16.2.4 Mr Craig's outside interests

482 Mr Craig was engaged as a contractor in October 2015.²⁹⁴ At that time, and since then, Mr Craig was involved in the management of businesses outside of icare, and had a financial interest in a family company. I have reviewed his evidence, icare's statements to my Review, and their supporting material. There is no evidence of any actual conflict of interest in Mr Craig's involvement with those outside entities. Nor is there evidence of deliberate concealment.

483 When Mr Craig started at icare, he disclosed his various external interests to Mr Bhatia. Thereafter, Mr Craig made disclosures to Mr Nagle and others (including the Chief Risk Officer (CRO)) by email in March 2018 (shortly after Mr Nagle took over as interim CEO), and again in 2019 when Mr Craig considered becoming involved with Squirrel Group.

484 However, icare did not formally record those interests, nor were they formally declared by Mr Craig, until August 2019²⁹⁵. This was because Mr Craig, and it would appear those to whom he spoke, understood that the interests did not constitute conflicts of interest which needed to be disclosed under the conflicts of interest policy.²⁹⁶ Amendments to the policy in November 2019 appear to have drawn attention to the concept of personal interest. Mr Craig sought clarification from the General Counsel on the changes. He then made formal declarations on 29 May 2020.²⁹⁷ icare did not provide an explanation for the time between the policy change in 2019 and the declaration in May 2020.

485 Mr Craig's involvement with ICG (raised in the media and Parliament), does not in itself produce cause for concern. There is nothing of significance for this Review in the fact that Mr Craig had been employed by ICG.

16.2.5 Engagement of Mr Nagle's wife

486 The conflict of interest arising from icare's engagement on contract of Mr Nagle's wife was not properly recorded at the time. When Mr Nagle became CEO, that conflict was not properly declared. icare engaged Gilbert & Tobin to conduct an independent investigation of the engagement of Mr Nagle's wife (known as Project Stanley) and the disclosures of it that had been made. Mr Nagle was subsequently sanctioned by the Board.²⁹⁸

487 icare generally accepted the allegations made, although it provided me with some further information as to the events which had taken place. In particular, icare accepted that Mr Nagle's wife had been engaged as a contractor, that the potential

²⁹⁴ icare, *Media Issues Response*, 25 September 2020, at Item 9 [37]

²⁹⁵ icare, *Response to draft Procurement and Probity Appendix*, 23 April 2021, 2

²⁹⁶ icare, *Explanatory Note 14 - Interim GE, PI interests and NISP Delegation*, 24 February 2021, [3]-[4]

²⁹⁷ *Ibid* [4]

²⁹⁸ The Sydney Morning Herald, *Perrottet's 'baby' is now his problem child*, 8 August 2020; The Sydney Morning Herald, *icare chiefs reaped \$4m in pay, bonuses*, 25 August 2020; The Sydney Morning Herald, *Insurer faces judge's review*, 5 August 2020; Standing Committee on Law and Justice, Legislative Council, Sydney, 3 August 2020, 24 August 2020, 13 November 2020 and 23 November 2020

conflict had not been properly disclosed to the Board at the time Mr Nagle became CEO, and that sanctions had been imposed on Mr Nagle and other executives.²⁹⁹

16.2.6 Declaration of gifts and benefits

488 There were delays in declaring gifts and benefits under the icare policy by:

- Mr Bhatia in 2016-2018 and
- in relation to travel by the CEO and the CRO in 2017 and 2018.

489 No gifts and benefits received by Mr Bhatia were recorded while he was icare's CEO. However, four months after he left, 42 such declarations were made, all on 18 April 2018.³⁰⁰ There is no explanation for this.

490 Mr Bhatia said that he relied on his personal assistant to file the necessary declarations,³⁰¹ and assumed that she had done so from time to time. He said that he does not know why that did not happen. There is no record of icare conducting any investigation, or seeking any explanation at the time the gifts were declared.

491 The fact that a large number of declarations were made very belatedly on behalf of the former CEO, all on one day four months after his departure, suggests a breakdown in process. It ought to have prompted icare to make some inquiries. That no such inquiries were made, or at least recorded, adds further weight to the conclusion that there was a lack of focus on embedding effective probity processes and ensuring that they were followed.

492 Some of the declarations related to lunches and similar events attended by Mr Bhatia and other executives. These, although they involved several people as recipients, were recorded only once, under Mr Bhatia's name in April 2018.³⁰²

493 Another example relates to icare's then CRO. In 2017, the CRO travelled to and gave a presentation at a conference organised and paid for by RSA Archer, an icare service provider. This was approved by the CEO (Mr Bhatia) and notified to the Chair of the Board, but was not declared on the gifts and benefits register until a number of months later. It was not reported in icare's annual reports.³⁰³

494 A third example is that in 2018, Guidewire paid for the CEO (at that time, Mr Nagle) and another employee to travel to and give presentations at a conference. Again, this was approved by the Chair of the Board, but not recorded on the Gifts and Benefits Register, nor declared in the annual report.

495 There is no evidence in any of these cases of an intention to conceal, deceive or mislead. However, icare could not offer any explanation as to why those benefits were not recorded on its gifts and benefits register in a timely fashion.

496 The staff involved were very senior officers of icare. They were the leaders who should have been setting the cultural tone for icare's more junior staff. They were the very

²⁹⁹ icare, *Media Issues Response*, 25 September 2020, at Item 9 [40]-[47]

³⁰⁰ For completeness, I note that of the 42 items declared, 21 of the gifts and benefits were under \$100 in value and therefore did not need to be declared. However, the lack of investigation into the delay remains relevant.

³⁰¹ V Bhatia, *Interview*, 1 February 2021, Notes at 8

³⁰² As noted above, icare's Gift and Benefits policy only required gifts and benefits of more than \$100 in value to be declared, which may explain the reason similar declarations were not made.

³⁰³ icare, *Media Issues Response*, September 2020, at Item 10 [16]-[18]

people one would expect to model proper practices. Their failure to ensure that appropriate declarations were made and recorded suggests that there was in those years a lack of attention to probity matters at the highest levels of icare. The failure to inquire into any of them is regrettable. They should have been investigated promptly, to identify and address any underlying weakness of process.

497 I note that the personnel involved in these events have all since left icare. It is to be hoped that their replacements are able to model better practices, and to set the correct cultural tone for other staff. There are signs that icare is shifting its culture and processes to address this.³⁰⁴ However, as the external advisers assisting my Review have noted, there remains a need for icare to understand and address the underlying attitudes which allowed the historical oversights to occur.

16.3 Previous attempts to improve probity and procurement practices

498 It appears that icare knew of and attempted to address deficiencies in its probity and procurement systems from early in its existence. There were several such attempts, which appear overall to have been ineffective to address the existing deficiencies or to avert the problems which subsequently arose.

- a) As early as August 2016, icare's internal compliance team commenced a compliance review of icare's procurement framework. This occurred because '*Matters were raised in August 2016, indicating that neither the [NSW Procurement] Framework nor the icare Procurement Procedures Manual were being followed*'.³⁰⁵ That review was eventually completed and its report was presented to the Board in late 2016. It identified a number of deficiencies in icare's compliance.
- b) On 2 September 2016, the NSW Audit Office informed icare that it was not complying with the GIPA Act (see at [16.4 below](#)).³⁰⁶ icare's response was that it was in the process of '*revising [its] operating procedures*' and would address those matters in that review.
- c) In May 2017 a revised Procurement Policy was prepared and approved.³⁰⁷
- d) From late 2017 to early 2018, icare conducted an internal audit into its procurement activities. That produced recommendations that icare's Guidelines be updated. A gap analysis of icare's procurement guidelines resulted in some 44 findings,³⁰⁸ including that '*specific required actions to help comply with relevant legislation are yet to be developed*',³⁰⁹
- e) In April 2018, and again in November 2019, icare's conflict of interest policy was updated.³¹⁰

³⁰⁴ E.g. In February 2021, icare updated its Gifts and Benefits Policy and Travel policy to include the requirement to identify and declare conflicts of interest when receiving Gifts and Benefits, and to align with NSW Treasury Guidelines relating to the approval and management of work-related travel - icare, *Response to Draft Parts A and B to McDougall Report*, 9 April 2021

³⁰⁵ Anonymous, *Submission to Independent Review - Exhibit F*, 1

³⁰⁶ icare, *Management Letter on Limited Assurance Compliance Review Engagement to icare*, 2 September 2016

³⁰⁷ icare, *Compliance Update to icare's Risk, Compliance and Audit Committee*, 25 May 2017, 1

³⁰⁸ icare, *Submission to the Independent Review - 1(h) Procurement practices*, November 2020, [11(e)]

³⁰⁹ icare, *Internal Audit Update of Completed Engagements* 24 May 2018, 1-2

³¹⁰ icare, *Media Issues Response*, 25 September 2020, at item 9 [53]

- f) In November 2018, the procurement policy and guidelines were updated.
- g) Commencing in August 2018, icare established ‘Project Hexagon’ to consider and establish ‘*independent risk assurance and oversight*’.³¹¹ This project included a complete review of procurement,³¹² and the development of ‘*icare wide contract procedures and a centralised contract register*’,³¹³ and the development of the ‘*Procurement Operational Excellence Program*’.³¹⁴ This was consciously intended to be a part of icare’s ‘*transition*’ from a ‘*build and deliver*’ state to one of ‘*operational excellence and commercial maturity*’.³¹⁵
- h) In November 2018, a procurement deep dive concluded that icare’s approach to procurement was at a low level of maturity. It identified a number of amendments that were required to icare’s procurement processes. They included updating policies ‘*in consideration of past internal and external audit review observations and agreed actions ... to align with the [GIPA Act] and the NSW Government Procurement Policy Framework*’ – that is, issues identified in 2016. It concluded that there was a ‘*lack of clarity on current policy and procedures creating compliance issues against NSW Government and legislative requirements*’. An improvement process was proposed to address the identified issues by late 2019.
- i) The actions arising from icare’s gap analysis (completed in early 2018) were completed by 19 June 2019.³¹⁶
- j) In March 2020, icare commenced a further internal audit ‘*focused on contract management (pre-execution phase) & procurement*’ which made further recommendations.³¹⁷
- k) In April 2020, icare established an executive steering committee to oversee a program for ongoing compliance.³¹⁸ That program has recommended further changes to the procurement policy.
- l) icare commissioned EY to undertake an independent review of a sample of recent contracts and to assess icare’s compliance with NSW procurement rules and key procurement controls.³¹⁹
- m) icare recently conducted a further review of its policies and procedures for compliance with legislation, guidelines and best practice, and an internal audit of icare’s adherence to its existing internal frameworks on outgoings and benefits.

499 icare’s efforts to review, audit and improve its procurement and probity policies are commendable. However, the sheer number of reviews identified above, the time taken

³¹¹ icare, *Board briefing – Operational improvement Project Hexagon*, 27 August 2018, 1

³¹² Ibid 4

³¹³ icare, *Project Hexagon Update*, 25 October 2018, 5

³¹⁴ icare, *Procurement Deep Dive and Updated Procurement Policy Report to Audit and Risk Committee*, 22 November 2018, [3] 4

³¹⁵ icare, *Procurement Deep Dive and Updated Procurement Policy Report to Audit and Risk Committee*, 22 November 2018, [3] 4

³¹⁶ icare, *Submission to the Independent Review - 1(h) Procurement practices*, November 2020, at [11(f)]

³¹⁷ Ibid at [11(i)]

³¹⁸ Ibid at [13]

³¹⁹ Ibid at [13]

to complete action on issues identified, and the ongoing examples of poor practices are in themselves strong condemnation of the extent of icare's historically inadequate attention to probity and procurement processes.

500 One possible reason for icare's ongoing non-compliance over 2017 to 2019 is that icare did not give priority to procurement governance more generally. For example, in a Project Hexagon October 2018 Update, icare attributed delays in completion dates for its Procurement Framework Initiatives (which included action on GIPA Act compliance) as '*probably unrealistic based on current resourcing and other commitments*', and noted '*competing priorities*'. It appears, consistent with other matters discussed in this section of my Report, that there was insufficient focus on developing and embedding meaningful improvements in practices. It may also be that icare became caught in a rolling cycle of reviews which distracted efforts from making actual changes to practices and procedures.

501 From mid-2016 and into 2017, Mr McCann raised a number of concerns with icare's probity and procurement practices. As discussed in [12.2 above](#), there were delays in bringing his concerns to the attention of the Board. A number of Mr McCann's concerns have now been substantiated, either whole or in part. They include his concerns as to Mr Bhatia's conflict of interest with Capgemini and Mr Pescott's interest in Perceptive.

502 The matters Mr McCann raised should have been investigated promptly at the time they were raised, and the outcome of the investigations should have been recorded. The failure to investigate and record those matters properly, and bring them promptly to the attention of the Board, confirms my conclusion that there was insufficient attention to, and support for, proper probity and procurement practices.

16.4 Compliance with the GIPA Act

503 icare's response to historical non-compliance with the GIPA Act provides a striking example of inexplicable delay in correcting clearly inadequate practices.

504 The GIPA Act aims to ensure that government agencies remain transparent and accountable.³²⁰ Relevantly, the Act includes requirements to:

- keep a register of all contracts with a value of \$150,000 or more, recording prescribed information including the value, duration and tender details;
- update that register within 45 days of the contracts' becoming effective;³²¹ and
- publish the register on the government tenders website.³²²

505 icare accepted that it has '*historically not complied with the contract disclosure...[regime]... under the GIPA Act.*'³²³ That non-compliance dates from the start of icare as an organisation. It was identified as early as September 2016, but was not addressed until February 2019.³²⁴

³²⁰ Information and Privacy Commission, *Final - icare Phase 1 Compliance Report*, October 2020, 4

³²¹ *Government Information (Public Access) Act 2009* No 52 (NSW), s 27

³²² *Ibid* s 35

³²³ icare, *Media Issues Response*, 25 September 2020, at Item 9 [12]

³²⁴ *Ibid*

506 On 2 September 2016, the Audit Office of NSW reported to icare following an audit of icare's compliance with the GIPA Act.³²⁵ The audit report and accompanying management letter were addressed to the CEO and copied to the Chair of the ARC.

507 The report and management letter clearly identified a number of defects in icare's compliance with its obligations under the GIPA Act, including that, while icare had a register of contracts:³²⁶

- a) that register did not have an Independent Reviewer;
- b) icare's disclosure of certain contract classes was missing information;
- c) contracts were missing from the contract register,
- d) there was a dearth of formal documented procedures to manage the government contracts register; and
- e) uploads of contracts onto the Government tenders register were delayed.³²⁷

508 icare accepted the audit report's recommendations, and listed a number of actions it proposed to take in response to the management letter. They included actions to update the contracts register to align with disclosure requirements in the GIPA Act.³²⁸ icare's response to the issues raised included the statement that '*procurement are in the final stages of revising our operating procedures and these recommendations will be incorporated and documents as part of that review*'.³²⁹

509 However, despite all this, icare took no action specifically to address GIPA Act compliance at that time, or indeed until a concerted effort was made in 2019. Rather, icare attempted to address the issue in the context of the numerous general reviews of procurement practices outlined above.

510 Further, over this time, there was no evidence of specific programs or actions which aimed either to remediate past non-compliance, or to ensure ongoing compliance, with the GIPA Act. While the development of broader procurement policies and practices might require a careful and nuanced approach to improvement, it is difficult to understand why icare failed to take the simple and direct actions necessary to correct a clear failure to comply with legislation.

511 In 2019, over two years after the issue was first identified, icare commenced a remediation plan which aimed to specifically address icare's non-compliance with the GIPA Act.³³⁰ The program aimed to '*remediate [icare's] historical non-compliance with public disclosure obligations*,' and to '*refine its ongoing GIPA Act and procurement systems and process to clarify accountabilities*'.³³¹

512 Since that work started, icare publicly disclosed 442 contracts on eTendering. That happened between May 2019 and August 2020,³³² and included the upload of 179

³²⁵ Audit Office, *Management Letter on Limited Assurance Compliance Review Engagement to icare*, 2 September 2016

³²⁶ Ibid

³²⁷ Audit Office, *Management Letter on Limited Assurance Compliance Review Engagement to icare*, 9 September 2016, Appendix 1.1 -1.6, 7-12

³²⁸ Ibid at Appendix 1.1, 7,

³²⁹ Audit Office, *Management Letter on Limited Assurance Compliance Review Engagement to icare*, 9 September 2016,

³³⁰ icare, *Media Issues Response*, 25 September 2020, at Item 9 [13]

³³¹ Ibid

³³² Ibid

contracts on 25 February 2020.³³³ icare states that it has now completed its remediation by disclosing historic contracts.³³⁴

513 icare has also recognized that while it has made attempts to remediate its contracts register, there are still a number of areas of work required to ensure full compliance with the GIPA Act.³³⁵

514 A recent IPC investigation report sheds further light on the issue and its possible causes. In October 2020, the IPC released its report on icare's compliance with the GIPA Act. The report noted that icare had a '*history of non-compliance*', but acknowledged icare's recent efforts to comply with the GIPA Act.³³⁶ Its findings included:

- a) *Partial compliance with established governance and systems around the contract register and relevant requirements of the GIPA Act.*³³⁷
- b) *Non-compliance with requirement to maintain a contract register.*³³⁸
- c) *Partial compliance with having a contract register as open access information.*³³⁹

515 The IPC concluded that '*it appears that the absence of a clear governance framework relating to the disclosure of contracts has contributed to icare's historical non-compliance with the contract reporting requirements of the GIPA Act.*'³⁴⁰ It noted the repeated statements of intention to remediate made before 2019.³⁴¹

516 The IPC provided eight recommendations,³⁴² which icare has adopted in full.³⁴³

16.5 Use of the Nominal Insurer exemption

517 A final matter relevant to icare's probity and procurement practices is the use of the NI exemption.

518 The NI is expressly exempt from a number of NSW procurement rules. Section 154A(3) of the WC Act 1987 states that the NI '*is not and does not represent the State or any authority of the state*'. It provides further, in sub-section 4, that '*[f]or the avoidance of doubt, the Nominal Insurer is not a government agency for the purposes of Part 11 of the Public Works and Procurement Act 1912*'.

519 Part 11 of the *Public Works and Procurement Act 1912* (NSW) (Procurement Act) provides for oversight of government procurement by the NSW Procurement Board, and for the making of directions and policies for procurement of goods and service by or for NSW Government Agencies.

³³³ Parliamentary Inquiry Portfolio Committee 6, Budget Estimates, Sydney, 9 March 2020, at 80

³³⁴ icare, *Media Issues Response*, 25 September 2020, at Item 9 [13]

³³⁵ Ibid at Item 9 [14]

³³⁶ Information and Privacy Commission, *Final - icare Phase 1 Compliance Report*, October 2020, 5

³³⁷ Ibid 11

³³⁸ Ibid 14

³³⁹ Ibid 16

³⁴⁰ Ibid 12

³⁴¹ Ibid 15-16

³⁴² Ibid 19-20

³⁴³ Ibid 20

520 The exemption applies to the NI and not to icare as a whole, nor to icare's activities in respect of any other scheme that it manages.

521 The NI's exemption from Part 11 of the Procurement Act was inserted into the WC Act 1987 at the time of icare's establishment. The explanatory memorandum contains no rationale for its insertion. It is unclear whether the amendment was seen (or intended) to effect a change from the existing position, or whether it was intended to clarify the existing position.

522 icare has used the NI exemption for a number of very large contracts. The recurrent use of that exemption has contributed to a number of the concerns raised in respect of procurements.

523 The NI exemption was relied upon in the procurement of the Guidewire/Capgemini contract, the engagement of EML as a single agent, and the engagement of IVE Group (each of which was considered by RSM for this Review). The Capgemini/Guidewire procurement has been described above. I shall give a brief account of the other two.

16.5.1 EML

524 RSM found that the engagement of EML differed from, and was an improvement upon, the procurement process followed for Guidewire/Capgemini in that the '*selection documentation was transparent*³⁴⁴ and all five existing scheme agents participated in the process. No issues were raised with this Review as to the time provided to respond.

525 However, RSM found that there were deficiencies: '*whilst records were maintained of key procurement documents and activities, records were not maintained to the level that would be expected for a transaction of this size and significance*',³⁴⁵ '*[p]rocurement [ie, the icare department] were not involved in the negotiations, with these being led by the Executive General Manager, Workers Insurance*', and that there was a lack of documentary evidence to confirm the advice provided on conflicts of interest.³⁴⁶

16.5.2 IVE Group

526 The IVE procurement refers to a contract between icare and IVE in 2016. The contract took the form of a Master Services Agreement that icare, on behalf of the Nominal Insurer, made with IVE Group. It replaced an existing arrangement between the NI and IVE Group that predated icare's formation. In the period June 2015 to June 2020, the Nominal Insurer spent over \$18 million, and icare over \$2.7 million in its own right, on services under the IVE contract.³⁴⁷

527 icare said that as IVE '*was a pre-existing supplier to Safety, Return to Work and Support*',³⁴⁸ its engagement was continued when icare was established. Then, in 2016 and without calling for tenders, icare entered into the Master Services Agreement with IVE. In doing so, icare relied on the Nominal Insurer exemption.³⁴⁹ RSM found no evidence that icare had tested the market. Nor was there evidence that a case had

³⁴⁴ RSM, *Independent Review of icare – Probity and Procurement*, March 2021, 28

³⁴⁵ Ibid

³⁴⁶ Ibid 29

³⁴⁷ RSM, *Independent Review of icare – Probity and Procurement*, March 2021, 32

³⁴⁸ icare, *Media Issues Response*, 25 September 2020, at Item 10 at [30]

³⁴⁹ Ibid 10 at [31]; RSM, *Independent Review of icare – Probity and Procurement*, March 2021, 31

been made for or against direct negotiation with IVE Group.³⁵⁰ There is also evidence which suggests that the original contract negotiations were managed by Capgemini and ITNewcom, contractors or consultants to icare. In short, there is no evidence of a clear and transparent process in conducting this procurement.

528 The media allegations assert that there were improper links between icare, the Liberal party and IVE. They referred specifically to the fact that icare's then Deputy Chair, Mr Bell, was a director of both icare and IVE. Those allegations are no more than speculation unsupported by evidence.

529 icare and Mr Bell³⁵¹ produced documentation proving that Mr Bell had made appropriate declarations, recorded in icare directors' conflict of interest register, of his membership of the IVE Board, and that he '*[was] not ... involved [in] any procurement activities relating to IVE and icare*'.³⁵²

530 There is no basis for a suggestion that Mr Bell had acted improperly. Nor is there any evidence that his membership of IVE Group's board had any bearing on the negotiations between icare and IVE Group. While numerous issues, which I discuss further below, have been identified with the tender process, none of them relates to Mr Bell or his interest in IVE.

531 The use of a Master Services Agreement structure produced some troubling outcomes. The total value of the procurement was not estimated either at the time negotiations commenced or at the time the contract was made. Services were provided and paid for from time to time. There is no evidence that there was any consideration or review of the whole of life costs over the contract.

532 In reporting on its deep-dive investigation into this contract, RSM stated:

*RSM would expect that some other procurement framework or policy would have been developed or applied, however RSM was advised that the NI exemption was understood, at officer level, to not require this.*³⁵³

533 RSM reported that there were only limited records for the IVE Group procurement.

534 RSM was advised that:

*...under icare's philosophy of "commercial mind, social heart"; people were encouraged to reduce red tape. This was understood at officer level to minimise processes and record-keeping. RSM would expect to see as a minimum, documented evidence of procedures that demonstrate stewardship to funds owners and management accountability for its actions.*³⁵⁴

535 Mr Bhatia stated that the NI exemption was provided for a reason, and that icare was entitled to rely upon it. He did not agree that there might be other policy reasons to apply government (or other) procurement guidelines even if the exemption was available.³⁵⁵ His position on this ignores the importance of good procurement practice

³⁵⁰ RSM, *Independent Review of icare – Probity and Procurement*, March 2021, 32-33

³⁵¹ G Bell, *Feedback to Parts A & B of Independent Review Report*, 8 April 2021, 1

³⁵² icare, *Media Issues Response*, 25 September 2020, at Item 9 [32]

³⁵³ RSM, *Independent Review of icare – Probity and Procurement*, March 2021, 32

³⁵⁴ Ibid

³⁵⁵ V Bhatia, *Interview 1 February 2021*, Notes at 10

for any organisation, especially in an organisation which derives its income from a mandatory statutory benefits scheme.

536 I agree with the conclusion stated by RSM that '*the primary consideration of any procurement, whether the NI exemption applies or not, should be achieving value for money in an appropriate and defensible manner*'.³⁵⁶ There is no evidence that, in this case, icare sought to do so.

16.5.3 Comensura

537 A further matter which arose late in the course of my Review was an allegation that icare had spent \$235 million³⁵⁷ over a number of years under a contract with Comensura. Although that company is a labour hire firm, the sum included costs for the leasing and fitout of office space. Media reports and parliamentary questions suggested that this contract may have been designed to avoid government procurement rules, or to hide icare's spending from scrutiny.³⁵⁸

538 During the development of the NCOM, and in particular the NISP, icare engaged a number of contingent (i.e. contract) workers under a variety of mechanisms, including labour hire contracts. From July 2016, CapGemini leased premises at 309 and 321 Kent St Sydney for the purposes of its work on the NISP.³⁵⁹ In early 2017, icare commenced a project to consolidate its contingent workforce and make arrangements for related services, including technology and premises.³⁶⁰

539 In April 2017, icare issued a formal Request for Tender. Except in one respect, there was no irregularity in the tender process. On 3 August 2017 icare entered into an agreement with the successful tenderer, Comensura (the Comensura Agreement). icare did so on behalf of the NI and other schemes.

540 In October 2017, the Comensura Agreement was amended to apply to the NI only.³⁶¹ That was done because Procurement NSW was concerned that the Comensura Agreement did not comply with NSW Government requirements.³⁶² That was not a problem for the NI, for reasons explained elsewhere in this Report.

541 Thereafter, in December 2017, icare entered into a new agreement with Comensura on behalf of the other schemes that it manages.³⁶³ That agreement complied with applicable procurement policies.

542 After questions on this subject were raised in the Legislative Council at Budget Estimates hearings in March 2021, icare commissioned Allens to conduct an investigation. A copy of that report has been provided to me for the purpose of this Review. Allens considered whether there was any evidence of an attempt to avoid the oversight or approval of Treasury, and the nature and terms of the agreement.

³⁵⁶ RSM, *Independent Review of icare – Probity and Procurement*, March 2021, 9

³⁵⁷ icare has informed me that the total contract spend to end February 2021 is 233.23 million: icare, *Comensura - Explanatory note*, 17 March 2021, [28-29] and Table 1.

³⁵⁸ Sydney Morning Herald, *icare paid \$235 million to a labour hire firm, including for office fit-out*, 8 March 2021

³⁵⁹ Allens Linklaters, *External Report – Insurance and Care NSW/Comensura Pty Ltd*, 9 April 2021, 2

³⁶⁰ *Ibid* 2-3

³⁶¹ *Ibid* 3

³⁶² icare, *Comensura - Explanatory note*, 17 March 2021, [14-18]; Allens Linklaters, *External Report – Insurance and Care NSW/Comensura Pty Ltd*, 9 April 2021, 14

³⁶³ Allens Linklaters, *External Report – Insurance and Care NSW/Comensura Pty Ltd*, 9 April 2021, 3 and 14

543 I understand that icare intends to make the Allens report publicly available, and has no objection to my quoting from it in this report.

544 Allens found that there was '*no substantive basis on which we could conclude that there was an intention to disguise the leases from NSW Treasury or Property NSW*'.³⁶⁴ In respect of icare's compliance with procurement obligations, Allens found that:

*...it appears that prior to the variation it was at least arguable that icare's arrangements with Comensura were not compliant with certain NSW Procurement Guidelines. However, icare's response to DFSI's concerns indicate that these issues were carefully considered by icare at the time and a solution was negotiated with NSW Procurement ... we do not consider that icare or the Nominal Insurer was in breach of any applicable legislation or guidelines after the Comensura Agreement was varied to exclude the other scheme authorities on 31 October 2017*³⁶⁵

545 As to the Comensura Agreement itself, Allens concluded that its terms were generally appropriate and that there was a commercial rationale for the Agreement.³⁶⁶ The circumstances of the Agreement did not give rise to concern, and there was a competitive tender process.³⁶⁷

546 Allens identified two questions that it could not fully answer. The first was, what was the commercial basis on which icare agreed to pay Comensura a 5 per cent service fee for taking the lease of the premises. The second was, why, over the years, there was a drift towards premises being used by icare's employees rather than by contingent staff. Both are potentially explicable given the surrounding circumstances and icare's changing needs.³⁶⁸ In any event, the leases are soon to be taken over by Property NSW and therefore these issues present no ongoing concern.

547 Allens' investigation was necessarily conducted in a short space of time. Despite this, it appears (as one would expect) to have been done thoroughly. There is nothing in the Allens Report to suggest that the investigation was hampered in any way.

548 I have given the Report careful consideration. In my view, the conclusions reached are sound on the basis of the material available to Allens.

549 I conclude, on the basis of the Report, that the Comensura Agreement does not identify any new issue for my consideration. There is no basis shown for a suggestion that icare was attempting deliberately to avoid Treasury (or other government) scrutiny. Accordingly, I am of the view that it is not necessary for me to delay my Review to investigate further.

550 I conclude, as to the Comensura Agreement, by saying that it may be another example of the early difficulties and confusion as to icare's procurement obligations. I discuss that more fully at [12 above](#) and note that there has been recent improvement to icare's attitude to proper procurement practice. There seems no need to say more.

³⁶⁴ Allens Linklaters, *External Report – Insurance and Care NSW/Comensura Pty Ltd*, 9 April 2021, 14

³⁶⁵ Ibid 15

³⁶⁶ Ibid 5 and 6

³⁶⁷ Ibid 5 and 7-8

³⁶⁸ Ibid 10-12

16.5.4 Subsequent developments

551 icare has since made successive attempts to restrict its use of the NI exemption. From November 2018, the Board decided that the use of the exemption should require approval at the GET level.³⁶⁹

552 icare's Board has now directed management that the NI exemption may no longer be used unless its use is expressly authorised by the Board, and then only in exceptional circumstances.³⁷⁰ The direction was formally given on 20 August 2020, with immediate effect.³⁷¹

553 Each of the three procurements above (Guidewire/Capgemini, IVE Group and EML) were for a very large contract. RSM has identified that in each, there were deficiencies in record keeping and process. The Guidewire/Capgemini and IVE Group procurements (both of which occurred early in icare's lifetime) lacked transparency. That reflected the absence of robust systems aimed at ensuring sound procurement and management of probity concerns.

554 Both RSM and PWC identified an attitude held by senior staff of icare from its inception: it was a 'start-up'; its transformation of the workers compensation system should be driven with urgency; and 'red tape' should not stand in the way. That is consistent with comments made to me during the course of this Review to the effect that the early days of icare involved a "get it done" mentality, or a focus on accomplishing goals rather than on developing and embedding sound procurement and probity policies.³⁷²

555 It appears clear from the reports of RSM and PWC that the existence of the NI exemption, and the understanding of it apparently held by staff, contributed directly to the deficiencies in process exemplified in these three examples.

556 Overall, RSM identified³⁷³ an attitude that icare's "*commercial mind*" imprimatur was interpreted and applied by staff to mean that formal processes should not be allowed to hinder procurement. That attitude involved a failure to ensure that value for money had been adequately assessed. The lack of detailed and documented processes, resulting in poor record keeping, mean that there is no basis on which the probity of those procurements can be assessed. Nor can it be shown that the procurements resulted in icare's obtaining value for the very large sums of what is in substance the money of others that has been spent on them.

557 That is a severe indictment of the leadership of icare at the time.

³⁶⁹ RSM, *Independent Review of icare – Probity and Procurement*, March 2021, 35; icare, *Audit and Risk Committee Strategic Sourcing update* 27 August 2020, 3

³⁷⁰ icare, *Media Issues Response*, 25 September 2020, at Item 9 [67]

³⁷¹ icare, *Audit and Risk Committee Strategic Sourcing update* 27 August 2020, at 2-3; icare, *Media Issues Response*, 25 September 2020, at Item 9 [67]

³⁷² D Plumb, *Interview*, 12 November 2020, Notes 4

³⁷³ RSM, *Independent Review of icare – Probity and Procurement*, March 2021, 2

17 Relationship between SIRA and icare

558 There can be no doubt that there has been a breakdown of the relationship between SIRA and icare. Neither icare nor SIRA disputed this. It was identified as a difficulty in the Dore 2019 Report, and has been the subject of much evidence to the SCLJ.

559 Two particular examples of this difficulty have been raised in the media, in the SCLJ, and in evidence to my Review. They are SIRA's concerns about, and review of, icare's valuation of the NI's liabilities, and the dispute over RTW measures

560 Although Mr Nagle suggested otherwise,³⁷⁴ the evidence from icare and SIRA concurred that the breakdown in their relationship occurred at the senior management level of these organisations, and reflected a '*tone from the top*', at least within icare.³⁷⁵ icare also said,³⁷⁶ and SIRA concurred, that the relationship difficulties were most marked in the workers compensation area, and were not reflected in the oversight of other schemes regulated by SIRA. icare stated that relationships between individual executives³⁷⁷ and through joint committees had been more productive and effective.

561 SIRA also alleged that icare had, from time to time, taken matters to the Treasurer rather than engaging with SIRA as a regulator.³⁷⁸ However, there is no evidence, as opposed to assertion, to support this allegation (although noting, once more, that the Treasurer declined to be interviewed for my Review).

562 SIRA's experience of resistance to oversight is consistent with icare's focus, in the early years, on change, '*transformation*', and '*getting things done*'. Oversight was seen as an impediment to change.³⁷⁹ It is also consistent with an apparent over-emphasis on what was thought to be a commercial attitude, one that was impatient with the perceived impediments of a public service approach. The same may be said for icare's relationship with Treasury (see at [12.4 above](#)). However, while those matters may help to explain the difficulties, they do not justify them.

563 The tension between icare and SIRA was not well managed by icare's senior leadership. Nor was it dealt with by icare's Board. This was a clear and serious failure on the part of both.

564 Both icare and SIRA have said that the relationship at senior levels, and icare's apparent attitude towards SIRA, have improved following Mr Nagle's resignation.³⁸⁰ This adds weight to the conclusion that the approach of the senior leadership was a contributing factor to the relationship tensions (although probably not the sole cause). It also suggests there is reason to believe that icare's new leadership will support a more functional relationship into the future.

³⁷⁴ J Nagle, *Feedback on A & B of the Independent Review*, 13 April 2021

³⁷⁵ SIRA, *Interview*, 25 November 2020, Notes 2-3

³⁷⁶ icare, *Media Issues Response*, 25 September 2020, Item 11 [16]

³⁷⁷ icare, *Submission to the Independent Review - 1(j) Relationship with SIRA*, November 2020, [28]

³⁷⁸ SIRA, *Interview*, 25 November 2020, Notes 3-4

³⁷⁹ D Ferguson, *Interview with icare*, 12 November 2020, Notes 6

³⁸⁰ icare, *Media Issues Response*, September 2020, at 11 [2]; SIRA, *Submission to the Independent Review*, November 2020, [22]

565 icare suggested, and I accept, that there may have been some confusion or disagreement as to the proper role and sphere of influence of SIRA as regulator.³⁸¹ To some extent, this may reflect the difficulties to be expected in the transition from SRWS to separate organisations with functionally separate roles. That said, I remain baffled by the fact that these difficulties persisted for over five years, and that the relationship was allowed to deteriorate to the extent it did.

566 The situation also provides a further example of the difficulties faced by icare's Board in ensuring that icare's senior leadership acted appropriately. Both past and current members of the Board suggested to me that the Board was aware of friction in the icare/regulator relationship, and gave directions to the CEO of the day to manage it. While I accept that the Board took some steps to encourage a more positive relationship, they were ineffective. There is no clear explanation of why the Board could not have been more effective in encouraging a cooperative relationship.

567 It is important that, in developing recommendations, I give due consideration to the differing roles of the Board and management. It is not the Board's role to conduct the day to day management of icare's operations. Any attempt on its part to do so is likely to result in further confusion, delays and inefficiencies. However, given the importance of the relationship with SIRA, the historical experience, and the need for a period of time to rebuild trust between icare and the regulator, I consider it appropriate that a system be put in place to monitor and hold senior officers to account for efforts to rebuild that relationship.

568 Thus, I adopt PwC's recommendation³⁸² that icare implement a regime that allocates individual accountability for the SIRA relationship to key staff, in particular the CEO. It is also important that the Board understands its responsibility to monitor the way in which the relationship is working, and that it implement policies to do so. I return to this at *Part 1B below*.

569 I turn to some external, or structural, considerations which were raised with me. I start by noting icare's perception that SIRA's oversight has been burdensome. That perception is understandable. In the past five years, icare been subjected to:

- multiple reviews by SIRA of the NI's valuation (discussed below);
- reviews of RTW data and performance; and
- the Dore 2019 Review, plus the follow-up claims audits and monitoring of the 21 Point Plan.³⁸³

570 SIRA has advised, in addition, that it intends in the near future to review both icare's management of medical costs and, separately, some aspects of the use of the Workers Compensation Insurance Fund. SIRA is also planning an Independent Compliance and Performance Review of the TMF.³⁸⁴

571 However, given that reviews of these kinds are within the power of the regulator, their burden is a fact of life for a regulatee. That burden does not in any way excuse icare's resistance to engaging with SIRA, and it is fair to comment that if icare had been more

³⁸¹ A Ziolkowski, *Interview with icare*, 12 November 2020, Notes 8

³⁸² PwC, *Independent Review of icare governance, accountability and culture*, February 2021, recommendation 68, 82-83

³⁸³ SIRA, *Chronology of SIRA's supervision of the NI and decisions and deliberations of the SIRA Board*, September 2020

³⁸⁴ SIRA, *Submission: icare and State Insurance and Care Governance Act 2015 Independent Review*, November 2020

cooperative in the early days, it is likely that SIRA would have been less motivated to exercise its powers to the extent that it has.

572 icare submitted that the terms of the SICG Act, and particularly what it said was the lack of clarity as to the allocation of statutory functions, roles and responsibilities between icare and SIRA, had contributed to the tension between them.³⁸⁵ I do not accept that such lack of clarity as there may be provides any excuse for resistance to regulatory oversight. icare as the regulated entity had a responsibility to comply with the regulator to the extent that SIRA acted within its powers.

573 Both icare and Mr Nagle suggested that SIRA had from time to time overstepped the bounds of its legal powers, there is no persuasive evidence that it has done so. The suggestion is not supported by the material that icare has produced.

574 It may be that subjective perceptions of uncertainty as to roles and responsibilities could provide some explanation for the tension, and a partial explanation for the difficulty experienced in resolving it. In this context, I think it is relevant that other participants in the workers compensation system have raised the issue of legislative uncertainty. Where the allocation of roles and responsibilities between the agencies is neither clearly defined by legislation nor well established by custom, there can be confusion and tension. Of course, if the legislation is unclear, its proper operation can be determined by the courts. It is far preferable, however, that such disputes not arise at all. I address the response to this in *Parts 2 and 3 below*.

17.1 Valuation dispute

575 The valuation dispute, as it has been termed, appears to be more a concern by SIRA which icare took no steps to allay. It resulted in ongoing tension, and led to reviews by SIRA which appear to have exacerbated those tensions.

576 I have commented elsewhere at *18.4 below*, with the benefit of expert assistance, on the assessment of the NI's liabilities. In brief, although in the longer term the position of the NI requires improvement. I do not think there are immediate concerns as to its ability to pay claims as and when they fall due. I also question the appropriate way to consider solvency in a longtail scheme such as this. However, there is no question that, over time, the financial position of the NI, at least as shown in its financial statements, has declined, and that this decline has, understandably, concerned both SIRA and Treasury.

577 The point of present relevance is that although those concerns have been raised by SIRA with icare over a number of years, they could not be resolved. That bears directly on icare's relationship with SIRA.

578 SIRA, in the exercise of its regulatory role, reviews the twice-yearly estimate of NI liabilities. It engages external actuaries to do so.³⁸⁶ icare provide documents from and access to its own internal actuaries and its external actuaries. This process has occurred since 2016.

³⁸⁵ icare, *Media Issues Response*, September 2020, 11 [27-29]

³⁸⁶ SIRA, *Chronology of SIRA's supervision of the NI and decisions and deliberations of the SIRA Board*, September 2020

579 SIRA has advised my Review that it became focussed on the accuracy of the estimate of the NI's liabilities in 2019 and 2020.³⁸⁷ It held concerns as to both the apparently deteriorating capital position of the NI and the risk of premium under-pricing (the estimate of liabilities is a key factor in determining premiums).

580 In April 2020, in the lead-up to the 2020-21 premium filing, SIRA procured EY to carry out a risk review of the December 2019 estimate of the NI's liabilities³⁸⁸. EY's draft report was provided to icare.

581 icare's response³⁸⁹ can only be described as defensive. It demonstrated a fundamentally adversarial approach to the relationship with SIRA. It failed to deal with the genuine concerns expressed by SIRA. It ignored the need for SIRA to identify risks. It missed the opportunity to engage with SIRA to discuss those risks.

582 After the change in icare's leadership in August 2020, there was a marked change in the tone of correspondence between icare and SIRA.³⁹⁰ icare now takes a position of engagement and cooperation. SIRA's position softened in response.

583 SIRA has sought to clarify the role that its reviews will play in the future: '*identifying those aspects of the valuation findings where the highest levels of uncertainty and/or risk exists, and describing the nature of that uncertainty and/or risk to inform appropriate insurer and/or regulatory responses*'.³⁹¹

17.2 RTW dispute

584 Since at least 2018, there has been disagreement between SIRA and icare regarding RTW performance, and the basis of its measurement.

585 The dispute had its genesis in the statutory review conducted by the SCLJ. In March 2017. The SCLJ made a recommendation to SIRA and icare to improve the collection and measurement of data regarding RTW, which the committee found was unclear and not satisfactorily maintained.³⁹²

586 As I have mentioned previously at [8.1 above](#), icare on its establishment adopted a payment-based measure that in effect used the cessation of payment of benefits as a proxy for return to work. That measure had been used historically within SRWS.

587 In late 2017, SIRA introduced a new measure. It relied on actual return to work: the date when the worker returned to employment. SIRA maintains that there are clear advantages to this measure.

588 However, icare continued to measure RTW, both publicly and internally, by use of the cessation of benefits measure. This continued until September 2020.³⁹³

³⁸⁷ SIRA, *Interview*, 25 November 2020, Notes at 6-7

³⁸⁸ C Donnelly, Standing Committee on Law and Justice, Legislative Council, Sydney, 3 August 2020, 43

³⁸⁹ icare, *Letter from icare CEO to SIRA Chief Executive*, 17 July 2020

³⁹⁰ icare, *Letter from icare CEO to SIRA Chief Executive*, 28 September 2020

³⁹¹ SIRA, *Letter from SIRA Chief Executive to icare CEO*, 14 September 2020

³⁹² Standing Committee on Law and Justice, *First review of the workers compensation scheme*, March 2017, Recommendation 2, 1

³⁹³ icare, *Board Communique*, September 2020; icare, *Submission to the Independent Review - 1(a) Operations*, November 2020, [148-155]

589 icare stated to my Review that it was concerned that the data underlying the SIRA measure were not complete or accurate, and that the use of those data would lead to an inaccurate RTW rate. icare said also that historical deficiencies in data would mean the RTW rate was unreliable for tracking performance over time. icare added that it had become concerned when it could not replicate the RTW results SIRA obtained using the SIRA approach.

590 None of these problems appear to me to have been, with goodwill and no doubt a lot of work, insurmountable.

591 icare acknowledged that initially it had resisted the adoption of the SIRA metric, but asserted that this was based on uncertainty and disagreement as to its accuracy.³⁹⁴

592 That disagreement manifested itself in two interrelated matters:

- a) the accuracy and appropriateness of measuring performance using the RTW measure chosen by SIRA; and
- b) the extent to which unreliability of data was responsible for the appearance of a decline in RTW.

593 As to the first point, I accept that there may have been some genuine basis to seek to understand the RTW metric and to raise concerns about the accuracy of the data and whether that metric was appropriate. SIRA acknowledged to icare that there were at times deficiencies in the data that it provided to icare.³⁹⁵ Nevertheless, the dispute extended beyond any reasonable point.

594 The dispute over the second point led in part to the Dore 2019 Review. As I have already said, it was, or ought to have been, clear that RTW rates had declined over time. There is no dispute that icare failed to identify that decline promptly and to address it, although the reasons for that failure remain contentious.

595 In December 2019, SIRA published the Dore 2019 Report. That report highlighted a deterioration in RTW performance, whether measured using icare's or SIRA's RTW methodology.³⁹⁶

596 The findings of the Dore 2019 Report should have brought an end to the dispute, and encouraged focus on the real problem – the decline in RTW rates. It did not. The dispute continued into 2020.³⁹⁷

597 Ultimately, it was necessary for SIRA and icare to seek the intervention of a third party to resolve these issues. The Boards of SIRA and icare agreed to engage an independent expert, Mr John Trowbridge, jointly to develop a set of performance KPIs that each organisation and Board could use to monitor the performance of the NI, including as to RTW rates, on a monthly basis.³⁹⁸

³⁹⁴ A Ziolkowski, *Interview with icare*, 12 November 2020, Transcript 24-27 and N Allsop, *Interview with icare*, 18 November 2020, Notes 1

³⁹⁵ icare, *Letter from John Nagle to Carmel Donnelly*, 29 January 2020, 1

³⁹⁶ Janet Dore, *Independent Reviewer Report into the Nominal Insurer*, December 2019, Figure 15 [5.5.1] 41-42

³⁹⁷ icare, *Letter from John Nagle to Carmel Donnelly*, 29 January 2020, 1

³⁹⁸ icare, *Board Paper, John Trowbridge Monthly KPIs for NI operational performance - Proposal for the icare and SIRA Boards*, 24 August 2020, 3

598 In August and September 2020, Mr Trowbridge gave a presentation to the Boards of icare and SIRA on a suite of key performance measures developed with icare, which demonstrated a RTW measure based on work status.³⁹⁹

599 In September 2020, icare announced it had adopted the work status code methodology for use in determining the RTW rate and for the purpose of reporting workers insurance claims performance data.⁴⁰⁰

600 icare continues to use the work status code to measure RTW for public reporting on performance and for assessing whether it is meeting its operational targets. icare has also commenced a large-scale remediation of historical data to ensure that work status code data is accurately and consistently captured.⁴⁰¹

³⁹⁹ SIRA, *Board Agenda Paper 6.1 – Recovery at work measurement framework*, 2020, 2; icare, *Monthly KPIs for NI operational performance – Proposals for the icare and SIRA Boards*, 24 August 2020

⁴⁰⁰ icare, Website announcement - icare changes return-to-work rate measure, 24 September 2020, [weblink](#)

⁴⁰¹ icare, *Submission to the Independent Review – Delivery of Dore Review Recommendations*, 30 October 2020, 117-132,

18 NI's financial statements and position

601 These two issues are so obviously linked that it is necessary to treat them together.

602 The specific allegations raised in the media are that:

- a) The NI has made large losses in recent years.
- b) The assets of the NI are less than its liabilities, so that its solvency may be at risk.
- c) There is a risk of substantial increase in premiums. That risk arises from icare's alleged mismanagement of the NI.
- d) The liabilities of the NI may have been understated.
- e) SIRA and its actuaries have raised concerns about the appropriateness of the valuation of the NI's liabilities.
- f) The Auditor-General has raised concerns about the allocation of expenses to the NI.

603 The first three allegations relate to the NI's financial statements. The remaining three relate to the NI's financial position.

604 Treasury engaged an independent firm of consulting actuaries, Cumpston Sarjeant (CS), to assist my Review in respect of these and other matters. I refer to the conclusions of their work throughout this section.

18.1 Background

605 The financial statements of the NI, and specifically the assessments of liabilities and reserves that form an integral part of those statements, are subject to multiple levels of control. The actual statements themselves are prepared by icare, and responsibility for valuation of the reserves is undertaken by icare's external actuary, Finity. Those financial statements are prepared in accordance with all applicable accounting and auditing standards and conventions. Finity's liability estimate is independently peer reviewed by another firm of external actuaries.⁴⁰²

606 The financial statements, including the valuation of liabilities are audited by the Auditor-General, who also uses external actuaries as part of the audit process.⁴⁰³

607 After all this has happened, SIRA procures its own actuarial review of that assessment of liabilities (a process that has taken place since 2018).⁴⁰⁴

18.2 Accounting and actuarial concepts

608 Before moving to the detail of the allegations, it is necessary to recognise some basic accounting and actuarial concepts.

⁴⁰² icare, *Media Issues Response*, September 2020, at 13 [7-13]

⁴⁰³ For example: see icare, 2019-20 Annual Financial Report, 268

⁴⁰⁴ SIRA, *Chronology of SIRA's supervision of the NI and decisions and deliberations of the SIRA Board*, September 2020

609 Firstly, and as I have said already, the NI's financial statements are to be prepared in accordance with applicable accounting standards and conventions. That means, among other things, that:

- a) The estimated future liabilities of the fund must be brought back to a present value at the date to which the financial statements speak. That is required to be done using the risk-free rate as a discount rate.
- b) Assets are to be valued at market value.

610 Those standards have several consequences. The first is that the net present value (NPV) of the reserves is influenced by the discount rate. For a given gross liability, the NPV will decrease as the risk-free rate increases. The risk-free rate in this case is determined by Commonwealth Government Bond rates with maturities corresponding, so far as possible, to the estimated age profile of the future liabilities.

611 The second point is that assets usually will be held in a variety of different investments. icare applies an asset management policy to ensure that, so far as possible, the overall mix of investments is hedged against fluctuations in the long-term bond rate. It is convenient to mention at this point that icare's investment policy appears to have been successful in achieving that result.

612 The valuation of liabilities is first undertaken at the "central estimate". That is an estimate which has a 50 per cent chance of being higher or lower than the actual valuation of liabilities.

613 Once the central estimate is determined, a risk margin is assessed. That margin allows for the risk that outcomes may differ from the central estimate of the insurance liabilities. That may happen both because the distribution of outcomes is inherently uncertain and because their occurrence is inherently random. The risk margin (sometimes called prudential margin) is intended to increase the probability of sufficiency to higher than 50 per cent.

614 That leads to the probability of adequacy (POA), which is a statistical measure of the estimated level of confidence that the outstanding claims provision will be sufficient to pay claims as and when they fall due.

615 Accounting, actuarial and Australia Prudential Regulation Authority (APRA) standards either contemplate or require a risk margin to be assessed at a stated POA. The APRA prudential standards for private sector general insurers require the risk margin to be determined at a POA of 75 per cent.

616 Up until recently, icare had determined its risk margin based on an 80 per cent POA. However, in recent months, it has moved to the APRA standard of 75 per cent.

617 The expression '*funding ratio*' is frequently used. That expression is often used to indicate what is more accurately called the accounting funding ratio (AF ratio). It is an indicator of financial position based on the assets and liabilities reported in financial statements: the ratio of the value of recorded assets to the value of the recorded liabilities. It will be seen from what I have said already that the AF ratio will fluctuate with, among other things, fluctuations in the estimate of liabilities caused by changes in the discount rate used to derive the NPV of those liabilities.

618 An alternative ratio, which may have more to recommend it in terms of real world analysis, is the economic funding ratio (EF ratio). That too measures the ratio of scheme assets to scheme liabilities. However, the liabilities are measured on a best estimate basis using economic assumptions that are consistent with those used to

value the assets. In more concrete terms, the EF ratio discounts liabilities to achieve a NPV (at the relevant date) using not the risk-free rate, but the expected earning rate on scheme assets.

- 619 Another important concept, once again used in two different ways, is that of the breakeven premium (BEP). That is the premium expected to be sufficient to cover the incurred cost of claims made during the period of premium coverage, including an allowance for claims handling costs. In one usage, that is assessed as actuarial breakeven premium which is based on risk-free discount rates. The other usage is the operational breakeven premium (OBEP) which is based on a best estimate of investment earnings on premiums between receipt and disbursement. It is obvious that if, over the long term, premiums are charged below breakeven levels, there is a real risk of insolvency.
- 620 I add that the significance of BEP differs to some extent according to whether the insurance scheme being considered is a long-tail scheme or a short-tail scheme. The reason for this is that in the former, it may take many years for liabilities to mature and become payable, so that some fluctuation in premiums and earnings can be accommodated as a matter of economic reality. By contrast, if the liabilities insured are short-tail in nature, the time factor, as an allowance for the possibility that economic conditions will improve, may not be relevant.
- 621 The liabilities insured by the NI are essentially long-tail in nature.

18.3 The NI's AF ratio

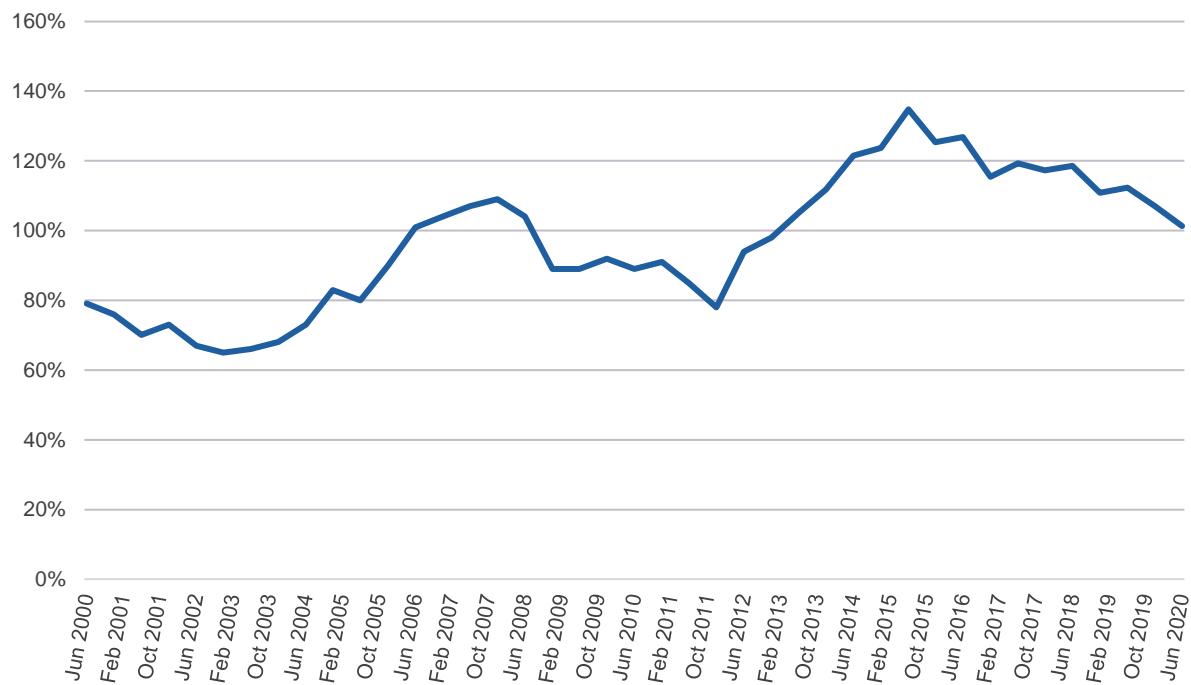
- 622 icare's most recent determination, in July 2020, was that an appropriate target range for the NI's AF ratio was 115 to 135 per cent⁴⁰⁵. As at 30 June 2015, that ratio was 135 per cent at a 75 per cent POA above the then target range.⁴⁰⁶ It has declined since then.
- 623 It is important to recognise that the funding ratio of the NI has fluctuated widely over the past 20 years. icare produced the following graph showing fluctuations in the funding ratio (adjusted to show the figures at a constant 75 per cent POA) from June 2000 to June 2020.⁴⁰⁷

⁴⁰⁵ icare, *Workers Insurance Scheme (Nominal Insurer) Capital Management Policy 202007 V02 Final*, July 2020, at 9

⁴⁰⁶ That is, after adjusting from the 80% POA used in 2015.

⁴⁰⁷ icare, *Media Issues Response*, 25 September 2020, at Item 12 [20] 5

Figure 22: Historical Insurer Funding Ratio (75 per cent POA)



Source: icare, *Annual Report 2019-20*, 42

624 The AF ratio for the NI as at 30 June 2016 was 127 per cent at 75 per cent POA. That declined to 119 per cent at 75 per cent POA as at 30 June 2017 and remained at that figure as at 30 June 2018. The accounting results for those years were, respectively, a loss of \$0.6 billion; a loss of \$1 billion; and a profit of \$0.1 billion.⁴⁰⁸

625 As at 30 June 2019, the AF ratio for the NI declined to 112 per cent at 75 per cent POA. As at 30 June 2020, the figure declined further, to 101 per cent at 75 per cent POA. The results for those years were, respectively, a loss of \$0.9 billion and a loss of \$1.9 billion.⁴⁰⁹

626 I emphasise at this point that those losses are assessed according to the financial statements. They are heavily influenced, although not entirely explained, by the increasing NPV of future liabilities flowing from decline in the risk-free rate.

627 I note, although it is not central to the present issue, that CS expressed the view that '*the focus on movements in bond rates in isolation ignores the general positive correlation between bond yields and inflation, particularly over the medium to long term*'.⁴¹⁰ CS pointed out that where inflationary expectations are reduced, that reduction will '*have almost as great an effect on liabilities as falls in bond yields, but in the opposite direction, and so act to offset the liability increases due to bond yield falls*'.⁴¹¹ It is beyond both my understanding and, fortunately, the scope of my Review to pursue that point.

⁴⁰⁸ icare, *Media Issues Response*, 25 September 2020, at Item 12 [37-44] 10-11

⁴⁰⁹ Ibid at Item 12 [43-49] 11-12

⁴¹⁰ Cumpston Sarjeant, *Comments on draft of Part A*, 13 April 2021

⁴¹¹ Ibid.

628 icare has identified four principal drivers of the decline in the AF ratio over the past five years. The first is the impact of changes to the workers compensation legislation in 2012 and 2015. When those changes were introduced, icare's predecessor (for 2012) and icare (for 2015) were required to reassess the NI's reserves.

629 The 2012 changes reduced benefits. icare says that the impact of the changes (in terms of reducing liabilities) was overestimated. Therefore, more recent and more accurate estimates have required an increase in reserves. This accounted for an 11 per cent reduction in the AF ratio, according to icare.

630 The 2015 changes increased benefits. icare attributes 10% of the decline in the AF ratio to the impact of those changes.

631 The second driver is the change in the economic environment: specifically, the continued fall of the risk-free rate to historically low levels. As I have said already, a decline in the risk-free rate means that there will be an increase in the NPV of liabilities at any given valuation date. The result is that icare needs to hold more reserves against those liabilities.

632 The third driver identified by icare is the increase in medical payments. There are several reasons for this. One is increases in the cost of medical services above inflation. Another is the increased utilisation of medical services. A third, and a result of poor RTW rates, is the increased rate of claimants remaining on benefits.

633 In the context of that last point, I note that CS concluded that the poor and declining RTW rate has been a '*significant contributor to [the NI's] recent financial underperformance*'.⁴¹² I agree with that conclusion.

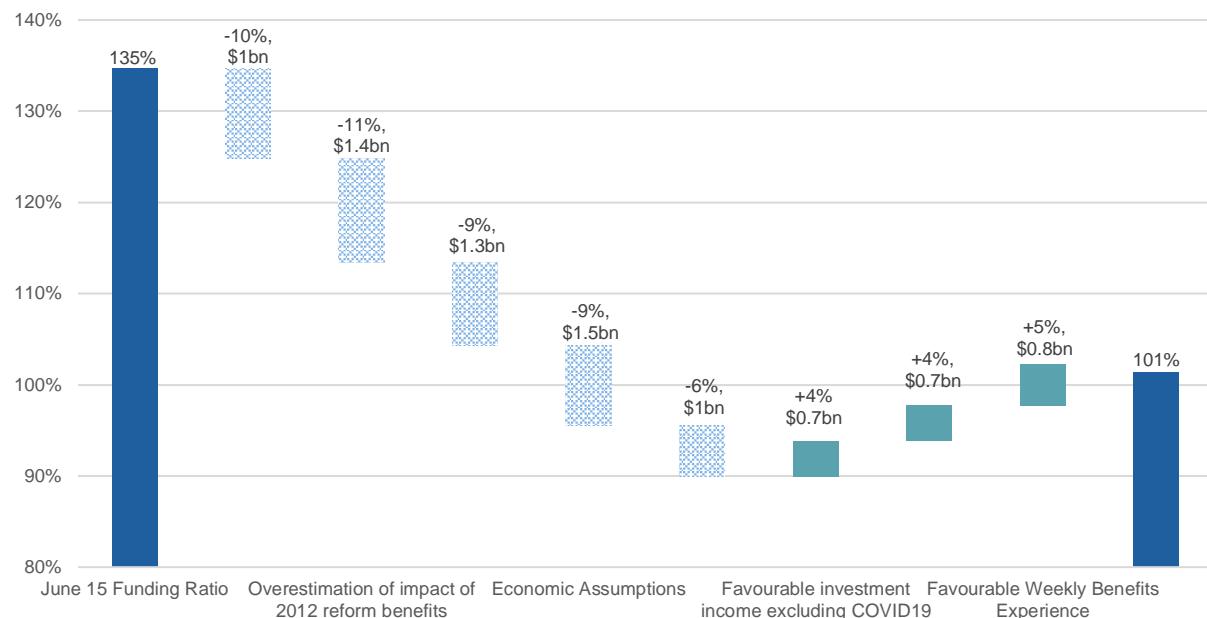
634 The fourth driver identified by icare is the impact of the COVID-19 pandemic. It has had an adverse impact on both the value of icare's investments and on the extent and amount of claims liabilities.

635 icare prepared a waterfall chart that it said demonstrated the cumulative effect of those matters (and included also an adjustment made for over-estimation of the impact of reforms to the workers compensation legislation). I reproduce that chart:⁴¹³

⁴¹² Cumpston Sarjeant, *Independent Review of icare – Financial Sustainability*, March 2021, 2

⁴¹³ icare Response to Media Issues, 25 September 2020 at Item 12, [22]

Figure 23: Funding ratio 75 per cent POA Waterfall June 2015 to June 2020



Source: icare, *Annual Report 2019-20*, 42

636 Three of those factors (legislative changes, changes in economic assumptions and the impact of the COVID-19 pandemic) were entirely beyond icare's control. A third one (increase in medical costs) was to some extent beyond icare's control. icare could not have averted them by its management of the NI.⁴¹⁴

637 CS commented that the chart just set out did not contain all the usual elements that would be seen in a waterfall chart in an actuarial report.⁴¹⁵ It is not appropriate to go into the detail of the commentary that CS supplied on the elements of that chart, in part because icare has not been given (nor could it have been given, in the time available) an opportunity to respond. Further, and as will become apparent in a moment the concerns that CS expressed are of historical significance. That follows from the conclusion expressed by CS:

The waterfall chart presented by icare is a non-standard presentation and does not correspond with our own understanding of impacts of some of the major drivers of change in the NI funding ration between 2015 and 2020.

We have not been able to properly review all aspects of this chart. The ambiguities and inconsistencies that we have highlighted above lead to a risk that readers of this chart will be left with incorrect or incomplete impressions about the path of the funding ratio between 2015 and 2020.⁴¹⁶

⁴¹⁴ Refer to the discussion of the fourth issue at [11 above](#).

⁴¹⁵ Cumpston Sarjeant, Comments on draft of Part A, 13 April 2021

⁴¹⁶ *Ibid.*

638 For present purposes, the important point is that the NI remains financially sustainable. The AF ratio has declined to 101 per cent at 75 per cent POA. Although that is of concern, it is worth noting that:

- the WorkCover target AF ratio immediately prior to icare's inception in 2015 was 90 to 100 per cent at 75 per cent POA;⁴¹⁷ and
- for the reasons I explain at *18.6 below*, the AF ratio is not necessarily the best gauge of the financial health of the fund.

18.4 Review of the NI's liabilities

639 CS was instructed to undertake a review of the financial sustainability of the NI. In doing so, CS reviewed the valuation of the outstanding claims liability of the NI as at 30 June 2020. As I have said, that estimate had been first reviewed by independent actuaries, Finity. Finity's work was then peer reviewed, in the manner described above, by PwC and EY then reviewed it on behalf of SIRA.

640 CS concluded there was nothing that had come to its attention that would leave it 'to believe that *Finity's valuation results are unreasonable*'.⁴¹⁸

18.5 Risks to the long-term financial sustainability of the NI

641 The CS Review identified the principal risks to the financial stability of the NI as being, in decreasing order of significance:

- the amount of premiums that will be collected;
- the investment return on financial assets;
- claims costs (of both existing claims and future underwriting); and
- other expenses of the NI.⁴¹⁹

642 The first risk, which comprises two elements, is probably the major determinant of long-term financial stability. Those two elements are the extent to which premiums can be increased, and the extent to which premiums are actually collected. It should be noted that although there is no legal constraint on increases in premiums, there may be very significant practical and political constraints. The second of those constraints is beyond the scope of my Review, but among the practical constraints is the risk that if premium rates are increased too much, some employers may leave the NI and choose either to self-insure or to insure with a specialised insurer. It is possible that the effect of employers departing the NI in this way would be to take out what are overall better risks, and leave the NI with a pool of overall worse risks.

643 The investment returns derived by icare on the assets of the NI are in accordance with its Strategic Asset Allocation (SAA). However, CS suggests that the focus on the AF ratio is a potential constraint on the SAA in the sense that it may be driving asset allocation away from assets with the potential for higher long-term returns, or assets

⁴¹⁷ Cumpston Sarjeant, *Feedback on Parts A and B*, 7 April 2021, 1

⁴¹⁸ Cumpston Sarjeant, *Independent Review of icare – Financial Sustainability*, March 2021, 1

⁴¹⁹ Ibid 2

which are a more appropriate match for inflation-linked liabilities. I return to this at [18.6 below](#).

644 The impact of fluctuations in the assumed discount rate on the NPV of liabilities is substantial. For example, if nothing else changes, a 1 per cent per annum decrease in the assumed discount rate for all years would lead to a 9.6 per cent increase in the present value of the NI's liabilities. But that increase in the NPV would have no impact on the economic performance of the NI.⁴²⁰ To put it another way, the focus on the AF ratio as the sole determinant of the financial health of the NI may not be appropriate.

645 CS considered the present premium levels of the NI and the assumed premium levels for the next three underwriting years, taken from icare's budget. CS concluded, as to the current premiums, that they were insufficient to cover claims costs and expenses.⁴²¹ That is not contentious. icare accepts that the decision to forego premium increases for the current financial/underwriting year necessarily meant that the premiums actually charged would be loss-making and would contribute to the deterioration of the NI's financial strength. That decision was made deliberately, having regard to the outbreak of the COVID-19 pandemic and its impact on the economy in general and on the stability of employment in particular.

646 icare's budget assumes that there will be increases in premium rates, as a percentage of wages, over the next three underwriting years (in addition to the usual increases for inflation and employment growth). icare has recently announced the details of its proposed premium changes for the next two years, being increases of 2.9 per cent for each of those years.⁴²²

647 The intention of those increases is to return icare to its preferred AF ratio of 115 per cent. As CS commented, a return to that ratio is highly dependent on the premium increases.⁴²³ SIRA has highlighted a concern as to the length of time it will take to reach BEP levels, even with icare's planned increases.⁴²⁴ However, whilst the return to the desired AF ratio and to break-even pricing will take several years, it is important to note that there is no basis for suggesting that the NI will be unable to meet its liabilities over that period.

648 The work done by CS considered the possibility that large employers or groups of employers might leave the NI in favour of self-insurance or specialised insurers. CS concluded that a small number of exits would not have a large effect on the financial sustainability of the NI. They cautioned, however, that if those who left represented relatively less risky employers, there would be a long-term negative effect.⁴²⁵ That, as I have said, is a possible constraint on premium increases, and it has to be balanced against the need for premiums to be increased to a level that will restore the long-term financial health of the NI.

649 It is clear from all the actuarial work that has been performed, at the various levels I have described, that if the NI's premium rates are increased in accordance with the

⁴²⁰ And in any event, as I have noted above, it may be offset by a corresponding decrease in inflationary expectations.

⁴²¹ Cumpston Sarjeant, *Independent Review of icare – Financial Sustainability*, March 2021, at 1

⁴²² icare, Website announcement - Workers compensation premiums adjust to future risks, 24 March 2021

⁴²³ Cumpston Sarjeant, *Independent Review of icare – Financial Sustainability*, March 2021, 15

⁴²⁴ SIRA, *Response to draft Parts A and B McDougall report*, 13 April 2021, 16

⁴²⁵ Cumpston Sarjeant, *Independent Review of icare – Financial Sustainability*, March 2021, 16

business plan prepared by icare, it will assist greatly in assuring the long-term sustainability of the NI. There are a number of assumptions built into the business plan, including as to possible savings in claims costs. CS considered that the assumed savings, being relatively modest, should be achievable; but should they not be achieved, the impact would be no more than a slight delay to return to the desired AF ratio.⁴²⁶ That is a simple consequence of the proposition that investment return assumptions are more significant to long-term sustainability than assumptions regarding claims costs, and that premium rates and collections are the most important factor of all.

18.6 AF ratio versus EF ratio

650 CS explained the issue as follows:⁴²⁷

The capital management and long term financial sustainability framework for the Nominal Insurer has been established by icare based on accounting liabilities of the scheme, determined using risk-free discount rates, and summarised using the Accounting Funding Ratio (AFR) (the ratio of scheme assets to liabilities measured using risk free discount rates).

The Accounting Funding Ratio (AFR) has been established by icare to be a centrally important metric of financial position for the Nominal Insurer. The Capital Policy of icare/NI refers to Capital (difference of assets and accounting liabilities) as being core to the insurer's financial strength and long term sustainability. The Board's risk appetite in this area is expressed via the Target Capital Ratio Policy, again based on the accounting liability.

In our view, it may be more appropriate for icare to establish a capital management and long term financial sustainability framework that is based on an Economic Funding Ratio (EFR) (measured using a discount rate based on expected investment returns, as is done when setting premiums). This would in our view create a more internally consistent and stable measure of financial position over the longer term, and would focus considerations of risk away from short term noise such as volatility in discount rates.

651 That was explained in more detail at Appendix B to the CS Report.⁴²⁸ CS gave a simple example of the way in which the valuation of a liability may change depending on the economic assumptions made:

While the use of risk-free discount rates is mandated for accounting disclosures, there is no mandated requirement that risk-free rates be used for other purposes. The most obvious alternative to using risk-free discount rates is to use asset-based discount rates based on expected returns on scheme assets.

There is a natural logic to the use of asset-based discount rates in some contexts. Consider an example where \$100 is required to settle an obligation in 5 years from now. The risk free discount rate may be 1% pa,

⁴²⁶ Cumpston Sarjeant, *Independent Review of icare – Financial Sustainability*, March 2021, 17

⁴²⁷ Ibid 6

⁴²⁸ Ibid 53

meaning that the liability measured on this basis is $\$100/(1+1\%)^5 = \95.15 . However, consider an example where the scheme has an opportunity to invest for that five year period, with expected earnings of 5% pa. If the scheme invested \$78.35 now, this would grow to \$100 in 5 years [$\$78.35 \times (1+5\%)^5 = \100]. From a funding perspective, the more appropriate measure of the central estimate of the present value of liability is \$78.35.

This use of an asset-based discount rate is common in management of funding, and the liabilities measured on this basis are closer to genuine best estimates of the amount required to settle the obligations than those determined using risk-free discount rates.

652 CS then summarised the advantages and disadvantages of the use of the two ratios as follows:⁴²⁹

The advantages and disadvantages of EFR compared to AFR when monitoring the longer term sustainability and capital position of the scheme include:

- *EFR includes a genuine best estimate of liability, determined using an asset-based discount rate based explicitly on the expectations for earnings on scheme asset. This creates an internal consistency in the numerator and denominator of the ratio, and a transparent measure of the underlying financial position of the scheme. In our view this is a significant advantage of EFR over AFR;*
- *The EFR is less volatile in the short term than AFR, but similarly responsive to changing economic conditions in the medium term. In our view this is a significant advantage of EFR over AFR;*
- *The EFR is not based on the liabilities reported in financial statements, whereas AFR is. This creates a communication challenge in the use of EFR, but this can form part of the overall communication of icare about the capital management approach. In our view this is a minor disadvantage of EFR, and not a reason to avoid use of EFR.*

653 Next, CS pointed out that focus on the AF ratio rather than the EF ratio had potential opportunity costs, without any corresponding economic benefit to the fund:⁴³⁰

The short term volatility in the AFR is actively managed by icare through an interest rate hedging strategy. While the movement in the AFR is real in terms of financial reporting, we contend that this volatility is not strongly or directly related to the economic position of the scheme. The hedge acts as a constraint on the investment policy – the cost of hedging is substantial (an opportunity cost for investment return that we think is probably in the range \$50-100M per annum), and we contend that, while the hedge will act to limit short term movements in the AFR, there are other ways of addressing the AFR volatility problem. In particular, a shift to EFR as the primary measure of economic position of the Nominal Insurer would reduce or remove the

⁴²⁹ Cumpston Sarjeant, *Independent Review of icare – Financial Sustainability*, March 2021, 54-55

⁴³⁰ Ibid 56-57

motivation for the interest rate hedge. We have provided further details on the interest rate hedge justification and practice in Appendix B1;

The premiums being put forward by icare include an amount in respect of balance sheet repair. While an AFR below 100% may be interpreted as an indicator of a solvency problem requiring balance sheet repair, we note that a shift to EFR as the primary indicator of long term sustainability may result in a different view. For example, in the Victorian context the AFR for Transport Accident Commission (TAC) was about 82% at 30 June 2020, but this is not taken as a sign of distress because the EFR (which is the primary measure of financial sustainability) remains at over 137%, and within the target range.

654 The costs of hedging were further discussed:⁴³¹

We have discussed the hedging strategy in detail with icare, TCorp (as investor) and Mercer (as the icare investment strategy peer reviewers). We have explored the concept of opportunity cost with these stakeholders. We understand from briefing papers prepared by TCorp for the IAC that TCorp expect the reduction in bond yield hedge from 100% to 50% to increase yields on the portfolio by about 0.3-0.4% per annum.

On an asset base of about \$18B, the opportunity cost of hedging appears to be quite high. The additional returns expected to be generated by reducing interest rate hedging from 100% to 50% is in the range \$50-90M per annum. There would be further gains expected if the interest rate hedge was removed altogether, and we consider that the overall cost of the interest rate hedge, in terms of foregone investment returns, is probably in the range \$50-100M per annum.

655 When icare commented on the draft of this part of my Report, it suggested, contrary to the views expressed by CS, that the NI had derived substantial benefits from the hedging program that icare had put in place. I do not need to decide whether CS or icare is correct (or, indeed, whether there is in fact any conflict between their views). I have no doubt that icare will take account of the comments made by CS when it comes to assess the extent and nature of any hedging strategies that it puts in place for the NI in future years.

656 I have included that somewhat lengthy summary of the two approaches in this part of my Report because it is directly relevant to the media issues presently under discussion. Its relevance to those issues lies in the fact that the focus (both in the media and by other critics) on the financial sustainability of the NI is based on the AF ratio; that is, on the position stated in NI's accounts. icare has no choice but to prepare the accounts of the NI on the basis that it does, including by assessing the NPV of future liabilities using the risk-free rate.

657 However, the focus on the accounting position as a measure of the real-world health of the NI seems to me to be questionable. An assessment that measured assets and liabilities, and hence financial sustainability, using the EF ratio rather than the AF ratio, would in my view lead to a more realistic appraisal. It would assess the value of assets (i.e. capital held against claims) on a real-world economic basis, and would assess the

⁴³¹ Cumpston Sarjeant, *Independent Review of icare – Financial Sustainability*, March 2021, 59

NPV of the liability for future claims on the same basis: an approach that compares like with like.

658 Another benefit of that approach would be that it avoids annual or semi-annual fluctuations in the assessment of the reserve for future claims unrelated to their real-world cost. It would allow a more nuanced approach to be taken to the management of the NI's capital position. One consequence of the focus on the AF ratio is that premiums as a percentage of wages may need to be increased to allow the NI to stay within its preferred funding ratio. A focus on the EF ratio as the tool for assessing premium rates could help to minimise premium fluctuations.

659 Thus, whilst I can accept that the criticisms that have been expressed of the financial sustainability of the NI might have some justification by reference only to the NI's financial statements, I do not think that they say anything particularly useful about the real-world financial sustainability of the NI. Many of those criticisms overlook the long-tail nature of the liabilities. In doing so, in my view, they pay excessive regard to the artificial construct of the financial statements: a construct that does not reflect economic reality.

660 Of course, the NI's assets and liabilities require very careful monitoring and management. Of course, icare must set premiums at rates that are consistent with the long-term sustainability of the NI. Of course, icare must do all it can to reduce costs, including most importantly by achieving appropriate claims management that maximises early, safe and sustainable RTW. Of course, it is appropriate for SIRA to maintain a close focus on those areas (among others) of icare's operations. These activities are all incidents of the proper management of the scheme. The fact that those activities are necessary is not an indication that the scheme is in danger; it is part of the process of assurance that it is not.

661 In summary, given the level of assurance produced by the multiple layers of review that I have described, and the assistance I have received from CS in relation to this subject, any suggestion that the scheme's financial sustainability is currently in doubt is, in my opinion, unsupportable.

18.7 Accuracy of the NI's financial statements

662 In my view, the criticisms that have been made of the accuracy of the NI's financial statements are not substantiated. I have described the process by which those statements are prepared and the valuation of liabilities is assessed, with that assessment being peer reviewed. Nothing in the report prepared by CS suggest that this process has gone awry, or that the stated liabilities, in the terms in which they are stated, are inaccurate, or are unreasonably assessed. It should be noted that the Audit Office has audited those statements every year, and in doing so has retained EY to provide assistance. Every audit opinion has been unqualified.

18.8 Concerns expressed by SIRA and others

663 SIRA, in the exercise of its regulatory role, reviews the semi-annual valuations of the liabilities of the NI. It does so by engaging external actuaries.⁴³² Those external actuaries have access to icare's documents, its in-house actuaries, the external

⁴³² SIRA, *Chronology of SIRA's supervision of the NI and decisions and deliberations of the SIRA Board*, September 20, 1

actuaries Finity, and the reviewing actuaries PwC. That process of review (on behalf of SIRA) has occurred since 2018.

664 SIRA said that it became focussed on the accuracy of the valuations of the NI's liabilities in 2019 and 2020.⁴³³ That focus arose from concerns that SIRA held as to what it perceived to be the deteriorating capital position of the NI and the risk of under-pricing of premiums. In April 2020, SIRA procured EY to carry out a risk review of the December 2019 valuation of those liabilities.⁴³⁴ There was some dispute between icare (under its then CEO Mr Nagle) and SIRA as to the quality of EY's review.⁴³⁵ Regardless, EY commented as follows:

*The major risk identified relates to the findings of the Dore [2019] Report in regards to claims management... if the technical case management issues identified in the Dore Report... do not continue to improve then there will be no commensurate improvement in return to work rates. This will likely have flow-on impacts to many aspects of the scheme. This is a key risk associated with the Nominal Insurer's performance and hence the actuarial valuation.*⁴³⁶

665 EY's conclusion is hardly surprising (and I do not mean to downplay it by saying this). It is obvious that effective claims management is the key factor in achieving safe and sustainable RTW. It is equally obvious that the management of RTW rates is a key factor driving the financial sustainability (or otherwise) of the scheme.

666 In August 2020, SIRA commissioned EY and another firm of actuaries, Taylor Fry, to review the June 2020 valuation of the NI's liabilities. Those firms replied in November and December 2020. EY's report essentially repeated what it had said in its earlier report.⁴³⁷ Taylor Fry concluded:

*In our assessment, Finity's valuation is reasonable. However, there are [sic] a range of key risks and uncertainties that require close monitoring and would benefit from more relevant data.*⁴³⁸

667 Neither of the EY Reviews, nor the Taylor Fry Review, was a formal peer review or audit review of the work done by Finity (which, as I have said, was peer reviewed by PwC and which has been assessed by EY in connection with the Audit Office's audit of the NI financial statements).

668 On the material that has been provided to me, the work done by EY and Taylor Fry for SIRA does not identify inaccuracies in the valuations of the NI's liabilities on which they commented. Rather, and appropriately, those firms identified key risks that might affect the liabilities. There is a significant difference between the identification of risks and the identification of inaccuracies.

669 As I understand it, the work done by EY and Taylor Fry assessed the valuations in the terms in which they were expressed: that is to say, valuations discounted to NPV using

⁴³³ SIRA, *Interview*, 25 November 2020, at notes 6-7

⁴³⁴ Standing Committee on Law and Justice, Sydney, 3 August 2020, at 43, (Carmel Donnelly)

⁴³⁵ *Ibid* at 43, (Carmel Donnelly) and at 57 (John Nagle)

⁴³⁶ Standing Committee on Law and Justice, Sydney, Key Risks Associated with the 31 December 2019 Nominal Insurer Valuation, August 2020 at 4-5

⁴³⁷ *Ibid*

⁴³⁸ SIRA, *Taylor Fry Review of the Nominal Insurer Valuation as at 30 June 2020*, December 2020, 4

the risk-free rate. I have commented already on the possible utility of using the EF ratio rather than the AF ratio as a real-world indicator of financial stability.

670 It is part of SIRA's regulatory role to consider the sustainability of the NI, including the accuracy of valuations of its liabilities. No criticism can be levelled against SIRA for seeking to perform that role nor for doing so in the way that it did (by obtaining the advice of independent actuaries). The key point, for present purposes, is that while there are risks to the accuracy of assumptions embedded in the valuations, it is clear that both SIRA and icare are taking appropriate steps to contain them.

671 Another criticism of the valuation of icare's liabilities that has received much attention in the media is one advanced by Mr Peter McCarthy. Mr McCarthy is a retired actuary whose qualifications, experience and ability are undoubted. Because those criticisms were reported so widely, I asked CS to cover them in its work.

672 As I understand it (based on Appendix A1 to the CS Report),⁴³⁹ the starting point of Mr McCarthy's criticism is to be found in the concept of WPI. As CS point out, WPI data for each claimant are an important element in determining benefit entitlement.⁴⁴⁰ Different WPI levels have different maximum durations of weekly payments and medical benefits. They also affect other entitlements, including the right to obtain a Work Injury Damages (WID) settlement. Thus, as CS conclude in the section of their report from which I am taking this:

WPI data is a necessary and crucial predictor of future claim behaviour Finity's Valuation Model. However, the scheme has inherent delays in receiving accurate WPI data, and in practice it is common for them to be a five year delay between injury and emergence of complete and objective WPI data.

*One of the key uncertainties in the liability valuation is the blind spot of the scheme relating to the ultimate WPI severity distribution for claims from recent accident years.*⁴⁴¹

673 CS identified what they considered to be three factors that have led to increased uncertainty in the assumed WPI distribution. Those factors are:

- worsening RTW experience;
- the apparently increasing prevalence of high WPI psychological injuries; and
- threshold disputes as to the extent of WPI.

674 As I understand it, Mr McCarthy's criticism relates to the first of those factors. Accordingly, before I turn to it, I will simply note that, as to the second and third factors, CS concluded:

- Psychological injuries: the valuation approach taken by Finity was reasonable, and the uncertainty as to this aspect of the valuation was represented within the central estimate and risk margin.

⁴³⁹ Cumpston Sarjeant, *Independent Review of icare – Financial Sustainability*, March 2021, 39

⁴⁴⁰ Ibid

⁴⁴¹ Ibid

⁴⁴² Ibid 39-43

⁴⁴³ Cumpston Sarjeant, *Independent Review of icare – Financial Sustainability*, March 2021, 42-43

- b) Threshold disputes: The low level of threshold disputes is below that which would invalidate the valuation approach, and thus that Finity's approach and assumptions are not unreasonable.⁴⁴⁴

675 I return to the first factor: RTW experience. CS noted that Finity's underlying assumption was that future WPI experience was more or less independent of RTW experience. That is, that future poor RTW rates would not translate into significantly more or higher WPI claims. Finity based that view on long term historical experience. CS thought that the experience on which Finity relied supported the assumption. CS added that other evidence studied by Finity in fact suggested that its assumption was conservative rather than optimistic.⁴⁴⁵

676 The alternative view of course is that a declining RTW rate will translate into higher WPI claims for the more recent accident periods in which RTW rates have declined. That appears to be Mr McCarthy's view. Mr McCarthy gave evidence to the SCLJ. He said:

*The scheme actuary [Finity] has not allowed for one additional claim to exceed the 10, 15, 20 percent WPI threshold arising from the obviously substantial deterioration in return to work.*⁴⁴⁶

677 CS deduced from that evidence that Mr McCarthy was linking a decline in RTW rates to an increase in higher WPI threshold experience, with the increased costs that would follow if those thresholds were exceeded for a greater number of claims.

678 CS commented, as to Mr McCarthy's evidence, that it was '*satisfied that Finity's valuation assumptions... are based on a substantial body of objective evidence and are within the reasonable range, rather than being unduly optimistic.*'⁴⁴⁷

679 CS repeated its view that the assumptions adopted by Finity were conservative. It added⁴⁴⁸:

We consider that the valuation risk margin has a role to play in representing the impacts of any low-probability high impact event. Finity have explicitly considered the unusually large potential impact of WPI severity uncertainty in setting their risk margin for this valuation, and this is the single largest component of their overall risk margin. We consider that this is reasonable.

680 Thus, CS concluded:

The general stability of the WPI frequency distribution in the past in the face of changes in RTW experience gives comfort that, at worst, any increase in WPI frequency distribution due to poor RTW experience will be a muted response not proportionately linked to the recent and expected future increase in active weekly claims at the 4-6 year duration. Further, the valuation currently includes an allowance for a deterioration in the severity distribution compared to the exceptionally good most recent emerging severity data (for accident periods 2013-2015).

⁴⁴⁴ Ibid

⁴⁴⁵ Cumpston Sarjeant, *Independent Review of icare – Financial Sustainability*, March 2021, 39-42

⁴⁴⁶ P McCarthy, Standing Committee on Law & Justice, Sydney, 23 November 2020, 26

⁴⁴⁷ Cumpston Sarjeant, *Independent Review of icare – Financial Sustainability*, March 2021, 41

⁴⁴⁸ Ibid 42

We are satisfied that Finity's assumptions and approach in this respect are not unreasonable.

681 I accept that Mr McCarthy was well qualified to express the opinion that he did, and that his criticism must be considered on its merits. I accept that he has identified correctly a key risk. However, Mr McCarthy did not have available to him the amount of consultation and other work that CS has performed. Taking that work and the conclusions of CS based on it into account, I conclude that Finity's valuation of the liability is reasonable, and is founded on a substantial body of evidence; and that the inherent uncertainty has been accommodated explicitly in the overall risk margin. Thus, I am not persuaded that Mr McCarthy's criticism, read in the light of the further information that I have received, is sustained.

682 Mr Nagle said that icare had '*offered Peter McCarthy [the opportunity] to meet with internal and external actuaries to discuss his concerns and offered an open book discussion...*'⁴⁴⁹ icare had not said this, and since I did not conduct an interview with Mr McCarthy, I can do no more than note Mr Nagle's comment.

18.9 Allocation of expenses between the NI and other schemes managed by icare

683 On 10 December 2020, the Audit Office of NSW released its Central Agencies Report, in which (among other things) it stated that '*icare's allocation of service fees to the Workers Compensation Nominal Insurer is not transparent and does not assure they reflect actual costs*'.⁴⁵⁰ This statement has been raised both in the media and in Parliamentary hearings.

18.9.1 Background

684 icare incurs costs in its capacity as the service entity of the schemes it administers. It then seeks to recover those costs through service fees it charges to those schemes. While some of those costs are directly referable to, and charged against, identifiable schemes (direct costs), other costs, such as general overheads, are necessarily shared between schemes (indirect costs). This position is not troubling in principle. It is a means of accomplishing the economies of scale and operational efficiencies that icare was established to achieve.

685 However, it is necessary that icare have some reasonable and defensible method to allocate indirect service costs between the various schemes, to ensure that the funds available to those schemes are used for lawful purposes, and that shared expenses are distributed fairly.

686 The NI is primarily funded through the WCIF, made up of premiums and investment earnings. The purposes for which that fund may be used are set out in section 154E(2) of the WC Act 1987.

⁴⁴⁹ J Nagle, *Comments on Part A*, 13 April 2021

⁴⁵⁰ Audit Office, *Central Agencies Report 2020*, 10 December 2020, at 31

(2) The assets of the Insurance Fund may be applied for the following purposes only—

- (a) meeting claims under policies of insurance issued (or taken to have been issued) by the Nominal Insurer other than a claim transferred pursuant to a claims transfer agreement under Division 6,
- (b) the payment of direct expenses associated with any such claims (not being expenses of a class excluded by the regulations from this paragraph),
- (c) the payment of management expenses relating to the Insurance Fund (not exceeding such amount as the Minister may from time to time determine),
- (d) the provision of rebates or refunds (including interest) to employers by the Nominal Insurer for overpayment of premiums for policies of insurance issued (or taken to have been issued) by the Nominal Insurer or for any other reason that the Nominal Insurer considers appropriate,
- (e) the payments required for any contract or arrangement for re-insurance in respect of liabilities under policies of insurance issued (or taken to have been issued) by the Nominal Insurer,
- (f) meeting the costs of any actuarial investigation of the Insurance Fund,
- (g) meeting the costs of any management, consultancy or auditing fees incurred in connection with the exercise of the functions of the Nominal Insurer,
- (h) the payment by the Nominal Insurer of contributions under this Act to the Guarantee Fund or the Terrorism Re-insurance Fund as referred to in section 239AE,
- (h1) the payment to the Workers Compensation Operational Fund of amounts approved by the Minister under section 35 of the 1998 Act,
- (i) the payments authorised or required to be made by the Nominal Insurer to scheme agents under their agency arrangements,
- (j) exercising any other functions of the Nominal Insurer,
- (j1) the transfer of assets of the Insurance Fund to a claim agent pursuant to a claims transfer agreement under Division 6,
- (k) making any other payment authorised by or under this Act or the regulations.

18.9.2 Concerns as to cost allocations

687 The Audit Office found that icare had not been able to demonstrate that its cost allocations reflected the actual costs incurred by each scheme:

In the absence of documentation supported by robust supporting [sic] analysis, there is a risk of the Workers Compensation Nominal Insurer being overcharged, and the allocation of costs being in breach of legislative requirements.⁴⁵¹

688 icare provided my Review with information on its cost allocation methodology. That methodology is as follows.

689 icare prepares a budget, as part of which it seeks to apportion indirect costs for each scheme according to its expected usage. Each scheme other than the NI is then charged, as an actual cost, the amount apportioned to it. If the indirect costs vary from the budgeted figure, the variance is allocated to the NI. That may mean that the NI is charged a figure different to that allocated to it.

⁴⁵¹ Audit Office, *Central Agencies Report 2020*, 10 December 2020, at 31

690 The rationale for this is that, in icare's view, costs variances from the budget are '*highly likely*' to be attributable to the transformation process to date.⁴⁵² There is presumably a further assumption, namely that the indirect costs of the other schemes are more susceptible to accurate estimation, and less to variance.

691 The costs so allocated are then reviewed monthly, with any adjustments made as part of the half year budget review and annual review processes. That is done in an attempt '*to ensure that the allocation broadly aligns with usage*'.⁴⁵³

692 icare '*accepts that there are steps it can take to improve [the] transparency*'⁴⁵⁴ of this process, and has commenced a detailed review. SIRA has also announced, in response to this issue, that it will review the use of the WCIF.

693 I do not have sufficient information to conclude whether icare's methodology for allocating indirect cost complies with relevant legislative obligations. Further, given that the reviews I have described are to be undertaken, I do not think it either necessary or appropriate to do so.

694 However, before I leave this issue, I should make it clear that it is troubling that the Audit Office has identified significant concerns as to the transparency of the process of allocating indirect costs and as to the lack of documentation to support what icare does. This appears to be another manifestation of the theme I have identified in the context of other issues: the lack of attention to process.

695 It may be (I express no view, for the reasons already given) that icare's process for allocation of indirect costs is justifiable. But whether that is so or not, it is essential that icare ensures that it documents its decisions, and the reasons for them, on significant matters such as this. My concern is that its failure to do so to date may have resulted in a breach of the legislation governing the use of the NI's funds.

696 I do note that icare has, in this instance, moved promptly to review the matter raised. It is to be hoped that if any rectification be shown to be necessary as a result of that review (or SIRA's), it will be attended to swiftly and completely.

⁴⁵² icare, *Further Media Issues Response – Allocation of service entity costs*, February 2021, at [3], 1

⁴⁵³ Ibid at [3], [15]-[19]

⁴⁵⁴ Ibid at [35]

19 Financial position of the TMF

697 The specific allegation made in the media was that the TMF needed a ‘*bailout*’ with a \$4 billion payment from Consolidated Revenue in June 2020.⁴⁵⁵ That report was factually incorrect, and in any event misunderstood the way that the TMF operates.

19.1 The statutory background

698 In substance, the State of New South Wales self-insures in respect of workers compensation and other liabilities of the State, state authorities and eligible state officials. Those self-insurance arrangements are provided through Government Managed Fund schemes which are now governed under the *NSW Self Insurance Corporation Act 2004* (SICorp Act). That Act establishes the SI Corp and gives it a number of functions. Those functions include, by section 8, the following:

8 Specific functions in relation to Government managed fund schemes

(1) The Self Insurance Corporation has the following functions with respect to Government managed fund schemes:

- (a) to operate one or more Government managed fund schemes (including the function of establishing, reorganising, amalgamating, dividing or winding up such schemes),
- (b) to enter into agreements or arrangements with other persons to provide services (as agents or otherwise) in relation to the operation of any Government managed fund scheme,
- (c) to enter into insurance or other agreements or arrangements (including by providing indemnities) to cover the liabilities to which a Government managed fund scheme applies,
- (d) to act for the State, an authority of the State or an eligible State official in dealing with claims under a Government managed fund scheme (including the recovery of amounts payable to the State, an authority of the State or an eligible State official in connection with such claims).

(2) In exercising its functions under subsection (1) (c), the Self Insurance Corporation may enter into contracts of insurance as the insured but not as the insurer.

Note—

The Self Insurance Corporation may, for example, obtain insurance from another insurer to cover its own liabilities in providing cover under a Government managed fund scheme. However, it may not provide insurance to the State or any authority of the State or eligible State official whose liabilities are covered by such a scheme. Their liabilities may be managed by means of other agreements and arrangements, including by the provision of indemnities.

(2A) To avoid doubt, the Self Insurance Corporation may exercise its functions under subsection (1) (d) by acting for a person who is a former eligible State official in dealing with claims under a Government managed fund scheme relating to the person’s acts or omissions when the person was an eligible State official.

(3) Nothing in the *State Owned Corporations Act 1989* (including clauses 5 and 6 of Schedule 10 to that Act) prevents the Self Insurance Corporation from providing indemnities to, or entering agreements or arrangements with, a director or other officer (or any other person concerned, or taking part, in the management) of a State owned corporation to cover the liabilities of such a director, officer or person.

⁴⁵⁵ Sydney Morning Herald, *NSW Treasurer authorises \$4 billion bailout for the icare scheme on funding deadline*, 22 August 2020

(4) Entering into insurance or other agreements or arrangements (including the provision of indemnities) to cover the liabilities to which a Government managed fund scheme applies is declared to be an excluded matter for the purposes of the *Corporations Act 2001* of the Commonwealth in relation to Chapter 7 (Financial services and markets) of that Act.

Note—

Section 5F of the *Corporations Act 2001* of the Commonwealth provides that if a State law declares a matter to be an excluded matter for the purposes of that section in relation to all or part of the Corporations legislation of the Commonwealth, then the provisions that are the subject of the declaration will not apply in relation to that matter in the State concerned.

- 699 By section 9(1) of the SICorp Act, SI Corp is authorised to delegate any of its functions (apart from the power of delegation) to an 'authorised person'. Authorised persons include, by section 9(2)(a), a member of staff of icare. Section 10(1)(b) of the SICG Act authorises icare to provide services for any relevant authority in relation to any insurance or compensation scheme administered by that authority. By section 10(2)(d), SI Corp is one such relevant authority.
- 700 The TMF is one, and the largest, of six government insurance funds operated by SI Corp.

19.2 Outline of the operations of the TMF

- 701 It is convenient to talk of the TMF insuring the various agencies, and I will do so in this Report. That convenient usage, however, obscures the true legal position. The agencies actually self-insure; the TMF's function is to manage that self-insurance. It does that through icare. For the purposes of workers' compensation liabilities, the employer and the (self) insurer are one and the same.
- 702 The TMF assesses the insured liabilities at the central estimate. In doing so, it assesses the NPV of those liabilities on the accounting basis – that is, discounted using the risk-free rate. Unlike the NI, the TMF does not apply a risk margin. However, pursuant to the Net Asset Holding Level Policy (NAHLP) administered by Treasury, the TMF is expected to operate on an accounting funding ratio of between 105 per cent and 115 per cent.
- 703 That funding ratio takes a number of considerations into account, including of course the possibility of an unanticipated or rapid deterioration in claims experience.
- 704 The insured entities pay contributions into the TMF each year towards the cost of claims that they will experience. If for any particular year claims overall fall below the central estimate, contributions together with investment earnings will exceed the amount paid out. The reverse of course will happen if claims overall exceed the central estimate.
- 705 The assets and liabilities of the TMF are reviewed each year. If, for whatever reason, the assets of the TMF exceed what is necessary to keep the TMF's AF ratio within the 105 per cent to 115 per cent band, the TMF may be required to pay an amount into Consolidated Revenue. If the funding ratio falls below the desired band, the funds of the TMF may be topped up by a payment from Consolidated Revenue.

706 The following chart shows the extent to which the TMF has contributed towards (positive), or received payments from (negative), Consolidated Revenue from 2005 to 2020.⁴⁵⁶

Figure 24: TMF Consolidated Revenue Contributions



Source: NSW Treasury, *Treasury response to Independent Reviewer request*, 22 February 2021, 8

707 As can be seen, payments to Consolidated Revenue have substantially exceeded payments from it over those years.

708 More importantly for my purposes, the chart shows that the NAHLP was operating as intended. The operation of that policy ensured that the TMF had sufficient funds, but no more than sufficient funds, to meet its expected liabilities.

19.3 Inaccuracy of the \$4 billion ‘bailout’ allegation

709 I said above that the allegation of a \$4 billion ‘bailout’ was factually incorrect. The Treasurer approved a payment of up to \$4 billion to be paid to the TMF and to other Government Managed Funds if needed. Of that \$4 billion, only \$2 billion was, in the events that happened, paid. And of that \$2 billion, only \$1.8 billion was paid into the TMF. The balance was paid into another Government Managed Fund. Presumably, the unpaid balance of \$2 billion is available if needed; but the important point, in terms of the inaccuracy of the published allegation, is that of the whole of the headline figure of \$4 billion, only 45 per cent was paid to the TMF.⁴⁵⁷

710 I add that the opportunistic usage of the term ‘bailout’ misrepresents the truth, which is that the payment into the TMF was a normal, although in monetary terms very large, incident of the designed operation of the NAHLP.

⁴⁵⁶ NSW Treasury, *Treasury response to Independent Reviewer request*, 22 February 2021, 8

⁴⁵⁷ Ibid

711 The other point to note, before leaving this issue, is that the losses in the TMF were not attributable to icare's mismanagement. The principal contributors to those losses include:

- a) extreme losses from the 2019-20 bush fire season;
- b) losses due to the impact of the COVID-19 pandemic on state agencies and entities;
- c) a provision for liabilities for historic child abuse claims; and
- d) an adjustment for contributions from insured agencies relating to prior underwriting years. Those contributions were required as a result of a Treasury review of the TMF contribution mechanism.

19.4 Conclusion

712 There is nothing of substance in this allegation. The emotive and pejorative term '*bailout*' is unjustified. The report is, factually inaccurate. And, to the extent that the media commentary sought to assign to icare responsibility for the need for the transfer of cash into the TMF, it was wrong.

Part 1B: Organisational review of icare

20 Terms of Reference

- 1 Part 1 of my Terms of Reference requires me to conduct a comprehensive organisational review of icare, having regard to allegations recently raised in the media and in Parliament. I dealt with those allegations in *Part 1A*. In this Part of my Report, I turn to the organisational review. That will cover icare's:
 - a) Operations, including claims managements, the claims agent model and incentive structures, RTW performance, and the service provided to injured workers.
 - b) Delivery of the recommendations of the Dore 2019 Review.
 - c) Realisation of the benefits icare was established to achieve.
 - d) Culture.
 - e) Governance.
 - f) Executive Remuneration.
 - g) Board effectiveness and accountability.
 - h) Procurement practices.
 - i) Management of probity matters such as gifts, travel, & conflicts of interest.
 - j) Relationship with SIRA.
- 2 I deal with this aspect of my Review in the following sections below:
 - a) Submissions received (*21 below*).
 - b) Operation of the workers compensation scheme and related matters (Terms of Reference (a) and (b)) (*22 below*).
 - c) Organisational matters (Terms of Reference (b), (d)-(i) and (j)) (*23 below*).
 - d) Supervision of icare and relationship with SIRA and others (Terms of Reference (e) and (j)) (*24 below*).
 - e) Realisation of the benefits icare was established to achieve (Terms of Reference (c)) (*25 below*).

21 Submissions received

- 3 The Review made a formal call for written submissions. In addition, a survey was developed to enable employers, injured workers and other people with experience of the scheme to provide input, without having to make a written submission.
- 4 Both modes of communication to the Review were made available through the NSW Government 'Have Your Say' website.

21.1 Survey

- 5 The questions in the survey were framed to elicit a broad range of responses, ranging from simple satisfied or dissatisfied (or equivalent) answers to more detailed responses. There were 201 responses to the survey. Those responses provided me with an opportunity to identify themes and systemic issues other than those raised in written submissions.
- 6 Responses to the survey were consistent with, and reflected the issues raised in, the Dore 2019 Report; media and Parliamentary reporting; and the written submissions to the Review.
- 7 It is important to note that there are a number of limitations on the utility of the survey. The number of respondents, 201, is tiny compared with the number of claims on scheme. The survey was voluntary and was conducted online. These factors could produce a bias in responses. It is possible that dissatisfied workers, and workers who are comfortable engaging through an online portal, were more likely than others to respond. As responses were anonymous and self-directed, respondents may have interpreted questions and answered questions differently.
- 8 For those and no doubt other reasons, the survey cannot be taken as a statistically valid representative sample of worker experiences. It does however have value. It enabled people who might otherwise have remained silent to put their views through an informal and accessible means. And it has added weight to the body of evidence obtained by the Review.
- 9 Over half the respondents to the survey identified themselves as a person who had been injured at work, while 11 per cent were employers. Less than 10 per cent of respondents stated that their main experience with the system was through a family member or friend, or that they did not have personal experience of the system. Over 70 per cent of respondents said they dealt with icare, rather than with a third-party insurer.
- 10 Most respondents who said they dealt with icare directly said they were extremely dissatisfied with the service they received during their claim. When asked about their experience, the most common issue raised was criticism of the triage model. That was followed by concerns with the timeliness and clarity of communications during the claims process. Several responses also raised the time it took to access treatment or process a claim.
- 11 Most respondents expressed strong support for better customer service in the area of claims management, and called for both icare and insurers to be more accountable for their actions. There were very few responses suggesting that the separation of WorkCover into three agencies had been ineffective, or that there should be a greater choice of claims providers.

21.2 Written Submissions

12 Claims management was the primary theme of written submissions to this Review. Most focused on the new claims management model, although they raised other issues as well.⁴⁵⁸ The most prominent concerns expressed in submissions were the need to improve the claims management process; declining RTW rates; and questions on the nature and extent of legislative oversight of icare under the SICG Act.

21.2.1 Operations, including claims management, the claims agent model and incentive structures, RTW performance, and the service provided to injured workers

13 Both survey responses and submissions criticised the introduction of the triage engine in January 2018, and referred to other perceived shortcomings in case management.⁴⁵⁹ By and large, survey participants noted that these concerns were the main reasons for their dissatisfaction with icare in particular and the workers compensation system more generally.

14 Respondents often commented on their personal claims experience, or the experiences of people they represented or people they treated. They highlighted poor customer service and poor communication from either icare or the insurer during the claims management process. Access to treatment and the workload of case managers were also frequently discussed by workers, employers and employer groups.⁴⁶⁰

21.2.2 Delivery of the recommendations of the Dore 2019 Review

15 Submissions that discussed the Dore 2019 Review and Report focused on the deterioration in case management and in RTW rates since the introduction of the NCOM and the NISP.⁴⁶¹ Most of those submissions came from employers and industry representatives. Submissions recommended that a dedicated claims manager be appointed for every claim.⁴⁶² Others saw benefit in the appointment of multiple scheme agents (with improvement expected to flow from competition), and in the introduction of incentive structures to improve RTW outcomes.⁴⁶³

⁴⁵⁸ Issues related to the interaction between privacy laws and the workers compensation system were raised in submissions from Business NSW, November 2020; NIBA, October 2020; and the Australian Federation of Employers and Industries, November 2020. These are discussed in *Part 2*.

⁴⁵⁹ For example: *Submissions to the Independent Review*: Anonymous Stakeholders; Australian Federation of Employers and Industries, November 2020, 2, 4 and 12; Anonymous stakeholder group

⁴⁶⁰ For example: *Submissions to the Independent Review*: Australian Medical Association (AMA), 29 October 2020, 2; Unions NSW, 30 October 2020, 4; Public Service Association (PSA), 30 October 2020, 3-7; Law Society of NSW, 29 October 2020, 3; National Insurance Brokers Association (NIBA), 6 November 2020, 4; Australian Federation of Employers & Industries (AFEI), November 2020, 3-5; Anonymous Stakeholder Group

⁴⁶¹ For example: *Submissions to the Independent Review*: Teachers Federation, October 2020, 2; Insurance Council of Australia (ICA), 30 October 2020, 3

⁴⁶² For example: *Submissions to the Independent Review*: Insurance Council of Australia (ICA), 30 October 2020, 3; Australian Federation of Employers & Industries (AFEI), November 2020, 3

⁴⁶³ For example: *Submissions to the Independent Review*: Insurance Council of Australia (ICA), 30 October 2020, 35; Anonymous Stakeholder Group

21.2.3 Realisation of the benefits the legislation was intended to achieve

- 16 Submissions discussed the benefits that the introduction of icare had been meant to achieve.⁴⁶⁴ Submissions also cited anecdotal evidence from employers that RTW outcomes have been deteriorating significantly. Some submissions highlighted perceived inadequacies in the current claims management model, and asserted that it has not resulted in improved scheme outcomes.⁴⁶⁵ Submissions also cited high turnover of case managers, high caseloads, and poor communication, leading to increasing scheme costs and liabilities, as key factors contributing to the alleged failure to achieve the benefits of legislative change.⁴⁶⁶
- 17 EML (who should be in a position to know) submitted that '*The focus of the claims management model had shifted too far towards a general insurance model and away from what we believe are good principles of personal injury management; people-led and supported by systems*'.⁴⁶⁷

21.2.4 Culture

- 18 A number of submissions referenced icare's culture. Unsurprisingly most of these came from current or former employees of icare. The overriding thrust of those submissions was that cultural shortcomings were not just the result of the actions or inactions of a few individuals or the outcome of bad processes, but were the consequence of a wider organisational breakdown. These submissions asserted that icare's senior management had tolerated the development of a poor workplace and organisational culture, in which people who tried to do the right thing and disclose information related to wrongdoing were ostracised, seen as unmanageable, and eventually terminated.⁴⁶⁸

21.2.5 Governance

- 19 Issues of governance were raised in a small number of submissions. They came from current or former icare staff, who wished to remain anonymous.
- 20 These submissions raised concerns relating to the overall culture of icare, including a culture of dismissing concerns and a lack of clear reporting and accountability in relation to issues raised. I note that questions about icare's governance were a key theme of media reports.

21.2.6 Executive Remuneration

- 21 Executive remuneration at icare was not a central focus in the submissions received, either from the public consultation or from the survey. Of the submissions received, some stated that the payment of salaries outside the framework set by the *Government Sector Employment Act 2013* had had an adverse impact on the financial

⁴⁶⁴ For example: *Submissions to the Independent Review*: Anonymous Stakeholder; Teachers Federation, October 2020, 5

⁴⁶⁵ For example: *Submissions to the Independent Review*: Unions NSW, October 2020, 2; Anonymous Stakeholder Group, 2; Anonymous Stakeholder Group

⁴⁶⁶ For example: *Submissions to the Independent Review*: The Australian Industry Group, 29 October 2020, 10; AMA, October 2020, 3; ARPA, October 2020, 5 and 14

⁴⁶⁷ EML, *Submission: icare and State Insurance and Care Government Act 2015 Independent Review*, 30 October 2020, 6

⁴⁶⁸ For example: Three Anonymous submissions

viability of the scheme.⁴⁶⁹ However, most of the allegations concerning alleged excessive remuneration came from media reports.

21.2.7 Board effectiveness and accountability

- 22 Submissions from current and former icare staff, all of whom wished to remain anonymous, raised issues of the Board's effectiveness and accountability. Those submissions suggested that there was a general culture of dismissing concerns and problems. They asserted that the Board's effectiveness had declined over time. There was a strong suggestion that significant information was either kept from the Board, or provided to the Board too late, for it to take action.
- 23 Some of those submissions suggested there was limited experience of Board members in areas of operations and insurance.⁴⁷⁰ Again, however, most of the focus on board accountability appeared in, and derived from, media coverage.

21.2.8 Procurement Practices

- 24 Most of the submissions discussing procurement practice referred to the tenure of Mr Bhatia and Mr Nagle whilst they were, consecutively, icare's CEO. Those submissions alleged that icare's Board at the time had tolerated questionable practices, which were supported by a culture that either disregarded or circumvented legal obligations and NSW Procurement Guidelines.
- 25 Submissions from current and former icare employees alleged that it was widely known and accepted within icare that no procurement framework or policies were being followed while Messrs Bhatia and Nagle were in charge.⁴⁷¹ Some of those submissions suggested that this was a consequence of the Board's and executive management's lack of experience with NSW Government practices and legislation. That last point can hardly be correct, bearing in mind the number of people on the Board with that experience, and the fact that many of icare's employees had come across when icare devolved from WorkCover.

21.2.9 Management of probity matters such as gifts, travel, & conflicts of interest

- 26 A number of submissions dealing with probity matters outlined perceived shortcomings in icare's policies and procedures. All the submissions that discussed this topic came from current or former employees. They gave examples of what they said were failings in probity at icare. Those submissions also alleged that employees who raised concerns with senior leaders had been, in consequence, mistreated.
- 27 A small number of submissions alleged that there had been widespread theft of icare property, misuse of company credit cards and travel. Those behaviours were said to have been recurrent and systemic, and to have been tolerated. This was said to highlight the lack of experience and rigour with NSW state legislation rules on probity.⁴⁷² As to the last point, I repeat what I said at [25 above](#).

⁴⁶⁹ For example: Anonymous Submission

⁴⁷⁰ For example: Three Anonymous Submissions

⁴⁷¹ For example: Three Anonymous Submissions

⁴⁷² For example: Three Anonymous Submissions

21.2.10 Supervision of icare and its relationship with SIRA and others

- 28 Several submissions suggested that the legislative and regulatory structures should provide for more governance and oversight of icare, and that there was a need for more accountability for poor performance. Some suggested that there had been conflict between icare and SIRA. However, it was acknowledged that following the appointment of Mr Don Ferguson as interim CEO in August 2020, the relationship with SIRA had improved.
- 29 One of those submissions agreed with the Dore 2019 Report's recommendation for ongoing collaboration between the boards of icare and SIRA.⁴⁷³ Others queried whether SIRA has the appropriate powers to exercise of its role as the regulator.⁴⁷⁴

⁴⁷³ For example: Education Union – Teachers Federation, *Submission to the Independent Review*, 4 November 2020, 4

⁴⁷⁴ For example: *Submissions to the Independent Review*: Australian Industry Group, 29 October 2020, 10; Anonymous Stakeholder Group; Australian Lawyers Alliance, 28 October 2020, 4

22 Operation of the workers compensation scheme and related matters

30 In this section, I deal with the following parts of my Terms of Reference together:

- operations, including claims management, the claims agent model and incentive structures, return to work performance, and the service provided to injured workers; and
- delivery of the recommendations of the Dore 2019 Review.

31 To assist me in this part of my Review, at my request Treasury engaged Ms Dore to undertake a review (the Dore 2021 Review). Ms Dore was instructed to:

- assess the delivery of recommendations made as part of the Dore 2019 Report;
- review performance reporting since the Dore 2019 Review;
- provide an updated assessment of the benefits and risks to performance of the NI scheme flowing from recent changes to the claims management model and incentive structures; and
- analyse actuarial data related to performance, outcomes and trends in operational performance.

32 In this section of the report, I consider first icare's claims management model (22.1) and claims agent model (22.2). In doing so, I shall show how those models were developed, and set out what I think are the lessons to be learnt.

33 I shall then state briefly how icare has addressed the findings of the Dore 2019 Report and the 21 Point Plan developed in response to that report (22.3).

34 Next, I move on to assess the current position. In doing so, I consider the findings of the Dore 2021 Report (22.4) and assessing more broadly the service that icare is currently providing to employers and to injured workers (22.6).

35 Finally, drawing on Ms Dore's 2021 work, I make recommendations for further improvements (22.7).

22.1 Claims management model

36 icare's institutional view of the rationale for its establishment is that its role in life was to transform the claims management process, so as to improve significantly the claims experience of and outcomes for injured workers.⁴⁷⁵ In 2018, in what it perceived to be furtherance of that goal, icare implemented significant and wide-reaching changes to the way in which, up to then, claims management services had been delivered.

37 Whilst those changes appear to have resulted in some improvements in customer experience, icare now acknowledges that they also created significant problems: '*the extensive change agenda had, in part, contributed to a deterioration in front-end return to work outcomes*'.⁴⁷⁶

⁴⁷⁵ icare, *Submission to Independent Review - 1(a) Claims Operations*, 18 November 2020, at [1]

⁴⁷⁶ *Ibid* [2]

38 SIRA agreed. It said that '*[t]he major changes implemented by icare in early 2018 had significant and negative implications on the performance of the workers compensation system...in the months that followed I observed negative trends in return to work rates, liability valuations and costs, premium setting, operational reforms, risk management and data quality.*'⁴⁷⁷

39 The changes made by icare to the operational aspects of the workers compensation system are central to a number of the matters to be considered by this Review, and are therefore set out in some detail below.

40 When one considers what follows against the experiences of injured workers, employers and others since 2018, it quickly becomes apparent that the changes were overly ambitious in their scope, and overly rapid in their introduction. They stacked multiple significant changes one on another in a short space of time: a process that increased the risk factor by a multiple of the number of changes. They were implemented without due testing, and with insufficient (if any) regard for the risks inherent in that approach.

41 I acknowledge that these comments are made with the benefit of hindsight: one of the most powerful analytical tools invented by humanity. Nonetheless, none of the problems that ensued were unforeseeable or unpredictable. They were problems that should have been identified as possible to occur, and then considered and analysed through appropriate testing and modelling. *Festina lente*⁴⁷⁸ was a maxim as appropriate in 2015 – 2018 as it was in Roman times.

22.1.1 The New Model

42 icare came to the view that, prior to its establishment in 2015, claims management had been characterised by:

- a) overly adversarial management;
- b) a lack of consistency in service delivery, process, systems and training between the existing five scheme agents;
- c) duplication of work, resulting in inflated costs to the scheme and inconsistency in treatment of injured workers; and
- d) inappropriate influence from external stakeholders (i.e. employers and insurers).

43 In 2016, icare developed what it termed a 'new claims management model'⁴⁷⁹ in response to those problems. That model 'was underpinned by icare taking 'ownership' over the customer experience, by introducing a single IT claims platform (launched in 2019 for new claims ...) and creating a uniform claims experience for all injured workers and employers'.⁴⁸⁰

44 The new claims management model had a number of strategic objectives. They included a less adversarial, 'customer-centric' approach, and icare's accepting 'accountability' for outcomes.⁴⁸¹

⁴⁷⁷ SIRA, *Response on Media Issues*, 2 October 2020, 1

⁴⁷⁸ Make haste slowly.

⁴⁷⁹ icare, *Media issues response*, 25 September 2020, at Item 3, at [2]

⁴⁸⁰ Ibid

⁴⁸¹ icare, *Submission to Independent Review- 1(a) Claims Operations*, 18 November 2020, at [18]

45 The NCOM was designed around three key, inter-related, components:

- a) a '*dedicated provider*'⁴⁸² or single agent model: a reduction in scheme agents, with icare having greater control of the scheme agent's behaviour
- b) the NISP: a single technology platform to operate across the entire scheme; and
- c) a new claims service or management model, focussing on the customer experience and using technology to allocate resources to claims.

46 Unfortunately, the NCOM did not work as icare had hoped. icare has stated to this Review that:

*With the benefit of hindsight and experience, icare acknowledges that the single provider captive model has not delivered the anticipated outcomes and that opportunities for improvement must be demonstrated to strengthen the performance of the scheme and rebuild the trust and confidence of stakeholders.*⁴⁸³

22.1.2 Claims Service model

47 The NCOM was introduced in January 2018. As part of that introduction there was a move to the use of a single agent to manage new claims. I return to this topic at [22.2.1 below](#).

48 The NCOM was '*intended to make the claims process simpler, more transparent, more effective and deliver fairer and more consistent outcomes to injured workers*',⁴⁸⁴ and to make the process less adversarial.⁴⁸⁵ Its design '*sought to ensure that every injured worker was contacted as a priority in the lodgement process and was intended to operate within the following principles*:

- a. *Resources allocated accordingly to need;*
- b. *Straight-through processing where possible;*
- c. *Empathic customer service which empowers customers;*
- d. *Service partners as an extension of icare; and*
- e. *Focus on return to work and life.*⁴⁸⁶

49 Most notably, the NCOM's operation was based on a process of triage. Although I have described that in [Part 1A](#), I shall, for convenience and to avoid backtracking, repeat that description.

50 When a new claim was submitted, an automated triage engine assigned it to one of four service segments.⁴⁸⁷

⁴⁸² icare, *Submission to Independent Review- 1(a) Claims Operations*, 18 November 2020, at [18]

⁴⁸³ *Ibid* at [42]

⁴⁸⁴ *Ibid* at [25]

⁴⁸⁵ *Ibid* at [27]

⁴⁸⁶ *Ibid* at. [26]

⁴⁸⁷ See *Ibid* at [31]-[36]; icare, *Media issues response*, 25 September 2020, at Item 1 [9]-[23]

- a) Guide: a segment intended for the lowest complexity claims. Injured workers in this segment were assigned to a team within the 'Support Centre' rather than to a dedicated claims manager. Initially, claims where the worker expected to return to work within 6 weeks were assigned to the Guide segment. That time has since been progressively revised down and now sits at one week of lost time.⁴⁸⁸.
- b) Support: a segment intended to handle more complex injuries where there was thought to be a greater period off work, or where there were biosocial factors that were seen as likely to increase the risk of delayed return to work. Claims in this segment receive a dedicated case manager, with a target maximum case load of 65 such claims for each case manager.
- c) Specialised: a segment for more complex claims requiring more support, such as claims involving psychological or medically complex injuries. Claims in this segment have a dedicated case manager, with a target caseload of 35 such claims for each claims manager.
- d) Care: a segment for the handling of claims involving the most severe injuries, where the injured worker is likely to require lifetime care and support.

51 icare said that the Guide segment has the following three objectives:

...to educate injured workers on injury pathways and health literacy, empowering the worker to take control of their own recovery, in line with the Health Benefits at Work ideology,

Remove low complex, low risk claims away from skilled case managers so they can focus on recovery strategies for more complex claims; and

Providing immediate service for low-complexity claims through the team-based approach, with share resources and capability. The rate of resolution following the first call is 80 per cent in this segment (the highest of the segments)'⁴⁸⁹

52 icare adds the further comment that '*[f]or high complexity claims, external commentary has made comparisons with specialised insurers who have lower caseloads. These insurers typically only allocate claims to a dedicated case manager where an injured worker is unable to work, and, once the person returns to full duties, the "medical only" claims are moved into another team (meaning the worker experiences a change in case manager and often team-based case management)*'⁴⁹⁰

22.1.3 Development of the NCOM

53 As discussed in *Part 1A*, work on development of a new technology platform commenced prior to icare's establishment. The contract for that work was approved in November 2015, shortly after the establishment of icare.

54 Between June 2015 and December 2015 icare (which devolved from the SRWS Board during this time) conducted customer experience research to inform the design of a new claims service model. McKinsey Digital was engaged to develop a '*customer centric service solution ...premised on the assumption of a centralised claims*

⁴⁸⁸ icare, *icare status report for SIRA 21-point actions*, November 2020, 5

⁴⁸⁹ icare, *Submission to Independent Review- 1(a) Claims Operations*, 18 November 2020, at [35], 9

⁴⁹⁰ icare, *Media Issues Response*, 25 September 2020, at Item 1, at [10]

platform'. McKinsey Digital also conducted a '*design project*' to '*redesign the customer experience*', including through research of claims management both within and outside the insurance industry.⁴⁹¹

- 55 Although icare says that this initial phase of work included '*piloting of segmentation*', the nature and extent of that piloting are unclear.⁴⁹² icare did not formally consider or document the possible impact of the triage process on workers outcomes such as return to work. Nor did it attempt to quantify the possible impact of the change on the short term stability of the scheme. Rather, it seems that icare believed that improved RTW rates and recovery at work would follow automatically from the changes it proposed to make.
- 56 On 26 April 2016, management, under the direction of Mr John Nagle (who was then icare's Executive General Manager, Workers Insurance),⁴⁹³ presented to the Board a detailed proposal for the NCOM. At that time, the proposal expressly noted that the implementation of the NISP would be the '*key*' to the success of the NCOM.⁴⁹⁴ The supporting briefings outlined in detail the various stages of the model's development and the expected benefits for service provision.
- 57 It appears that there was some consideration of return to work at a general level at this stage of the NCOM's development. icare, having identified '*focus areas*' for the design, stated that '*to achieve timely RTW outcomes, holistic profile of a workers situation will be required*', and that providing appropriate support will require '*getting the triage right – right owner to handle the right claim*'.⁴⁹⁵
- 58 So far as the evidence to my Review goes, those prescient observations do not seem to have been supported by or followed up with any further piloting or testing to ensure that the NCOM as designed was in fact capable (or likely to be capable) of performing according to those excellent principles.
- 59 In November and December 2016, icare developed the model further through a series of workshops with a range of stakeholders. This development work continued into 2017.
- 60 On 27 March 2017, the Board was asked to, and did, approve the appointment of EML as a single agent to handle new claims. This is discussed further at [22.2 below](#). The Board asked whether transition to the new model ought to be delayed until Release 2 (that is, the anticipated release of the Guidewire platform to support claims management) was in place and operating. '*Management commented that the delay would be for 12 months, however the opportunity was to improve the experience for new claims in the interim and this was the key motivator for selecting a single partner*'.⁴⁹⁶

⁴⁹¹ icare, *Explanatory note - Development and approval of the new model of claims management*, December 2020, at [9]-[11]

⁴⁹² *Ibid* at [11]

⁴⁹³ *Ibid* at [9]-[11]

⁴⁹⁴ icare, *Board Meeting Minutes*, 26 April 2016, 8

⁴⁹⁵ icare, *Briefing for the Board*, 26 April 2016, at Tab A, 14

⁴⁹⁶ icare, *Board Meeting minutes*, 27 March 2017, 5

61 Shortly before the roll-out of the NCOM, icare conducted two rounds of testing designed to confirm that the service and operations models were fit for purpose and able to go live. They comprised:⁴⁹⁷

- a) a ‘dress rehearsal’ – operational testing against 1200 historical claims (with 850 of those claims to be triaged after delivery of the triage engine during the dress rehearsal) over a period of eight weeks; and
- b) customer experience testing, which roleplayed a series of scenarios to test claims handling in the early stages of a claim (from initial contact to receiving an initial management plan).⁴⁹⁸

62 The dress rehearsal utilised historical claims files to conduct detailed testing of staffing, training, processes and procedure. The reports that were prepared on that process focused significantly on the testing of staffing assumptions, case flows and management, the skill level of staff, and similar matters. The dress rehearsal did not test decision rights and delegations, as these had not been set in place at the time the dress rehearsal was conducted.⁴⁹⁹

63 There were other limitations to the testing. The operation of the triage engine could not be fully tested, because the triage engine itself was only delivered about three weeks before the end of testing. Further, the limited time for testing must have meant that the impact of triage thresholds and of delaying proactive case management could not be assessed. Indeed, the tests were not designed to enable any assessment of those matters, as there was no long term testing, and because the claims tested were historical.

64 Customer experience (CX) testing was directed specifically towards testing the new elements of Triage and Support Centre. The testing used roleplays and reflective discussions to test four scenarios, from lodging a claim to receiving an injury management and return to work plan. That testing did not involve actual claims management using new, real life, claims.

65 The CX testing identified a number of problems. Those problems became manifest in the operation of the scheme once it was launched. The inference is that if anything was done to deal with the problems, it was ineffective.

66 The testing feedback noted that ‘we continued to hear that customers want a dedicated point of contact’.⁵⁰⁰ The customers referred to included both workers and employers. Testing also identified a weakness in the pooled approach to claim management, where a pool or team of individuals, rather than a dedicated claims manager, supported individual injured workers. When customers dealt with the team, the information they received could, and during the testing did, vary from person to person. That experience led customers to question the integrity of the process.⁵⁰¹ Although this identified a key weakness in the pooled aspect of icare’s NCOM, it does

⁴⁹⁷ icare, *Explanatory note - Development and approval of the new model of claims management*, December 2020, at [9]-[11]; See icare, *Dress Rehearsal Summary Report*, 11 December 2017

⁴⁹⁸ icare, *CX Experience Testing for Aspire Day 1*, December 2017, 45

⁴⁹⁹ icare, *Dress Rehearsal Summary Report*, 11 December 2017, 15

⁵⁰⁰ icare, *CX Testing – Full Report - January 2018*, December 2017, 5

⁵⁰¹ *Ibid* 18

not appear that icare appreciated the potential impact of that weakness on claim outcomes, or took any steps to correct it.

- 67 Regardless of these limitations, the testing that had been performed seems to have satisfied icare that the NCOM was ready to proceed.
- 68 It appears that the focus throughout development of the model was on the customer experience. Far less (indeed, it seems, very little) consideration was given to assessing the potential impact of the new model on worker outcomes such as return to work.
- 69 The design objectives and features of, and briefings on, the model refer to customer experience. Board minutes record a desire to 'seek better outcomes'⁵⁰² without specifying what they were. Briefings refer to an intention to deliver '*icare accountability for the ongoing sustainable scheme result*'.⁵⁰³ No doubt, customer experience is important. But it cannot be (nor could it have been thought to be) the key determinant of the efficient functioning of the operation of a claims management system for workers compensation claims.
- 70 It is difficult to identify, from icare's records, any significant discussion or assessment of RTW rates as a factor to be considered in the testing of the NCOM. There is little discussion of the possible impact that removing proactive case manager support might have on claims outcomes. No one seems to have considered the desirability of conducting pilot testing of the triage engine and pooled model in what was to be their operational state.
- 71 It was appropriate for icare to direct efforts to the improvement of customer experiences, to the reduction of disputes in the system, and to the improvement of efficiency and accountability. However, those matters were not all that needed to be built into the NCOM. Good claims outcomes – specifically prompt, safe and sustainable return to work - lie at the heart of a fair system for workers compensation.
- 72 The haste with which icare moved to implement large scale change meant that it did not test the way in which the operation of the NCOM would affect claims outcomes. The testing that was conducted was directed to day to day aspects of the model's operation. There was no attempt to test the model with real claims. Only historical claims, which of their very nature could not lead to the identification of any deficiencies in the triage model, were used. That testing was not designed to assess, and thus could not assess, how the fundamental changes that were proposed would improve claims outcomes; or at the very least, would not worsen them.
- 73 Changes of this magnitude ought to have involved far more careful consideration of their potential impacts on claims outcomes. There should have been more thorough testing (for example, through a properly designed, conducted and supervised pilot scheme using live claims) before the NCOM was implemented for all new claims, and more thorough testing of the ability of EML's claims management staff to operate in a real world, live claim, environment.
- 74 Similarly, although the NISP had been identified as a fundamental part of the NCOM and as a key to its successful functioning, icare elected to proceed with the rollout of

⁵⁰² icare, *Board Meeting Minutes*, 26 April 2016, 8

⁵⁰³ icare, *Briefing for the Board*, 26 April 2016, 1

the NCOM without the NISP. I do not understand how this could have been done; how the model could have been, as it were, put on the road without a steering wheel.

- 75 The obvious conclusion is that icare's commitment to transformation overwhelmed common sense; that speed and the need for apparent achievement triumphed over planning and process. The result was inevitable. The vaunted achievement has been devalued accordingly.
- 76 That, unfortunately, was not the end of the problems. They continued after the NCOM was rolled out. icare was slow to adapt to the operational difficulties that, all too soon, emerged.
- 77 It took approximately nine months, and required escalation to the CEO, for icare to provide approval for EML to increase staff numbers, and to permit EML to recruit in advance of forecast increases in claim volumes to allow for induction and training. Claims forecasting was not delegated to EML until 2020.
- 78 icare accepts that there were significant delays in its response to the unexpectedly high claims numbers. By the time it did respond, efforts to improve the numbers of claims management staff were hampered by high attrition rates – to which, as I have already found, the wholly unreasonable caseloads that resulted from under-forecasting contributed.
- 79 The problems that arose, reflected in part the rigid contractual arrangements, and other difficulties, in the relationship between icare and its single scheme agent (discussed further at [22.2.4 below](#)). If icare had been positioned to react swiftly to issues as they arose, the consequences of its decision not to conduct pilot testing on live claims might have been averted, or at least ameliorated. icare was not able to do so, and those consequences accrued.

22.1.4 Authorised Provider Model

- 80 Prior to the launch of the NCOM in 2018, icare had received feedback from large employers, through industry consultation, that they wished to retain their existing relationship with their current claims service provider. As a result, since 2018 there has been a small number of employers who have continued to use Allianz and GIO instead of EML.⁵⁰⁴
- 81 As noted, EML experienced challenges in meeting the staff resourcing demands of claims management activity in 2018 and 2019. I discuss this at [22.2.3 below](#). This issue was examined in the Dore 2019 Review. The Dore 2019 Report recommended that icare '*should consider allocating files to other agents with expertise to reduce the load on EML and provide time for skills and experience to improve*'.⁵⁰⁵
- 82 From January 2019, icare engaged Allianz to conduct pilot testing of an Authorised Provider (AP) Model to handle NI claims. It was intended to give some freedom of choice of service provider to some employers. Under that model, large employers were given the choice to have Allianz, rather than EML, manage their claims, with certain other amendments to allow for dedicated points of contact and other variations preferred by large employers.⁵⁰⁶

⁵⁰⁴ icare, *Submission to Independent Review- 1(a) Claims Operations*, November 2020, at [122] 33

⁵⁰⁵ Janet Dore, *Independent Reviewer Report into the Nominal Insurer*, December 2019, 68-69

⁵⁰⁶ icare, *Submission to Independent Review- 1(a) Claims Operations*, November 2020, at [123] 34

83 In late 2019, as part of a reassessment of its claims model, icare considered expansion of the AP Model. It also considered the introduction of a specific model to meet the needs of small and medium businesses; but ultimately icare did not proceed with this. icare says that '*in learning from its experiences in the commencement of the new claims model ... icare modelled the impact of RTW improvement through reducing concentration risk in the scheme*'.⁵⁰⁷

84 icare decided that the pilot testing of Allianz's AP Model was successful. It engaged Allianz, GIO and QBE as additional providers. From 1 January 2020, the AP Model became available to large employers.⁵⁰⁸

85 Before 2015, claims agents providing outsourced claims management were able to do so using their own IT platforms. However, APs under the current AP Model are required to operate on icare's IT platform. icare has advised my Review that this will provide '*greater oversight and control through direct access to the claims system and real-time access to data*'.⁵⁰⁹

86 icare has said that as at February 2021, 310 employers or employer groups have chosen an AP over EML. That accounts for approximately 12 per cent of newly lodged NI claims⁵¹⁰ and approximately 51 per cent of eligible businesses. EML suggested that whether measured by number of employers or premium value, the numbers who had moved was less.⁵¹¹ In my view, as icare has the totality of the data on the AP Model, its figures are more likely to be reliable.

87 Some participants in the AP Model suggested that there have been, and in some cases continue to be, concerns as to how that model is run. They gave as examples that the model used by icare may underestimate the rate of psychological injuries, and therefore the number of claims managers required; there have been ongoing negotiations in respect of decision rights; and the model imposed by icare has resulted in delays and duplication of work.⁵¹²

88 It has not been possible in the time available to evaluate those concerns, or more generally to explore the operation of the AP Model in more detail. I note that there are some indications that icare has committed to greater transparency and flexibility in the way in which services are delivered under this model.⁵¹³ That is something to be monitored closely and carefully.

89 icare says that the initial results suggest that the AP Model delivers RTW performance when compared with EML's performance. There are several possible reasons for this.

90 Firstly, it may be the result of the smaller caseloads that the AP providers have. It may also be the result, not of any advances in the AP Model, but because that model was not the victim of the errors made in the rollout of the NCOM and the NISP. Further, the

⁵⁰⁷ icare, Return to Work (RTW) modelling – explanatory note, February 2021, at [9], 3

⁵⁰⁸ icare, *Submission to Independent Review- 1(a) Claims Operations*, November 2020, at [123-124] 34

⁵⁰⁹ *Ibid* at [126] 34

⁵¹⁰ *Ibid* at [125] 34

⁵¹¹ EML, *EML Feedback*, 9 April 2021, 1

⁵¹² *Interview with ICA*, 11 December 2020, at Notes 2-3; *Interview with Anonymous Stakeholder Group*

⁵¹³ *Interview with ICA*, 11 December 2020 at Notes 2; *Interview with Anonymous Stakeholder Group*

AP Model is only available to larger employers. Both icare⁵¹⁴ and EML⁵¹⁵ claim that RTW rates tend to be higher for large employers than for smaller employers. It is therefore unclear whether the AP Model itself results in improved RTW outcomes.

- 91 Allianz, GIO and QBE have all recently commenced utilising icare's claims platform (the NISP), which may assist in comparing performance in future.
- 92 icare intends to continue to promote the AP Model in the hope of maintaining the benefit that it suggests have been realised to date. EML raised concerns that the movement of a significant number of businesses to APs is likely to increase competition for experienced claims staff, including those currently working for EML, and may thus further exacerbate turnover and impede EML's programs aimed at increasing their skills and capabilities.
- 93 It is not clear that the AP Model will produce an overall, scheme-wide, increase in RTW rates. It may be that for the employers who migrate to the AP Model, RTW rates will improve. However, the opposite side of that coin would be a reduction in RTW rates for the pool of employers who remain insured by the NI. The two factors may cancel out.
- 94 Not all employers are eligible to take advantage of the AP Model. It is not yet clear from any empirical evidence whether in fact the use of the AP Model delivers benefits for injured workers greater than those of the modified new claims management model in its current (and projected) form. It is essential that the APs present their data to icare in a form that enables it to be compared with data on the performance of other agents. As I understand it, icare intends that the use of the NISP by APs as well as by EML will achieve this. It is also essential that icare monitor the operation of the AP Model very carefully to ensure that the splitting of claims management functions does not detract from (and ideally improves) RTW rates and the timely and comprehensive delivery of benefits to injured workers.

22.1.5 Claims Management for the TMF

- 95 Management of the TMF's workers compensation claims is broadly similar to that for the NI. The main difference is that, for the TMF, the government agency employers play an active role in the management of claims. Larger agencies have their own dedicated workers compensation teams. icare has described the overall approach for the TMF as one where '*day to day oversight of claims management manifests in those agencies, with scheme level performance and portfolio oversight provided by icare*'.⁵¹⁶
- 96 Starting in 2018, icare developed a new claims model for the TMF, in consultation with government agencies.⁵¹⁷ That came into effect on 1 January 2020. Under this model, claims are segmented into one of two categories based on severity of injury and need for support, among other factors. That segmentation is used to allocate resources to support the injured workers. It is important to note that, in both categories, each claimant has a dedicated case manager.⁵¹⁸

⁵¹⁴ icare, *Claims Service Provider performance data*, (Webpage, July 2020) at <https://www.icare.nsw.gov.au/about-us/statistics/claim-service-provider-performance-data>.

⁵¹⁵ EML, *EML Feedback*, 9 April 2021, 1

⁵¹⁶ icare, *Submission to Independent Review- 1(a) Claims Operations*, at [48] 11

⁵¹⁷ *Ibid* at [50-52] 11

⁵¹⁸ *Ibid* at [62-63] 13-14

97 In January 2020, icare appointed four claims agents to provide management services for TMF claims. They are Allianz, EML, GIO and QBE. icare has advised me that the contracts with these agents incorporate lessons learned from the former contract with EML, and include performance incentives that are directed to claims outcomes, including RTW, as well as to costs.⁵¹⁹

98 As shown in [22.5 below](#), the RTW performance of the TMF has consistently been better than the NI's, and better than the self and specialised insurers. However, in common with all providers, the TMF's RTW performance has declined in recent years.

99 A key feature of and challenge to the TMF's RTW performance has been the increased incidence of psychological claims. These typically have longer duration and greater support costs. icare says that the average number of psychological claims as a proportion of all claims for the TMF has increased from 14 per cent in 2016 to 18 per cent in February 2020, with a peak of 21 per cent in 2021.⁵²⁰

100 Only a limited number of submissions to my Review addressed the management of TMF claims. Where they did so, the primary complaint appeared to be the continuation of longstanding issues (pre-dating icare), although those issues may be escalating.⁵²¹

101 Representatives of workers raised concerns that employers in the TMF (who are self-insurers) were not in all cases meeting their own responsibilities to assist workers back to work, and that claims managers were not performing their function of encouraging employers to do so. The prevalence of these issues varied between agencies. A recurrent theme in submissions on the TMF is that neither icare nor SIRA is responding properly to these ongoing concerns.

102 SIRA has stated that it will use its regulatory powers to carry out a compliance and performance review of the TMF in 2021. SIRA says that the review is in response to '*regulatory monitoring and stakeholder input as well as a recent investigation into the handling of three Department of Corrective Services workers compensation claims*'.⁵²²

22.1.6 Changes to claims management

103 Since 2019, icare has made several changes to its claims management model. Those changes are intended to address some of the issues identified in the Dore 2019 Report.

104 The changes were made by icare in conjunction with EML. They focus on improving the design of the claims model and stabilising operations within EML. Key elements of the changes include:

- adjusting the Guide segment risk settings and introducing dedicated case managers to any claim with more than seven days continuous time loss⁵²³ (reduced from two weeks in September 2019);^{524&525}

⁵¹⁹ icare, *Submission to Independent Review- 1(a) Claims Operations*, at [55] 11

⁵²⁰ *Ibid* at [183] 50

⁵²¹ *Interview with Anonymous Stakeholder*

⁵²² SIRA, *Submission: to the Independent Review*, November 2020, 15

⁵²³ icare, *Submission to Independent Review – 1a Claims Operations*, 18 November 2020, 24

⁵²⁴ EML, *Submission to the Independent Review*, 30 October 2020, 5

⁵²⁵ icare, *Submission to the Independent Review– 1a Claims Operations*, 18 November 2020, 22

- b) improving EML's performance through collaboration with EML, amending the SPA between icare and EML, and building the capability of EML claims staff;
- c) revising the Decision Rights Framework to help govern new claims service model in a transparent and more accountable manner;⁵²⁶ and
- d) delegating claims forecasting to EML.⁵²⁷

105 EML supports those changes. It considers that they will '*strengthen the Scheme and deliver a higher level of service and improved return to work outcomes*⁵²⁸ and '*empower case managers to provide a highly individualised service to injured workers and their employers*'.⁵²⁹

106 In addition to these changes, icare has taken steps to refine the claims model to help deliver more effective claims service. Those steps include providing coaching to claims management providers on how best to implement better practice, implementing better initial engagement strategies to improve initial contact with claimants, promoting stronger engagement for return to work recovery, and introducing post-call surveys to collect feedback.⁵³⁰

107 Improvements have also been made to the underlying predictive analysis modelling. Those improvements seek to ensure greater accuracy in the recognition of risk factors associated with claims, and to ensure that claims are properly assigned into their appropriate segment having regard to the complexity of each claim.⁵³¹

108 A broad review of icare's claims service model and operating model commenced in November 2020.⁵³² While this work is ongoing, icare is considering options to refine the model further. They include ways to spread risk, enable healthy competitive behaviour between agents, and review of the role of an icare claims team.⁵³³ These options are being considered '*on the premise that good infrastructure has been built (Guidewire) but the model can be opened up to more providers rather than the original single provider approach*'.⁵³⁴ The possible benefit of competition must be weighed against EML's ability to employ and retain suitable claims management staff, as I discuss at [22.2 below](#).

109 In the Dore 2021 Report, Ms Dore placed particular emphasis on the following reviews commissioned by icare since the Dore 2019 Report:

- a) Review of PIAWE calculations 2019-20 – prepared by KPMG and delivered in September 2020;
- b) Internal Audit Report - Workers Insurance Claims Determination (EML NewCo) – prepared by icare and delivered in January 2021; and

⁵²⁶ icare, *Submission to the Independent Review– 1a Claims Operations*, 18 November 2020, 20

⁵²⁷ EML, *Submission to the Independent Review*, 30 October 2020, 4

⁵²⁸ Ibid 3

⁵²⁹ Ibid

⁵³⁰ icare, *Submission to Independent Review– 1a Claims Operations*, 18 November 2020, 22

⁵³¹ Ibid

⁵³² Ibid 25

⁵³³ Janet Dore, *Operational Review of Insurance and Care NSW and Delivery of recommendations of the Dore Report*, 5 March 2020, 13

⁵³⁴ Ibid

c) Claims Service Model Implementation Review – prepared by PwC and delivered in November 2020.

110 Ms Dore concluded, after considering those reports, that while changes to the claims management model implemented to date have resulted in some improvement in claims performance, improvement in key metrics such as return to work have not been as timely or as marked as they should have been.⁵³⁵

111 Ms Dore stated that '*Substantial work has been conducted or commissioned by icare with a focus on the three key areas of data quality, RTW and sustainability of the Workers Compensation (WC) scheme. This work has not raised new issues but has confirmed the need to adjust the Claims Service Model (CSM) to a hybrid model, involving more service providers to spread caseloads and the risk inherent to the single service provider model.*'⁵³⁶

112 Skills and capability, data quality, and ongoing financial sustainability are reiterated throughout the Dore 2021 Report as known areas of weakness in the claims management model. They are identified as areas which require ongoing focus in order to deliver the necessary improvements in operational performance.

113 The Dore 2021 Report also points to continuing concerns about the attraction and retention of capable staff within the claims management operation. This is identified as a further area of weakness which reduces service consistency and customer confidence. Ms Dore states that '*All [improvements to the claims management model] will depend on capable and experienced staff available which icare has acknowledged as one of the weaknesses confronted by EML from the start of implementation.*'⁵³⁷

22.2 Claims agent model

22.2.1 Move to single scheme agent

114 The central idea in icare's conception of the proposed new claims management model was that icare would be '*taking "ownership" of the customer experience*'.⁵³⁸

115 icare told my Review that when it conducted its selection process, it '*was seeking value for cost while maximising the ability to deliver quickly on customer experience objectives and transition to the new claims management model.*'⁵³⁹ By way of aside, that statement is consistent with my conclusion at [22.1.3 above](#) that customer experience, in itself a nebulous concept capable of accommodating to quite diverse subjective understandings of its content, was the focus of the transformation that icare intended to achieve.

116 In December 2016, icare commenced the process of selecting a new agent. The selection process commenced by seeking submission of expressions of interest. The

⁵³⁵ Janet Dore, *Operational Review of Insurance and Care NSW and Delivery of recommendations of the Dore Report*, 5 March 2020, 2

⁵³⁶ Ibid

⁵³⁷ Ibid 14

⁵³⁸ icare, *Submission to Independent Review – 1a Claims Operations*, 18 November 2020, 37

⁵³⁹ icare, *Media issues response*, 25 September 2020, at Item 3 [2]

submissions concluded in February 2017. Consideration of the submissions took place in March 2017.⁵⁴⁰

- 117 The selection process included separate advisory and selection committees, with the former considering the submissions and making recommendations to the latter. There were internal and external probity advisers. The final decision was made by the Board.⁵⁴¹ The selection of EML as the single agent was approved by the Board on 27 March 2017.
- 118 After the Board made that decision, icare and EML negotiated the terms of their contract. Those negotiations continued throughout 2017. The EML SPA was signed on 22 December 2017.
- 119 So far as I am aware, there has been only one criticism of the procurement process that icare followed leading up to the engagement of EML.⁵⁴² That criticism was raised in the SCLJ hearings on 3 August 2020.⁵⁴³ It was to the effect that tenderers may have been caught by surprise, because they had not understood that icare was contemplating a move to a single agent model.
- 120 I do not think that this criticism has substance. The tender documents were clear. They required all tenderers to provide pricing for three different shares, 33 per cent, 50 per cent and 100 per cent, of the portfolio.⁵⁴⁴ It could be thought that the reference to 100 per cent might convey, at least to a moderately careful reader, that the appointment of a single claims agent was a possibility.

22.2.2 Suitability of single claims agent

- 121 As noted above, a deliberate part of icare's approach to reform of claims management was to achieve consistency of customer experience, with icare being responsible and accountable for claims management. In part, this approach was intended to address existing and longstanding concerns about the behaviour of some scheme agents, and the existence of what were perceived to be perverse incentives in their remuneration models.
- 122 icare considered that the proposed 'captive'⁵⁴⁵ single agent model would help it achieve those objectives. These matters were expressly considered both in deciding on the number of agents to be engaged, and in selecting the tenderer to perform the role of agent.
- 123 One of the risks that management put to the Board for its consideration was an '*increased risk of disruption and greater operational complexity, the more scheme agents appointed*',⁵⁴⁶ with attendant risk of increased operational costs. These risks were seen as possible offsets to the benefits that might accrue from increased

⁵⁴⁰ icare, *Selection Process Timeline, Annexure 3A to icare response on media issues*, 25 September 2020

⁵⁴¹ *Ibid*

⁵⁴² I note that RSM identified a lack of proper record keeping.

⁵⁴³ Standing Committee on Law and Justice, Legislative Council, Sydney, 3 August 2020, 13, (McHugh)

⁵⁴⁴ icare, *Media issues response*, 25 September 2020, at Item 3, [15]

⁵⁴⁵ icare, *Discussion Document for Board Meeting*, 27 March 2017, at 4

⁵⁴⁶ icare, *Board Meeting Minutes*, 27 March 2017, at 4

competition. By contrast, they were risks that would not arise from the proposed ‘captive’ model.⁵⁴⁷

- 124 The Board considered the possibility of appointing two service providers. However, as I have said, it decided to approve the single provider model.⁵⁴⁸ It is important to remember that the proposed single agent model relied on the availability of a certain level of automation, and the ability for claimants to access self-service through technology.⁵⁴⁹
- 125 The Board raised concerns as to capacity and scale-up: the ability of EML to employ sufficient capable staff, and to increase the scale of its operations to handle the load. Management addressed these concerns, although as we now know, the measures that they proposed were insufficient.
- 126 I accept that there were sound, common sense practical reasons for icare to decide to adopt to a single provider model. That model, if successfully implemented, was capable of providing a solution to the real problems that had plagued the claims system since well before icare was created, and that clearly, icare was intended to cure. It was a solution that was consistent with icare’s implicit charter to innovate.
- 127 In short, I conclude that the process leading to the decision to move to a single provider model was not inherently flawed. It was however essential that the implementation of the model be carefully planned and managed. And it was equally essential that EML be given the resources and support to allow it to plan for, and scale up to, the huge workload that it would take on.
- 128 Again, I do not consider that there was any manifest error in the decision to select EML. It was obvious that whoever was chosen would have needed to scale up significantly if it were successfully to take on 100 per cent of new claims. EML had significant operations elsewhere in Australia. It had successfully participated in the NSW workers compensation scheme both in its capacity as a scheme agent and in its capacity as an insurer in the hospitality industry.
- 129 It is not the function of this Review to undertake a merits review of the decision to select EML. My concern is with the process by which that decision was developed, analysed, considered, and ultimately adopted.
- 130 In my opinion, that process was not afflicted by any inappropriate probity or procurement concerns. The recommendations put forward by management were developed through an externally reviewed, exhaustive and comprehensive process. There was consideration of the alternatives and risks. The Board adequately challenged the options and recommendations put up by management. It came to a decision which, in my view, was one to which a reasonable Board could have come in all the circumstances then existing.
- 131 Why, then, did things go wrong? The answer is to be found in a number of divergences between what was assumed and modelled on the one hand, and what was put into practice on the other.

⁵⁴⁷ icare, *Discussion Document for Board Meeting*, 27 March 2017, at 4

⁵⁴⁸ icare, *Board Meeting Minutes*, 27 March 2017, at 4

⁵⁴⁹ *Ibid*

132 As will appear, it can now be seen that there were flaws in the assumptions made, including as to claims volume, coupled with inadequate resourcing. There were also, unsurprisingly, unexpected difficulties in the transition from multiple scheme agents to a single service provider model. Finally, at least among the major problems, there was the delay in launching Guidewire. The planning was built on the assumption that the new model would be supported by automated technology from the time it was launched. The immediate availability of Guidewire was integral to the success of the new model.

133 EML succinctly summarised its perception of the key issues as follows:

In the transition to the new model and new technology platform in NSW, many factors resulted in the investment in capability being less than what was required to achieve target results, and much less than required to deliver fundamental improvement. The performance of the scheme can, in our view, be attributed to the issues that led to under resourcing.⁵⁵⁰

134 I add that the strains imposed by under-resourcing were greatly exacerbated by the unavailability of Guidewire.

135 In December 2018, icare commissioned PwC to conduct a review of the NCOM. That review identified a number of issues contributing to poor claims performance, including:

- a) *'the workforce has been below approved capacity since commencement due to recruitment delays, there are some gaps in staff capability, compliance with defined processes has generally improved over time but performance is inconsistent and the underlying technology does not fully support the new way of working.'*
- b) *'the governance model underpinning the new Service Model has not yet been fully implemented;'* and
- c) *'delivery challenges have had an impact on the level of trust between EML and icare.'*⁵⁵¹

136 The PwC review identified the following 'root causes':

- a) *'Lack of efficiency at scale;'*
- b) *'Governance not fully implemented;'* and
- c) *'Issues with reporting accuracy and lack of insights... lack of certainty around number of claims in the system is leading to difficulties in managing capacity and impacting on trust between the parties.'*⁵⁵²

137 These issues were exacerbated by the failure of icare to research fully, and conduct appropriate pilot testing of, the NCOM, the single claims agent model, and the interaction between the two. Although icare conducted tests to determine business readiness against forecast requirements, there was no piloting or testing of the longer term impacts of the captive single agent model.

⁵⁵⁰ EML, *Submission to the Independent Review*, 30 October 2020, 4

⁵⁵¹ icare, *Review of New Service Model*, December 2018, 3

⁵⁵² *Ibid*

138 The selection of a single provider, captive to a mandated and inflexible approach to processing claims, had the effect of concentrating the risk inherent in the move to the new claims service model.

22.2.3 Forecasting and resourcing

139 EML and icare both acknowledge that claims were higher than expected, leading to higher than expected caseloads, and that these factors contributed to the decline in service levels that in fact occurred. icare and EML differed as to their relative responsibility for those factors.

140 Under the EML SPA, icare set staffing targets for a number of staff levels within EML, including staffing targets for claims managers. Initial staff numbers were based on forecasts of claims numbers prepared by external parties, based on claims lodgement data held by SIRA.⁵⁵³ Staff numbers were determined from those forecasts by modelling the workloads under the NCOM.⁵⁵⁴ The adequacy of systems and workloads was tested in a 'dress rehearsal' in late 2017.⁵⁵⁵

141 The modelling also took into account the operation of the triage engine based on historical data as to the nature of injury and duration of claims.⁵⁵⁶ In other words, the modelling was based in part on assumptions as to the number of new claims that would be assigned to the Guide segment, not requiring the assignment of a dedicated claims manager. It is obvious, at least in retrospect, that this must have been a significant source of error. The consequences of that error were magnified as the Guide segment was modified, with the result that claims were shifted into other, more labour-intensive, segments.

142 There was a further, although related, problem. The forecasting of claims numbers was based on an assumption that claims would take the same time to resolve under the new model as they did under previous claims management models. This was an unsafe assumption given the magnitude of the change.

143 Since the workloads relied on modelling of claims numbers both overall and in each segment, any significant variation from the model's assumptions, such as the number of claims to be received, and any delay in the rollout of the NISP,⁵⁵⁷ would affect the workloads and therefore staffing numbers. Any significant variation from the modelled segmentation of claims would have the like effect.

144 Adequate pilot testing, on live claims, of the assumptions as to claims numbers, severity, frequency and other variables might have detected some of these problems. But as has been seen, that did not happen.

145 icare's forecasting materially understated the number of claims, resulting in significantly higher than expected caseloads⁵⁵⁸ that exceeded the target levels that had

⁵⁵³ icare, *Explanatory note – modelling used to forecast claims numbers*, at [2]

⁵⁵⁴ *Ibid*

⁵⁵⁵ icare, *Dress Rehearsal Summary report*, 11 December 2017

⁵⁵⁶ icare, *Explanatory note – modelling used to forecast claims numbers*, at [2]

⁵⁵⁷ icare, *Discussion document "Claims operating model - EML ramp-up and key execution risks"*, 30 March 2017, 2-6

⁵⁵⁸ EML, *Submission to the Independent Review*, 30 October 2020, 4

been set. That, in EML's view, was a significant contributor to the poor RTW performance of the new model.⁵⁵⁹ I agree.

146 The reasons for the under-forecasting, according to icare, were:

- Inadequate planning for '*notification only*' claims: guideline changes by SIRA, which were introduced in 2016 and became effective in mid-2017, had the effect of requiring a small amount of additional work to be done on a subset of claims which had been previously been '*notification only*'. These claims had not been included in modelling of claims numbers (as they were not reflected in historical data), and the additional work required was not included in Full Time Equivalent (FTE; a measure of staff numbers) predictions.⁵⁶⁰
- Flaws in the modelling itself: including using the date of injury, rather than the date of lodgement, failure to account for claims being held back in the latter part of 2017 ahead of the introduction of the new system, and an increase in industrial deafness claims.⁵⁶¹
- Inadequacies in forecasting workloads: including failure to account for a peak in workload in the first seven days of a claim; assumptions as to the skill levels of case managers that were not realised; and higher than expected staff turnover rates.⁵⁶²

147 In addition to those factors, the forecast of claims volumes produced by an independent consultant was arbitrarily reduced by icare. icare does not now seek to justify that arbitrary reduction (it may be noted that the person who was responsible for the decision to reduce the forecast claims volumes is no longer employed by icare). Nor is there anything in the material made available to my Review that could be regarded as justificatory of it.

148 By at least April 2018, discrepancies between forecast and actual claims numbers had become apparent.⁵⁶³ An analysis produced by icare in or around April 2018 noted that there was a discrepancy of between 12 per cent and 38 per cent between modelled and actual claims numbers, and that there was a clear need for additional resourcing. When the analysis was remodelled using updated data, icare noted that: '*Return to Work and Advisory segments show the largest variation in FTE numbers (from original to updated model)*'.⁵⁶⁴

149 It is difficult to reconcile this analysis, carried out as it was by icare, with icare's assertion that it had insufficient information from EML to support the need for increased resourcing.

150 There was, and remains, a difference of opinion between icare and EML as to whether EML managed to meet its recruitment targets. Broadly, icare says that EML's recruitment and staffing were below approved levels. Its position is supported by the investigations and figures to which it pointed in support of its submission (except in one instance). EML accepts that its staff levels overall were below targets at various

⁵⁵⁹ EML, *Submission to the Independent Review*, 30 October 2020, 5

⁵⁶⁰ icare, *Explanatory note – modelling used to forecast claims numbers*, at [12]-[14]

⁵⁶¹ *Ibid* at [14]

⁵⁶² *Ibid* at [16]

⁵⁶³ icare, *New Claims Model – Actual v Expected experience*, April 2018

⁵⁶⁴ *Ibid*

times,⁵⁶⁵ but says that it met or exceeded agreed front-line staffing levels, and that the excessive caseloads that it experienced were caused by a combination of the unexpectedly high claims levels that were experienced and icare's delays in responding to EML's staffing concerns.

- 151 EML's position is supported by an analysis of its resourcing prepared by icare in September 2020 and provided to my Review.⁵⁶⁶ EML's position is also supported by a further analysis provided by icare to me as part of this Review.⁵⁶⁷ Those figures show that EML's staffing levels in the period Jan 2018 to February 2019 met or exceeded its approved staff levels, but that this was significantly below the required levels based on claims numbers.
- 152 EML discussed these resourcing and contractual issues with icare. It took them directly to Mr Nagle, the then CEO, in August 2018. EML identified the following issues in the claims operations at that time:
 - a) lodgement numbers and claims volumes substantially in excess of initial estimates (a matter which is supported by the evidence available to me);
 - b) 25-30 per cent of claims triaged as Guide being reallocated to Support and requiring '*detailed remediation after six weeks without prior claims management*'; and
 - c) lack of workers compensation experience in its claims staff, driven by icare's focus on customer service skills.⁵⁶⁸
- 153 I should point out Mr Nagle said that the emphasis on customer service skills was applicable to '*staff that were to be employed for the low-touch claims not for claims that needed claims management*'.⁵⁶⁹ As I understand it, '*low-touch claims*'⁵⁷⁰ are those that would fall principally into the Guide segment. I accept that it was desirable, as Mr Nagle said, to deploy experienced staff where their skills were most needed. Unfortunately, it does not appear that either icare or EML were able to ensure that there were enough experienced staff for the areas where their skills were most needed to be given proper service and attention.
- 154 icare responded, although belatedly, in late 2018. It made efforts in 2018 and 2019 to improve staffing numbers. Those efforts were hampered by the existing high claims volumes, high staff attrition rates and the lack of available staff in the market. Staffing levels did begin to stabilise in 2020, although with inexperienced staff and continuing attrition (as to which, see [22.4 below](#)).

22.2.4 Contractual control and relationship issues

- 155 The response to unexpected claims volumes was hampered by the relationship between icare and EML, both contractually and otherwise.

⁵⁶⁵ Interview with EML, 29 January 2021, at Notes 9

⁵⁶⁶ icare, *EML Resourcing Analysis*, September 2020

⁵⁶⁷ icare, Annexure H to Modelling used to forecast claims numbers – explanatory note,

⁵⁶⁸ EML, *Executive discussion paper - Operationalisation of Claims Model*, August 2018, 1

⁵⁶⁹ John Nagle, *comments on draft Part 1B*.

⁵⁷⁰ *Ibid*

156 Contractually, EML had to seek approval from icare for additional resources over forecasts, resulting in delays in recruitment.⁵⁷¹

157 PwC, in its 2019 review, identified slow decision-making part of the 'root causes' of issues with the model.⁵⁷²

158 icare accepts that in early 2018, it 'required EML to provide substantial evidence to validate the claims volumes'. That information was required, icare said, because there were gaps in EML's operational reporting which made it difficult for icare to appreciate the actual volume of claims. For that reason, and because the reported claims volume did not reflect that which had been forecast, 'icare initially questioned the need' for more resources.⁵⁷³ Changes were made to modelling in mid 2018 and again in late 2018 in an attempt to resolve these resourcing disputes.⁵⁷⁴

159 The issues over resources also gave rise to trust and relationship difficulties between icare and EML. PwC's December 2018 review⁵⁷⁵ concluded that uncertainty as to claims volume data caused icare to suspect that EML was seeking to increase its payments under the cost-plus remuneration model.

160 Another, and obvious, consequence of high caseloads was an increase in staff attrition.⁵⁷⁶ icare submits that EML did not adequately forecast attrition rates. EML disputes that proposition.⁵⁷⁷ As I have said, it was to be expected that high claims volumes would lead to higher attrition rates, and this would take significant time to resolve. I am not sure how EML could have taken icare's under-estimate of claims numbers into account when it sought to forecast attrition rates.

161 Regardless, there was no dispute that for a significant period, EML's staff turnover was significantly higher than forecast. icare does now accept that under-forecasting of claims volumes led to under-resourcing, higher than planned caseloads and resultant high claims staff turnover.⁵⁷⁸

162 icare identified a number of other factors that, it said, contributed to high turnover among EML's claims staff. One was competition in the market arising from changes to the CTP scheme that led to increased demand for experienced personal injury claims staff. Another was early operational instability resulting in a perception of a poor working environment. Others included a desire to recruit for customer service skills and not solely claims management skills, and the allocation of decision rights as between icare and EML.⁵⁷⁹

⁵⁷¹ EML, *Submission to the Independent Review*, 30 October 2020, 4

⁵⁷² icare, *Review of New Service Model*, December 2018, 3 and 8, (9.4.6.1.46).

⁵⁷³ icare, *Explanatory note – modelling used to forecast claims numbers*, at [18]

⁵⁷⁴ *Ibid* at [19]-[20]

⁵⁷⁵ icare, *Review of New Service Model*, December 2018, 3 and 7

⁵⁷⁶ EML, *Submission to the Independent Review*, 30 October 2020, 4

⁵⁷⁷ EML, *Submission to Independent Review*, 10 February 2020, 2. EML further informed me that forecasting staff attrition was the responsibility of the joint icare and EML Workforce Planning Committee, and if this committee failed to forecast attrition appropriately, EML would not have had been able to meet and exceeded front-line staff requirements consistently.

⁵⁷⁸ icare, *Media issues response*, 25 September 2020, at Item 1 [58]

⁵⁷⁹ *Ibid*

163 EML expressed the view that the 2018 Decisions Right Framework resulted in '*delays in decision making and disempowerment of claims managers.*'⁵⁸⁰ WIRO noted that delays in decision making can have psychological and physical impacts on injured workers.⁵⁸¹ EML believes that the resourcing issues that I have described, compounded by the operational difficulties attending the introduction of the NCOM and the limitation on claims managers' decision rights, prevented it from achieving the legislative purposes of the scheme.⁵⁸²

164 icare's submission on Claims Operations noted feedback from customers and claims service providers on the Decision Rights framework, which '*led to a duplication of work, lack of efficiency and confusion around accountabilities.*'⁵⁸³ The Insurance Council of Australia offered a similar view. It submitted that improvements in resourcing and flexibility, together with reallocation of decision rights, would '*remove duplication, speed up claim decision making and focus resources on claims frontline.*'⁵⁸⁴

165 Amendments in late 2020 and early 2021 have improved EML's attitude towards the Decision Rights Framework. EML sees these changes as '*an important step in the performance improvement journey...*' that should '*empower case managers to provide a highly individualised service to injured workers and their employers throughout the journey of the claim.*' icare has acknowledged that those recent amendments to the Decision Rights Framework should contribute to a '*relationship reset*' and address critical difficulties relating to EML's workforce capability and capacity.⁵⁸⁵

166 Forecasting and claims volumes appear to have now stabilised, according to EML. In 2020, EML took over forecasting. EML states that by April 2020, it had adequate frontline resources.⁵⁸⁶ This is a promising sign that claims experiences may improve, although any expectations must be tempered by the relative inexperience of the current staff.⁵⁸⁷

167 That is not to say that the resourcing and related issues have been resolved. The Dore 2021 Report identifies the existence of '*[c]ontinuing concerns*' that are the subject of discussions '*between icare and EML to understand and address the staff attraction and retention issues.*' Ms Dore notes that '*staff turnover at EML had a target of 30% annualised and reached 32% in 2020. This is well above the 22.7% annualised turnover I documented in the Dore Report, and above the acceptable industry standard which EML suggested would be 20%.*'⁵⁸⁸ The factors contributing to this are discussed in *Part 1A*.

⁵⁸⁰ EML, *Submission to the Independent Review*, 30 October 2020, 3

⁵⁸¹ Interview with WIRO, 23 November 2020, at Notes 5

⁵⁸² EML, *Submission to the Independent Review*, 30 October 2020, 6

⁵⁸³ icare, *Submission to Independent Review - 1a Claims Operations*, 18 November 2020, at [101] 26

⁵⁸⁴ ICA, *Submission: icare and State Insurance and Care Government Act 2015 Independent Review*, 30 October 2020, at [iii] 4

⁵⁸⁵ icare, *Submission to Independent Review - 1a Claims Operations*, 18 November 2020, 18 November 2020, at [138b and d] 37

⁵⁸⁶ EML, *Submission to the Independent Review*, 30 October 2020, 4

⁵⁸⁷ Ibid 5

⁵⁸⁸ Janet Dore, *Operational review of Insurance and Care NSW and delivery of recommendations of the Dore Report*, 5 March 2021, 11-12

168 Similarly, the 2021 SPA between icare and EML makes substantial changes to the allocation of decision rights. Those changes are summarised in the below Figure.

Figure 25: Summary of Decision Rights changes from 2018 to 2021 between EML and icare

Decision Rights		Overview of Changes from 2018 to 2021		
		Key changes in 2020-21	EML engagement requirements	
	Change in accountability or responsibility from icare to EML	New requirement for icare to inform or consult with EML	Required to consult with icare	Required to inform icare of the decision
Referral for Services	✓ ¹	✓		
Significant Claims Event	✓		✓	
Whole Person Impairment (WPI)	✓(<20%)		✓(15-20%)	
Case Management Strategy	✓		✓	
Communication/Long Tail Management	✓		✓	
New Employer Scheme	✓			✓
Complex Behaviour	✓			✓
Complaints ²		✓		
Internal Reviews (Disputes)		✓		
Litigation ³	✓	✓		✓
General	✓			✓

Source: EML Submission to the Independent Review, 29 January 21, 1-2.

¹icare remained accountable for approval of covert optical surveillance.

²Accountability moved from EML to icare for Tier 2 complaints

³icare remain accountable for deciding whether to pursue, respond or manage an appeal of an arbitrators decision, a judicial review in Supreme Court and an appeal of Medical Assessment Certificate, and approving legal referral associate with an internal review (dispute) or significant legal matters.

22.2.5 Renewal of the EML contract

169 EML's SPA expired on 31 December 2020. icare exercised its option to extend the EML SPA for a further 12 months and at the time of making submissions to this Review, was in contract negotiations with EML.⁵⁸⁹ icare and EML have now agreed on the terms of the extension of the EML SPA.

170 In its submission to the Dore 2021 Review, icare stated that it '*has confidence in EML's capacity to be an effective partner and is optimistic about the potential for performance improvement during the 12-month extension period.*'⁵⁹⁰

171 icare also stated to Ms Dore that '*The 12-month extension is designed to provide the time necessary for icare to further refine the claims model including industry consultation and undertake a competitive market engagement for future claims management provider arrangements.*'⁵⁹¹

⁵⁸⁹ icare, *Submission to Operational review of Insurance and Care NSW and delivery of the recommendations of the Dore Report*, 17 November 2020, 39

⁵⁹⁰ *Ibid*

⁵⁹¹ *Ibid* 37

172 There are several significant changes to the EML SPA⁵⁹². They include the following:

- a) The remuneration model has moved from a cost-plus model to a reasonable cost model, and it includes capped quarterly outcome (i.e. incentive) fees linked to performance in return to work and customer experience.
- b) Changes to decision rights.
- c) Changes relating to resourcing and caseloads: claims forecasting has been delegated to EML.⁵⁹³ EML and icare have each invested \$10 million, intended to reduce caseloads, improve staff retention, enable mobile case management and provide staff coaching.⁵⁹⁴
- d) The structure of the icare/EML Governance Forum has been changed. There are new members. Meetings are to be more frequent. The object is to identify and address real or perceived deterioration in the relationship between icare and EML, so as to ensure that critical matters are promptly identified and put before the appropriate executives of each for resolution.

173 The Dore 2021 Report describes the new EML SPA as '*...an improvement which enables more direct decision making and invests in staff development.*'⁵⁹⁵

174 I note that these changes will affect icare's staffing requirements. The changes in decision rights and oversight should logically reduce the time spent by icare staff on claims. There is a risk that if this is not managed carefully, icare may find itself with excess staff and either unnecessary costs, or conducting excessive oversight of EML, in either case undermining the results of the otherwise positive changes.

175 icare accepts that it now has a decreased need for claims management staff. It states that it has '*increased oversight roles and clarified that these roles are accountable for performance measurement and quality oversight...[and] fewer icare staff directly involved in supporting EML.*'⁵⁹⁶ The expectation, as I understand it, is that staffing numbers associated with the NI and EML will decrease. icare suggests this will result in savings of approximately \$1.5 million per year,⁵⁹⁷ in addition to any further savings yet to be identified by the new GET.

176 There is another concern with the new EML SPA. Ms Dore suggests that the '*[t]he appropriate time for testing the veracity of the arrangement may need more than 12 months given that \$20m is to be jointly invested.*'⁵⁹⁸ Accordingly, the Dore 2021 Report recommends that: '*icare ... reconsider the potential impacts of a 12-month*

⁵⁹² icare, *Submission to Operational review of Insurance and Care NSW and delivery of the recommendations of the Dore Report*, 17 November 2020, 36-40

⁵⁹³ EML, *Submission to the Independent Review*, 30 October 2020, 4-5

⁵⁹⁴ icare, *Submission to Operational review of Insurance and Care NSW and delivery of the recommendations of the Dore Report*, 17 November 2020, 39

⁵⁹⁵ Janet Dore, *Operational Review of Insurance and Care NSW and Delivery of recommendations of the Dore Report*, 5 March 2020, 14

⁵⁹⁶ icare, *Staff changes as a result of EML Contract Change – explanatory note*, February 2021, 3

⁵⁹⁷ Ibid 2

⁵⁹⁸ Janet Dore, *Operational Review of Insurance and Care NSW and Delivery of recommendations of the Dore Report*, 5 March 2020, 15

*contract with EML in the context of performance requirements and expectations.*⁵⁹⁹ I agree.

22.3 Delivery of the recommendations of the Dore 2019 Review

- 177 As I have already discussed, the Dore 2019 Report was released in December 2019. It highlighted the adverse consequences of the move to the NCOM and new claims agent model that I have discussed, above.
- 178 In response to findings in the Dore 2019 Report, SIRA identified a number of key issues that it considered needed to be addressed in the '*interests of current and future customers, and stakeholders of the workers compensation scheme*',⁶⁰⁰ including:
 - a) early and safe return to work outcomes including psychological injury;
 - b) claims management early intervention and treatment;
 - c) premium transparency and volatility in alignment with SIRA guidelines;
 - d) data quality; and
 - e) escalating medical costs due to leakage and increases in utilisation.
- 179 SIRA prepared a 21-Point Action Plan based on and published together with the Dore 2019 Report. The Action Plan is being used by SIRA to monitor the NI's performance, and to '*drive fact-based steady improvement without causing uncertainty and volatility.*'⁶⁰¹
- 180 As of March 2021, SIRA reported that 13 of the actions in that Plan were completed, or put into effect, and eight actions were in progress. Ms Dore reviewed and endorsed SIRA's report on the status of implementation of the Action Plan as part of her 2021 Review.
- 181 The table below gives the status of the 21 Point Plan and shows the link between these actions and the Dore 2019 Report. The table also shows where Ms Dore has made further recommendations as part of her 2021 Review (discussed at [22.4 below](#), with her recommendations at [22.7 below](#).)

⁵⁹⁹ Janet Dore, *Operational Review of Insurance and Care NSW and Delivery of recommendations of the Dore Report*, 5 March 2020, 15

⁶⁰⁰ SIRA, *Response to media allegations*, 2 October 2020, 1

⁶⁰¹ *Ibid*

Figure 26: 21-point plan status

No.	21-point plan actions	Relevant Dore 2019 Finding	Status	Relevant Dore 2021 Recommendation
1	FY19/20 Business Plan Resubmission to address issues raised in Dore 2019 Review	6,7,9,10 & 11	Complete	7
2	Urgent data quality improvements	13	Progressing	5
3	Review of Premium Calculation Model	6	Complete	
4	Premium Review Arrangements	3 & 6	Complete	
5	Dedicated case manager allocated where an injured worker is away from work for 2 weeks	10	Complete	
6	Scheme agent incentives for RTW	9	Progressing	4
7	Provide small business employers with greater choice of claim management service provider	10	Progressing	
8	SIRA Tripartite Reference Group to meet once per quarter	3 & 6	Complete	
9	Review of governance, culture and accountability	13	Complete	
10	Conduct and publish quarterly compliance and performance audit	6	Progressing	1, 2 & 3
11	Independent audit of NI's approval and payments process for medical treatment	3, 4 & 5	Progressing	
12	SIRA to provide advice to Government on prudential supervision options for the NI	5	In place	
13	SIRA and icare board engagement	8	In place	
14	SIRA to provide advice to Government on legislative policy matters as required	12	In place	
15	SIRA to review performance indicators and compliance benchmarks for workers compensation insurer performance	1, 3 & 13	Progressing	
16	SIRA to lead consultation on measurement of RTW & frameworks	1,3,9 & 13	Progressing	
17	Medical partnerships	4	Progressing	
18	Review of health costs	3,4,5 & 9	Complete	8 & 9
19	SIRA to conduct a rolling survey of customer experience of injured people and policy holders across workers compensation & CTP	13	Complete	6

No.	21-point plan actions	Relevant Dore 2019 Finding	Status	Relevant Dore 2021 Recommendation
20	Half-yearly SIRA & icare board meetings, SIRA CE & icare CEO monthly meetings	2	In place	
21	Monitoring JPPOC and JCAC	2 & 8	In place	

22.4 Report of Janet Dore to this Review (the Dore 2021 Review)

182 As noted above, Ms Dore carried out a review and provided a report to me, to inform my Review.

183 Ms Dore received submissions from icare and SIRA. She reviewed materials provided to this Review including stakeholder submissions, and met with key stakeholders including icare, SIRA, EY, EML, Unions NSW, an anonymous stakeholder group who wishes to remain anonymous and the WIRO.

184 It is important to note that the Dore 2021 Review was commissioned less than ten months after delivery of the Dore 2019 Report. Ms Dore recognised this, stating that, *'[i]t is only fair to acknowledge the challenging context of 2020 for icare in striving for performance improvement whilst undergoing disruptive change and external criticism. However, the feedback from SIRA and the Dore Report during 2019 as the work proceeded was consistently about performance outcomes, particularly RTW, and case management principles and skills. More improvements should have been evident by this time.'*⁶⁰²

185 Ms Dore's complete findings from the Dore 2021 Report are set out below. Those findings are more than adequately supported by the evidence Ms Dore had before her, and are entirely consistent with conclusions apparent from evidence given to my Review. I accept her findings in full.

⁶⁰² Janet Dore, *Operational Review of Insurance and Care NSW and delivery of recommendations of the Dore Report*, 5 March 2021, 27

Figure 27: Findings of the Dore 2021 Report

Finding 1	In the first quarter review, EY expressed views that pointed to differentials in skill and capacity of case managers which led to inconsistencies in case management. The second quarter review continued this concern, albeit with improvements but still not markedly different to their initial review in 2019. This aspect of personal injury management is a critical point. Skills, training, capability and qualifications are essential to ensuring good outcomes through return to work and support. It is a demanding job requiring resilience and understanding of people in a variety of roles and backgrounds. Career development and role attractiveness are not evident.
Finding 2	icare is aware of weaknesses and challenges in basic claims management activities identified through independent assessments. As the control environment has been correctly identified as a mixture of systems and processes overlaid by interdependencies between several organisations, this is a major risk in itself.
Finding 3	Some improvements in claims management performance are emerging but are not yet consolidated and future stability of systems, controls and experience is essential. Returning to market for service providers within 12 months could exacerbate staff turnover and deplete the key resources needed.
Finding 4	The new contract between icare and EML is an improvement which enables more direct decision making and invests in staff development. The appropriate time for testing the veracity of the arrangement may need more than 12 months given that \$20m is to be jointly invested.
Finding 5	Data quality, skills and capacity and ongoing sustainability are recurring points throughout independent studies and previous reviews so do need to be subject of laser like focus and commitment to outcomes. The strategic imperative is implementation rather than further investigation and analysis.
Finding 6	Critical analysis of the claims model weaknesses is welcomed and, though overdue, should be supported through earlier case management and skills development. As previously stated there must be an implementation imperative to achieve improved outcomes.
Finding 7	Future changes to the claims model should be balanced against the need for improved performance.
Finding 8	The Customer Advocate confirms known areas for improvement in claims management and icare has sufficient existing internal resources in customer intelligence to support key priority change project areas.

Finding 9	Concerns over the time taken to address many of the improvements required appear valid, notwithstanding the challenges during 2020 of media attention, parliamentary hearings, senior management and Board changes. All of these occurred within the constraints of the COVID-19 pandemic and the ensuing challenges around RTW, particularly suitable duties. Matters about claims management have been the main focus of this report but broader structural issues and ongoing sustainability are also pertinent.
Finding 10	Overall, the NI FY21 Business Plan forecasts substantial financial improvement which, while necessary is reliant on the underlying assumptions being accurate in the current uncertain outlook.
Finding 11	<p>There is justifiable concern amongst scheme stakeholders about rising medical costs and it is not confined to NSW. Heads of WC and Compulsory Third-Party schemes, private insurers and hospitals all have an interest so any analysis could be useful to promote a national agenda for change.</p> <p>SIRA should continue its work on fee structures, rates, schedules, and basis of increases to provide an improved framework without perverse incentives, whether historical or not.</p>

22.5 RTW performance

186 As discussed in *Part 1A*, there can be no real dispute that RTW rates have declined during icare's management of the schemes, most notably since the introduction of the NCOM in 2018.

187 icare 'acknowledges that the change in the claims service model, as well as the transition in claims technology platforms, negatively impacted the workers compensation scheme's RTW rate.⁶⁰³

188 RTW rates have declined for all insurers in the NSW workers compensation system since 2017, with the smallest decline experienced in the TMF.⁶⁰⁴ icare attributes the general decline in return to work across all schemes to the following factors:

Changes in employment conditions, such as gig economy work, flexible working environment and a shift to a more contingent workforce, making access to suitable duties more complex;

Changes in economic conditions and its impact on suitable duties and hiring practices;

Changes in legislation over time;

Behaviour changes by participants in the ecosystem (e.g. some doctors have stated a reluctance to certify someone fit for work if they believe there is no work available);

⁶⁰³ icare, *Submission to Independent Review – 1a Claims Operations*, 18 November 2020, 39

⁶⁰⁴ Ibid 44

Changes to claims mix, in particular the increase in psychological injury claims, which have longer recovery periods and typically have longer periods of time off work; and

COVID-19 pandemic restrictions and the lack of suitable duties available to employees as a result of the pandemic.⁶⁰⁵

189 While the NI has experienced a ‘significantly greater rate of decline in RTW rates than the TMF scheme’,⁶⁰⁶ icare attributes this to the general factors listed above, in conjunction with two additional primary contributors:

A significant drop in claims performance in the period between November 2017 to February 2018 due to the movement and transition of claims between claims management providers, and

A prolonged period of operational instability within EML between January 2018 and June 2019, exacerbated in February 2019 for three months when the Nominal Insurer single information platform went live.⁶⁰⁷

190 It may also be that, as I have noted above, the agencies who in effect insure with the TMF take a more active role than do many private sector employers in supporting injured workers to return to work.

191 As I have noted in *Part 1A*, there is clear evidence that introduction of the NCOM itself was a significant contributor to the decline in RTW rates. However, and again as I have noted above, it is not necessary for me to determine the precise contribution of each of the various factors to that decline.

22.5.1 Present performance

192 The Dore 2021 Report acknowledges that icare has demonstrated an enhanced focus on addressing the decline in RTW performance following delivery of the Dore 2019 Report.⁶⁰⁸ icare has ‘taken steps to ensure improvement in RTW outcomes in the scheme including moving to reporting metrics that are consistent with SIRA’s metrics and building incentives for RTW performance in scheme agent contracts.⁶⁰⁹

193 icare says that it has taken additional actions to improve RTW rates. They include:

Accident month reviews: commenced portfolio reviews across all segments to provide coaching to uplift EML capability.

Work capacity strategies: joint icare and EML coaching for case managers on RTW strategies to support the building of work capacity and appropriate decision-making

Treatment approval process review: the development of early intervention program to identify claims requiring workplace rehabilitation and promote early referral

⁶⁰⁵ icare, *Submission to Independent Review – 1a Claims Operations*, 18 November 2020, 44

⁶⁰⁶ Ibid

⁶⁰⁷ Ibid

⁶⁰⁸ Janet Dore, *Operational Review of Insurance and Care NSW and Delivery of recommendations of the Dore Report*, 5 March 2020, 11

⁶⁰⁹ icare, *Submission to Independent Review– 1a Claims Operations*, 18 November 2020, 39

*Liability decision-making process: commenced exception reporting on delayed liability decisions, distributed weekly to EML, with a remediation response required within 7 days, and Project Pathway: a focused uplift in operational capability through process and workflow improvements, introducing Key Responsibility Area reporting to effectively manage performance and enable knowledge retention.*⁶¹⁰

194 icare says, further, that it ‘has also focused its uplift efforts on a number of areas to promote performance, including building case manager capability, initial and timely contact with an injured worker, improving liability decision-making, ensuring appropriate treatment at the right time, and ongoing medical management coaching strategies, including medical case management reviews and higher utilisation of rehabilitation providers.’⁶¹¹

195 I acknowledge the significant steps taken by icare. However, it is unfortunate that, while there has been some improvement in RTW rates since the Dore 2019 Review, those rates have not improved markedly or consistently, and are still well below 2017 levels.⁶¹²

196 Further, the substantial amount of work conducted by icare on return to work since the Dore 2019 Review has not identified any new factors contributing to the decline. On the contrary, that work has ‘...confirmed the need to adjust the Claims Service Model to a hybrid model, involving more service providers to spread caseloads and the risk inherent to the single service provider model.’⁶¹³

197 I accept that some allowance must be made for the impact of the COVID-19 pandemic in 2020. The economic and social effects of the pandemic must have had a real and significant impact on opportunities for work and RTW rates. This in turn is likely to have hampered efforts by the NI to improve RTW rates. The impact can be seen in the comparative RTW rates between types of insurers, all of which show comparable decline in 2020.

198 The below figures illustrate RTW rates based on SIRA’s measure, which has now been adopted by icare to report on RTW rates. There is indication of some improvement in 13, 26 and 52-week RTW rates since December 2019.

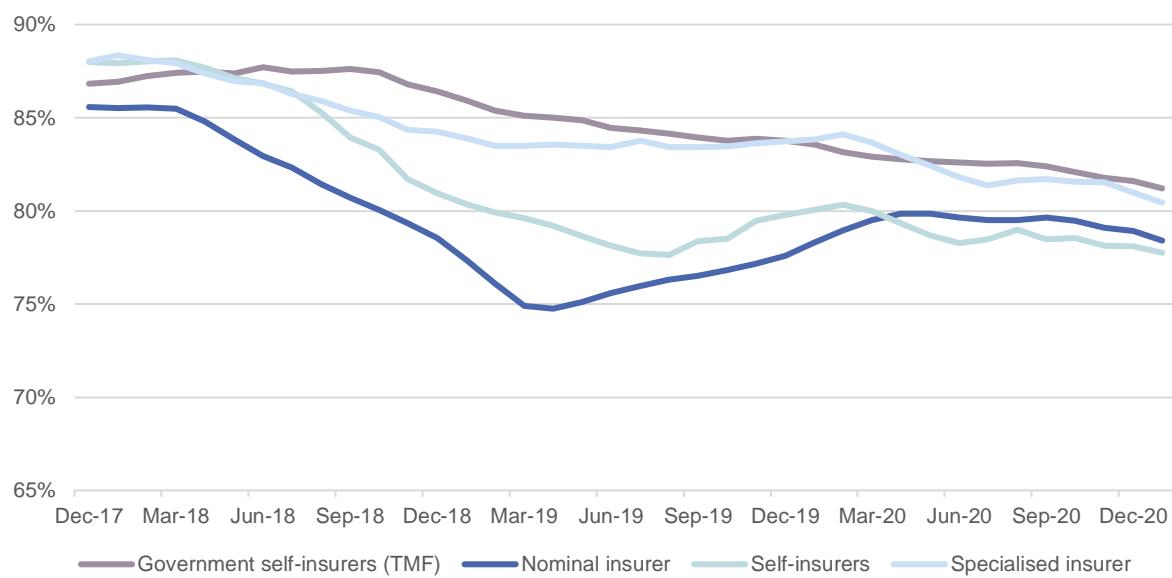
⁶¹⁰ icare, *Submission to Independent Review– 1a Claims Operations*, 18 November 2020, 46

⁶¹¹ Ibid

⁶¹² Janet Dore, *Operational Review of Insurance and Care NSW and Delivery of recommendations of the Dore Report*, 5 March 2020, 8

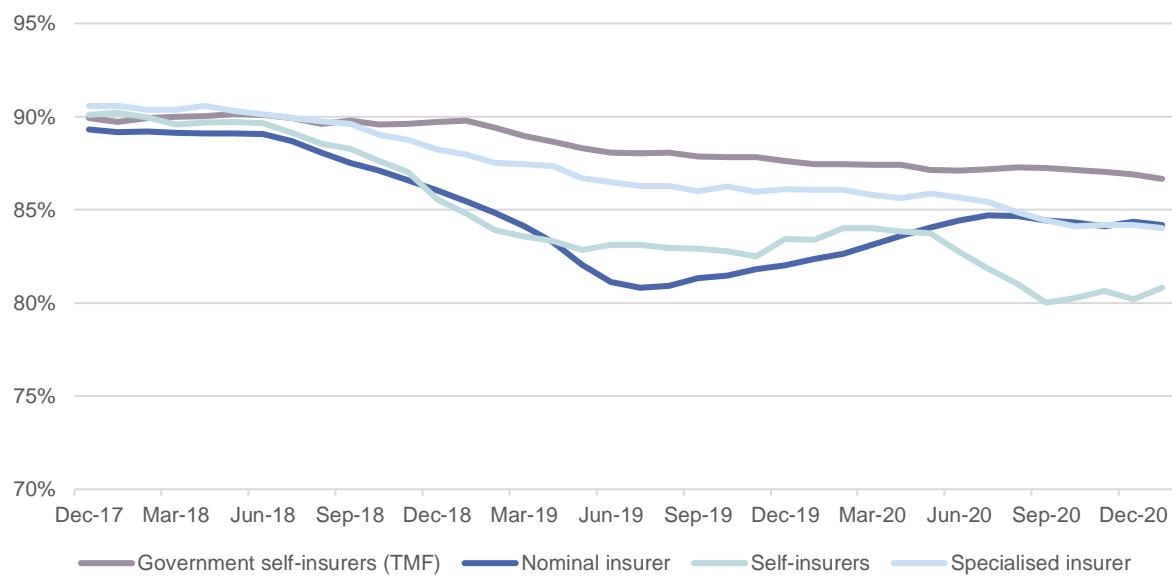
⁶¹³ Ibid

Figure 28: RTW rate market comparison (13 week - 12-month rolling average)



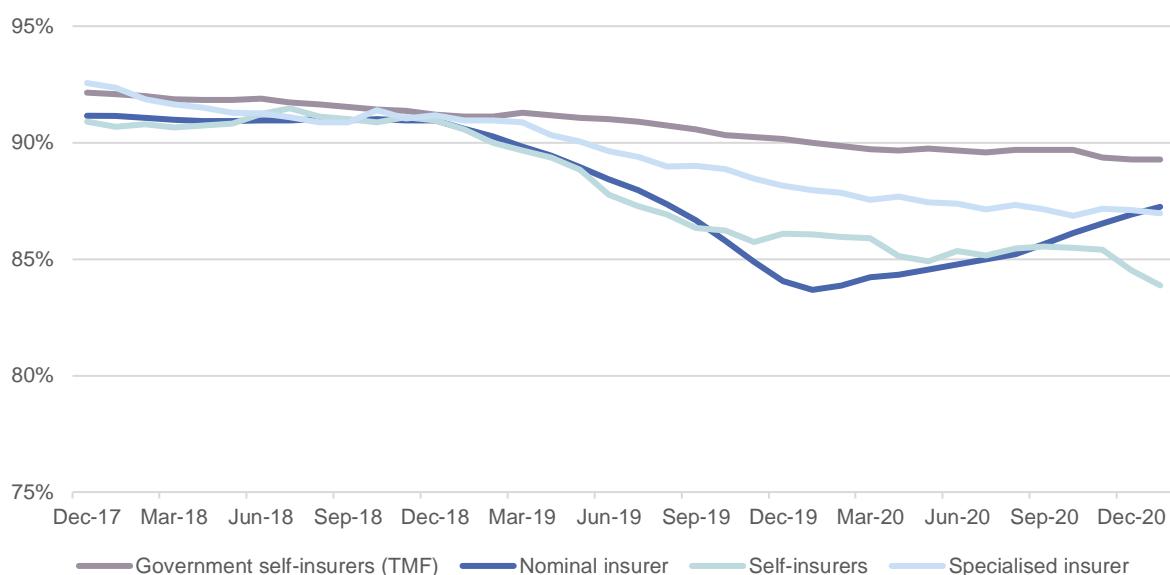
Source: SIRA, *Submission to Janet Dore Operational Review of Insurance and Care NSW and delivery of recommendations of the Dore Report*, 22 February 2021

Figure 29: RTW market comparison (26 week - 12-month rolling average)



Source: SIRA, *Submission to Janet Dore Operational Review of Insurance and Care NSW and delivery of recommendations of the Dore Report*, 22 February 2021

Figure 30: RTW market comparison (52 week - 12-month rolling average)



Source: SIRA, *Submission to Janet Dore Operational Review of Insurance and Care NSW and delivery of recommendations of the Dore Report*, 22 February 2021

199 As mentioned, there have been some signs of improvement since 2019. These improvements in RTW outcomes are seen by Ms Dore as a good indicator ‘...of re-setting the tactical and strategic approaches to the workers compensation system.’ However, she commented, ‘major challenges remain in data quality, skills and capacity and ongoing sustainability.’⁶¹⁴

200 EML’s submission to this Review acknowledges that, while resourcing for case managers is at a level that means caseloads are now within targets, ‘many case managers are inexperienced’.⁶¹⁵

201 icare has introduced a number of actions aimed at improving the skills of, and providing coaching for, claims management staff. Those actions are intended to improve performance in achieving higher RTW rates.⁶¹⁶ Those actions being acknowledged, it remains the fact that skills and capability are recognised throughout independent studies and previous reviews⁶¹⁷ as key areas of risk, which, as Ms Dore states ‘need to be subject of laser like focus and commitment to outcomes’.⁶¹⁸

22.6 Service to injured workers and employers

202 Although my terms of reference refer only to service to injured workers, it is clear that icare’s customers also include the employers who are required by law to participate in the WC scheme. For that reason, in what follows, I include the experience of

⁶¹⁴ Janet Dore, *Operational Review of Insurance and Care NSW and Delivery of recommendations of the Dore Report*, 5 March 2020, 8

⁶¹⁵ EML, *Submission to the Independent Review*, 30 October 2020, 6

⁶¹⁶ icare, *Submission to Independent Review – 1a Claims Operations*, 18 November 2020, 46

⁶¹⁷ Janet Dore, *Operational Review of Insurance and Care NSW and Delivery of recommendations of the Dore Report*, 5 March 2020, 16

⁶¹⁸ *Ibid*

employers, and of others who interact with the scheme to the extent they support workers and employers.

- 203 The nature of the services provided to injured workers and employers is such that any assessment of service must consider a range of elements. There are two key ways of looking at this. One is subjective: satisfaction with service from the perspective of the customer, be that worker or employer. The other is objective: assessment, particularly but not exclusively comparative, of measures of the outcomes delivered against key indicators of performance such as RTW rates.
- 204 Reviews and commentary on the workers compensation scheme over a number of years have commented on the adversarial nature of the scheme, on dissatisfaction with the various processes involved, and on the impact (including in terms of health outcome) that a poor claims experience can have on an injured worker. For that reason, there is merit in icare's attempts to refocus the provision of services on the experience of their customer, both workers and employers. On this measure, icare appears to have succeeded in improving experiences and achieving improved satisfaction, particularly for injured workers overall.
- 205 However, in a statutory benefits scheme, it is also important to focus on the proper delivery of benefits according to legislation. In workers compensation, this requires attention to the delivery of benefits and support in a timely and accurate fashion, fairly to both workers and employers. Claims reviews by both EY and the Dore 2021 Report indicate that icare still has significant work to do to ensure that the services it provides meet the appropriate standards.

22.6.1 Evidence from icare

- 206 icare's submission notes that the 2012 amendments to the WC Act 1987 'were intended to limit the compensation payable to injured workers'.⁶¹⁹ The nature of these amendments is discussed in detail at *Part 2*. icare has committed to ensuring 'adequate support for workers whose benefits are ceasing',⁶²⁰ as a result of the operation of those amendments. To that end, icare has implemented a number of initiatives to support injured workers towards RTW. They include:
 - a) good case management practices (although noting the Dore 2021 findings at *22.5.1 above*, which have found that further efforts are required to improve skills in this area);
 - b) providing information to injured workers, including as to the availability of supportive resources; and,
 - c) communicating with icare's customers and continuously educating stakeholders on the lifecycle of a claim.⁶²¹
- 207 icare has also introduced the Workers Assistance Program. That was done in November 2015. It is intended to support injured workers transitioning off benefits under the NI and TMF schemes.⁶²²

⁶¹⁹ icare, *Submission to Independent Review – 1a Claims Operations*, November 2020, at [206] 54

⁶²⁰ Ibid

⁶²¹ Ibid at [207a-c] 54

⁶²² Ibid at [209] 54

208 Other programs aimed at assisting workers as their benefits cease include:

- a) the creation of the Community Support Service to help link injured workers with the community and transition to other services available; and
- b) liaising with Centrelink to ensure workers exiting the scheme can begin receiving Centrelink payments.⁶²³

209 icare has developed a ‘Risk Education Express’ (REX) initiative.⁶²⁴ REX is offered through the TMF scheme. It aims to ‘*support NSW Government agencies build capabilities to protect the people, assets, and services of NSW.*’⁶²⁵ The initiative delivers programs relating to technical and behavioural strategies to mitigate risk of injury.⁶²⁶

210 Other initiatives developed by icare include collaboration between icare’s Injury Prevention Team and NSW Government to develop new initiatives to decrease further risk of injury.⁶²⁷ icare also provides factsheets, education sessions, and tools to NSW Government agencies in relation to mental health, COVID-19, risk, wellbeing, and culture.⁶²⁸

211 icare has not indicated whether it provides, or intends to provide, similar services to employers in the NI scheme.

212 In considering customer ratings of the NI, this Review analysed icare’s NPS data for the NI and TMF schemes.

⁶²³ icare, *Submission to Independent Review – 1a Claims Operations*, November 2020, at [212a-c] 56

⁶²⁴ Ibid at [219] 57

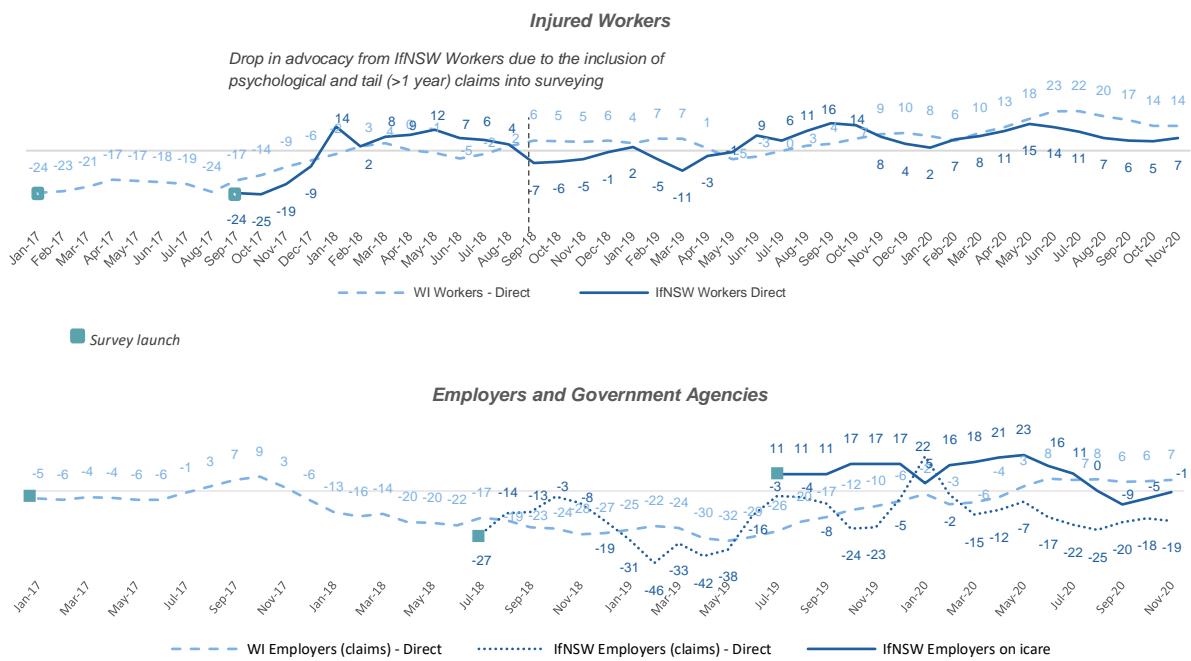
⁶²⁵ Ibid at [219] 57

⁶²⁶ Ibid at [220] 57

⁶²⁷ Ibid at [224] 58

⁶²⁸ Ibid at Table 1 [227] 59-61

Figure 31: Employer and worker NPS ratings on the NI TMF January 2017 – November 2020



Source: icare, *NPS scores since inception*, December 2020

Injured workers' ratings of the TMF and the NI trended steadily upward from January 2017 to a peak in June 2020. However, there has been a decline in scores over the last year.

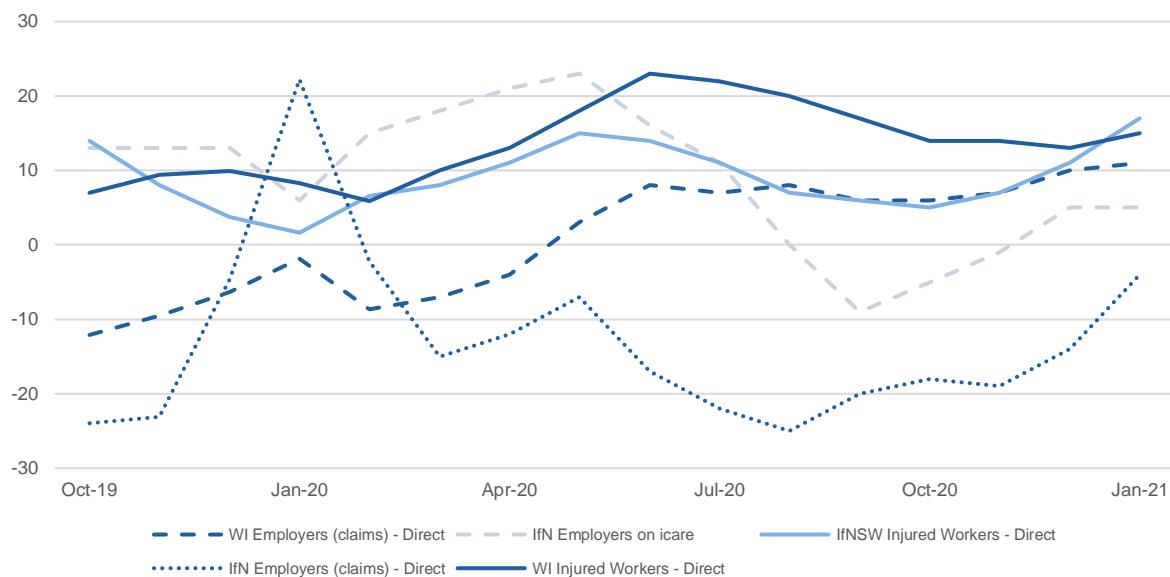
213 Employers' ratings of schemes managed by icare are inconsistent as between schemes. Employers' ratings of the TMF scheme have increased at points in time, but have trended downward since February 2020. The ratings of icare given by employers insured under the TMF have declined from June 2020. Conversely, employer ratings of the NI have steadily increased to +7 – its highest score since October 2017.

214 The Dore 2021 Report also notes that there was a decline in customer advocacy, measured by NPS, month on month from June to November 2020. icare attributes this decline to a number of factors, including the COVID-19 pandemic, case manager resourcing, an increase in adverse decisions and delays in claims management, and the impact of negative media coverage during 2020.⁶²⁹

215 The figure below demonstrates an improvement in NPS performance across most customer cohorts since December 2020.

⁶²⁹ Janet Dore, *Operational Review of Insurance and Care NSW and Delivery of recommendations of the Dore Report*, 5 March 2020, 23

Figure 32: NPS scores by customer cohort



Source: Janet Dore, *Operational Review of Insurance and Care NSW & delivery of recommendations of the Dore Report*, 5 March 2021, at Figures 8-10 [5] 24

22.6.2 Submissions to this Review

216 Overall, 34 per cent of all feedback from submissions and from survey responses, focused on customer service issues relating to claims management. Those issues included the operation of the single claims agent model. Many commented on the need for a dedicated case manager,⁶³⁰ noting that the use of automated algorithms did not consider the subtleties of individual circumstances.⁶³¹ Thus, it was said, icare's focus on standardisation and cost containment had resulted in decreasing innovation across the sector and a reduction in case management skills.⁶³² The lack of competition in claims management was also identified as a problem.⁶³³

217 Other submissions referred to the high turnover of claims management staff,⁶³⁴ resulting in poor communication,⁶³⁵ lower frequency of early intervention,⁶³⁶ delays in

⁶³⁰ For example: *Submissions to the Independent Review*: Australian Federation of Employers and Industry, November 2020, 3; Insurance Council of Australia (ICA), 30 October 2020, 2; Law Society, October 2020, 3

⁶³¹ For example: *Submissions to the Independent Review*: Insurance Council of Australia, 6 November 2020, 4; Two Anonymous submissions

⁶³² For example: Insurance Council of Australia, *Submission to the Independent Review*, 6 November 2020, 3

⁶³³ For example: *Submissions to the Independent Review*: National Insurance Brokers Association, 6 November 2020, 3; Anonymous Stakeholder Group; Law Society of NSW, 29 October 2020, 3; Insurance Council of Australia, 6 November 2020, 3; Anonymous Stakeholder Group; Business NSW, November 2020, 7

⁶³⁴ For example: Australian Industry Group, *Submission to the Independent Review*, 29 October 2020, 10

⁶³⁵ For example: *Submissions to the Independent Review*: Australian Medical Association, 29 October 2020, 3; Australian Industry Group, 29 October 2020, 10; Australian Rehabilitation Providers Association, October 2020, 5, 14, 25 and 38

⁶³⁶ For example: *Submissions to the Independent Review*: Australian Rehabilitation Providers Association, October 2020, 6-7; Anonymous Stakeholder Group

treatment,⁶³⁷ and overall poorer claims experiences⁶³⁸ for injured workers. Some respondents suggested that high caseloads had led to practices such as not returning calls or responding to requests for information, and to decisions being made that were unsupported by evidence.⁶³⁹

- 218 Similarly, survey results attributed dissatisfaction with service to the introduction of the NCOM. They highlighted poor communication, poor customer service and staff experience, and high staff turnover. When asked how icare could be improved, respondents stated this could be achieved through improving claims processes and customer service.
- 219 There were also submissions which asserted that the premise of a customer-centric scheme was not appropriate, because there was no customer seeking a service.⁶⁴⁰ Those submissions contended, with some linguistic justification, that the use of the terms customer and consumer as interchangeable was inaccurate and led to confusion. I confess to little liking for either term in this context.
- 220 Injured workers outlined issues such as case managers not reading certificates,⁶⁴¹ delays in treatment,⁶⁴² case workers not actively managing cases⁶⁴³ or responding to doctors' requests.⁶⁴⁴ They felt let down and confused by the scheme, stating that service should be individually focused on each injured worker.⁶⁴⁵
- 221 Unions NSW articulated the practical impacts of delay on injured workers, and the unanticipated impacts of inappropriate reliance on interim decisions – for example, an interim PIAWE decision is generally for less than proves, ultimately, to be the correct entitlement. That, obviously, results in the making of lower payments for period of time.⁶⁴⁶
- 222 Some workers' representatives also commented that there are ongoing concerns about employers being held to account for their responsibilities in the scheme.⁶⁴⁷ I have addressed this further in *Part 2*.

22.6.3 Employer experience

- 223 Employers also raised a number of issues shared with employees, including delays and concerns about not having a dedicated claims manager.⁶⁴⁸ This was something

⁶³⁷ For example: *Submissions to the Independent Review*: Australian Medical Association, 29 October 2020, 3; Australian Lawyers Alliance, 28 October 2020, 2

⁶³⁸ For example: *Submissions to the Independent Review*: National Insurance Brokers Association, 4 November 2020, 3; Anonymous Stakeholder Group

⁶³⁹ For example: *Submissions to the Independent Review*: Australian Lawyers Alliance, 28 October 2020, 2; Australian Industry Group, 29 October 2020, 15; Anonymous Stakeholder Group; Anonymous submission

⁶⁴⁰ For example: *Submissions to the Independent Review*: Self-Insurers Association, 30 October 2020, 2; Law Society of NSW, 29 October 2020, 4

⁶⁴¹ Anonymous submission

⁶⁴² Two Anonymous Submissions

⁶⁴³ Anonymous submission

⁶⁴⁴ Anonymous submission

⁶⁴⁵ Four Anonymous submissions

⁶⁴⁶ *Interview with Unions NSW*, 16 December 2020, at Notes 1

⁶⁴⁷ For example: *Submissions to the Independent Review*: Insurance Council of Australia, 6 November 2020, 5-6; Australian Federation of Employers and Industry, November 2020, 3

⁶⁴⁸ *Interview with Law Society*, 20 January 2021, at Notes 2

which it appears was raised with icare during the design of the NCOM (see 22.1 *above*). icare responded, not by adapting the model, but by introducing the AP Model for larger employers. Smaller employers nonetheless considered that there was benefit in having a single claims manager. From an employer's perspective, the manager could develop familiarity with their business. In some cases, a claims manager could develop familiarity with a business or industry over a number of claims. These benefits are lost when claims are distributed over a pool of claims managers.⁶⁴⁹

- 224 As well as confirming poor return to work experiences, employers also raised issues of service surrounding premiums including poor communication, incorrect or unissued premiums and adjustments, and issues with Guidewire.⁶⁵⁰
- 225 Employers particularly complained that, under icare's oversight, there had been significant volatility in experience-rated premiums. They are premiums charged (generally to larger employers) which are weighted to take account of past workers compensation claims. As may be expected, not all employers have an experience-rated premium. Smaller employers, for example, are charged a flat rate. Since they have infrequent workers compensation claims, a single claim would have a disproportionate effect on future premiums.
- 226 When icare took over responsibility for setting premiums in 2018, employers complained that they had seen volatile premium increases, including an increase of 30 per cent or more, and instances where premium calculations were not transparent, or were incorrect.⁶⁵¹ An anonymous stakeholder group, called for the design and implementation of experience-rated premiums to be improved.⁶⁵²
- 227 Employers also expressed dissatisfaction with icare's less adversarial approach to claims management. In particular, employers considered that icare (and, under its direction, EML) were too quick to provisionally accept psychiatric injury claims, and too reluctant to apply legislative exemptions for psychiatric claims resulting from employer's disciplinary action (see section 11A of the WC Act 1987).⁶⁵³ Others also referred to what they identified as the unusual extent or effects of icare's less adversarial claims management approach.⁶⁵⁴
- 228 As I discuss in more detail later, it is essential that icare continues to take account of the views and needs of employers as it works to improve the operation of the scheme. They are participants, or stakeholders, or customers, or consumers, just as much as are workers.

⁶⁴⁹ *Interview with Anonymous Stakeholder group*

⁶⁵⁰ For example: *Submissions to the Independent Review*: Business NSW, November 2020, 11; National Insurance Brokers Association, 6 November 2020, 4; AFEI, November 2020, 10; Australian Industry Group, 29 October 2020, 4

⁶⁵¹ For example: *Interview with Anonymous Stakeholder group*

⁶⁵² For example: *Interview with Anonymous Stakeholder group*

⁶⁵³ For example: *Interview with NIBA*, 1 February 2021, at Notes 5

⁶⁵⁴ For example: *Interview with Law Society*, 20 January 2021, at Notes 2

22.6.4 Ms Dore's assessment

229 Ms Dore considered submissions made to this Review as part of her 2021 Review. She noted that some submissions pointed to early signs of improvement, but that they were not expressed in overly confident terms.⁶⁵⁵

230 This is consistent with comments I received during my consultations, in that many expressed support for the Dore 2019 Report recommendations and believed there had been a change in icare's attitude, but considered that changes had been implemented slowly.⁶⁵⁶

22.6.5 Dore 2021 Report and EY Claims file reviews

231 In accordance with SIRA's 21-point plan formulated after the Dore 2019 Report was delivered and as a result of that Report's findings, SIRA commissioned quarterly compliance and performance claims file reviews.

232 The Dore 2021 Review considered the findings of the following claims file reviews performed by EY:

- Quarter 1 claims file review delivered in July 2020 – review of a sample of 85 files reported between 9 February 2019 and 31 December 2019, and
- Quarter 2 claims file review delivered in October 2020 – review of a sample of 120 files reported between 1 April 2019 and 31 March 2020.

233 Ms Dore reported that EY had observed improvements in the following areas in the Quarter 1 and Quarter 2 claims file reviews:

- acceptance and communication with the injured worker and employer;
- triage of claims had improved with reduced times to move to more appropriate categories; and
- appointment of rehabilitation providers was appropriate and appeared to result in better injury management.⁶⁵⁷

234 In addition, EY observed that improvements in the Guidewire controls applying maximum gazetted medical fee rates had assisted appropriate scrutiny of surgery and associated costs in the Quarter 1 file review.⁶⁵⁸

235 While acknowledging that the Quarter 1 and Quarter 2 claims file reviews relate to claims reported more than 12 months earlier, Ms Dore highlighted three areas of improvement identified by EY in the Quarter 1 file review. Those areas are consistent with findings made in EY's 2019 claim file review and observations made in the Dore Report. They are:

- liability determination;
- injury and medical management planning; and

⁶⁵⁵ Janet Dore, *Operational Review of Insurance and Care NSW and Delivery of recommendations of the Dore Report*, 5 March 2020, 25

⁶⁵⁶ Interview with Anonymous Stakeholder Group

⁶⁵⁷ Janet Dore, *Operational review of Insurance and Care NSW and Delivery of the recommendations of the Dore Report*, 5 March 2021, 6

⁶⁵⁸ Ibid

c) payment of weekly benefits.

236 Ms Dore reported that EY had observed demonstrated improvement in those three areas during the Quarter 2 claims file review. However, Ms Dore concluded that:

[a]lthough these improvements are welcome, there is ongoing concern that the three areas of concern cited in the EY work and the Dore Report, liability determination, injury and medical management planning and payment of weekly benefits, are still not achieving sufficient levels of consistency.⁶⁵⁹

22.6.6 Complaints patterns

237 icare provided me with complaints data relating to the NI from the beginning of 2018 to November 2020. icare said that although there were earlier figures, they were not directly comparable, as the nature of the complaint was captured differently by its predecessor organisations and former scheme agents.⁶⁶⁰ Claims management and underwriting complaints data were captured separately and were recorded in icare's Salesforce Customer Relationship Management (CRM) database.

238 Complaints patterns are important, because they can be indicative of poor service quality levels to injured workers. When those complaints are examined, they appear to suggest that there has been some increase in complaints associated with the changes in 2018. Although the level of complaints has not significantly abated, it appears to have stabilised after August 2020.

Claims management complaints

239 The monthly figures for customer complaints for the period January 2018 to November 2020 are summarised in Figure 32 below. I note from the data that there was an apparent increase in monthly complaints in the period between early 2018 and June 2020.⁶⁶¹

240 The rise in complaints in August 2020 is likely to have been associated with the increased media and parliamentary scrutiny of icare during 2020.

241 icare attributes the low complaints numbers between January 2018 to July 2018 to under-recording by EML.⁶⁶²

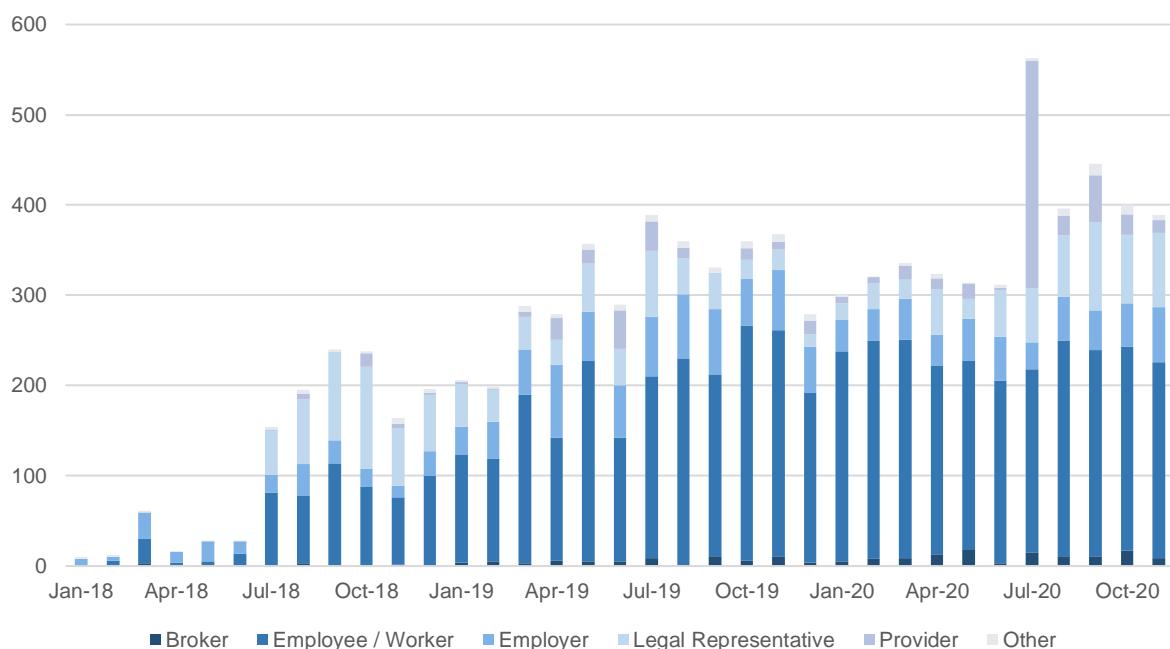
⁶⁵⁹ Janet Dore, *Operational review of Insurance and Care NSW and Delivery of the recommendations of the Dore Report*, 5 March 2021, 7

⁶⁶⁰ icare, *Explanatory Note: complaints data since icare's inception*, December 2020, at [11] 3

⁶⁶¹ icare, *Annexure A -complaints data analysis*, December 2020, at 10. Note that the sudden increase in SIRA complaints in July 2020 relate one provider's SIRA complaint relating to late payment of invoices for 200 claims (i.e. the provider submitted 200 separate complaints).

⁶⁶² icare, *Annexure A – Complaints data analysis*, December 2020, 8

Figure 33: Customer related complaints January 2018 – November 2020



Source: icare, *Complaints data analysis*, December 2020, 10

242 Further analysis of complaints relating to injured workers showed that most complaints concerned the timeliness of weekly payment benefits or the amount of the benefit entitlement paid to an injured worker.⁶⁶³ The next largest category of complaints related to claims decisions. icare noted that complaints as to decisions ‘primarily relate to delays in requests for treatment and claims determination.’⁶⁶⁴ While this has been the subject of media scrutiny, the data suggest that complaints relating to decisions had remained stable between June 2019 and June 2020.

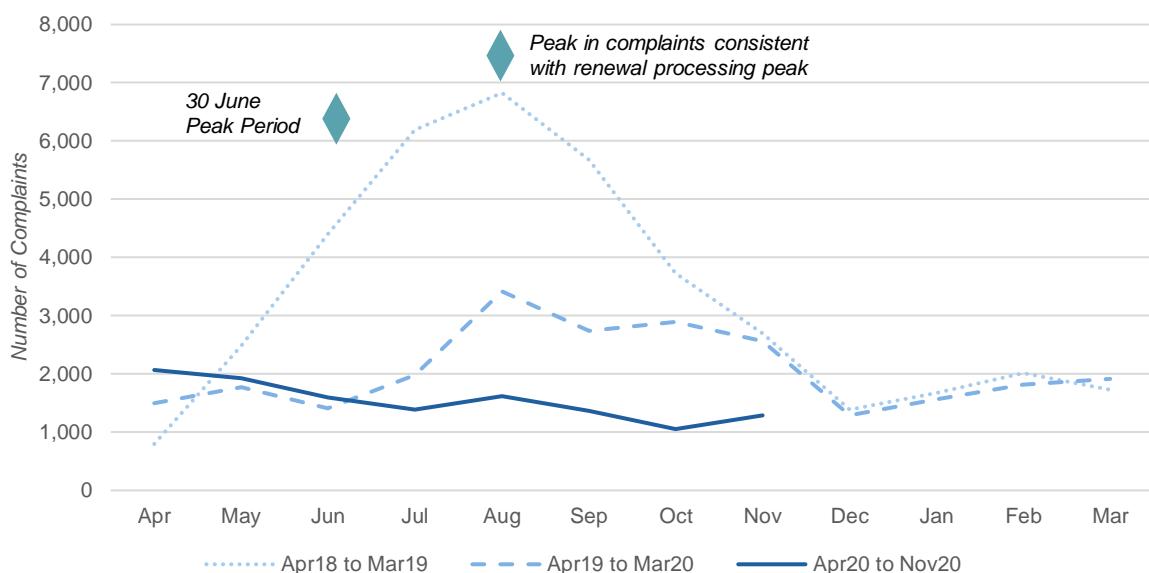
Premiums and Underwriting

243 Premium and underwriting complaints have declined since 2018. The majority of those complaints related to process. Complaints peaked during the renewal period over July and August, and were particularly high in 2018, possibly associated with a change in icare’s management of premiums at that time. During 2019, there was a significant decline in complaints, but there was still the expected peak during the renewal period. 2020 did not see an increase in complaints or a peak. This is unsurprising, given icare’s decision to delay premium increases for employers.

⁶⁶³ icare, *Annexure A – complaints data analysis*, December 2020, 17

⁶⁶⁴ Ibid 13

Figure 34: Premium and Underwriting complaints volumes April 2018 – November 2020



Source: icare, *Complaints data analysis*, December 2020, 16

22.6.7 icare's approach to customer feedback

244 Both the Dore 2019 Report and the 2021 PwC CGA Review suggest that icare, at least in the past, has not applied an appropriately comprehensive analysis to its customer satisfaction survey results. They identify, in particular, an overemphasis on NPS ratings as the key indicator of satisfaction. Extracts from Ms Dore's and PwC's comments are set out in the following paragraphs. I agree with them.

245 The Dore 2019 Report stated:

[the survey results suggest] injured workers are more (or at least, no less) satisfied with the treatment and service they have received. However, those who experienced mental illness and those who received 130 or more days' compensation, reported significantly lower ratings for most attributes on the Perceived Justice Scale. This suggests that the longer a person is off work, the less likely they are to return to work and less satisfied they are with the treatment service provided. With a clear deteriorating RTW rate, this cohort is likely to increase and thereby impact future results.⁶⁶⁵

246 To similar effect, the CGA Review stated that, 'There was a strong focus on the customer experience and an overemphasis on the NPS (net promoter score) as the driver of scheme success rather than the delivery of material outcomes to customers'.⁶⁶⁶ It concluded that the focus on NPS rather than outcomes was inappropriate, stating that 'icare customer reporting is focused on tracking the customer experience and high level NPS metrics, rather than tracking customer outcomes'.⁶⁶⁷

⁶⁶⁵ Janet Dore, *Independent reviewer report on the Nominal Insurer of the NSW workers compensation scheme*, December 2019, at 4.13.10

⁶⁶⁶ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 26

⁶⁶⁷ Ibid 38

247 PwC recommended, in terms that are consistent with Ms Dore's 2021 report, that it would be desirable for icare to track and report against key claims outcomes for workers and employers. This should include both the high-level lagging indicators, such as RTW rates, and leading indicators such as correct and timely payment of weekly benefits, and the timely issue of correctly calculated premium notices.

248 I agree that the approach suggested by PwC should be adopted. It appears to be essential, in light of the apparent disconnect between the NPS scores and practical outcomes such as RTW rates.

249 icare says that it has taken steps to ensure the correct and timely delivery of services, and has drawn my attention to its appointment of a Customer Advocate.

250 In October 2019, icare engaged Righthandturn Pty Ltd (RHT) as 'Customer Advocate'. RHT was an external consultant. Its role was to meet stakeholders and customers to 'gain further insights on their experience as a customer interacting with icare and identify opportunities for icare to enhance customer service delivery'.⁶⁶⁸ RHT held 33 stakeholder interviews between October 2019 and December 2019. Stakeholders interviewed consisted largely of those who had made submissions to the Dore 2019 Review.⁶⁶⁹ I understand that icare intends this to be a continuing process, with RHT reporting periodically to icare.

251 RHT's report was delivered to icare on 18 December 2019. It made 17 recommendations, broadly addressing the themes of premium management, claims management, customer engagement and governance.⁶⁷⁰ icare's view is that RHT's report 'complements the outputs of the [Dore Review], through tangible and actionable service delivery recommendations to improve customer outcomes and experience'.⁶⁷¹

252 Ms Dore, in her 2021 Review, stated that the report 'covered areas similar to SIRA's 21 Point Plan, however there is no evidence of prioritisation or integration with other work'.⁶⁷² The themes identified by RHT correspond with those apparent from work already under way by icare. This is unsurprising, given that the work of RHT was conducted shortly after the conclusion of the Dore 2019 Review.

253 Ms Dore took the view that '[i]t is icare's responsibility to ensure its work in improving these four areas results in better outcomes from customers without the need for additional advice'. She said that the information provided by icare's own Customer Insights teams, incorporating the WIRO complaints data, 'should be sufficient intelligence to guide improvements to the CSM [Claims Service Model]'.⁶⁷³

254 In Ms Dore's view, the work done by RHT as Customer Advocate duplicates that done by icare internally. Thus, she concluded, there was no reason for RHT to continue in its role.⁶⁷⁴

⁶⁶⁸ icare, *Report of the Customer Advocate – icare response*, 25 February 2020, 2

⁶⁶⁹ RightHandTurn, *Report of the Customer Advocate*, 18 December 2019, 7

⁶⁷⁰ Ibid 4-5

⁶⁷¹ icare, *Report of the Customer Advocate – icare response*, 25 February 2020, 2

⁶⁷² Janet Dore, *Operational Review of Insurance and Care NSW & Delivery of Dore Report Recommendations*, 5 March 2021, at [5.1.1] 24

⁶⁷³ Ibid

⁶⁷⁴ Ibid

255 I agree with Ms Dore that icare ought not to rely on external advisers to do work that it can, and properly should, do itself. However, I am also conscious that I have received many submissions that expressed serious dissatisfaction with icare's attempts at engagement to date. I am also conscious of PwC's conclusion that icare has been overly focussed on NPS reporting, to the exclusion of other measures of the quality of its work. Ms Dore did not have the benefit of PwC's conclusions in preparing her report.

256 For those reasons, I consider that removal of the Customer Advocate position at this stage may be premature. icare ought to improve its internal resources to ensure they are able to prove frank and effective advice to icare on customer experience. icare should use the Customer Advocate position as a resource to confirm and ensure that its internal resources have reached that standard. I have adapted the recommendation of Ms Dore accordingly.

257 I accept that it is for icare to determine, in an operational sense, the precise manner in which it surveys and reports on the experience of the customer. However, it is essential that in doing so, icare bears steadily in mind that a focus solely or principally on the NPS score is likely to produce an inapposite measure of the performance of its claims management process. On one view, the objective outcomes, in terms of delivery of benefits, are more important than subjective views of satisfaction. More significantly, it would seem to be axiomatic that improvements in the former area would lead, almost inevitably, to improvements in the latter.

258 I address below at [24.4 below](#) the possibility of including stakeholder voices within icare's management and oversight structures. That model of engagement may help to add another perspective on icare's operations, separate to the role of a customer advocate.

22.7 Recommendations of the Dore 2021 Report

259 I adopt (with minor and non-substantive changes in wording) the following recommendations made by Ms Dore in the Dore 2021 Report. The one exception relates to the Customer Advocate role, where I have modified the recommendation as discussed above.⁶⁷⁵ Ms Dore made one recommendation for SIRA (Ms Dore's final recommendation), which I adopt in [Part 2](#) of this report.

Recommendations	
Claims management	
1	icare should continue its investment in skills and professional development through the Personal Injury Education Foundation (PIEF) or other education resources, in conjunction with the wider insurance industry, to build on icare's and EML's current commitments to improving claims management capabilities.

⁶⁷⁵ See [paragraph 256](#).

2	icare should examine the Internal Audit Report on EML from a major risk perspective to identify actions, timelines and responsibilities for overcoming whatever shortcomings may be identified in the report.
3	If icare intends to seek market tenders for claims management, it should review the timing for doing so (so as to avoid exacerbating EML's staff turnover problems), and its competitive strategy, and should prioritise stability and performance outcomes.
4	icare should reconsider whether the 12 month contract duration of its current Service Provider Agreement with EML is appropriate, or whether the duration should be extended to 24 months to allow EML sufficient time to implement the changes in claims management process and other innovations that it has agreed with icare.
5	icare should affirm the three points of data quality, skills and capacity, and sustainability as essential priority work for management with detailed timelines for achievement.
6	<p>icare should:</p> <ul style="list-style-type: none"> • Retain the Customer Advocate role for a further period of 12 months • Strengthen its internal capacity to assess and understand customer views and needs, with a view to ensuring that that internal capacity is able to provide the services and insights currently provided by the Customer Advocate; and • Thereafter, if appropriate, remove the Customer Advocate roles in light of existing internal capability to support business change projects.
7	SIRA and Treasury should stress test the assumptions in icare's NI FY21 Business Plan with icare to verify their veracity.
8	The bodies responsible for workers compensation across Australia should consider proposing a national approach to achieving more consistency in, and application of, health costs founded on value-based health care principles.

23 Organisational matters

23.1 Procurement practices and probity management

260 My review in *Part 1A* of the matters identified in media reports and SCLJ hearings demonstrates that there have been very significant historical problems in the institution and implementation of probity and procurement policies and practices, and in the effectiveness of those policies that were instituted.

261 icare's practices in these areas were, as it now acknowledges, haphazard and deficient, and contributed to the making of procurement decisions that were inconsistent with icare's obligations as a NSW government agency.⁶⁷⁶ It is clear, historically, that:

- a) there has been a culture at icare which prioritised outcomes over process, resulting in a lack of effective and consistent implementation of such policies and procedures as were in place;
- b) the continued use of the NI exemption (especially as it was understood by management) contributed to inadequate procurement practices; and
- c) icare has found it difficult to improve its procurement practices, with some issues taking many years to resolve. This is the result of historical lack of priority given to probity and procurement, and would seem to indicate a failure to focus properly on embedding good practices.

23.1.1 Submissions

262 In addition to the matters identified in the media, I received submissions from two previous tenderers (Company A and Company B) who asked that their submissions remain confidential, who had both tendered for icare contracts, and from a number of anonymous or confidential submissions from current or former employees of icare.

263 Company B raised concerns as to what it said was a pattern of '*aggressive and unrealistic*' procurement deadlines, which impaired its ability to tender. It proposed that oversight be put in place to ensure compliance with NSW procurement guidelines, regardless of the NI exemption.⁶⁷⁷ Company B also stated that it did not always receive feedback on its tenders. It added that it found it difficult to raise its concerns with the procurement process with icare, in a way which would be effective and would not have an adverse impact on its relationship with icare and its prospects of success in any future tender.⁶⁷⁸

264 Company A raised serious concerns about a RFP tender process commenced by icare in December 2017. That process has been reviewed by icare internally. icare's review (see below) and complaint handling were subject to review by the NSW Procurement Board. As I have stated elsewhere, the focus of my review is on systemic issues. I therefore do not propose to comment on whether the procurement decision that icare made was reasonable. However, having reviewed documents provided by Company A in its submission, and by icare in response to my Review's request for information, I

⁶⁷⁶ icare, *Submission to Independent Review- 1h Procurement Practices*, November 2020, at [1]

⁶⁷⁷ Anonymous stakeholder

⁶⁷⁸ Interview with Anonymous stakeholder

conclude that this procurement was attended by similar concerns to those identified in *Part 1A*.

265 During icare's own 2019 investigation of the allegations made by Company A, it found that a number of records had not been kept. While the formal evaluation reports were available, an approved RFP Probity and Conduct Plan could not be located, a number of probity reports from the probity advisor were still in draft (some two years after the RFP process), and minutes detailing key decisions and reasons could not be located.⁶⁷⁹

266 Company A, in its submission to me, expressed a concern that conflicts were not properly managed. icare's response is that no conflicts were declared by those on the RFP team; Mr Craig's interest in AusPayNet was declared, but considered by the independent probity advisor not to be a conflict; and one Board member declared an interest in a funder of the (ultimately) successful tenderer and '*abstained from participating in the decision-making of the Customer, Innovation and Technology Committee*'.⁶⁸⁰

267 I have not independently confirmed that all those involved in the process provided a conflict of interest declaration. It is, in my view, sufficient that icare engaged an independent probity adviser who managed that process.

268 icare did not conduct a feedback session with Company A until seven months after the contract had been awarded (and a year after Company A was informed that its proposal would not progress to the next stage). Had that feedback been given more promptly, it is likely that a number of Company A's concerns would have been allayed. The tender process shows, as do others from the same period of time, poor record-keeping, particularly as to the actual process of decision-making. While external advisers were involved, that must be an aspect of or adjunct to sound practices. It does not absolve icare from the responsibility to ensure that proper practices were followed and that proper records were kept.

269 The current and former employees raised issues similar to those identified through examination of the media issues above: a culture that was dismissive of process; a focus on getting things done; and concerns around the existence and management of conflicts of interest.

23.1.2 Background

270 icare, as a government agency, was and is bound by the following laws and cross-government policies:

Figure 35: Public sector laws and policies applicable to icare

Title	Description
Governance	
<i>Government Sector Finance Act 2018</i>	Requires icare to prepare and table annual reports in Parliament and provides the requirements for icare's annual reporting
<i>Independent Commission Against Corruption Act 1987</i> and the <i>Independent Commission</i>	Establishes the Independent Commission Against Corruption to investigate allegations of corruption. Public officials can report corrupt conduct if they believe there is intentional wrongdoing within an organisation.

⁶⁷⁹ Anonymous stakeholder

⁶⁸⁰ icare, Response to Part A and B of McDougall Report, 12 April 2021, at 10

Title	Description
<i>Against Corruption Regulation 2013 (NSW)</i>	
<i>Public Works and Procurement Act 1912 (Procurement Act) and the NSW Government Procurement Policy Framework (Policy Framework).</i>	<p>Under the WC Act 1987 icare and the schemes it manages (with the exception of the NI) are required to comply with the Procurement Act and the Procurement Policy Framework.</p> <p>As per section 154A(4) of the WC Act 1987, the Procurement Act does not apply to the Nominal Insurer: <i>'For the avoidance of doubt, the Nominal Insurer is not a government agency for the purposes of Part 11 of the Procurement Act.'</i>⁶⁸¹</p>
<i>TPP16- 02 Guidance on Shared Arrangements and Subcommittees</i>	<p>Requires agencies to establish an Audit and Risk Committee (ARC) and describes the functions and responsibilities and Charter requirements of the ARC.</p>
<i>TPP20-08 Internal Audit and Risk Management Policy for the General Government Sector</i>	<p>Assists agencies to implement their legislative obligations under the <i>Government Sector Finance Act 2018</i> by outlining minimum standards for risk management, internal audit and Audit and Risk Committees.</p>
<i>TPP17-10 Guidelines for Board of Government Businesses</i>	<p>Replicates private sector corporate governance standards. The Guidelines outline the Government's expectations for standards of corporate governance that should be adopted by all commercial governing boards</p>
<i>TPP 18-05- Major Projects Policy for Government Businesses</i>	<p>Outlines the Cabinet approval and project assurance requirements for major projects being undertaken by government businesses.</p>
<i>TPP18-8 Board Appointment for State Owned Corporation and Other Commercial Government Businesses</i>	<p>The policy and guidelines document the process for Board Appointments managed by Treasury as part of the Commercial Policy Framework. The guidelines include practice guides to assist practitioners and stakeholders throughout the process.</p>
<i>TPP17-11 CEO Appointment Guidelines for Government Businesses</i>	<p>Provides guidance in relation to the appointment, including remuneration, for CEOs or managing directors not covered by the <i>Government Sector Employee Act 2013</i>. Includes requirements for executive remuneration disclosure.</p>
Resource Management	
<i>NSW Government Travel and Transport Policy</i>	<p>Requires agencies to have the appropriate travel and transport tools available to support business needs while maintaining purchasing transparency.</p>
Reporting, Record Keeping and Data Integrity	
<i>Annual Reports (Statutory Bodies) Act 1984 and the Annual Reports (Statutory Bodies) Regulation 2015</i>	<p>Requires all statutory bodies and departments to prepare and present to Parliament an annual report containing both financial and non-financial information on their operational activities.</p>
<i>State Records Act (1998) and the State Records Regulation 2015</i>	<p>Provides for the creation, management and protection of the records of public offices of the State and for the public access to those records.</p>
<i>Public Interest Disclosure Act 1994</i>	<p>Sets in place a system to encourage public officials to report serious wrongdoing.</p>
<i>TPP18-02 Reporting and Monitoring Policy for Government Businesses</i>	<p>Establishes obligations for reporting and monitoring to Treasury and to responsible ministers. Provides for annual Statement of Corporate or Business Intents and quarterly reporting.</p>
<i>Government Information (Public Access) Act 2009 (GIPA Act)</i>	<p>Outlines the requirements for public release of government information.</p>

271 However, icare either expressly or by virtue of its establishment as a separate body corporate, is not obliged to comply with certain policies that apply elsewhere in government. It was accordingly necessary for icare to prepare its own policies and procedures to address such issues.

⁶⁸¹Note that icare and the other schemes it manages are still obligated to comply with the Procurement Act.

Figure 36: Public sector laws and policies not applicable to icare

Title	Description/Explanation
<i>Government Sector Employment Act 2013 (GSE Act)</i>	The Act does not apply to icare by reason of Section 14 of the SICG Act; <i>'ICNSW is authorised to employ such staff as it requires to exercise its functions. The provisions of the Government Sector Employment Act 2013 relating to the employment of Public Service employees do not apply to the staff employed by ICNSW.'</i>
<i>Code of Ethics and Conduct for NSW Government Sector</i>	Identifies mandatory requirements and best practice conduct for all government sector employees consistent with Part 2 of the GSE Act. ⁶⁸² The Code of Ethics and Conduct applies to <i>'all government sector employees... consistent with Part 2 of the GSE Act'</i> and <i>'employees of separate Public Service Agencies (GSE Act, Schedule 1, Part 3) are covered by the Code.'</i> icare employees are not employed under this legislation.

23.1.3 Current procurement and probity policies and practices

272 Treasury engaged RSM to assist my Review by reviewing and considering the application of probity and procurement related policies and practices within icare, and by conducting deep-dive assessments of three selected historical, and three selected more recent, procurements.

273 After RSM was appointed, icare advised me that it was undertaking a significant program of work to revise the policies and procedures then in place. I agreed that RSM's scope be amended to examine the robustness of icare's revision processes, including its gap analysis and its action plans for the implementation of new policies and procedures.

274 RSM concluded that:

- There is a trend of improvement over time, with icare working towards organisational transformation and improvement. RSM observed *'a deeper and broader change agenda across the organisation'*⁶⁸³ when viewed as a whole and not solely from the contracts reviewed.
- There is a need to train icare's management and staff, where necessary and appropriate, on key procurement processes so as to reduce icare's reliance on external consultants and advisers.⁶⁸⁴
- The probity and procurement action plans provide sound platforms for further work to be done, although there is a need to ensure that icare understand the problems that must be solved to integrate procurement into the rest of the organisation. There remain gaps in icare's practices. The plans are considered high level and require further targeted system and process analysis to ensure their currency and completeness. This will then provide a sound basis to develop detailed tactical plans that are capable of being implemented in a controlled and monitored basis.⁶⁸⁵

⁶⁸³ RSM, *Independent Review of icare*, 11 March 2021, 2

⁶⁸⁴ Ibid44

⁶⁸⁵ Ibid 18 and 20

d) Consistent and regular messaging of the organisation's governance approach and cultural expectations must be reinforced.⁶⁸⁶

275 The steps taken or being taken by icare to improve its processes include:

- undertaking a GIPA Act remediation program;
- establishing an executive steering committee (established in April 2020), to oversee a '*comprehensive program of ongoing compliance*',⁶⁸⁷
- establishing an '*Enterprise Sourcing and Planning Group*' to '*improve coordination of procurement planning activities across the organisation*',⁶⁸⁸
- appointing a '*Chief, Assurance and Sourcing as an additional level of oversight*',⁶⁸⁹
- preparing an updated Procurement Policy, which includes a requirement for Board approval for use of the NI exemption and a requirement for Strategic Sourcing to be involved in any procurement over \$30,000 (or any Information and Communications Technology (ICT) procurement regardless of value),⁶⁹⁰
- improving processes, tools and cross-checks and developed a new training program;⁶⁹¹ and
- quarterly reporting to the ARC on procurement activities.⁶⁹²

276 icare's development of its procurement policies and processes is continuing. The steps it is taking include implementation of the findings of its most recent internal audit (March 2020).⁶⁹³ icare is also revising its conflict of interest, travel, and gifts and benefits policies,⁶⁹⁴ and is undertaking an '*awareness campaign*'.⁶⁹⁵ Some updated policies were available for RSM's review.⁶⁹⁶

277 Efforts such as these are only useful to the extent that they succeed in embedding good practices and a strong ethical culture within icare. In this context, I note that RSM states that icare's procurement personnel are not always or consistently involved in procurement activities.⁶⁹⁷ The addition of further layers of oversight will achieve very little unless it is accompanied by cultural change to ensure that improvements on paper do not remain confined to paper.

278 To that end, I agree with and adopt the recommendations of RSM that a Chief Procurement Officer be appointed, and that a regular education program be established. I note particularly RSM's statement that strong leadership will be critical if

⁶⁸⁶ RSM, *Independent Review of icare – Probity and Procurement*, March 2021, 3

⁶⁸⁷ icare, *Submission to Independent Review– 1h Procurement Practices*, November 2020, at [3] and [13]-[14]

⁶⁸⁸ Ibid at [15]

⁶⁸⁹ Ibid at [3-12]

⁶⁹⁰ Ibid at [15]

⁶⁹¹ Ibid at [31]

⁶⁹² Ibid at [15]

⁶⁹³ icare, *Submission to Independent Review– 1h Procurement Practices*, November 2020, at [16]-[17]; icare *Submission to Independent Review – 1i Probity*, November 2020, at [32]-[33]

⁶⁹⁴ icare, *Submission to Independent Review– 1i Probity*, November 2020, at [31]

⁶⁹⁵ Ibid at [35]

⁶⁹⁶ RSM, *Independent Review of icare – Probity and Procurement*, March 2021, 12

⁶⁹⁷ Ibid 43-44

icare is to achieve open, transparent and comprehensively documented procurements. RSM comments that the need for leadership will require both Board sponsorship of and accountability for proper procurement policies and strong C-level leadership if changes are to permeate the organisation.⁶⁹⁸ I agree.

279 RSM conducted a review of icare's updated conflicts of interest policy. It found the new policy to be suitable, and the process by which it was developed to have been sound. However, icare's updated gifts and travel policies were not completed in time for RSM to review them.

280 What is concerning is that RSM found no evidence of any assessment or gap analysis to indicate whether the proposed policies would be consistent with better practice, NSW government standards and public expectations generally.⁶⁹⁹ I note that icare contended, in its comments on the draft of this Report, that it had conducted appropriate gap analysis and other assessments. RSM was informed of this, but maintained its position. I cannot resolve this point.

281 What is important is that RSM made recommendations to strengthen the policies in question.⁷⁰⁰ I agree with and adopt those recommendations. I note in particular the recommendation that icare complete its assessment of its gifts and benefits policy and travel policy without delay, and ensure that these and all other updated policies are implemented effectively across the organisation.

282 RSM considered icare's new procurement policy to be '*consistent with better practice, NSW Government standards and public expectations generally*'.⁷⁰¹

283 RSM noted that icare's Procurement Improvement Program (PIP), dated 12 January 2021, relied heavily on past reviews and assessments of icare's procurement dating back to 2016. While the PIP mapped future work, it did so at a high level.⁷⁰² The fact that the findings of past reviews remain relevant suggests that this earlier work was not properly performed at the time, or was not properly embedded. This appears to repeat the pattern I noted in *Part 1A*, that icare has previously taken steps towards improvement, but failed to approach them in a sustainable fashion that ensured issues were addressed and that the solution was embedded in icare's practices and culture. It is apposite to note that icare revised its procurement policy in November 2020, and then prepared a further PIP in January 2021.

284 If history is any guide, there must still be a real risk that icare will expend significant effort without achieving the necessary improvement in practices across the organisation as a whole. RSM comments that significant effort is required, and that investment in the PIP and cultural shift will not in itself provide evidence of the program's success. Strong and sustained leadership, and effective monitoring, are essential.

285 Thus, program evaluation processes will need to be developed to define and measure the success of the PIP. As RSM comments, icare must be able to shift and update the

⁶⁹⁸ RSM, *Independent Review of icare – Probity and Procurement*, March 2021, 43-44

⁶⁹⁹ Ibid 13-14

⁷⁰⁰ Ibid 43-44

⁷⁰¹ Ibid 18

⁷⁰² Ibid

delivery of that program promptly if the proposed approach is not shown to achieve the necessary rate and extent of change.⁷⁰³

286 I therefore recommend:

Recommendations	
Probity and procurement	
9	icare should appoint a Chief Procurement Officer, who will be responsible for the significant procurement process and cultural changes that are required, and to ensure their successful and sustainable permeation throughout the organisation.
10	icare in its own right should be bound to a procurement and probity framework equal to or better than other government agencies, and should have in place robust procurement processes. These processes should align with the existing procurement obligations of government agencies and be consistent with the guidance provided by RSM.
11	icare should establish a regular education program to demonstrate to staff how governance systems help improve performance and achieve goals, and ensure that staff understand the expected behaviours and requirements to which they must adhere under icare's policies and procedures and applicable NSW Government policies and guidelines. Probity and Procurement education should follow the guidance provided by RSM.
12	For icare employees with authority to carry out procurement across the Business Units, a more tailored education program should be developed and delivered on an annual basis, in line with the guidance provided by RSM.
13	After one year from the date of this Report, icare should undertake an independent review of the operation and implementation of the new probity and procurement policies.

23.2 Culture

23.2.1 Historical culture of icare

287 When icare was established, it employed together both staff who had come across from WorkCover and new staff from the private sector.

⁷⁰³ RSM, *Independent Review of icare – Probity and Procurement*, March 2021, 45

288 A 2014 Parliamentary Review had found that WorkCover had a significant longstanding cultural and organisational problem with bullying.⁷⁰⁴ icare took a number of steps. They included seeking external expert advice.⁷⁰⁵ It appears from the results of my review and the CGA Review that icare's actions were largely successful in addressing some elements of that culture. On the material before me and as I have said in *Part 1A*, icare does not appear now to have a widespread toxic or bullying culture.

289 I did conclude that icare could have done more to address the concerns of whistleblowers, particularly Mr McCann. This issue links to a broader tendency, as identified by PwC and others, of a positive news bias within the organisation. Further it is clear that, at least in the early years of icare's existence, there was insufficient focus on the important issues of probity and procurement practices. It is in my view likely that the translation of icare's '*commercial mind, social heart*' ethos into its desire to achieve what it called transformation led its management to disregard the need to establish, inculcate, and ensure the observance of appropriate practices, including as to probity and procurement.

290 icare contends that its culture (both past and present) more generally reflects its continuing ethos of '*commercial mind, social heart*'.⁷⁰⁶ For the reasons I have outlined in *Part 1A*, that ethos appears to have encouraged a focus on commerciality, speed of action and transformation, all too often in icare's early days at the expense of proper process.

291 When one puts all these things together, it is clear that icare still has cultural challenges that it needs to address. These were identified in general terms in the Dore 2019 Review, and led to SIRA's recommendation (in the 21 Point Plan) that the external CGA review be carried out.

292 As noted, I have relied heavily on the work of PwC in reaching the conclusions I have expressed on cultural issues. I note that there were only a small number of submissions from current or former employees of icare. Of those, two were anonymous. Two others asked that their submission and names be kept confidential.

23.2.2 Recent changes by icare

293 icare conducts regular surveys of its employees through an eNPS survey and the whole of public sector PMES survey.⁷⁰⁷ These surveys are reported to both team management and senior leadership to track and respond to that feedback.

294 As part of attempts to improve its culture, icare commenced a series of '*listening tour[s]*' in 2019, which consisted of focus groups run with employees.⁷⁰⁸ icare says that the results of those activities are used to develop initiatives to address identified cultural issues. In 2019, the issues raised included:

- a) lack of role clarity;

⁷⁰⁴ General Purpose Standing Committee, *Allegations of bullying in WorkCover NSW*, 19 June 2014

⁷⁰⁵ icare, *Submission to Independent Review- 1d Culture*, 18 November 2020, at [10]

⁷⁰⁶ Ibid at [1]

⁷⁰⁷ For a description of these surveys, see icare, *Submission to Independent Review- 1d Culture*, 18 November 2020, at [13]-[24]

⁷⁰⁸ icare, *Submission to Independent Review- 1d Culture*, 18 November 2020, at [25]

- b) inconsistent prioritisation of work;
- c) system outages; and
- d) work inefficiencies.⁷⁰⁹

295 In 2020, these listening tours identified the following issues:

- a) the importance of keeping icare's commitment to purpose and customers;
- b) rebuilding trust and transparency;
- c) ensuring greater leader accountability, compliance and consistency; and
- d) continuing to collaborate across icare.⁷¹⁰

296 Most recently, listening tours indicated:

- a) a strong connection to icare's purposes, customers and colleagues; and
- b) concerns relating to icare's relationship with SIRA and scheme agents, as well as transparency and accountability.⁷¹¹

297 I suggest that icare continue this process of consultation with employees, and that it give serious attention to utilising the results to assist in cultural improvement.

298 One particular cultural issue raised concerned icare's treatment of whistleblowers. The allegation is that whistleblowers in general, and Mr McCann in particular, were not properly protected, and that issues raised by them were not properly investigated. As a result, it is said, icare lost the opportunity to use their concerns to help in the improvement of its policies and processes.

299 icare has always had in place some policies and procedures to manage both PIDs, and other complaints or concerns which do not fall within that definition. However, historically, those policies and procedures were inadequate, as is shown by the treatment of Mr McCann.

300 icare has developed those policies and procedures over the years. It intends to make further improvements to them. Those proposed improvements include the development of an outsourced hotline,⁷¹² and the implementation of a system for feedback. The former is intended to facilitate disclosure. The latter is intended to ensure that disclosures are used, where appropriate, in the development of more effective cultural behaviour.⁷¹³

301 Improvement is necessary because, as the CGA Review showed, there are still weaknesses in icare's existing policies and procedures.⁷¹⁴ These weaknesses are compounded by the continued failure, on the part of managers, to respond appropriately to concerns raised outside the framework of existing policies and procedures.⁷¹⁵ As Mr McCann's experience demonstrates, it is vital that managers at all levels are properly equipped to support the formal and informal disclosure

⁷⁰⁹ icare, *Submission to Independent Review- 1d Culture*, 18 November 2020, at [25-26]

⁷¹⁰ Ibid at [27]

⁷¹¹ Ibid at [28]

⁷¹² Ibid at [35]

⁷¹³ Ibid

⁷¹⁴ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 60-61

⁷¹⁵ Ibid 61

mechanisms in place within icare. Employees continue to report failures by their managers to take seriously, respond to and escalate matters raised by employees.⁷¹⁶

302 I adopt the recommendations of the CGA review as to the support or whistleblowers and response to incidents:⁷¹⁷

Recommendations	
Culture – protection of whistleblowers and response to incidents	
14	<p>icare should update and implement policies and procedures in relation to wrongdoing to enable and better support speak-up.</p> <p>icare should ensure that reporting channels are in place to support the anonymity, safety from reprisal and independence of the wrongdoing process. Any changes should be communicated to all staff.</p>
15	<p>icare's management should coordinate and report to the Audit and Risk Committee on the complete set of material grievance and wrongdoing issues to provide oversight and an understanding of systematic themes.</p> <p>icare's management should implement a system of feedback to help inform future behaviours and ensure lessons are learned.</p>
16	<p>icare should ensure that management takes action efficiently and effectively on all formal and informal reports of wrongdoing and other complaints, and that there is effective communication in support of this process.</p>

23.2.3 Overall culture of icare

303 As the CGA Review said in relation to icare's culture, it, '*like that of any organisation, ... has both strengths and weaknesses*'.⁷¹⁸

304 Many of the themes that I have identified in this Report reflect cultural traits within icare. The CGA Review also identified a number of cultural traits within icare, and corresponding strengths and challenges – I replicate their summary below.

Figure 37: CGA Review assessment of icare's cultural traits

Cultural trait	Strengths	Challenges
Commitment to vision: Strong commitment and unity around icare's 'vision' as it relates to both focus on customers and the vision of transformative change	<ul style="list-style-type: none"> Driven by positive intent for customers Courage and confidence to transform Resilience in times of adversity 	<ul style="list-style-type: none"> Speed over process and execution discipline Tunnel-vision when on a path Overlook 'hygiene' factors, such as active management of risks and issues

⁷¹⁶ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 61

⁷¹⁷ Ibid, at Recommendations 43-45, 10

⁷¹⁸ Ibid 85

Cultural trait	Strengths	Challenges
Alignment seeking: The value of collaboration and consensus and pride sought from the influence of others	<ul style="list-style-type: none"> • Collaboration and collective problem-solving • Strong task deliverable focus • Generates momentum and engagement 	<ul style="list-style-type: none"> • Decisioning outside formal channels • Consensus-bias • Lack of robust challenge
We are the experts: Self-reliance and confidence with a high value placed on expertise and robust design	<ul style="list-style-type: none"> • Confidence and self-reliance • Navigate uncertainty and ambiguity • Pride in leading others 	<ul style="list-style-type: none"> • Over-reach in activity management • Lack of trust • Dismissiveness of advice • Limits productive working partnerships
In the tribe: Tight connections and support for team members exist in icare with an ability to form tight teams across functions	<ul style="list-style-type: none"> • Belonging and loyalty • Tight connections and support for colleagues • Rapid formation of cross-functional teams 	<ul style="list-style-type: none"> • Incongruence in priorities • Lack of uniform identity across icare • Protection of 'patches' and combative behaviours
Positive news bias: Positive news energises the team around a common sense of achievement and a strong recognition of good performance	<ul style="list-style-type: none"> • Energises the organisation around sense of achievement • Recognition of strong performance • Provides sense of achievement 	<ul style="list-style-type: none"> • Complacency and ineffective response to risks • Selective reporting and positive spin • Inhibits speak-up, raising concerns and confrontation

Source: PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 6

305 Without repeating the full detail of that report, it is clear to me that the current culture of icare continues to contain a number of the features which have contributed to poor performance and poor practices in the past.

306 The CGA report outlined the way in which its key findings about the improvements in governance and accountability were linked to icare's culture, as follows:

Figure 38: CGA Review assessment of the link between icare's cultural traits and the CGA Review's findings in relation to governance and accountability

Governance & Accountability findings	Underpinning cultural traits
Unclear identity of icare as a NSW government agency	<ul style="list-style-type: none"> • Commitment to vision - speed over outcomes • We are the experts - inward orientation
Lack of governance discipline in hearing the voice of customer and execution excellence	<ul style="list-style-type: none"> • Commitment to vision - focus and courage to transform • Alignment seeking - lack of openness to change/own mistakes
Absence of effective challenge around risk and compliance	<ul style="list-style-type: none"> • Alignment seeking - groupthink • Positive news bias - ignoring action on risk

Governance & Accountability findings	Underpinning cultural traits
Challenges to identification, escalation and management of risks and issues	<ul style="list-style-type: none"> Positive news bias - conflict avoidance Commitment to vision - ignoring of evidence that challenges grandiose vision
Strained relationships with external stakeholders, for example SIRA and EML	<ul style="list-style-type: none"> We are the experts - dismissiveness of advice Positive news bias - selective reporting and spin
Absence of consequence management for accountabilities, outcome delivery, and poor performance	<ul style="list-style-type: none"> Positive news bias - conflict avoidance In the tribe - bystander effect
Insufficient investment in reflecting, learning and course-correcting from previous experiences	<ul style="list-style-type: none"> Alignment seeking - lack of openness to change/own mistakes Commitment to vision - tunnel-vision

Source: PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 97-98

307 There are indications that the present need for change permeates throughout icare's management, right up to its most senior levels. The CGA Review identified that there were gaps in reporting and access to information at the GET level which contributed to a 'positive news' bias, and a lack of root cause analysis of incidents.⁷¹⁹

308 More concerningly, the CGA Review observed that there is a culture at the GET level of making decisions '*outside the room*'. The CGA Review noted, as a related problem, that some members of the GET were not comfortable in challenging issues or decisions relating to other parts of the business.⁷²⁰ Further, there was evidence that some managers had not escalated matters to the GET when it was appropriate to do so – perhaps another example of '*outside the room*' decision-making.

309 I add further my own observation, consistent with the observations of PwC, that icare has brought about changes most promptly when under intense public scrutiny. I consider it both prudent and appropriate that icare accept the level of public scrutiny and accountability which appears to have encouraged so much change in so short a time.

310 As noted above, icare has taken some steps towards improving its culture, and addressing some structural aspects which at the very least facilitate adverse aspects of that culture. A number of recommendations in this Report address these structures further, and are intended to help icare to achieve substantial cultural change. However, cultural change requires behavioural and attitudinal shifts as well as formal amendment to policies and procedures. As was the case with probity and procurement, the presence of good policies is not sufficient on its own to ensure that good practice will follow.

311 It is clear that icare needs to make deliberate and focussed efforts to move its culture to an appropriate position. PwC warns that '*big bang*' change risks creating fatigue and undermining efforts for change, and that any change in culture must be planned,

⁷¹⁹ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 35

⁷²⁰ Ibid

prioritised, and provided with sufficient time to allow meaningful and sustainable change.⁷²¹ I agree.

- 312 I must however stress that the story of icare's culture is not all bad. The CGA Review identified a number of strengths within icare which may assist in achieving positive cultural change. They include the strength of leadership provided by the GET,⁷²² and a strong corporate sense of vision and loyalty.⁷²³ There is no reason to believe that icare cannot shift its culture, given sufficient time and focussed effort.
- 313 The ongoing nature and importance of that work, mean that some form of oversight of the process of change is required. That oversight must seek to ensure that the necessary steps are taken and are sufficiently effective. That will not be a quick process. Cultural change requires rather more time than the changes to policies and procedures of themselves will take.
- 314 Accordingly, I recommend that icare's Board take responsibility for ongoing oversight of icare's cultural change program. I recommend further that another review of icare's culture be conducted in two years. That review should be conducted, as was the CGA Review, by an independent third party. It should address, among other topics, the progress of implementation of planned improvements to icare's cultural practices and shifts in its underlying culture.
- 315 I accept that the continued use of external consultants is a source of expense that, ultimately, must be borne by the WCIF and other funds that icare manages. However, in my view, the further review is essential, and so therefore is the expense of conducting it.

Recommendations	
Culture – culture change and assessment of change	
17	<p>icare's Board should take responsibility for ongoing oversight of icare's cultural change program</p> <p>icare should prepare and publish a plan for cultural change which addresses, at minimum, the key risk factors of inattention to process, focus on transformation at the expense of process and resistance to oversight. In doing so, the plan should take into account recommendations and qualifications 70 to 76 in the CGA Review Recommendations⁷²⁴.</p> <p>icare should report annually to the Treasurer and publicly on its progress in executing that plan.</p>

⁷²¹ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 100

⁷²² Ibid 31-34

⁷²³ Ibid 88 and 92-93

⁷²⁴ Ibid 99-101

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There should be a further review of icare's culture by June 2023. That review should be conducted, as was the CGA Review, by an independent third party. It should address, among other topics, the progress of implementation of planned improvements to icare's cultural practices and shifts in its underlying culture.

23.3 Governance and board effectiveness

23.3.1 Historical governance concerns

316 My review of the issues raised in media reports and parliamentary hearings has led me to conclude that, at least in the past:

- icare's Board was not provided with a with a balanced view of (or in some cases at all) the information it needed, and was instead provided with an overly rosy or incomplete picture.
- The Board could have been more rigorous in its oversight of icare and its direction to previous CEOs.
- The Board would have benefited if its members had included people with direct experience of workers compensation insurance.

317 Mr Nagle disputes the conclusion set out in sub-paragraph (a) above. He says that icare's management '*made every endeavour to ensure that the Board and sub-committees were fully informed*' and that they received '*balanced reports, based on what we knew or expected to be the truth*'.⁷²⁵

318 Those assertions are inconsistent with a considerable body of other evidence given to my Review, including the views of Board members themselves, and of some executives, expressed both through the Challis Report and directly in interviews. I add that not all Board members expressed that view; to put it another way, there was not overwhelming and universal criticism from Board members of the quality of information provided to the Board.

319 Governance was also raised in a smaller number of submissions to the Review by former employees of icare. All those providing submissions either did so anonymously or asked for their submission to be kept confidential.

320 Perceived governance issues were raised in other submissions, although often those submissions were made only on the basis of publicly available information. That these issues were raised by people without direct knowledge of the matters indicates the significance accorded to governance issues, and therefore the importance of ensuring good governance within icare.

321 I have discussed at [23.2.3 above](#) continuing and concerning aspects of cultural traits at the GET level.

⁷²⁵ Mr Nagle, Response to draft Independent Review report, 14 April 2021

23.3.2 Public and private nature of icare

322 Effective Governance noted that in its review of governance arrangements, interviewees 'questioned whether *icare is a commercial organisation or a government organisation'.*⁷²⁶ This question goes to the heart of a number of issues for icare:

- a) Effective Governance notes the existence of tension between those holding commercial attitudes, who '*questioned government compliance and reporting requirements that do not appear to add value*' and those holding a public sector view and considers that strict accountability and transparency requirements are appropriate.⁷²⁷
- b) At least some of the conflicts between icare and SIRA appeared to stem in part from tensions between a view held by some in icare, that it ought to be solely responsible for operational matters, and a view attributed to SIRA, that robust regulation, including of operational matters, should be expected.⁷²⁸
- c) The '*commercial mind*' ethos (as one part of '*commercial mind, social heart*') and the exemption of the NI from NSW Government procurement requirements between them have encouraged a lack of attention to good procurement practice.

323 The CGA Review noted that '*there is complexity and some lack of certainty for icare over the regulatory standards that icare must comply with*'.⁷²⁹ The CGA Review specifically refers to icare being a government agency that is exempt from some requirements generally applicable to NSW public agencies; is not subject to APRA regulation but is not subject to express prudential regulation from the NSW Treasurer or otherwise; and is subject to SIRA's oversight for some but not all of the schemes it manages.

324 icare is, by statute, a NSW Government agency. It is required to report to, and is subject to the direction of, the responsible Minister, presently the Treasurer.⁷³⁰ It is also subject to government procurement rules except when and to the extent it is managing procurement for the NI, and is subject to oversight by bodies such as the Audit Office.

325 However, the circumstances of icare's creation, considered in conjunction with a number of other statutory indications, suggest that it was intended to operate in a manner similar to a private commercial organisation. As noted in the introduction to this Report, the governance arrangements of icare reflect most closely those appropriate to a State Owned Corporation. They give icare significantly more independence than most NSW Government agencies have.

326 icare has no shareholders to whom the Board is ultimately accountable. The Board is accountable to the Treasurer, by whom of course its members are appointed. Presumably, this arrangement is intended to provide some external oversight of icare; oversight that, in the case of a listed company, might be provided by or on behalf of shareholders.

⁷²⁶ Effective Governance, *icare Governance Review*, December 2020, 13

⁷²⁷ Ibid

⁷²⁸ Ibid 14

⁷²⁹ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 4

⁷³⁰ SICG Act s 4, 6 and 7

327 Another notable feature of icare's governance is that its directors have no personal liability for any act, as long as it is done in good faith.⁷³¹ That position is in marked contrast to the statutory duties and (at least potential) liabilities of directors of companies generally.

328 Further, icare's position as the manager of a statutory benefits scheme places it in a unique position. It has what is in substance a statutory monopoly in the field of workers compensation in NSW. (Self and specialised insurers may be put to one side, as these are not choices available to the vast majority of employers.) The funds employed by icare for the NI scheme it manages are ultimately obtained from employers, pursuant to a compulsory statutory scheme. icare's role in that scheme, is to manage the payment of benefits to or for injured workers as that statutory scheme mandates. Injured workers have no choice but to engage with icare and its agents. For these reasons, the proper and effective operation of icare, a state agency, is of fundamental public importance and interest.

329 As Effective Governance comments,⁷³² icare ought to be seen as having both a public and a private character. In its private character, its governance and processes ought to reflect the importance of its position as a NSW government agency and the public nature of the funds it manages. The impact of this on the oversight of icare is addressed further below.

23.3.3 Changes to governance structures

330 In recent months, icare has made a number of changes to the governance structures in place as at mid-2020. icare recognises that its previous governance frameworks were not sufficiently robust to ensure that serious issues were taken to the Board in a timely manner.⁷³³

331 At the Board level, those changes include establishing a Governance Committee to review and advise the Board on governance and regulatory engagement. Another function of the Committee is to ensure that past delays in reporting to the Board are not repeated.⁷³⁴ The Committee is currently considering a '*Policy Governance Framework*'.⁷³⁵ It would be highly desirable if that Framework made provision for the need for review and oversight of cultural change that I have referred to at [23.2.3 above](#) in this report.

332 At the executive level, icare now has a new CEO, Mr Richard Harding, who commenced in the role in January 2021. The CEO of icare is supported by the GET. There have been very substantial changes at the GET level in recent months. The GET meets formally on a weekly basis, and in addition conducts monthly 'deep-dives' into key areas of icare's business such as risk, finance, projects, people and customer.⁷³⁶

333 icare conducted a leadership culture survey at the GET level in 2019, and then held workshops on the results obtained from that survey. As a result, icare's annual review

⁷³¹ SICG Act s 28

⁷³² Effective Governance, *icare Governance Review*, December 2020, 5

⁷³³ icare, *Submission to Independent Review– 1g Board Effectiveness and Accountability*, 18 November 2020, at [4]

⁷³⁴ icare, *Submission to Independent Review– 1e Governance*, 18 November 2020, at [6]

⁷³⁵ *Ibid* at [61]

⁷³⁶ *Ibid* at [6-7]

of the performance of its senior leaders now includes attention to appropriate leadership behaviours.⁷³⁷

23.3.4 Current governance and future improvements

334 I am satisfied, from the evidence given to my Review, that for the most part, icare's present governance arrangements are appropriate. They do however require some formal strengthening to ensure that the mistakes of early years are not repeated. I discuss those matters in the following paragraphs.

Board governance

335 Effective Governance considered the current governance model. It concluded that the board and committee structure is appropriate for an organisation of icare's size and nature.⁷³⁸

336 However, both Effective Governance and PwC commented that the Board has not been as effective as it ought to have been. Effective Governance noted that the Board '*could have been more vigorous in its management of previous CEOs and would benefit from improved processes and increased formal oversight*'.⁷³⁹ The CGA review found the Board did not set a strong enough '*tone from the top*' on key matters, and had been slow to respond to matters such as signals of the deteriorating relationship with SIRA.⁷⁴⁰

337 However, both Effective Governance and PwC commented that there had been change for the better in 2020. They noted that this had coincided with the appointment of new Chair, Mr John Robertson.

338 It is to be hoped that the recent substantial changes in the composition of the Board, coupled with the scrutiny of and following this Review, will result in a more proactive Board. That having been said, there are a number of practical steps which should be taken to ensure that the Board's oversight becomes and remains fully effective.

339 The key matters which require further strengthening are:

- a) the mix of experience among the membership of the Board, noting the previous lack of experience in workers compensation insurance;
- b) the workload of committees, which was generally high, and excessively so for the Audit and Risk Committee (ARC); and
- c) succession planning, including specifically staggering of directors' terms of office to allow for overlap. This should facilitate the transmission of experience, culture and corporate memory.

340 Both Effective Governance and PwC identified the existence of weaknesses in those three specific areas. I note that some current board members also consider that the

⁷³⁷ icare, *Submission to Independent Review– 1e Governance*, 18 November 2020, [6-7]

⁷³⁸ Effective Governance, *icare Governance Review*, December 2020, 6

⁷³⁹ *Ibid*

⁷⁴⁰ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 22

Board's capability would be enhanced by the presence of members with workers compensation and public sector experience.⁷⁴¹

- 341 In my view, the Board would benefit from more specialised experience in key areas. It is likely that deeper experience in the area of workers compensation might have allowed the Board to challenge management more effectively and closely on the extent of the new model transformation. Experience in the public sector experience remains essential, for obvious reasons.
- 342 Effective Governance note that the Board is able to make use of specialist members on its committees, even if they are not directors. The use of specialist committee members could help to compensate for any continuing shortfalls in particular areas of expertise.⁷⁴² It could also help to alleviate the workload of directors who are on more than one committee.
- 343 icare will face significant challenges in the coming years in establishing, embedding and overseeing the changes to process, culture and operations that are discussed and recommended elsewhere in this report. The Board will be an essential part of that process. It must provide oversight to, and ensure the accountability of, management. It must therefore ensure that it has the time, experience and capacity to do so properly.
- 344 Both Effective Governance⁷⁴³ and PwC⁷⁴⁴ identified, as a matter of particular concern, the enormous burden borne by the ARC. There is a very real need to ensure that this committee has the time and support to enable it to deal effectively with its manifold duties. The risk aspect of the ARC's work is of particular present significance, given the process of reform to procedures and policies that is under way.
- 345 I accept of course that for organisations at a mature stage of development, the interlinked nature of the risk and audit functions makes them a natural twin. Nonetheless, icare is not, in the organisational sense, mature.
- 346 Effective Governance recommends the splitting of this committee.⁷⁴⁵ I agree. It is essential, in my view, that there be one committee whose sole function is the oversight of all risk-related functions and change. That should remain the case now and for the foreseeable future, at least until icare completes its present process of renewal.
- 347 For that reason, as well as the reasons given by Effective Governance, I conclude that it is necessary for the ARC be split into two separate committees, one for Audit and one for Risk. That need not be a permanent change. It is, as with any other aspect of icare's operations, something that can be altered or undone in years to come if the Board then perceives it appropriate to do so in all the circumstances then obtaining.

⁷⁴¹ Interview with C Bartlett and D Plumb, 12 November 2020, at Transcript 7-8

⁷⁴² Effective Governance, *icare Governance Review*, December 2020, 20

⁷⁴³ Ibid

⁷⁴⁴ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 24

⁷⁴⁵ Effective Governance, *icare Governance Review*, December 2020, 20

348 I agree with, and adopt, the recommendations of Effective Governance,⁷⁴⁶ as follows:

Recommendations	
Governance – Board effectiveness	
19	The Board of icare should include one or more members who possess extensive public sector experience and workers compensation insurance experience.
20	icare should recruit people with specialist qualifications to join Board Committees, where this is necessary to ease the workload of committee members or to make up for any shortfall in expertise in any area by Board members.
21	The ARC should be split into a separate Audit Committee and a separate Risk Committee.

Succession planning

349 Both Effective Governance⁷⁴⁷ and PwC⁷⁴⁸ recommend the staggering of terms for succession planning purposes. I agree, as will be seen from what I have said above. Staggered terms would provide more opportunity for new directors to become familiar with the complexities of icare (and it is a complex organisation) and to familiarise themselves with the labyrinthine details of the schemes for which icare is responsible. They would allow retiring directors to pass on their accumulated experience, including as to operational and cultural challenges that icare has experienced in the past.

350 Further, it is clear that icare has a lot of work to do in moving the organisation away from its past deficiencies. That process is well under way, but is not complete. It may take several years to complete. The Board must offer stability during this process, and must be able to provide continuity and consistency of guidance. It must ensure that icare retains the capacity to apply the lessons learnt from past mistakes.

351 It would be a serious mistake if the process of reform and renewal resulted in the loss of the experience icare should have gained from those past mistakes. It would be an even greater mistake if a lack of consistent guidance from the Board were permitted to undermine, through instability, the changes that are being and are yet to be effected.

352 The director's term of office is set at three years by legislation.⁷⁴⁹ However, the renewal of those terms is not limited, nor is there any legislative limit on length of tenure. To the extent that limits on tenure arise from government guidelines and practice,⁷⁵⁰ they may be dispensed with in a suitable situation.

⁷⁴⁶ Effective Governance, *icare Governance Review*, December 2020, 8

⁷⁴⁷ Ibid 18

⁷⁴⁸ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 23

⁷⁴⁹ SICG Act sch 1 s 3

⁷⁵⁰ Effective Governance, *icare Governance Review*, December 2020, 17

353 There are very clear competing objectives in play. One is the need for renewal. The other is the need for continuity. To my mind, the present three-year limit is a potential barrier that could impede the effective transfer of knowledge and experience from one generation of directors to the next. I think that a four-year limit, coupled with effective staggering of terms, is likely to provide a more effective way of reconciling the competing objectives.

354 I accordingly recommend:

Recommendations	
Governance – board terms and succession-planning	
22	<p>That the legislature give consideration to extending the maximum term of office provided by clause 3 of Schedule 1 to the <i>State Insurance and Care Governance Act 2015</i> from three years to four.</p> <p>That there continue to be no statutory limit on the number of terms for which an individual director may be appointed.</p> <p>Exemptions from any policy limit on successive terms, if thought desirable in a particular case, should be discussed and resolved on an ad hoc basis but without any presupposition against exemption.</p>
23	<p>The present Board of icare, in consultation with the Treasurer and if necessary after taking independent external advice, should develop a succession plan for the Board which will facilitate the staggering of terms and will include a program specifically designed to allow the transmission of corporate experience from a retiring to a new director.</p>

Quality of reporting to the Board

355 As discussed in *Part 1A*, there appears to have been an historical ‘good news’ bias affecting the provision of information to the Board. Unsurprisingly, this appears to have had a negative impact on the Board’s ability to provide oversight of management, as it limited the Board ability to challenge management. This shortcoming was noted by both Effective Governance⁷⁵¹ and PwC,⁷⁵² and was also raised with me in interviews.

356 Effective Governance suggests that this has now been corrected, and that the Board now receives the information it needs to make decisions about the organisation. The increased attendance of management at Board meetings is seen to strengthen the Board’s exercise of its duties.⁷⁵³ However, as Effective Governance notes, it is a separate matter to ensure that the Board is able to challenge the accuracy and utility of the information it is given.⁷⁵⁴

⁷⁵¹ Effective Governance, *icare Governance Review*, December 2020, 26-28

⁷⁵² PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 25-26

⁷⁵³ Effective Governance, *icare Governance Review*, December 2020, 27

⁷⁵⁴ *Ibid* 26

357 The CGA Review also identifies this as an issue. PwC states that, although there have been improvements in management reporting in 2019 and 2020,⁷⁵⁵ there is room for further improvement. It is ultimately a matter for icare whether and how far to pursue the further suggested improvements.

358 One matter that should be specifically reported to the Board (or to the appropriate committee) is the state – the health – of icare’s relationship with SIRA. I address this further at [24.1.4 below](#).

359 It is of fundamental importance that the board of any company is able to rely upon full and appropriately detailed information flows from management. That is equally so for icare. The CEO’s role is vital in ensuring the integrity of this process. It is essential that icare’s CEO ensures that reporting to the Board is comprehensive and balanced. It remains, however, necessary for the Board to be vigilant to ensure that the present desirable position is maintained.

360 I regard the integrity of information flows to the Board as a matter of very great importance. It must be prioritised during the present and continuing process of change so as to enable proper tracking of changes yet to be implemented. In my view, the improvements to this area of reporting ought to be monitored as part of the process of change management.

Accountability of and to the Board

361 There are, as identified by the CGA Review, a number of areas where icare’s accountabilities are not clearly articulated. This includes an absence of accountabilities both externally, and internally within icare.⁷⁵⁶ PwC noted the potential for improvements to be made in reporting on and management of icare’s relationship with SIRA.⁷⁵⁷

362 There is no formal documented framework in place to govern icare’s approach to the relationship with SIRA.⁷⁵⁸ I think that a more formal structure could have two benefits. First, it could assist in maintaining an appropriately respectful and, so far as possible, cooperative relationship. And, clearly, it could assist the Board in holding management to account in this area.

363 To address, in part, the Board’s ability to hold management to account, the CGA review recommended that icare develop its own accountability framework to provide clarity on standards and hold people to account.⁷⁵⁹

364 The CGA Review also identified, as I have done elsewhere in my report, that historically, icare was too slow in escalating issues in the relationship with SIRA to the GET and to the Board.⁷⁶⁰ Plainly, icare acted far too slowly in addressing those issues with SIRA itself in an appropriate, rather than combative or obstructive way.

⁷⁵⁵ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 25

⁷⁵⁶ Ibid 77-78

⁷⁵⁷ I have focussed on recommendations and improvements which are necessary at an organisational level. I have not commented on recommendations which sit at a more ‘operational’ level.

⁷⁵⁸ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 33

⁷⁵⁹ Ibid 77

⁷⁶⁰ Ibid 51

365 It may be noted that a failure to act promptly and appropriately is common to a number of issues identified in this Review. They include:

- failures in managing probity and procurement concerns;
- failure to act on difficulties that were experienced in the operation of the NCOM;
- difficulties in icare's relationship with SIRA; and
- weaknesses in the treatment of whistleblowers.⁷⁶¹

366 PwC identified an ongoing weakness in icare's reporting and documentation of incidents, as well as historical delays in the management of incidents.⁷⁶² This was then reflected in inadequacies and delays in reporting to SIRA,⁷⁶³ which in turn contributed to the distrust between SIRA and icare overall and to poor coordination of responses to complaints.⁷⁶⁴

367 In this area, the recommendations made by PwC descend to a level of management detail that I do not think is appropriate for me to consider in full in this Review. However, I have considered everything that PwC has said and recommended. The fact that I do not specifically accept every one of those recommendations does not mean that icare should ignore them. On the contrary, I am firmly of the view that icare must consider each and every one of those recommendations, and to the extent that it does not adopt them, should formulate clear reasons for that decision.

Group Executive

368 The CGA Review identified a number of concerning features of governance at the GET level. They include:

- the GET does not set a clear enough '*tone from the top*' on important matters such as icare's public sector nature, the importance of a productive relationship with the regulator, and risk management;
- gaps in the information considered by the GET; and
- decision-making being often undertaken informally, '*outside the room*', rather than with the full consideration of the whole GET.⁷⁶⁵

369 PwC also considered icare's prioritisation and decision making. It noted that:

- '*there has been growing recognition in icare that the organisation tried to take on too much, too soon, and likely did not have the right skills and experience to drive the scale of transformation undertaken. Many of these issues are anchored in the way icare approaches prioritisation and a weakness in managing "risk of change"*'.⁷⁶⁶
- icare has not applied a robust decision-making framework for its significant decisions. Such a framework did not exist until 2019 (and therefore postdates the

⁷⁶¹ Including those who made PIDs.

⁷⁶² PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 55-56

⁷⁶³ Ibid 59

⁷⁶⁴ Ibid 60

⁷⁶⁵ Ibid 30-36

⁷⁶⁶ Ibid 69

majority of the most significant decisions from the perspective of this Review), but it is not applied even now.⁷⁶⁷

c) While there were governance bodies in place with oversight of important decisions, significant projects were considered in isolation, not in a way that took into account their impact on other projects elsewhere in the organisation. In the past, leaders had not found ways of curbing such behaviour. Large projects, such as the NISP, have historically overshadowed smaller projects, while the ‘*good news bias*’ has affected the assessment of necessity or inflated the outcomes of projects. There was inadequate consideration of risk in a number of ways, and warning signs were sometimes missed or ignored.⁷⁶⁸

370 Those observations are consistent with my assessment of the evidence presented directly to me.

371 As I have said more than once, it is not appropriate in an organisational review of this kind to descend to a consideration of specific operational matters unless they are relevant to, or evidence of, broader organisational concerns. However, the matters raised by the CGA Review do, as a whole, indicate that the GET must realign its processes and priorities to ensure that it is able to provide effective leadership to address the matters of concern to this Review. And it goes without saying that the Board and the GET must give very serious consideration to each and every one of PwC’s recommendations.

372 I make the following recommendation, recognising that it is for icare to decide how the recommendations of the CGA Review are to be implemented:

Recommendations	
Governance – executives	
24	<p>icare’s executive leadership should consider the observations and recommendations of the CGA Review with specific focus on:</p> <ul style="list-style-type: none">• Improving information flows both to the GET and to the Board; and• Ensuring icare and the GET apply best practice risk identification and mitigation practices consistently across the whole of icare’s organisation.

23.3.5 Risk management framework

373 Both Effective Governance and PwC observed that icare’s risk management framework was under development at the time of their reports. However, they differed in their assessments of its present adequacy.

374 Effective Governance concluded that:

The icare risk management framework is still a work in progress, however based on our review we believe that the board approved risk strategy and

⁷⁶⁷ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 69

⁷⁶⁸ Ibid 70-74

*risk appetite is supported by an appropriate risk management framework... and there is now appropriate director and officer oversight of both financial and non-financial risk... that will only with time and the commitment of the Board and GET.*⁷⁶⁹

375 PwC concluded, on the basis of a fuller review, that:

*We observed considerable gaps and weaknesses in icare's risk frameworks and practices and in the operation of its three Lines of Defence... icare has been undertaking important work over 2020 to strengthen its risk management framework...but there remains significantly more work to be done.*⁷⁷⁰

376 PwC provided a number of detailed recommendations as to the work remaining to be done. Again, I do not propose to descend to the level of detail they offer. But I repeat what I have said above: icare must consider each and every one of those recommendations, and to the extent that it does not adopt them, should formulate clear reasons for that decision.

377 I do note that the risk management issues identified by PwC have a strong correlation with the concerns I have expressed as to the proper development and implementation of probity and procurement practices, and to the cultural concerns discussed above. That reinforces the importance of the point made in the previous paragraph.

378 Risk management, and in particular non-financial risk management, is an area in which historically icare has displayed inconsistent success. This aspect of icare's governance is crucial. I reaffirm my recommendation that icare's progress on this front be monitored, and reviewed after a suitable period of time.

23.4 Executive Remuneration

23.4.1 icare's approach to executive remuneration

379 I have addressed icare's executive remuneration in detail in [15 above](#).

380 As I have said there, I consider that icare's general approach to remuneration is reasonable. Executive salaries in icare are, on average, higher than the salaries seen in the public sector. However, that is consistent with what I perceive to be the legislative purpose behind exempting icare from the restrictions of the GSE Act. In short, there is a benefit to allowing icare to set its salaries in a way which is competitive against the broader insurance market and allows it to attract appropriate talent. Salaries are, benchmarked against both the public and private sector. Nothing presented to me suggests that is an inappropriate approach.

381 Executive salaries have increased over the life of icare. However, as the analysis in [Part 1A](#) indicates, that increase has not been excessive.

382 Moving from the general to the specific, icare has not always taken appropriate account of key aspects of organisational performance when awarding bonuses, as I discussed in [Part 1A](#). That must not recur.

⁷⁶⁹ Effective Governance, *icare Governance Review*, December 2020, 39

⁷⁷⁰ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 40

383 In my view, it is appropriate, taking account of the significant public interest in the operations of icare, and the way in which those operations are funded, that remuneration is properly and transparently reported. I therefore recommend that icare's current approach to reporting of the remuneration of the CEO and each of the GET continue.

Recommendations	
Executive remuneration	
25	icare should continue the approach adopted in its 2019-20 annual report of providing detailed reporting on executive remuneration, including performance payments.
26	icare's Board, on the advice of the People and Remuneration Committee, should give careful consideration to the design of remuneration and incentive structures to ensure that they are aligned to achieving the statutory objectives of the schemes that icare manages.

23.5 icare's financial management, staffing and costs

384 A number of submissions to my Review raised concerns as to icare's staffing and overall expenditure. The work done by EY for the Dore 2019 Review raised similar concerns. icare's overall spending was the subject of implied criticism in the media and in parliament when particular contracts were considered. Those concerns included:

- That icare's staffing levels are unreasonably high. EML in particular suggested that this may result in over-servicing.
- That icare's expenditure has been excessive overall, or improperly controlled.
- That icare's own expenses have increased, offsetting the benefits of decreased external scheme costs.

385 Some particular aspects of icare's spending have been identified and criticised in parliament and the media. They include some specific contracts. While it is beyond my Terms of Reference to consider the commercial wisdom of specific contracts, the matters identified raise an underlying question as to whether icare's spending has been appropriate. Having said that, it is within my terms of reference to consider, at an organisational level, whether icare's costs are being properly managed.

23.5.1 Background

386 icare's expenses are inextricably linked with the operations and costs of the schemes that it manages. The demands on and activities of those schemes are material drivers of icare's costs. So too are costs incurred to meet the need to improve the management of those schemes.

387 icare reports its own costs separately from those of the schemes. However, the operating costs of icare are charged out to the schemes. icare as an entity makes no profit or loss each year.

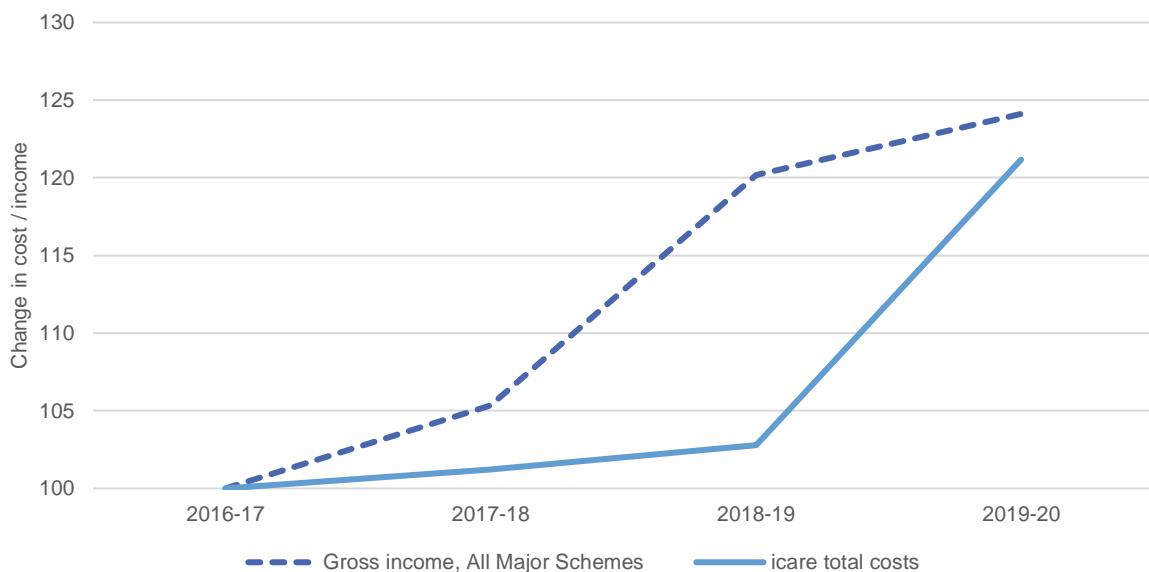
388 However, not all the costs of running the schemes flow through icare. Some costs do: they are charged first to icare and then on-charged to the schemes. Some other costs are charged directly to the schemes. icare meets its own staff costs and then on-charges them to the schemes. The cost of contingent workers (that is, workers supplied as needed through a labour hire contract) is charged direct to the relevant scheme .

23.5.2 Expenses and staff numbers overall

389 icare, as one would expect, disputes that its expenditure has been excessive or has contributed to increases in scheme expenses.

390 icare's annual reports show a 21% increase in total organisational costs from 2016-17⁷⁷¹ to 2019-20.⁷⁷² That is below the growth in the schemes' incomes. The largest part of that cost increase – about 18% – occurred between 2018-19 and 2019-20.

Figure 39: Change in icare total costs vs total income (2016-17 = 100).



Source: icare, *Annual Financial Reports 2016-17 to 2019-20*

391 As discussed in *Part 1A*, icare's overall staff numbers have more than doubled between 2015-16 and 2019-20, from 711 to 1,562 FTE workers.⁷⁷³

392 icare attributes the increases in staff to its process of consolidating functions for various insurance and care schemes. That is being done, icare says, to achieve the operational efficiencies and economies of scale that in its view were intended by parliament.⁷⁷⁴ It submits that the increases in staff and expenditure 'reflect icare's upfront investments in establishing new in-house functions to achieve savings in other areas, such as scheme agent remuneration and external provider fees'. icare's

⁷⁷¹ Comparison to 2015-16 is not possible because icare came into existence part-way through the year.

⁷⁷² icare, *Annual Financial Reports 2015-16 to 2019-20, icare Service Entity, Statements of Financial Performance*

⁷⁷³ icare, *Explanatory note on transformation and staffing numbers*, 24 February 2021, at [25]

⁷⁷⁴ icare, *Transformation and Staffing numbers – explanatory note*, 24 February 2021, at [2]

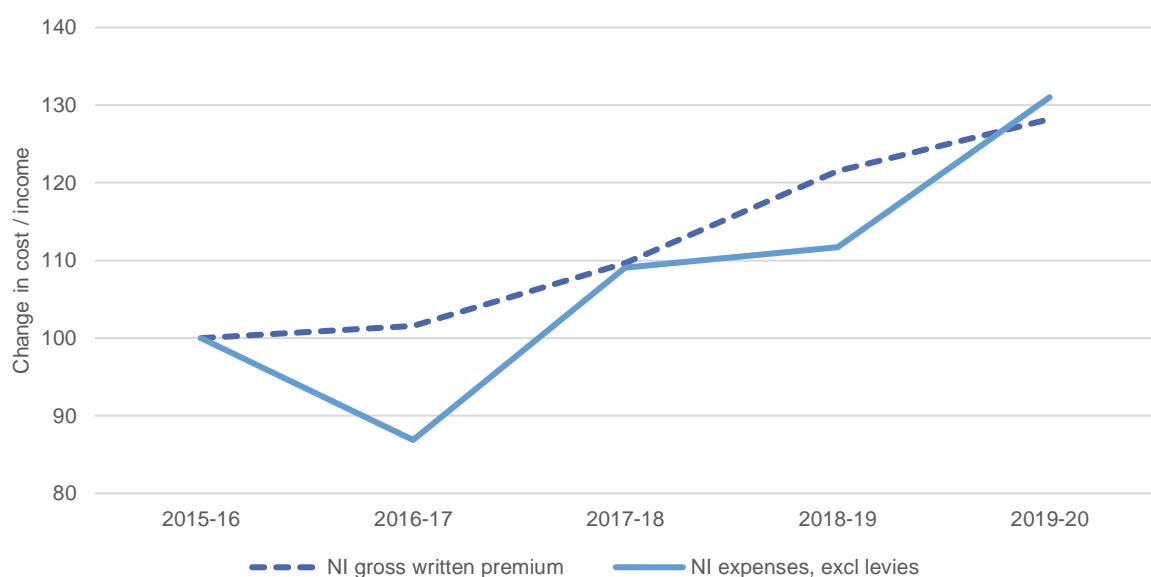
submits, further, that it has decreased overall staff costs by converting contingent (contract) staff to permanent staff.⁷⁷⁵

393 icare submits that: *'In the 2014-15 financial year, the Nominal Insurer's scheme agents were paid remuneration of \$409 million. By ending these arrangements and moving to a hybrid model, icare's aim was to create savings that would contribute to reductions in employer premiums. In the 2019-20 financial year, scheme agent remuneration... reduced to \$270 million.'*⁷⁷⁶

23.5.3 Expenses of the NI overall

394 The costs of managing the NI have increased at a faster rate than the rate of increase in premium income, as shown below. It is likely that this is due, in part, to the underperformance of the NI scheme, resulting in lower RTW rates, and therefore more workers remaining in receipt of benefits.

Figure 40: Change in NI total costs, controllable by icare, vs total income (2015-16 = 100)



Source: icare, *Annual Financial Reports 2016-17 to 2019-20*

395 In the course of her 2019 Review, Ms Dore engaged EY to review the expenses of the NI. EY analysed expenditure up to 2018-19 and found that:

- The NI's total expenses had increased at 5.5% per annum since 2014-15, but that rate dropped to 2.8% once transformation costs and levies were deducted.⁷⁷⁷
- the NI's operating expenses had increased at an annualised rate of 3.3%.⁷⁷⁸

⁷⁷⁵ icare, *Transformation and Staffing numbers – explanatory note*, 24 February 2021, at [3]

⁷⁷⁶ Ibid [9]

⁷⁷⁷ EY, *Compliance and Performance Review of the Nominal Insurer Part 3: Expense Review*, 2

⁷⁷⁸ icare, *Response to Independent Reviewers Final Report on the Nominal Insurer NSW Workers Compensation Scheme, for the State Insurance Regulatory Authority*, 10 December 2019, 17

c) The reduction in scheme agent remuneration was largely offset by icare's increased salary costs and ICT costs allocated to the NI.⁷⁷⁹

396 icare accepts that the expense ratio for the NI – comparing expenses with gross earned premium – is higher in 2019-20 than it was at icare's inception. It is however budgeted in 2020-21 to fall below the pre-icare level.⁷⁸⁰

23.5.4 Transformation costs

397 As I have noted, icare submits that the cost of transformation forms a significant part of the NI's management costs.

398 icare contends that it has:

set about building a more effective and efficient operating model for the schemes it manages. In particular...icare has introduced an information technology platform to enable the use of a centralised claims system which is designed to deliver greater efficiencies to the management of workers compensation claims. This program has required considerable investment of effort, time and resources, but has resulted in a more efficient operating environment for the Nominal Insurer and the TMF. These benefits will continue to be realised⁷⁸¹

399 icare reports the costs of transformation separately from the core NI management costs. In the three financial years from 2016-17 to 2019-20, transformation costs totalled \$470 million.⁷⁸² This is in addition to the \$183 million cost over the same period for the capitalised development costs of the NISP and other software.⁷⁸³

23.5.5 Contractual expenditure

400 icare has advised me that all allegations of corruption in procurement or otherwise have been reported to ICAC, and that no findings of corruption have been made. I have received and reviewed the relevant material. There is nothing in it to suggest that corruption occurred, let alone that it or other unlawful conduct led to unnecessary expenses.

401 That having been said, I have noted elsewhere in this Report that procurement and probity practices were historically deficient, and that those deficiencies have only recently begun to improve. It is likely that those deficiencies had at least some adverse impact on the efficiency and amount of contractual expenditure. As RSM comment, '*icare's "Commercial Mind" imprimatur appears to have been interpreted and applied, at least by some people, to mean minimal, if any, "red tape" and manifesting as value for money not being adequately assessed...*'⁷⁸⁴

402 The Capgemini contract was a key part of icare's transformation program. It was one of the largest single contracts icare made. RSM said that it '*does not consider the*

⁷⁷⁹ icare, *Response to Independent Reviewers Final Report on the Nominal Insurer NSW Workers Compensation Scheme, for the State Insurance Regulatory Authority*, 10 December 2019, 17

⁷⁸⁰ icare, *Explanatory Note on Expense Review*, February 2021, at [8]

⁷⁸¹ *Ibid* at [3]

⁷⁸² icare, *Annual Financial Reports 2015-16 to 2019-20 – NI Financial Performance Statements*

⁷⁸³ *Ibid* at Notes to the accounts - Intangible Assets.

⁷⁸⁴ RSM, *Independent Review of icare – Probity and Procurement*, March 2021, 2

procurement activity was conducted in a competitive manner, in consequence that ‘we are unable to determine whether the procurement achieved value for money’.⁷⁸⁵

23.5.6 icare response

403 In response to concerns about increasing expenses, icare states that:⁷⁸⁶

- a) icare has deliberately invested in the new operating model and associated centralised claims system.
- b) A ‘*significant proportion*’ of the increase in expenses relates to matters out of icare’s control, such as bad debts.
- c) Operating efficiencies have been achieved following the one-off transformation costs. icare’s assessment is that they have delivered \$469 million in cumulative operating expense savings from 2015-16 to 2019-20, from improvements to operating models, structures and systems.

404 As to the first point, it does not answer the criticism that the deficiencies in icare’s historical procurement practices mean that icare cannot show that it obtained value for money.

405 As to the second point, bad debts are often a result of poor credit practices and delay in taking action. Generalisations do not prove a great deal. Having said that, I accept, as icare contends, that bad debts are not a primary or material contributor to increased expenses

406 As to the third point, it is beyond the scope of my Review to attempt to conduct, or to procure, a forensic accounting analysis of icare’s claim.

407 Regardless of those points, it does appear that icare accepts, at least implicitly, that there is a need for a review of organisational spending. A three-phase expense review commenced in 2020.

408 This review has so far included: savings and strengthened governance in employment, consulting and training; reduced spending on property, communications and technology; and migration of collections to Revenue NSW. In February 2021, as part of the latest phase of this work, the CEO announced a reduction in the size of the executive team.⁷⁸⁷ In March 2021, the CEO announced that he was targeting \$100 million per year in savings.⁷⁸⁸

23.5.7 Conclusions

409 A detailed expense review is, as I have said already, beyond the scope of my Review. However, from publicly available data, and evidence presented to me by icare, I conclude that there is some evidence that icare’s overall costs have increased not only substantially but perhaps in a way that is excessive in the circumstances. I say that because:

- a) the costs of the NI have increased beyond the rate of premium increases (by definition, thus having become less efficient);

⁷⁸⁵ RSM, *Independent Review of icare – Probity and Procurement*, March 2021, 23

⁷⁸⁶ icare, *explanatory note – Expense Review*, 10 February 2021 at [4]-[6]

⁷⁸⁷ icare, *explanatory note - Transformation and staffing number*, 24 February 2021, at [36]-[37]

⁷⁸⁸ icare, *Website announcement - Workers compensation premiums adjust to future risks*, 24 March 2021

- b) icare's overall costs increased by 18% in the most recent year; and
- c) staff numbers have more than doubled.

410 I note that icare has commenced a review of costs. It is seeking annual savings of \$100 million. That icare thinks savings of this magnitude are available is itself supportive of the proposition that icare's present costs are excessive.

411 icare has made progress in consolidating functions and achieving the economies of scale expected of it at the time of its creation. However, these achievements are outweighed by the overall increases in expenditure that are not entirely explicable by reference to income earned or levels of activity generally.

412 This is particularly so for staffing numbers. Staff numbers have seen an exceptional level of growth. It would be hard for any organisation to achieve that growth in a way that was perfectly efficient.

413 I accept that the concept of investing in transformation was appropriate in principle. That investment was made to achieve the changes that icare believed it was formed to make, and that it saw as necessary to address the deficiencies in claims management that it had inherited. Nevertheless, the result has been very substantial additional cost burden on the schemes, one that still awaits a return in terms of improved outcomes for injured workers.

414 It is not appropriate for me to interfere in the CEO's planned efforts to contain costs. It is important though that this process achieves material net improvement in cost efficiency and that there is confidence in icare's ability to manage its costs. I therefore recommend that:

Recommendations	
Financial management, staffing and costs	
27	icare's Board should commission an external review of the results of the extant expense savings program after two years and a summary of the results should be made public.
28	icare should report publicly and in detail each year on its transformation expenditure and on the benefits that icare says it is producing.

24 Oversight of icare as an organisation

415 One issue which has been raised in the course of this Review is the extent to which icare as an organisation is subject to oversight, and the effectiveness of that oversight.

416 SIRA stated in its response on media issues that '*SIRA does not regulate icare as an entity*'.⁷⁸⁹ Instead, SIRA has regulatory powers over icare's management of workers compensation and other schemes.

417 It is clear from my findings as to icare's culture, governance and claims management that there have been significant lapses and mistakes in icare's operations. Those mistakes have had real and detrimental effects in a number of areas. The affected areas include the delivery of workers compensation scheme benefits; implementation of the transformation project; and management of procurement and probity concerns. There have also been concerns raised in relation to icare's financial management, both internally and as manager of the schemes for which it is responsible.⁷⁹⁰

418 These matters take on significance because of icare's unique position. As I have already discussed, icare has a dual public and private nature. It has particular and special responsibilities due to the source and purpose of the funds under its management, and the public interest in the NI and the TMF.

419 The funds that icare uses for the management of the various schemes have a public character. The NI's funds are obtained from employers in NSW as part of a compulsory statutory scheme. The TMF's funds are derived from the budgets of state agencies, and therefore from state revenue. Likewise, the services icare provides have a public character. For these reasons, the proper operation of icare as a state agency is something of very significant public interest.

420 The protection of those public interests is accomplished in three ways:

- Regulatory oversight of the schemes by SIRA, pursuant to its statutory powers.
- Supervision by icare's Board, whose members are required to act with care and diligence,⁷⁹¹ although unlike directors of companies generally, they do not have personal liability for any action taken in good faith.⁷⁹² The Board has the power to direct the CEO in relation to icare's activities.⁷⁹³
- Supervision by the Minister (in this case, the Treasurer) through the Board's obligation to report,⁷⁹⁴ and the power to issue directions '*if it is necessary to do so in the public interest*'.⁷⁹⁵ No such direction has ever been given to icare.

421 I have addressed the role of the Board at [23.3 above](#).

⁷⁸⁹ SIRA, *Media Issues Response*, September 2020, 3

⁷⁹⁰ SIRA, *Submission: icare and State Insurance and Care Government Act 2015 Independent Review*, October 2020, 22-23; Sydney Morning Herald, *Systemic failures costing compensation giant billions*, 17 August 2020

⁷⁹¹ SICG Act s 5(5)

⁷⁹² Ibid s 28

⁷⁹³ Ibid s 6(3)(c)

⁷⁹⁴ Ibid s 6(3)

⁷⁹⁵ Ibid s 7

24.1 Oversight by and relationship with SIRA

24.1.1 Historical relationship difficulties

422 As discussed in more detail in *Part 1A*, there was no dispute that historically, the relationship between icare and SIRA was strained, particularly at the management level of the two organisations.

423 The good news is that as icare and SIRA agree, their Boards had and continue to have a strong relationship.⁷⁹⁶

24.1.2 Confusion of roles and responsibilities' contribution to the relationship difficulties

424 SIRA and icare agree that a lack of clarity as to the roles and responsibilities of icare and SIRA has contributed to their difficult relationship. There was a '*lack of common understanding*'⁷⁹⁷ and '*it has taken some time for icare and SIRA to fully understand and operationalise the respective functional boundaries established by the SICG Act*'.⁷⁹⁸

425 As evidence of this, icare states that it has better relationships with other participants in the workers compensation system such as the WIRO,⁷⁹⁹ and that '*where there is a clearer understanding and demarcation of roles and responsibilities between icare and SIRA (especially in relation to the Lifetime Care and Support Authority of NSW and the Home Building Compensation Fund), icare's relationship with SIRA is more straightforward*'.⁸⁰⁰

426 I note also that the Lifetime Care and Support section of icare was managed by Mr Ferguson from its inception until August 2020, and that under Mr Ferguson's tenure as acting CEO, the relationship with SIRA improved.

427 Overlap and potential confusion in the roles and responsibilities of icare and SIRA are addressed further in *Parts 2 and 3*.

428 icare considered that its '*understanding of SIRA's regulatory role has been maturing over the past five years ... icare has been assisted in this regard by the findings of the Dore Review report*'.⁸⁰¹

429 In 2019, icare and SIRA established a number of formal processes to '*improve the exchange of information, address known and emerging concerns and promote efficiency by minimising duplication or unnecessary activity*'.⁸⁰² icare also identified a number of steps taken to attempt to improve the relationship. Those processes and steps include the following:

- a) executive committee meetings, commenced in 2018;

⁷⁹⁶ icare, *Media Issues Response*, November 2020, at Item 11 at [5]

⁷⁹⁷ Ibid at [9]

⁷⁹⁸ Ibid at [10]

⁷⁹⁹ The WIRO concurred with this assessment in interview with the Review; *Interview with WIRO*, 23 November 2020, at Notes.

⁸⁰⁰ icare, *Media Issues Response*, November 2020, at Item 11 at [15]-[16]

⁸⁰¹ Ibid at [11]

⁸⁰² Ibid at [13]

- b) a Joint Premium and Prudential Oversight Committee, established in 2019; and
- c) a Joint Claims Assurance Committee, established in 2019.

430 Since August 2020, and under icare's interim and new CEOs, a significant number of further steps have been taken. They include invitations to SIRA to participate in key consultation around the NCOM, regular meetings with SIRA on a range of issues, and new joint projects to address matters of common concern.⁸⁰³

24.1.3 Oversight of relationship by Boards and Ministers

431 It is a matter of great concern that the relationship between icare and SIRA was allowed to deteriorate to the extent that it did over the years 2015-2020 (while, successively, Mr Bhatia and Mr Nagle were CEO). The duration and extent of the deterioration raise important questions: what was done to monitor the state of the relationship? What was done to ensure that it was appropriately respectful and productive? What if anything was done to give direction to icare's management in the conduct of the relationship? What was done to supervise that aspect of management's functions?

432 The first line of accountability for icare's management is to the Board. icare's Board members have stated that they did not receive regular reports on the relationship between icare and SIRA, although they knew it was fractious. By contrast, the SIRA board appears to have received more regular updates.

433 From at least July 2018,⁸⁰⁴ the SIRA Board received updates on SIRA's supervision strategy of icare. It was informed of disagreement as to reporting approaches between the agencies from this time.⁸⁰⁵

434 In December 2018, following discussion of SIRA's intention to commence an independent compliance and performance review of the NI (which became the Dore 2019 Review), the SIRA Board discussed strategies for SIRA and icare to '*...continue building a productive relationship*'.⁸⁰⁶ Those strategies included scheduling joint meetings of the two Boards' Chairs and the two CEOs, and a joint meeting of the Boards.

435 In May 2019, SIRA's Board was notified of a systems error icare had identified which resulted in 2,400 claims being otherwise than in accordance with relevant legislative requirements. SIRA's Board was informed '*... that if matters are not addressed satisfactorily, [Ms Donnelly] will raise SIRA's concerns with icare CEO, Mr John Nagle, directly*'. In response to this, the SIRA Board recommended that the Chair of icare's Board and Chair of SIRA's Board be copied into correspondence to icare's CEO regarding key items of concern.⁸⁰⁷

⁸⁰³ icare, *Submission to Independent Review-1j Relationship with SIRA*, 18 November 2020, at [25]-[30]

⁸⁰⁴ SIRA, *Board Meeting Minutes*, 27 July 2018, 5

⁸⁰⁵ Board minutes from 27 July 2018 SIRA Board meeting noted that while SIRA requested icare to assess and publish results for the NI with liabilities expressed at the 75 percent probability of adequacy, icare continued to express them at the 80 percent probability of adequacy. See: SIRA, *Board paper minutes*, 27 July 2018, 5.

⁸⁰⁶ SIRA, *Board Meeting Minutes*, 18 December 2018, 2

⁸⁰⁷ SIRA, *Board Meeting Minutes*, 24 May 2019, 5

436 icare's Board did not receive similar, or any regular, reporting on the relationship between SIRA and icare, including as to its deterioration.⁸⁰⁸ PwC's CGA Report found that:

The board was slow to respond to signals from SIRA on concerns it raised over management's interactions with the regulator. Management did not provide the board with regular updates on regulator communications or the state of the regulatory relationship between icare and SIRA, nor did it signal a red flag to the board on the deterioration of the regulatory relationship between icare and SIRA.⁸⁰⁹

437 icare's Board became aware of challenges in the relationship between SIRA and icare only following ongoing discussions at the board level regarding the appropriate measure for RTW rates.⁸¹⁰

438 By the time of the August 2019 meeting of icare's Board, and in the lead-up to the release of the Dore 2019 Report, icare's Board became aware of the seriousness of the breakdown in the relationship and of the need for it to take a more assertive role in improving the relationship.⁸¹¹

439 During October 2019, icare's Board discussed with management the '*desired tone and style of response to SIRA*'. It encouraged management to provide analysis on the differing RTW calculation methodologies to the Boards of both icare and SIRA.⁸¹²

440 By May 2020, icare's Board was aware that the relationship with SIRA continued to be challenged, and that the CEO (Mr Nagle) was unable to improve the relationship.⁸¹³ Challis suggested to the Board that icare could benefit from an agreed strategy to improve or '*reboot*' the relationship with SIRA.⁸¹⁴

441 Both SIRA and icare acknowledge there has been improvement in the relationship since the appointment of the interim CEO and new Chair in mid-2020.⁸¹⁵ The relationship is now characterised as '*more constructive and responsive*'⁸¹⁶ and '*operating in a more positive and collaborative manner*'.⁸¹⁷

442 icare's Board states that it sought to give management clear guidance on the relationship.⁸¹⁸ However, the ongoing issues which were still evident when the Dore 2019 Report was released in December 2019 indicate that such attempts were unsuccessful. It is also notable that the Challis Report (prepared in 2020) suggests that there were differing views on the Board as to the appropriate management of the relationship with SIRA.

⁸⁰⁸ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 24

⁸⁰⁹ Ibid

⁸¹⁰ Interview with Mark Lennon, 12 November 2020, at Transcript Q44

⁸¹¹ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 29

⁸¹² icare, Board Meeting Minutes, 21 October 2019, 3

⁸¹³ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 29

⁸¹⁴ Challis & Company, *Insurance and Care NSW Board Effectiveness Review*, 29 May 2020, 31

⁸¹⁵ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 29

⁸¹⁶ SIRA, *Submission to the Independent Review*, November 2020, 22

⁸¹⁷ icare, *Submission to the Independent Review – 1j Relationship with SIRA*, 18 November 2020, 1

⁸¹⁸ Interview with David Plumb, 12 November 2020, at Notes 4; and Interview with M Carapiet, 16 November 2020, at Transcript, 29-30,

443 The Challis report states that '*despite considerable effort by the [Board], relationships with the Regulator remain challenged. There are slight variations in views amongst the [Board] as to the extent to which the organisation should seek to challenge and 'educate' the Regulator. Some [directors] support the executive's view that the regulator can and must evolve; other [directors] take the view that a regulator is a regulator and 're-education' is an uphill battle*'.⁸¹⁹

444 I do not know to what extent, if at all, the Treasurer was informed of the difficulties in the relationship. As I have noted more than once, the Treasurer declined to be interviewed.

24.1.4 Current and future relationship

445 It seemed to me, as my Review progressed, that there were signs of a positive change in the relationship between icare and SIRA. I note that there had been a number of key personnel changes, including the resignation of the former CEO Mr Nagle. Whether that is more than coincidental I cannot say. SIRA appeared to think it was not: '*SIRA notes that icare's response to SIRA as the regulator is more constructive and responsive under the new Chair and interim Chief Executive Officer*'.⁸²⁰

446 icare confirmed the new approach:

*Going forward, icare intends to continue to focus on the sustained delivery of services to the NSW insurance and compensation schemes in a way that aligns with and respects regulatory authority*⁸²¹

447 It is difficult to state with any degree of certainty whether the improved relationship between icare and SIRA is likely to continue, although it is to be hoped that it does. The change is of recent occurrence; there has been significant change (to the point of upheaval) in the leadership of icare at the Board, CEO and GET levels; and there has been intense media and parliamentary scrutiny. However, I note that both icare and SIRA appear to be positive as to the continuation of their improved working relationship.

448 There is, of course, the potential for a regulator who is too involved in the operations of a regulated entity to become a captive of the entity. It is important that icare and SIRA each ensure that the relationship remains independent and professional; and that it continues to be beneficial, in the sense that it remains conducive to achievement of the purposes for which it exists. The principal of those purposes is of course the continued, effective and sustainable functioning of the workers compensation schemes in NSW.

449 Recommendations for the clarification of roles and responsibilities under the SICG Act are addressed in *Part 2 and 3*, along with SIRA's role and its regulation of icare.

450 I have made a number of recommendations at *23.3.4 above* that are intended to enhance the ability of icare's Board to monitor and oversee the relationship between the two organisations. I add a recommendation that the Boards of both icare and SIRA ensure that they receive regular reports on the relationship from their respective

⁸¹⁹ Challis and Company, *icare Board effectiveness review*, May 2020, at [55] 30

⁸²⁰ SIRA, *Submission to the Independent Review*, October 2020, 22

⁸²¹ icare, *Media Issues Response*, November 2020, at Item 11 at [30]

agencies, and that they continue to meet, without their respective management teams, to identify and discuss any continuing or new issues in the relationship.

451 I recommend further that the two Boards jointly report formally and regularly to the relevant Ministers on the state of the relationship between the agencies.

Recommendations	
Oversight by SIRA	
29	The Boards of icare and SIRA should ensure that they receive regular reports on the icare-SIRA relationship from their respective agencies, and that they continue to meet, without their respective management teams, to identify and discuss any continuing or new issues in the relationship.
30	The Boards of icare and SIRA should jointly report, formally and regularly, to their respective Ministers on the state of the relationship between the agencies.

24.2 Supervision by the Board

452 I have addressed at [23.3.4 above](#) the apparent effectiveness of icare's Board in respect of the historical issues, as to the management of icare, that have been identified. As I state there, it is undeniable that the Board could have done more, although I accept that its ability to act was hampered by lack of unbiased information from icare's management.

453 One matter of particular concern arises in respect of icare's consideration and introduction of the NCOM. The Board was briefed on and approved the transformation. It is not at all clear to me whether the Board understood the scale of the change, including the introduction of the triage engine, or the implications of the control and decision rights framework that was put into place. Nor is it clear if the Board was aware of the lack of adequate pilot testing and its implications or, if it were, why it approved the change nonetheless.

454 In my view, it is probable that if the Board had included someone with direct experience in the field of workers compensation insurance, it would have been much better placed to challenge management on the issues raised in the previous paragraph. That is why, in my view, it is essential that the range of experience among Board members include direct experience of workers compensation insurance.

455 Effective Governance concludes that icare's Board has sufficient powers to enable it to fulfil its responsibilities.⁸²² I agree. Effective Governance has however made a number of recommendations that are intended to enhance the Board's execution of its role (see [23.3.4 above](#)). I agree with those recommendations, and that icare should implement them.

456 Subject to the implementation of those recommendations, I do not consider that a change to the Board's overall powers or responsibility is needed. However, as I have

⁸²² Effective Governance, *icare Governance Review*, December 2020, 14

concluded in [23.3.4 above](#), icare should make improvements to the operation of the Board (including as to the provision of information to it) to ensure it continues to provide appropriate oversight of icare.

24.3 Supervision by Minister

457 The Board of icare is accountable directly to the appointing Minister, the Treasurer. As I have previously stated, it appears that icare has reported regularly to the Treasurer. However, as the Treasurer declined to be interviewed, I am unable to comment on the adequacy of that reporting.

458 Given what I have just said, I think there needs to be a formal mechanism to enable Board members to assess the adequacy of reporting to the Treasurer. Thus, I agree with and adopt PwC's recommendation in the CGA review that all reports from icare (including of course the Board) to the Minister or to Treasury be properly documented, and that the documents be tabled at Board meetings.⁸²³ That should allow the Board to have effective oversight of key issues discussed with the Treasurer and with Treasury.

459 PwC concludes that icare's management, over the period 2016 to 2020, has not always accepted that icare, as a government agency, is accountable to Treasury.⁸²⁴ There are now systems in place to ensure that this is understood and honoured. They appear to be adequate, at least from the perspective of Treasury (as noted in [Part 1A](#)). At present, I see no need to make any further recommendation in this area, except that icare's Board should include a record of those briefings in its periodic public reports of Board proceedings.

460 For the reasons already explained, I am unable to comment on the role which the Treasurer's oversight has played in the management of icare.

461 As the Minister is the sole point of statutory oversight for icare as an organisation (noting that SIRA's functions are limited to particular schemes), it is important that the Minister take a direct and active role in monitoring icare's operations. The Minister has two powers that enable him or her to exercise some degree of control over icare's management, should that be necessary.

462 First, the Minister is responsible for appointments to icare's Board. It is obvious that the manner of exercise of that power has the capacity to influence icare's strategy and operations.

463 More directly, the Minister is empowered to give directions to icare where it is in the public interest to do so. icare must comply with any such direction. The Minister must consult with icare's Board, and request advice from it as to whether the direction would not be in the best interests of icare, before exercising that power.⁸²⁵ There has been no exercise of that power to date.

464 Given the limitations on SIRA's regulatory role, it is essential that the Minister be prepared to use this power where it seems necessary to do so to ensure, among many other possible considerations, that the organisational recommendations identified in this Report are fully assessed and, where appropriate, implemented.

⁸²³ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 29

⁸²⁴ *Ibid* 83

⁸²⁵ SICG Act s 7

Recommendations	
Ministerial oversight	
31	<p>icare should update its board charter to include a requirement to report regularly to the NSW Treasurer in accordance with s6(3) of the <i>State Insurance and Care Governance Act 2015</i>. Governance processes should:</p> <ul style="list-style-type: none"> • Require the Board to consider, at regular intervals, whether it should inform the Treasurer of an issue because it is a material development in icare activities; and • Require the Board to table correspondence sent to or received from the Treasurer in relation to the activities of icare. • Require the Board to include a report of correspondence and other communications with the Treasurer in the minutes of its meetings.

24.4 Other possible sources of oversight

465 A number of submissions suggested that icare's performance and accountability could be improved by the enhancement of, or the creation of additional modes of, consultation with participants in the scheme. Participants in current, less formal, consultation forums consistently reported that such modes of consultation as presently exist were ineffective as a way to have icare understand and respond to their concerns.⁸²⁶

466 An anonymous stakeholder group proposed that a more '*collaborative and collegiate relationship*' with insurers and the regulator could be developed by a '*working group*' model, as seen in WA.⁸²⁷ An anonymous stakeholder group proposed that the former Ministerial Advisory Council be renewed,⁸²⁸ while others proposed that there ought to be stakeholder representation on icare's Board.⁸²⁹

467 The CGA Review identified this as an area where icare could do better. PwC noted that icare had not always been open to public scrutiny.⁸³⁰ That comment was echoed by a number of stakeholders who made submissions to my Review. In like vein, the CGA review commented that icare '*needs to build a stronger sense of accountability to employers and listen to their concerns and feedback*'⁸³¹ and '*needs to bring a sharper lens to the unique customer groups that are served by each scheme and move away from the tendency to manage the business using an aggregate NPS Score*'.⁸³²

468 PwC stated that icare relied too heavily on the NPS scores to track its performance. I agree. It is necessary for icare to engage with workers, employers, and other participants in a way that does not simply aggregate them as an entire and undivided

⁸²⁶ For example: *Interview with NIBA*, 21 February 2021, at Notes 6

⁸²⁷ Anonymous Submission

⁸²⁸ *Interview with Anonymous Stakeholder Group*

⁸²⁹ *Interview with Anonymous Stakeholder Group*

⁸³⁰ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 82

⁸³¹ *Ibid* 83

⁸³² *Ibid*

body of stakeholders, but gives attention to and deals individually with the concerns that each group raises.

25 Realisation of the benefits that icare was established to achieve

25.1 Benefits icare was established to achieve

470 As has been noted in the introduction to this Report and in other places,⁸³³ the creation of icare through the SICG Act was, at least in part, a response to the 2014 review of the WorkCover Authority.⁸³⁴ While the Act does not expressly state the objects it was intended to achieve, the Second Reading Speech⁸³⁵ makes it tolerably clear that purposes to be achieved by the structural separation of WorkCover and the devolution of icare would include:

- a) greater transparency in and accountability for the operation and regulation of the workers compensation system;
- b) avoiding conflicts of interest between the operator and regulator of the workers compensation schemes;
- c) achieving better outcomes for workers and economies through more efficient operations and economies of scale; and
- d) focussing on clear objectives.⁸³⁶

471 icare agreed that these were among the benefits which its creation as intended to achieve.⁸³⁷

472 icare stated that it has '*focussed on delivering financial benefits to the State through savings in the form of reduced operating and claims-related expenses, lower premiums for employers and reduction in future claim liabilities (including through improved return to work outcomes), as well as improving the customer experience*'.⁸³⁸

473 icare has agreed with NSW Treasury on five key metrics on which it will report each financial year as a way to track its achievement of those operational benefits. Those metrics are:

- a) operating expense savings;
- b) savings for claims-related operating expenses;
- c) savings through lower premiums;
- d) reductions in future claim liabilities (via actuarial claims releases); and
- e) customer NPS.

⁸³³ Standing Committee on Law and Justice, *Statutory Review of the State Insurance and Care Governance Act 2015*, December 2017, 3

⁸³⁴ Standing Committee on Law and Justice, *Review of the exercise of the functions of the WorkCover Authority*, 17 September 2014

⁸³⁵ Workers Compensation Amendment Bill 2015 and State Insurance And Care Governance Bill 2015 Second Reading Speech, NSW Legislative Assembly, 5 August 2015, 2099

⁸³⁶ I add that this expression was used in the Second Reading Speech. Its content, or the meaning to be ascribed to it, is a matter of conjecture. My own conjecture suggests that it is essentially devoid of specific meaning,

⁸³⁷ icare, *Submission to the Independent Review,- 1c Realisation of Benefits*, 18 November 2020, at [1]

⁸³⁸ *Ibid* at [3]

474 I address the overall purposes of the SICG Act in *Part 3*.

475 More specifically, the benefits that icare was established to achieve, which are referable to icare itself – as distinct from the broader benefits of the SICG Act reforms described at *470 above* – are:

- a) transparency and accountability;
- b) financial efficiencies for operating expenses;
- c) better outcomes for workers; and
- d) (as a result of the above) improved premiums for businesses.

476 I consider each benefit in turn below.

25.2 Realisation of benefits

25.2.1 Greater transparency and accountability

477 There are some similarities between the governance structures for icare and those for its predecessor organisation WorkCover. Each is governed by a Board appointed by the Minister. Each is the subject of parliamentary scrutiny. Each is subject to public sector transparency and accountability requirements.⁸³⁹ However, some submissions to my Review suggested that some stakeholders believe that icare has become less accountable than was WorkCover.⁸⁴⁰ The principal point of difference between icare and the old WorkCover lies in the structural separation of the regulatory and operational functions. This was an acknowledged problem with WorkCover as it existed before 2015.⁸⁴¹ The creation of the two separate entities, icare and SIRA, was the single largest step towards achievement of greater operational and regulatory transparency.

478 As has been seen, there is some truth to the submissions referred to at *24.1 above*. icare has resisted SIRA's attempted exercises of its regulatory powers. It has considered itself accountable only to the Treasurer. That has changed, although too slowly. icare has gradually come to accept the regulatory role of SIRA, and that it is accountable to Treasury as well as to the Treasurer. Those changes have resulted in enhanced accountability.

479 On balance, I conclude that icare has made progress in the area of transparency and accountability. That will continue if icare implements the recommendations made in this Report but, in my view, it will be necessary for further monitoring to ensure that the process of change continues.

25.2.2 Financial efficiencies

480 icare submits that it has achieved reduced operating and claims-related expenses, lower premiums, and reductions in future claims liabilities. Specifically, icare submits

⁸³⁹ For example: WorkCover Authority, *Annual Report 2014-15*

⁸⁴⁰ For example: *Submissions to the Independent Review*: Public Service Association, 30 October 2020, 11; Business NSW, 4-5

⁸⁴¹ Standing Committee on Law and Justice, *Review of the exercise of the functions of the WorkCover Authority*, 17 September 2014, 12

that, between its inception in 2015 and 30 June 2020, it has achieved across all the schemes it manages.⁸⁴²

- a) \$683 million in savings resulting from claims and operating efficiencies;
- b) \$313 million of actuarial reserve releases, which corresponds to a reduction in expected future claims costs;
- c) \$1.6 billion reduction in employer premiums; and
- d) improved customer NPS in all schemes

481 icare measures claims and operating efficiencies by comparing current year results with costs in its first year. In April 2020, icare engaged EY to review icare's methodology for the calculation of these benefits. EY reached similar results to those produced by icare's calculations.⁸⁴³

482 icare attributes the savings it says it has achieved in operating costs to improvements to insurance operating models and internal organisational structures. It refers also to the centralisation and rationalisation of supporting functions and improvements in IT systems.⁸⁴⁴ icare claims that savings in claims management expenses result from the rationalisation of a number of different contracts into the more centralised claims service model, along with in-house initiatives to increase performance and reduce cost, and the renegotiation of a number of contracts for medical services.⁸⁴⁵

483 As EML has pointed out, icare's savings, in relation to claims expenses, at least for the NI, appear to have come at the expense of the quality of service provided to workers and employers, and to have resulted in part from the movement of expenses from service agents to icare itself.

484 In the period from 2016 to 2019, total fees paid by icare to scheme agents reduced by \$99 million per annum (a reduction from 16% of total claims costs to 9% of total claims costs), while icare's own expenses have risen by \$114 million per annum. Total scheme costs have also increased. While it is true that scheme agent costs plus icare costs have reduced as a proportion of total claims costs (that is, a higher proportion of claims costs are going to benefits), the claims costs have risen overall.⁸⁴⁶

⁸⁴² icare, *Submission to the Independent Review,- 1c Realisation of Benefits*, 18 November 2020, at [4]

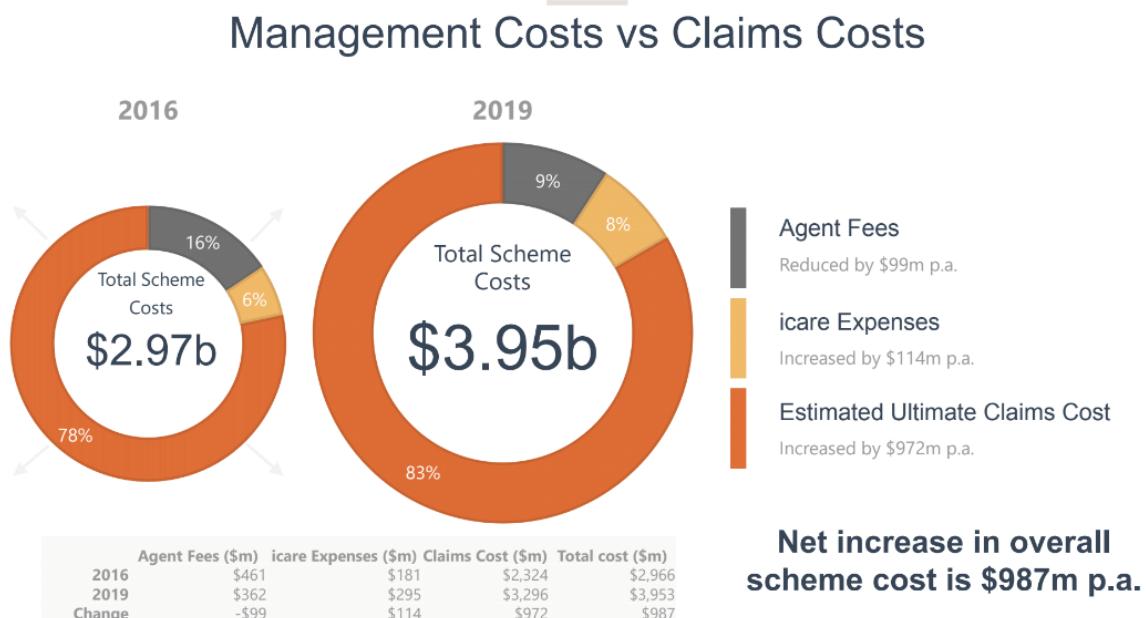
⁸⁴³ Ibid at [32-34]

⁸⁴⁴ Ibid at [13]

⁸⁴⁵ at [15]

⁸⁴⁶ EML, *Management Cost vs Claims Costs*, 6 January 2021

Figure 41: EML assessment of NI management costs compared to claims costs



Source: EML, *Management Cost vs Claims Costs*, 6 January 2021

485 This was confirmed by the EY 2019 report prepared for the Dore 2019 Review, which found that the reduction in scheme agent remuneration was largely offset by icare's salary and ICT costs allocated to the NI.⁸⁴⁷ In response to the 2019 findings, icare stated that '*the ongoing run costs incurred for NISP by icare are approximately \$32m p.a. (FY 2017/18), which is significantly lower than the saving in scheme agent remuneration relating to technology costs*'⁸⁴⁸ – that is, the NISP costs less to run than paying scheme agents to manage their own platforms. If that is the case savings may become apparent in coming years. It is not possible to express a concluded view on this claim.

486 One matter which may not be measured in icare's claimed savings is the impact of icare's transformation and capital costs. It is unclear whether the substantial expenditure on new systems such as the NISP, and of other transformation initiatives, are accounted for by icare in calculating the operating costs benefits it now claims.

487 The EY 2019 report on NI expenses indicates that transformation costs had been the most significant contributor to the increased NI costs. icare's view is that it expects transformation costs to reduce substantially in coming years.

488 There is some evidence that icare's overall costs have increased materially, as I discuss at [23.5 above](#). As noted there, icare says that this is due to its investment in the new operating model, and to other costs outside its control.⁸⁴⁹

489 Finally, icare submits that it has achieved claims liability savings, evidenced by the release of actuarial reserves in 2017-18, 2018-19 and 2019-20. This is said to be the

⁸⁴⁷ EY, *Compliance and Performance Review of the Nominal Insurer Part 3: Expense Review*, December 2019

⁸⁴⁸ icare, *Response to Independent Reviewers Final Report on the Nominal Insurer NSW Workers Compensation Scheme, for the State Insurance Regulatory Authority*, 10 December 2019, 18

⁸⁴⁹ icare, *Expense Review – explanatory note*, 24 February 2021, 1

result of several factors. icare points to lower weekly benefit costs for workers compensation claims over five years. Next, it says that improved WPI data have allowed more certain actuarial estimation of liabilities. icare also says that improvements in claims management initiatives have reduced the costs of managing claims.⁸⁵⁰

490 As to the second of those reasons, I observe that it appears to sit uneasily with the decreasing RTW rates observed in the NI scheme. It is also difficult to reconcile it with the need to increase premium levels, and the corresponding concerns expressed by employers and employer organisations (at [22.6.2 above](#)).

491 Those claimed savings are also difficult to reconcile with the reported declines in the financial position of a number of icare's schemes. While the financial management and viability of schemes other than the workers compensation schemes is beyond the scope of my Review, there are obvious tensions between the positive reporting of continued operational savings on the one hand, and the reported declines in the operational performance of the NI scheme, managed by icare, on the other.

492 Having said that, I note that icare is addressing recommendations made by EY to improve the calculation and reporting of the financial benefits that it says have resulted from its management of the scheme. I understand that it has engaged with Treasury to do so.⁸⁵¹ It is important that this work continue, so that the true position as to financial efficiencies can be tracked and assessed.

493 icare has also commenced a review of its expenses. I would have thought that this would be a recurrent activity. Control of costs is a routine although essential part of the management of any enterprise. The significance of cost control is, if possible, even more important for icare than it is for enterprises run for the benefit of proprietors, as wasted or unnecessary expenses must eventually result in higher premiums. Proprietors may be prepared to accommodate a level of wastage. Employers should not be compelled to do likewise.

25.2.3 Better outcomes for workers

494 As discussed at [22.6 above](#), while it is the case that icare's NPS scores have improved (suggesting an improved customer experience), the overall outcomes for workers present a more varied view:

- RTW rates have fallen, with some limited improvement in recent years;
- there are still inconsistent case management practices that are affecting the provision of services to injured workers,⁸⁵² and
- there are significant numbers of complaints from injured workers, mostly relating to delays in requests for treatment and claims determinations.⁸⁵³

⁸⁵⁰ icare, *Submission to the Independent Review,- 1c Realisation of Benefits*, 18 November 2020, at [20-23]

⁸⁵¹ *Ibid* at [35]

⁸⁵² Janet Dore, *Operational review of Insurance and Care NSW and Delivery of the recommendations of the Dore Report*, 5 March 2021, 6

⁸⁵³ icare, *Complaints Data Analysis*, December 2020, 13

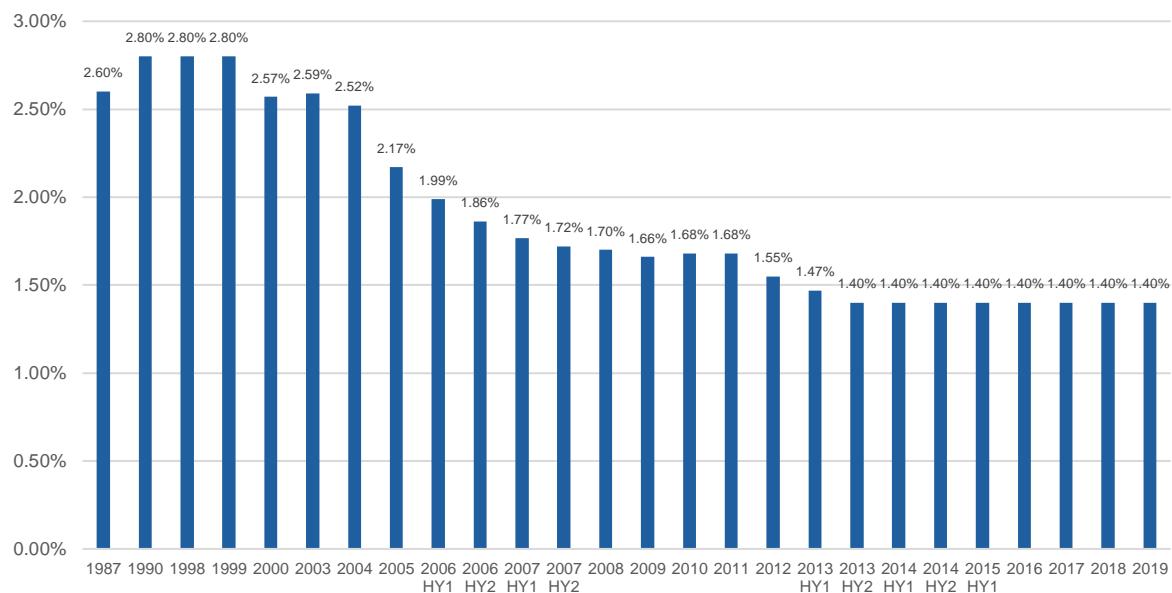
495 Thus, the most that I am prepared to say is that there has been some progress towards achievement of this benefit, but that more work needs to be done. I accept that icare is making significant efforts in this regard.

25.2.4 Improved premiums for businesses

496 I have addressed premiums in the context of the financial position of the NI in *Part 1A*.

497 I accept that icare has managed to keep average premium levels, as a percentage of wages, at the low level that it inherited. It has thereby delivered benefits for employers. icare provided me with details of historical average premium rates. The overall decline and stability in recent years is obvious:

Figure 42: NSW Average Premium Rates, as a percentage of wages, 1987 - 2020



Source: icare, *Submission to the Independent Review - Financial Sustainability*, November 2020, at [53]

498 However, the reduction in premium rates is not the full story. CS compared historic premium receipts against the actual claims costs for those years.⁸⁵⁴ CS found that premiums were around \$500 million lower than the actual claims costs that emerged in each of 2017-18 and 2018-19. Premiums for 2019-20 were in line with costs.

499 Actual costs are of course impossible to know at the time of premium rates are set. There is no suggestion that icare did anything wrong in setting premiums as it did; I am satisfied that it set premiums in accordance with the best information available to it at the relevant times. I accept that icare gave attention to the underlying legislative objectives when it did so.

500 Nevertheless it is now apparent that part of the apparent premium savings resulted from undercharging. icare recognises that premiums will need to increase materially over the coming years.⁸⁵⁵ It follows that the benefits reaped by employers in past years have come, in effect, at the expense of employers in future years. I do not see this

⁸⁵⁴ Cumpston Sarjeant, *Independent Review of icare – Financial Sustainability*, March 2021, 13

⁸⁵⁵ Ibid 15

particular example of inter-generational wealth transfer as one that the legislature intended to achieve.

25.2.5 Reporting on achievement of benefits

501 icare's reporting against its self-determined measures of benefits to some extent obscures other views of icare's performance. While icare's measurements show positive performance, they do not identify, and indeed may have distracted attention away from, declines in other areas. Accurate assessment and tracking of benefits would result in more accurately assessment of icare's impact on the schemes it manages.

502 I therefore make the following recommendation:

Recommendations	
Realisation of benefits	
32	<p>icare should develop and report against a new set of tracking measures that compares achievement of benefits against 2020-21 as the new baseline. This should include all relevant indicators, to ensure that it shows accurately improvements (or declines) in all the targeted financial and outcome benefits.</p> <p>icare should publish those reports both publicly and to the Treasurer at least annually.</p>

26 Implementation of Recommendations

503 Prompt and comprehensive implementation of the recommendations of this Report is self-evidently important. The Board must take the leading role in overseeing this implementation. It is also important that icare show publicly the progress that it is making towards full implementation.

504 I therefore make the following recommendation:

Recommendations	
Implementation	
33	icare should report in detail to the Treasurer on implementation of the recommendations of this Report (in so far as they are directed at icare) and should report on that publicly at least annually.

Part 2: Review of the government-managed workers compensation schemes and the legislative framework that supports them

27 Terms of Reference

- 1 Part 2 of the Terms of Reference require me to consider:
 - a) whether the schemes are delivering on their policy objectives;
 - b) the financial sustainability of the two schemes; and
 - c) the legislative and regulatory structure of the schemes to the extent that they relate to icare, the TMF, the NI, insurance, funding, or the powers, functions and independence of SIRA.
- 2 My terms of reference require me to review the '*government-managed workers compensation schemes*' and the legislative framework that supports them.⁸⁵⁶ I understand those "schemes" to be the NI and the TMF. I am to provide recommendations for their improvement, including amendments to the WC Act 1987 that seem to be necessary and desirable following completion of that task. For that reason, I include in what follows some analysis of the legislative structure underpinning, and policy objectives of, each of these schemes.
- 3 In addition, it is expressly within my terms of reference to make recommendations directed at improving the workers compensation system generally, and the organisations managing it.
- 4 My Review is not a comprehensive review of the workers compensation scheme, and it has run concurrently with the SCLJ's 2020 Review of the workers compensation scheme. The report of that Committee had not been completed by the time I finalised this Report⁸⁵⁷. Thus, I did not have the no doubt substantial benefit of considering its findings and recommendations.
- 5 Although my terms of reference and Review generally were limited in the way just described, it was necessary to pay close attention to the workers compensation scheme itself. The sole function of the NI, and a very significant function of the TMF, is to support the delivery of the benefits provided by the workers compensation scheme. The NI and the TMF cannot be considered in isolation from that scheme.
- 6 A number of submissions included comments and suggestions on particular aspects of the workers compensation scheme. I have acknowledged those submissions below. Where I consider it necessary or appropriate, I have made recommendations and other comments on those submissions.

⁸⁵⁶ In this context, I read "government-managed" as meaning "managed by icare".

⁸⁵⁷ I understand that it was to be released on the day I delivered this report: 30 April 2021.

28 Submissions

28.1 Survey

- 7 The public survey developed to inform my Review contained two questions relating to this term of reference:
 - a) Do you think the government managed workers compensation schemes are delivering on their policy objectives?
 - b) Do the current legislative and regulatory structures of the workers compensation schemes do enough to regulate the industry and protect injured NSW workers?
- 8 Only a small proportion of the 201 survey respondents gave answers to the first of those questions. Most of those who did said that the schemes were not delivering on their policy objectives, and highlighted the deterioration of RTW rates as an area requiring attention.
- 9 Several respondents thought that the current legislative and regulatory structures require more governance and oversight, with a greater emphasis on accountability for poor performance. In addition, some respondents stated that providers are using the system for financial gain, and suggested that this may need to be addressed by legislative reform.

28.2 Written submissions

- 10 Many stakeholder groups, including legal and insurance bodies, discussed the TMF, the NI, and their respective frameworks. Their submissions most often focused on the significant impact that declining RTW rates will have on workers and, as a result, the ongoing financial performance of the scheme.⁸⁵⁸
- 11 Some of those submissions drew attention to SIRA's regulatory powers over insurers.⁸⁵⁹ They noted that, as the Dore 2019 Report highlighted,⁸⁶⁰ those powers do not necessarily always apply fully to the NI.⁸⁶¹
- 12 In addition to the above, several individual and group stakeholders have suggested specific amendment to certain legislative provisions. These include changes to the assessment process that determines an injured worker's WPI.⁸⁶² Some suggested also that the once only opportunity allowed for the assessment of injured workers' WPI, and the capped entitlement to weekly and medical benefits, may compromise outcomes for

⁸⁵⁸ For example: *Submissions to the Independent Review*: Two Anonymous submissions; Insurance Council of Australia (ICA) Submission, 6 November 2020, 5; Police Association of NSW, November 2020, 3-4; Business NSW, November 2020, 10

⁸⁵⁹ For example: Public Service Association, *Submission to the Independent Review*, November 2020, at [61-64] 10-11; Anonymous Stakeholder

⁸⁶⁰ Janet Dore, *Independent reviewer report of the Nominal Insurer of the NSW workers compensation scheme*, December 2019, 70

⁸⁶¹ For example: *Submissions to the Independent Review*: Insurance Council of Australia, 6 November 2020, 5; *Interview with Anonymous Stakeholder*; Business NSW, November 2020, 7-8; Ai Group, October 2020, 17; and NSW Treasury, *Treasury response to queries raised in the icare Independent Review*, 22 February 2021, 11

⁸⁶² For example: *Submissions to the Independent Review*: Two Anonymous submissions, Dr Chesterfield Evans, 8; Law Society of NSW, 4 February 2021, 2

those injured workers who are permanently impaired.⁸⁶³ icare and the AMA also discussed the ‘reasonably necessary’ test and its relationship with the schemes’ increasing medical costs, and with outcomes for injured worker.⁸⁶⁴

⁸⁶³ For example: *Submissions to the Independent Review*: Law Society of NSW, 4 February 2021, 1-2; NSW Bar Association, *Submission to NSW Legislative Council's Standing Committee on Law and Justice of the NSW Workers Compensation Scheme*, 27 July 2020, 9-10; Teachers Federation, 3 November 2020, 8; Anonymous Submission

⁸⁶⁴ icare, *Medical costs Submission to the Independent Review*, February 2021, [59] 18-19; AMA, *Submission to the Independent Review*, 30 October 2020, 2

29 Review of the workers compensation scheme as a whole

29.1 Legislative framework and objectives

29.1.1 Legislative and regulatory structure of the schemes

- 13 Structurally, the NSW workers compensation scheme is underwritten by the NI, self and specialised insurers (for private sector employers), and by the TMF (for government employers). All insurers, excluding the NI and the TMF (if it is appropriate to describe them as “insurers”), must be licensed by SIRA.
- 14 The key legislation directly governing the scheme is:
 - a) WC Act 1987:⁸⁶⁵ It contains provisions that govern the entitlement to and calculation of statutory workers compensation benefits and modified common law damages.
 - b) WIM Act:⁸⁶⁶ It contains procedures for making a claim, dispute resolution, injury management and other scheme provisions.
 - c) SICG Act: It established icare and SIRA.
- 15 Unsurprisingly, each of those Acts provides the power to make regulations. The WIM Act also provides for the making of binding Guidelines for the management of claims. These powers have been exercised on a number of occasions, including in:
 - a) the *Workers Compensation Regulation 2016*,⁸⁶⁷ which outlines how the provisions of the WC Act 1987 and WIM Act are to be applied including as to the calculation of PIAWE, the scheduled costs for legal and medical services, premiums and policies, and other matters such as restrictions on the number of medical reports;
 - b) the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment*, 4th Edition⁸⁶⁸ which commenced on 1 April 2016. They were most recently modified on 1 March 2021. The Guidelines are based on the AMA⁸⁶⁹ Guides Fifth Edition (AMA5) and are used to evaluate permanent impairment arising from work-related injuries and diseases. Where there is a deviation between AMA5 and the Guidelines, the Guidelines prevail; and
 - c) the SIRA *Guidelines for Claiming Workers Compensation*, which commenced on 1 August 2016. These Guidelines explain what workers, employers and insurers must do in the process of claiming workers compensation in NSW. They operate under section 376(1)(c) of the WIM Act as delegated legislation.
- 16 Certain aspects of the workers compensation scheme are also affected by specialist legislation, such as the *Personal Injury Commission Act 2020*, which abolished the Workers Compensation Commission (WCC) and established a single Personal Injury

⁸⁶⁵ Workers Compensation Act (No 70) 1987 (NSW).

⁸⁶⁶ Workplace Injury Management and Workers' Compensation Act (No 86) 1998 (NSW).

⁸⁶⁷ Workers Compensation Regulation (Reg 599) 2016 (NSW).

⁸⁶⁸ SIRA, *NSW workers compensation guidelines for the evaluation of permanent impairment – Fourth edition*, 1 March 2021

⁸⁶⁹ In this context, the American Medical Association.

Commission (PIC) to resolve workers compensation and motor accident disputes. The PIC commenced on 1 March 2021.

17 The structure of the NSW scheme is unique in the Australian workers compensation landscape. Some of the features that make it unique are:

- a) the division of functions between icare, SIRA and SafeWork NSW. This includes separate Boards with separate reporting lines (to different Ministers) to avoid conflicts of interest. In most other jurisdictions, these functions are combined.
- b) the use of a NI with an unconditional licence which provides insurance directly to employers, rather than relying on private sector insurers⁸⁷⁰. Where private sector insurers are used in NSW⁸⁷¹, it is to act as service providers, not as underwriters;
- c) the operational structure of icare, including as it does not only management of the NI, but also management of other insurance-related schemes;
- d) a separate and independent regulator, SIRA, that regulates multiple compensation schemes in NSW, including the motor accidents, home building and workers compensation schemes;
- e) a separate and independent work health and safety regulator, SafeWork NSW; and
- f) the inclusion of a separate and independent ombudsman known as the Independent Review Office (IRO)⁸⁷² specifically for the workers compensation scheme. The IRO's functions include the provision of legal funding arrangements through the Independent Legal Assistance and Review Service (ILARS).

18 The following table shows the regulatory arrangements across Australian jurisdictions⁸⁷³.

Figure 43: Comparison between workers compensation arrangements in other Australian jurisdictions

Jurisdiction	Arrangement
New South Wales	<ul style="list-style-type: none">• icare as the NI with separate Board (appointed by the Treasurer) with four private sector service provider agents, 70 self-insurers and six specialised insurers.• SIRA as regulator with separate Board (appointed by the Minister for Customer Service).• SafeWork NSW as work health and safety regulator.
Victoria	Victorian WorkCover Authority trading as WorkSafe Victoria with five private sector scheme agents and 40 self-insurers.
South Australia	ReturntoWorkSA with two private sector agents, 71 self-insurers and 41 crown self-insurers.
Queensland	WorkCover Queensland with 28 self-insurers
Western Australia	WorkCover WA with seven private sector insurers, 25 self-insurers and the Insurance Commission of WA
Tasmania	WorkSafe Tasmania with seven private sector insurers and 11 self-insurers

⁸⁷⁰ Except for self-insurers and specialised insurers.

⁸⁷¹ With the same qualification.

⁸⁷² Known as the Workers Compensation Independent Review Office (WIRO) before 1 March 2021

⁸⁷³ SafeWork Australia, *Comparison of workers' compensation arrangements in Australia and New Zealand* (2019), 31 January 2020, 19-20

Jurisdiction	Arrangement
Northern Territory	NT WorkSafe with four private sector insurers, five self-insurers, nominal insurer and the Northern Territory Government self-insurer
Australian Capital Territory	WorkSafe ACT with seven private sector insurers and seven self-insurers
Commonwealth ComCare	<p>Comcare (under the Attorney General's department) is a government regulator, workers' compensation insurer, claims manager and scheme administrator under the Safety, Rehabilitation and Compensation Act 1988.</p> <p>Commonwealth Government claims are managed by Comcare. Claims by licensed Commonwealth authorities are managed in-house by those authorities. Commonwealth Authorities such as Australia Post and ANU may also be granted a licence to self-insure.</p> <p>Commonwealth entities, other than licensed Commonwealth authorities, pay experience based premiums to Comcare annually.</p>
Commonwealth Seacare	<p>Seacare is a national privately underwritten workers' compensation scheme which applies to defined seafaring employees. Claims rest with the employer.</p> <p>The scheme is overseen by the Seafarers Safety, Rehabilitation and Compensation Authority (the Seacare Authority) under the Seafarers Rehabilitation and Compensation Act 1992, comprising an independent Chairperson and Deputy Chairperson, the Chief Executive Officer of the Australian Maritime Safety Authority, two employer representatives and two employee representatives.</p> <p>The Seacare Authority does not have its own staff. Comcare makes staff available to support the Seacare function, operating as the Seacare Secretariat and providing policy and administrative support to the Authority.⁸⁷⁴</p>
Commonwealth Department of Veteran Affairs	Claims are managed directly through the Department of Veterans Affairs under the Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988 and the Military Rehabilitation and Compensation Act 2004

19 I discuss the structure of the two government-managed schemes – the NI and TMF – in more detail in [section 30 below](#).

29.1.2 Overview of the **Workers Compensation Act 1987 (WC Act 1987)**

20 The WC Act 1987 contains provisions that govern the entitlement to and calculation of statutory workers compensation benefits and modified common law damages. It establishes that, where a worker is injured during the course of their employment, the employer is liable for such injury. The WC Act 1987 provides that a worker suffering from such an injury should receive appropriate compensation arising from the employer's liability.

21 The WC Act 1987 defines benefits, thresholds, and the mechanisms available for lump sum payments or modified common law damages.

⁸⁷⁴ Seacare overview, 15 October 2020, at <https://www.seacare.gov.au/home/about_seacare_links>.

22 The WC Act 1987 also provides for the management of claims through insurers. As a result of amendments in 2003, it establishes the NI. It also provides for oversight of the calculation of premiums and licensing.

23 The WC Act 1987 works with the WIM Act and the two pieces of legislation are designed to be read together. That is not always an easy task.

29.1.3 Overview of the *Workplace Injury Management and Workers Compensation Act 1998 (WIM Act)*

24 The WIM Act provides for the management of claims for work-related injuries: such as making a claim, dispute resolution, injury management and the like.

25 The WIM Act does not set up the overall architecture of the scheme. It is concerned with the claim process, including what workers are entitled to expect in the management of their claim. It acknowledges specifically the importance of return to work. It also provides for the Workers Compensation Operational Fund which provides funds for the support of SIRA, IRO (formerly WIRO) and other entities, and for the handling of disputes.

29.1.4 Objectives of the scheme

Legislated objectives

26 The WIM Act⁸⁷⁵ provides a set of legislated objectives for the scheme (described as system objectives) as follows:

3 System objectives

The purpose of this Act is to establish a workplace injury management and workers compensation system with the following objectives—

- (a) to assist in securing the health, safety and welfare of workers and in particular preventing work-related injury,
- (b) to provide—
 - prompt treatment of injuries, and
 - effective and proactive management of injuries, and
 - necessary medical and vocational rehabilitation following injuries, in order to assist injured workers and to promote their return to work as soon as possible,
- (c) to provide injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses,
- (d) to be fair, affordable, and financially viable,
- (e) to ensure contributions by employers are commensurate with the risks faced, taking into account strategies and performance in injury prevention, injury management, and return to work,
- (f) to deliver the above objectives efficiently and effectively.

27 When the then Minister for Finance introduced the most recent structural changes to the scheme in 2015, he described the Government's intentions for workers

⁸⁷⁵ WIM Act s 3.

compensation, and the objectives of the proposed structural changes, in similar terms:⁸⁷⁶

If someone is injured, we need to provide them with the assistance they need to get back to work—or, for those with more serious long-term injuries, provide the support they need to live their lives with dignity. Injured workers, employers, health professionals and other stakeholders currently have to deal with multiple parties with disparate goals and purposes, with the government paperwork and regulation to go along with it. The system needs to have customers and their needs and goals at the centre of decisions—not at the end. It needs to be fair, sustainable and customer-centric. That is what the New South Wales workers compensation system should look like; and that is exactly what the New South Wales Government will strive to achieve.

The benefit enhancements being introduced by the Government are focused on three simple objectives: supporting injured workers to recover and return to work, providing proper assistance to workers with the highest needs and making sure that any changes to benefits will not compromise the financial sustainability of the scheme.

Stakeholders' views

28 The Ai Group raised a concern as to whether the interests of employers were given sufficient recognition. It submitted:⁸⁷⁷

These objectives, which are consistent with those in other Australia schemes, are a complex balancing act for scheme managers and the regulators. Whether a workers compensation scheme is “fair” is often hotly debated. What seems fair to one participant in the scheme may seem unfair to another...

... it is Ai Group’s view that there are sufficient examples of employer’s views not being taking into account to demonstrate that fairness to employers is not always applied in the consideration of claim liability and the payment of benefits.

29 Conversely, the Teacher’s Federation expressed concern about whether injured workers were given sufficient priority. It submitted:⁸⁷⁸

The policy objects of the workers compensation scheme in NSW are outlined in section 3 of the [WIM Act] ... The ordering from (a) to (f) above infers a priority order for the scheme’s policy objectives. It is no accident that the elements of injury prevention, access to necessary treatment for rehabilitation and income/medical expense support for injured workers are listed above measures of the scheme’s affordability. Clearly the policy objective is to put the treatment, rehabilitation and income/medical expense needs of the injured worker at the centre of all decisions made under the scheme.

⁸⁷⁶ Workers Compensation Amendment Bill 2015 and State Insurance And Care Governance Bill 2015 Second Reading Speech, NSW Legislative Assembly, 5 August 2015, 1

⁸⁷⁷ Ai Group, *Submission to the Independent Review*, October 2020, 14

⁸⁷⁸ Teachers Federation, *Submission to the Independent Review*, 34 November 2020, 6-7 and 10

However, in practice the scheme does not always operate in a manner that puts the injured workers' needs at the centre of all decision-making.

- 30 These comments, and numerous other submissions raising concerns about the way the scheme is being managed, suggest that icare's operational delivery may not have always met stakeholders' perceptions of the objectives of the scheme. That reflects in part, no doubt the reality that the relationship between the employers and the employees is a complex one, including areas of both common and opposed interests. I have discussed the operation of the scheme, and made recommendations for improvement, in *Parts 1A and 1B*.
- 31 However, no-one has suggested that the objectives themselves are inappropriate. The stated purposes set out in the Minister's second reading speech reflect those stated in the WIM Act. I see no reason to think that the statutory objectives, to the extent they set out in broad and purposive terms what the legislation as a whole is to achieve, are inappropriate, or that they need amendment.
- 32 In my view, the policy objectives that I have set out remain appropriate for the scheme as a whole. The specific objectives of the SICG Act in relation to icare and SIRA, being as it were subordinate to the overall scheme objectives, should be considered separately. I do that in *Part 3*.

29.2 Simplification of the legislative scheme

- 33 As those within the workers compensation system already know, the current legislative system is cumbersome, confusing and unwieldy. It consists of two key Acts, each containing hundreds of sections; a further Act dealing with regulatory and structural matters; and a suite of regulations, guidelines and policies issued by multiple agencies with overlapping functions. The benefits provided by, responsibilities under, and structures of the scheme have been amended repeatedly, sometimes at short intervals.
- 34 The scheme itself is mandatory in its application to all employers. It must balance benefits and protections for injured workers with fairness to employers. The scheme is responsible for the collection and payment of very significant amounts of money each year. Striking that balance involves considering macroeconomic factors, individual financial impacts, social pressures and the personal effects of injury and disease.
- 35 It is no surprise that the scheme is highly sensitive to ideological shifts in the political landscape, and that the stakeholders of the scheme are highly engaged. Any attempt at change is hard fought. Changes, once made, remain at risk of subsequent attack. That any agreement can be reached at all is a tribute to the dedication of scheme participants to a fair provision of benefits and support to injured workers at a fair cost to employers.
- 36 The result is a scheme which has been subject to repeated review and piecemeal amendment, but has not been subject to a wholesale legislative rethink, in over 30 years.
- 37 The current legislative provisions, Byzantine in their elaboration and labyrinthine in their detail, have resulted in a level of confusion, inconsistency and complexity that does nothing to assist the schemes to achieve their policy objectives. That must change.

38 There is another problem. The scheme as it exists at present is ill-equipped to deal with the changing nature of work. As icare noted⁸⁷⁹, there is great uncertainty as to the rights (if any) of gig workers under the scheme. The very rapid growth of the gig economy makes it important to clarify the status of those workers. There are at least two reasons why. Firstly, it is essential for the benefit of the workers themselves. And secondly, it is necessary for the purposes of actuarial analysis of their impact on the scheme.

39 This gig economy, and the changing nature of work more generally, have been debated in Parliaments around the nation. In NSW, it is the subject of current consideration by government. The results of that consideration should be used to inform the future development of the scheme. It would be logical for that to be done as part of the complete reconsideration of the legislative package that I am about to recommend, not as yet another bolt-on accretion to an already overly-complex suite of legislation.

40 There is a clear need for change. Thus, I have come to the view that there ought to be a wholesale revision of the entire statutory structure, including a reconciliation of the WC Act 1987, the WIM Act and the SICG Act. There is no reason for the retention of the existing and confused morass of multiple statutory instruments. Everyone involved with the scheme should be able to have recourse to one clear and consistent source of rights and responsibilities.

41 I wish to make it clear that I am calling for a reform of the legislative structure, not of its incidents. There should be no change to benefits payable to injured workers. What is necessary is that the way to realisation of those benefits be made straight. Nothing put to me in the course of my Review provided evidence of a need for any substantial change to benefits. Workers' benefits under the scheme have been subject to significant change over the past decade. There is no present need for further changes.

42 The current balance between benefits and obligations is the result of significant work and negotiation. Apart from some specific matters, neither workers' representatives nor employer groups submitted to my Review that there was need for wholesale change. The important work of simplifying and reconciling the regulatory regime should not be jeopardised by opening up debate on the fundamental balance in the scheme.

43 Both below and in *Part 3* of this report, I have made a number of recommendations aimed at clarifying certain specific points of particular concern. Those changes are additional to my recommendation to review and simplify the entire legislative foundation on which the scheme rests.

44 In short, it is my view that the present convoluted suite of legislation ought to be reconciled into a single Act which, whilst retaining the substance of the benefits currently provided, avoids or resolves, so far as possible, any contradictions and duplication in the present arrangements.

⁸⁷⁹ Interview with icare - J Robertson and D Ferguson, 2 February 2021, notes 2

45 I recommend:

Recommendations	
Legislative redrafting	
34	<p>The government should give consideration to appointing a suitable agency or body to conduct a review and reconciliation of the <i>Workers Compensation Act 1987</i>, <i>Workplace Injury Management and Workers Compensation Act 1998</i> and <i>State Insurance and Care Governance Act 2015</i> into a single consolidated piece of legislation.</p> <p>That review should consider, among other things, the appropriate legislative response to the changing nature of work and the growth of the gig economy, and the extent to which, and ways in which, gig workers should have the benefits provided by the workers compensation scheme.</p> <p>The reviewing body should be instructed to consider the further recommendations made herein this report, and should not otherwise consider, review, or amend workers compensation benefits.</p>

46 I note that some work has been done already towards this goal. There was a review, known as the 'Parkes Project,⁸⁸⁰ of the workers compensation scheme in 2014 and 2015. That project was established to consider matters related to the amalgamation of the workers compensation legislation, including ambiguities in that legislation and the regulations, resolution of drafting conflicts, and reduction of the complexity of the drafting, and the identification of potential enhancements to the legislative framework to benefit all stakeholders.

47 The Project was announced by then Independent Review Officer, Mr Kim Garling, in December 2014, and continued until August 2015. Unfortunately, although much was accomplished, the Project was not able to complete a report on its work.

48 The Project did however make substantial progress towards formulating possible improvements to the legislative scheme. In June 2015, it formulated a unanimous statement of principles, accompanied by concrete recommendations made to the Minister on specific aspects of the scheme. I note that some of those recommendations are consistent with conclusions I have reached independently based on the evidence presented to me.

49 The issues addressed by the Parkes Project remain relevant today. The Issues Paper released by that Project contains much that remains unresolved, although some issues, such as multiple claims processes and multiple dispute resolution pathways, have been modified by subsequent legislative amendment and the changes implemented by icare. I encourage the ultimate appointee under this recommendation to consider the work of the Parkes Project, including such results as may remain unpublished.

50 I now turn to consider specific areas of the scheme legislation and regulatory framework that were suggested, in the course of my Review, to need improvement.

⁸⁸⁰ WIRO, *Annual Report 2015*, 15 December 2015, 7

29.3 Medical treatment and costs

51 I received many submissions relating to medical treatment for injured workers and the strain placed by medical costs on the scheme. Many of the issues that were raised are related. I address each of those issues in the following section of this Review, regardless of whether the issue is principally financial or is one that has broader implications.

29.3.1 Medical costs and value-based care

52 icare has devoted considerable time during my Review to discussing with me,⁸⁸¹ and providing documentary explanations of,⁸⁸² its concerns about the legislative and regulatory framework relating to medical⁸⁸³ costs. icare provided a similar and detailed submission⁸⁸⁴ to SIRA's 2020 Healthcare Review.

53 icare submitted to me that:

...current regulatory and legislative arrangements in the NSW workers compensation system create incentives for medical and allied health service providers in respect of fee-for-service rather than enabling a value-based care approach which encourages a holistic view of a person's ability to function and recover.

For example, the current system provides a financial incentive towards a recommendation for surgery, rather than the consideration of conservative treatment options that may lead to better health outcomes in the long-term. In addition, the methods of assessment in the AMA 5 Guides attributes greater degrees of impairment for subsequent interventions in the management of an injury, providing a perverse incentive for injured workers to undergo multiple low value treatments, such as surgery, in order to reach impairment benchmarks.

icare advocates for a complete review of existing regulatory and legislative arrangements to ensure they support value-based care to avoid low value care and interventions in the NSW workers compensation system⁸⁸⁵

54 icare made a number of specific recommendations.⁸⁸⁶ They include:

- a) Reducing fees for those medical procedures where the rates are higher than for other jurisdictions and higher than in the CTP scheme.
- b) Addressing the test for medical intervention in section 60(1) of the WC Act 1987, that medical treatment be 'reasonably necessary'.⁸⁸⁷ This contrasts with the CTP legislation, for example, which requires treatment to be 'reasonable and necessary'.⁸⁸⁸ I discuss this at [29.3.3 below](#).

⁸⁸¹ Interview with C Colquhoun, R Craig and A Ziolkowski, 11 December 2020

⁸⁸² icare, *Medical Costs Submission – Final*, February 2021, 9-13

⁸⁸³ I use the term "medical" to include all aspects of health care treatment, whether or not it is provided by medical practitioners.

⁸⁸⁴ icare, *Response to consultation paper – regulatory requirements for health care arrangements in the NSW workers compensation and CTP schemes*, November 2019

⁸⁸⁵ icare, *Additional submission – management of medical costs for injured workers*, February 2021, at 56-58

⁸⁸⁶ Ibid at 4, 59-65, 66 to end

⁸⁸⁷ WC Act 1987 s 60(1)

⁸⁸⁸ Motor Accidents Act 2017 s3.24 (2)

- c) Replacing the use of the AMA5 assessment guide for the evaluation of permanent impairment with the AMA6 guide, which icare submits ‘*better aligns medical treatments with improved function and patient outcomes*’.⁸⁸⁹ See [29.3.2 below](#) for further exploration of this issue.
- d) Creation of enforceable treatment guidelines that will ‘*set up clear expectations of treatment and care to be provided and will help achieve the strategic goal of value-based care by ensuring only treatment and care that is necessary and cost-effective is approved*’.⁸⁹⁰
- e) Improvements to data capture, billing and invoicing systems.

55 icare made submissions and recommendations to similar effect to SIRA, which considered them in its 2020 Healthcare Review.

56 SIRA acknowledged that there were opportunities for improvement in the regulatory framework⁸⁹¹. Specifically, the report resulting from the Healthcare Review concurred with icare’s recommendation regarding fee levels. It stated that SIRA had ‘*identified that the fees being paid in NSW WC for healthcare services are largely higher than other schemes, for the majority of services provided*’.⁸⁹² SIRA did not however find that rates had increased significantly in recent years.⁸⁹³

57 The AMA, in its submission to this Review, disagreed with icare’s and SIRA’s positions in relation to fee levels. It laid the blame for increases in medical costs on icare, saying:

The AMA (NSW) was extremely disappointed that iCare’s [sic] submission [to the SIRA Healthcare Review] suggested that doctors’ fees were the reason for their financial blowout. For over 20 years, injured workers in NSW have had the benefit of being able to access medical care on the same basis as patients with comprehensive private health insurance. This ensures injured workers receive timely access to a wide range of specialist general practitioners and other medical specialists, thus aiding the return to work process. iCare’s suggestion to introduce a ‘gap fee’ and reduce doctors’ fees was solely about cutting costs, and would not, and will not, be the answer to iCare’s financial problems.

Prior to the establishment of iCare, New South Wales had one of the best schemes to help injured workers get back to work in the country. Under iCare, return to work rates have decreased and costs have exponentially increased. Over the same period, doctors’ fees have not increased significantly.

*Reducing doctors’ fees will not result in positive outcomes for patients. Doctors must be properly remunerated for providing high quality health care as they play a critical role in facilitating treatment and recovery of those injured at work.*⁸⁹⁴

⁸⁸⁹ icare, *Additional submission – management of medical costs for injured workers*, February 2021, at [65] 20

⁸⁹⁰ Ibid at [67] 20-21

⁸⁹¹ SIRA, *Healthcare Review Final Report*, December 2020, 10-11

⁸⁹² Ibid 18

⁸⁹³ Ibid

⁸⁹⁴ AMA, *Submission to the Independent Review*, 30 October 2020, 1

58 I accept without question that injured workers should have appropriate medical treatment, and that doctors ought be properly remunerated for providing that treatment. I accept also that icare must improve its management of claims. However, the AMA submission does not address, let alone tell against, SIRA's finding that medical fee in the NSW WC system for some procedures exceed, often substantially, those charged in other schemes. The AMA did not suggest that workers and others whose care is funded by those other schemes receive a lesser standard of treatment.

59 SIRA did not find any substantial justification for the fee differentials it documented, nor any substantial corresponding benefit to injured workers covered by the NI.⁸⁹⁵ Nor do I.

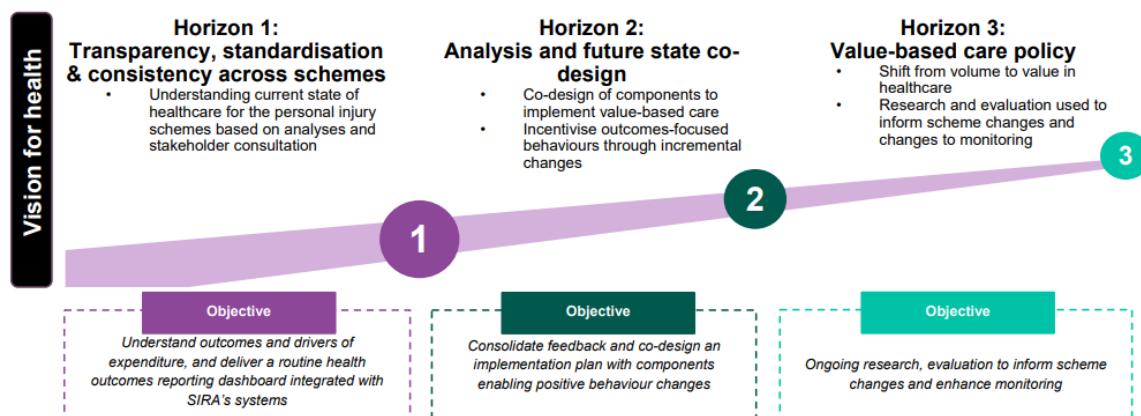
60 SIRA has already taken some action in this regard. In February 2021, it announced planned changes in surgical fees, to bring them in line with the CTP scheme, and thereby reduce them.⁸⁹⁶

61 More broadly, the report from SIRA's Healthcare Review, released in December 2020, discusses the '*required shift towards value-based care and immediate next steps including implementation of SIRA's health outcomes framework to deliver a financially sustainable, integrated healthcare approach*'.⁸⁹⁷

62 The detailed implementation process set out in that report, and many of the specific recommendations made by icare to similar effect, are at a level of detail beyond the scope of this Review. However, I recognise, from the evidence presented to me, that there now exists an opportunity both to address the quality of care being provided to injured workers and to manage better the costs of the scheme.

63 SIRA's Healthcare Review report outlined the process for achieving the shift to value based care as follows:⁸⁹⁸

Figure 44: SIRA's plan for implementing the health outcomes framework



64 The Healthcare Review was a thorough exercise. Its conclusions are well-supported by evidence. However, its recommendations must be followed up as promptly as possible. I recommend that whatever resources are necessary be devoted to addressing this important issue.

⁸⁹⁵ SIRA, *Healthcare Review Final Report*, December 2020. 17-18.

⁸⁹⁶ SIRA, *Changes to workers compensation surgical fees – website announcement*, 12 February 2021

⁸⁹⁷ SIRA, *Healthcare Review Final Report*, December 2020, 4.

⁸⁹⁸ Ibid 26

Recommendations	
Medical costs and value-based care	
35	SIRA should take prompt action to address excessive medical fee rates in areas where no benefit exists to injured workers from the fee disparity. This work should be undertaken in consultation with the Australian Medical Association (AMA), insurers and other stakeholder groups.
36	SIRA should develop an accelerated plan for implementation of the findings of its Healthcare Review, with additional resources allocated where necessary. This plan should be presented to the Responsible Minister, released publicly and reported on publicly at regular intervals.

29.3.2 Whole person impairment

65 I received submissions relating to the WPI test. The WC Act 1987 uses the expression '*degree of permanent impairment*',⁸⁹⁹ but for convenience I will stick to WPI.

66 Those submissions raised the following primary concerns about the WPI test:

- a) The concept of WPI was inappropriate as a test for entitlement to ongoing weekly and medical benefits.
- b) The current restriction to a single, once for all opportunity to assess WPI⁹⁰⁰ was producing perverse outcomes. Workers were delaying assessment, and therefore finalisation of their claim, in the hope of maximising their potential WPI assessment, resulting in longer claims durations.
- c) Compensation for up to five years for injured workers with up to 20 per cent WPI, as prescribed under section 59A of the WC Act 1987, may not motivate injured workers to recover and return to work.

Legislative history

67 Beginning with section 16 of the *Workers Compensation Act 1926*, the workers compensation system has provided for lump sum compensation as a result of '*loss*' or '*permanent loss of efficient use*'.⁹⁰¹ Initially, the amount payable was determined in accordance with a Table of Disabilities (also known, somewhat gruesomely, as the Table of Maims). For example, loss of a leg gave an entitlement to compensation of 600 pounds. This basic approach continued under the WC Act 1987 until 31 December 2001.

68 Effective from 1 January 2002, the *Workers Compensation Legislation Further Amendment Act*⁹⁰² introduced a new method of assessing impairment. Injuries were to be assessed not by reference to a Table, but by reference to the concept of WPI. The degree of WPI determined the amount of lump sum compensation payable. The

⁸⁹⁹ WC Act 1987 s 65

⁹⁰⁰ WIM Act s 322A

⁹⁰¹ *Workers Compensation Act 1926*, (NSW) s 16(4)

⁹⁰² *Workers Compensation Legislation Further Amendment Act (No 94) 2001* (NSW)

change was said to ‘ensure that workers who suffer a permanent injury have their injuries assessed in accordance with objective scientific evidence. The guides will ensure that workers with similar injuries are assessed in a consistent fashion’.⁹⁰³ The change had the effect of increasing the range of injuries which were compensable.⁹⁰⁴

69 The WPI test at that time applied only for limited purposes. They were:

- determining statutory lump sum compensation for non-economic loss, separate to weekly and medical benefits;
- as a threshold for seeking common law damages for non-economic loss; and
- as a threshold for compensation for personal domestic assistance (a new benefit introduced in 2002).

70 When the concept of WPI was first introduced, it was not used as a test for the payment of weekly benefits (that is, compensation for lost earnings) or for entitlement to medical treatment expenses. However, in 2012, the *Workers Compensation Legislation Amendment Act*⁹⁰⁵ made significant changes to benefits, and expanded the use of the WPI test (2012 Amendments).

71 Those changes included the introduction of a minimum threshold, for an entitlement to receive lump sum compensation, of 10 per cent WPI⁹⁰⁶, other changes to lump sum payments, and a restriction to a single impairment claim in respect of injury (with the exception of binaural hearing loss claims).⁹⁰⁷ The 2012 amendments also introduced section 322A of the WIM Act, which states:

322A One assessment only of degree of permanent impairment

- Only one assessment may be made of the degree of permanent impairment of an injured worker.
- (1A) A reference in subsection (1) to an assessment includes an assessment of the degree of permanent impairment made by the Commission in the course of the determination of a dispute about the degree of the impairment that is not the subject of a referral under this Part.
- The medical assessment certificate that is given in connection with that assessment is the only medical assessment certificate that can be used in connection with any further or subsequent medical dispute about the degree of permanent impairment of the worker as a result of the injury concerned (whether the subsequent or further dispute is in connection with a claim for permanent impairment compensation, the commutation of a liability for compensation or a claim for work injury damages).
- Accordingly, a medical dispute about the degree of permanent impairment of a worker as a result of an injury cannot be referred for, or be the subject of, assessment if a medical dispute about that matter has already been the subject of—
 - assessment and a medical assessment certificate under this Part, or
 - a determination by the Commission under Part 4.
- This section does not affect the operation of section 327 (Appeal against medical assessment) or 352 (Appeal against decision of Commission constituted by non-presidential member).

72 The 2012 amendments also changed the thresholds for weekly payments and medical expenses, using the WPI test to fix threshold points. Those thresholds have undergone

⁹⁰³ Second Reading Speech, Workers Compensation Legislation Amendment Bill, Hansard 19 June 2001, 14773

⁹⁰⁴ Ibid, 14773-14774

⁹⁰⁵ *Workers Compensation Legislation Amendment Act (No 53) 2012 (NSW)*

⁹⁰⁶ WC Act 1987, s 66(1)

⁹⁰⁷ *Sukkar v Adonis Electrics Pty Limited* [2014] NSWCA 459

some amendment since 2012, but that particular use of the WPI test has been retained.

- 73 All workers can access weekly payments for up to 130 weeks. After 130 weeks, entitlement to compensation continues if:
 - a) a worker is assessed as having no current work capacity and that situation is likely to continue indefinitely; or
 - b) in some circumstances, the worker has some current work capacity and one of two degrees of WPI.
- 74 For a worker who is assessed as having some current work capacity, the threshold for entitlement varies depending on their '*degree of permanent impairment*'⁹⁰⁸ (that is, WPI). Under section 38 of the WC Act 1987, those workers with greater than 20 per cent WPI are entitled to weekly payments if they apply in the required time. Those with less than 20 per cent WPI must have returned to work, and be working at least 15 hours a week, to be entitled to ongoing payments. The apparent aim is that workers who are less severely injured have an incentive to return to work, at least part time, if they are to continue to receive benefits, while more severely injured workers are relieved of that requirement.
- 75 Under section 39, weekly payments cease after 260 weeks (five years) for all workers unless their WPI is assessed at over 20 percent.
- 76 Finally, the 2012 amendments also amended the entitlement to medical benefits, again on the basis of WPI. Again, while threshold points may have changed, the use of WPI to determine the threshold has been retained.
- 77 For workers with 20 per cent WPI or less, medical benefits are payable for a fixed period after weekly benefits cease (with limited exceptions for some types of treatment). Workers with greater than 20 percent WPI are entitled to receive ongoing medical benefits.
- 78 The stated purpose of the 2012 amendments was to '*ensure better protection for injured workers*'⁹⁰⁹ while securing the financial sustainability of the scheme and avoiding substantial premium increases.⁹¹⁰ They sought to do so by combining two objectives: '*properly meeting the needs of the most seriously injured workers in the scheme ... [and] strongly incentivising return to work for those workers who have the capacity to return to work*'.⁹¹¹
- 79 The 2012 changes were rolled back in 2018, after it became apparent that some cuts to benefits were having a disproportionately harsh impact. However, the fundamental approach of the 2012 changes, and in particular their uses of the WPI test, remain in place.
- 80 The 2012 changes followed a Parliamentary Review which recommended, among other things, the introduction of time limits on benefits, varying according to the level of injury of the worker. That Parliamentary Review neither recommended nor specified the use of WPI as a threshold to identify the degree of injury. It referred generally to

⁹⁰⁸ WC Act 1987 s 65

⁹⁰⁹ *Workers Compensation Legislation Amendment Act 2012* Second reading speech, 19 June 2012, 1

⁹¹⁰ Ibid 2

⁹¹¹ Ibid 1

classes such as 'less seriously injured workers'.⁹¹² In the portion of its report where it canvassed submissions that raised concerns about using WPI, the Parliamentary Review recommended that the relevant support be given to 'appropriately defined severely injured workers'.⁹¹³

- 81 The reasons for choosing the WPI test are not apparent from the second reading speech for the 2012 amendments. I assume that it was adopted for the convenience, given that it was, seemingly, an objective measure, and one that was already in use for other purposes under the WC Act 1987.

Concerns with the use of the WPI test

- 82 The Law Society and Bar Association each put submissions to my Review against the use of the WPI as a test for weekly and medical benefits. The Law Society described the WPI test as:

...an [in]appropriate threshold test for recovery of medical treatment expenses, noting that injured workers may sustain injuries that require ongoing medical attention regardless of their WPI assessment. Further, we consider that restricting injured workers' access to medical benefits without considering the nature of their injury and recovery requirements leads to arbitrary, counterintuitive and unfair outcomes for claimants.⁹¹⁴

- 83 While the Law Society referred to section 39, a similar issue arises in relation to section 38 of the WC Act 1987.
- 84 The Bar Association pointed out that AMA 5 (on which the permanent impairment guidelines are based) was never intended to be used to assess the extent of an injured worker's work disability:

Chapter 1 of AMA5 specifically cautions that "impairment ratings are not intended for use as a direct determinants of work disability". Chapter 1 of AMA5 explains this by giving the example that a heart condition may prevent a manual labourer from pursuing his trade by that a sedentary worker, with the same condition, may not be prevent from resuming work.

Just as the authors of AMA5 caution that it is not appropriate to use WPI assessments as a way of assessing the payment of benefits for incapacity for work, it is the Association's view that it is not appropriate to use WPI assessments as a way of determining entitlements to medical expenses. AMA5 does not endorse this use.⁹¹⁵

⁹¹² For example: Joint Select Committee on the NSW Workers Compensation Scheme, 13 June 2012, at Recommendation 7, xiii

⁹¹³ Joint Select Committee on the NSW Workers Compensation Scheme, 13 June 2012, Report at 50-51 and Recommendation 2

⁹¹⁴ Law Society of NSW, *Submission to the Independent Review*, 4 February 2021, 2

⁹¹⁵ NSW Bar Association, *Submission to NSW Legislative Council's Standing Committee on Law and Justice of the NSW Workers Compensation Scheme*, 27 July 2020, 7

85 The Bar Association submitted that section 322A of the WIM Act be repealed,⁹¹⁶ while the Law Society submitted that a mechanism to allow further medical assessment be inserted where circumstances have changed.⁹¹⁷

86 In each case, the relevant entitlements depend on whether a worker is classified as having '*high needs*'.⁹¹⁸ A '*worker with high needs*'⁹¹⁹ is a worker with more than 20 per cent WPI. It is important to note that WPI assessments take a holistic view of impairment. While this may provide some measure of a workers' needs overall, it does not consider those needs in the context of employment. As a result, and as the Law Society submitted, a worker may suffer an injury which is below the 20 per cent threshold, but which has a significant adverse impact on capacity to work.⁹²⁰

87 The Law Society and the Teachers Federation each commented on the hardship experienced by a mandatory cessation of benefits after five years, regardless of capacity for work. The Law Society stated that:

*...the 260-week time limit imposed under s 39 has the capacity to create severe financial hardship for workers who have sustained significant ongoing injuries that prevent their return to work.*⁹²¹

88 The Teachers Federation stated that its members '*...experience financial hardship and denial of treatment under the scheme*'⁹²² because of the application of section 39 of the WC Act 1987.

89 The key point, as I understand it, is that an assessment of WPI does not always yield an appropriate indicator of either capacity for work or the need for and expense of medical treatment. As the Bar Association has submitted,⁹²³ the relevant section of the AMA 5 guidelines specifically states that '*impairment ratings are not intended for use as a direct determinants of work disability*'.⁹²⁴

90 This point was raised in a submission from Dr Arthur Chesterfield-Evans. Dr Chesterfield-Evans' submission to my Review commented on the practical implications of the use of AMA guidelines for the assessment of WPI. He noted that:

*[t]he AMA guide gives a higher percentage to people who have had surgery. The percentage impairment largely determines the compensation. Therefore, if the person is not scanned, not diagnosed, does not see a neurosurgeon and does not have an operation, the seriousness of their injury can be questioned and their payout will be lessened.*⁹²⁵

91 Another submission to my Review noted that as an assessor is required to use his or her own opinion in the application of AMA 5, WPI percentages vary widely.⁹²⁶ As I

⁹¹⁶ NSW Bar Association, *Submission to NSW Legislative Council's Standing Committee on Law and Justice of the NSW Workers Compensation Scheme*, 27 July 2020, 9

⁹¹⁷ Law Society of NSW, *Submission to the Independent Review*, 4 February 2021, 2

⁹¹⁸ WC Act 1987 s38.

⁹¹⁹ *Ibid*

⁹²⁰ See the example given in Chapter 1 of AMA5, quoted in the Bar Association's submission at [82] above.

⁹²¹ Law Society of NSW, *Submission to the Independent Review*, 29 October 2020, 2

⁹²² Teachers Federation, *Submission to the Independent Review*, 34 November 2020, 8

⁹²³ See at [84] *above*.

⁹²⁴ NSW Bar Association, *Submission to NSW Legislative Council's Standing Committee on Law and Justice of the NSW Workers Compensation Scheme*, 27 July 2020, 8

⁹²⁵ Dr Chesterfield Evans, *Submission to the Independent Review*, 8

⁹²⁶ Anonymous Submission

understand it, the problem to which this submission adverts is that the apparently objective measure is not necessarily so in its application to individual cases. That is hardly surprising.

92 The Law Society submitted that a fair system of compensation should not cut off permanently injured workers from receiving benefits at an arbitrary point in time⁹²⁷. The Law Society submitted that the scheme objective of providing '*payment for reasonable treatment and other related expenses*' would be better served (and the system would be simplified) by providing payment for all medical expenses reasonably necessary as a result of the injury.⁹²⁸ I note that this suggested approach is similar to that taken at the Commonwealth level under the Comcare scheme.

93 However, icare submitted that compensating injured workers for indefinite time periods might provide them with a disincentive to return to work.⁹²⁹

94 I accept that a sustainable scheme must impose some limits on benefits, and that it is open to the legislature to set those limits, including arbitrary limits as to time, as a matter of policy. The extent of benefits available is ultimately a question for the legislature, which must balance the need for support of injured workers with the financial burden placed on employers.

95 However, those limits should (as far as possible) be based on the degree of need that the benefit is intended to address. Weekly benefit payments are intended to compensate a worker for the loss of capacity to work, by providing an alternative source of income. Similarly, medical benefits are intended to compensate for the cost of medical treatment arising from the injury.

96 The use of the concept of WPI as the test for entitlement to weekly and medical benefits does not reflect the policy objective of ensuring that the most injured workers should receive appropriate support. That policy would be better served by a test that assessed the severity of an injury by reference to the treatment and support necessary to manage its consequences, as well as its impact on the worker's capacity for work.

97 WPI assessments may well be suitable for their original purpose – assessing lump sum compensation for the non-economic loss caused by the injury. I received no submission to the contrary. But those assessments measure neither the capacity to work nor the necessity of medical treatment. The use of a WPI assessment for those purposes creates a significant risk that workers may be left uncompensated for a real and severe loss of capacity to work, or substantial medical expense, arising from a workplace injury.

98 That of course points to the next question: what is (or would be) a better test for entitlement to ongoing benefits? That question is well beyond the scope of my Review. Its answer can only come after widespread consultation and careful consideration. It must balance the interests of both workers and employers, and give appropriate weight to overall considerations of costs and benefits. The objective ought to be to identify a test which minimises the capacity for disputes, but which is fair to the injured worker, considers their capacity for work and ensures that their reasonable needs are met.

⁹²⁷ See its submission quoted at [\[87\] above](#).

⁹²⁸ WIM Act s 3(c)

⁹²⁹ Interview with icare - medical costs follow up, 11 December 2020, at Transcript 35-36: Q8 and 39:Q99-104

99 It might be thought that this would lead to a process of bespoke assessments.⁹³⁰ icare expressed concerns about such a process, on the basis that further tailoring individual assessments beyond the current approach would not promote equity in threshold assessment across the scheme.⁹³¹ Whether that is so is a matter for consideration in the process that I have outlined.

100 I recommend:

Recommendations	
Assessment of entitlement to weekly and medical benefits	
37	That consideration be given to a replacement threshold test for entitlement to weekly and medical benefits that more accurately reflects the need for compensation.

Single WPI assessment

101 There was another significant concern as to WPI assessments expressed in submissions to my Review. It related to the once for all nature of the process: there can be only one WPI assessment, and only one claim for lump sum compensation.

102 Both the Law Society and the Bar Association submitted that limiting an injured worker to a once only assessment of WPI is unfair.⁹³² The Law Society submitted that it is '*...unreasonable to lock a claimant into a fixed assessment of impairment for life, particularly when an assessment of WPI is critical to the ability to access ongoing medical treatment.*'⁹³³

103 An anonymous submission to my Review suggested that the statutory limitation to a single assessment has '*...resulted in a significant slowdown in injured workers obtaining these assessments.*'⁹³⁴

104 Cumpston Sarjeant highlighted a further drawback of the once for all WPI assessment. Its report noted that the test tended to encourage injured workers to delay the assessment, thus limiting the information about injury severity available to the insurer, and thereby making the scheme harder to manage.⁹³⁵

105 As noted above, the Bar Association submitted that section 322A of the WIM Act should be repealed,⁹³⁶ and the Law Society submitted that the Act should be amended to provide a mechanism to allow further medical assessment where circumstances have changed.⁹³⁷

⁹³⁰ icare, *Submission – Assessment of Whole Person Impairment*, 10 February 2021 at [7] 1

⁹³¹ Ibid at [16]-[19]

⁹³² Law Society of NSW, *Submission to the Independent Review*, 4 February 2021, 2; NSW Bar Association, *Submission to NSW Legislative Council's Standing Committee on Law and Justice of the NSW Workers Compensation Scheme*, 27 July 2020, 9

⁹³³ Law Society of NSW, *Submission to the Independent Review*, 4 February 2021, 2

⁹³⁴ Anonymous Submission

⁹³⁵ Cumpston Sarjeant, *Independent Review of icare – Financial Sustainability*, March 2021, at 29-30

⁹³⁶ NSW Bar Association, *Submission to NSW Legislative Council's Standing Committee on Law and Justice of the NSW Workers Compensation Scheme*, 27 July 2020, 9,

⁹³⁷ Law Society of NSW, *Submission to the Independent Review*, 4 February 2021, 2

106 icare suggested that there are ways at present in which a worker might be able to obtain a further assessment:

Currently, in practice, icare's experience is that the WCC permits further assessments in certain circumstances where the worker can establish a deterioration in WPI. The WCC has also confirmed that proactive complying agreements and consent orders before the WCC do not constitute the permitted single assessment. This means that in practice, as long as claims managers are proactively assessing the degree of WPI, there is more than one assessment available in the scheme.⁹³⁸

107 However, icare opposed any expansion of the number of assessments, and instead suggested that the limitation to a single assessment be further strengthened.⁹³⁹ icare's key submission is that to allow a further assessment would add significantly to uncertainty in the scheme and increase the amount of work required in claims management.⁹⁴⁰

108 Finally, I note that the Joint Select Committee in its 2012 Report stated:

[t]he Committee however believes that in some isolated cases, an injustice may be done if there were a limit of one assessment where there has been a significant deterioration in a worker's condition.⁹⁴¹

109 The Select Committee recommended as follows:

That the NSW Government ensure that, under the Workers Compensation Scheme, after the determination of a claim for whole person impairment, only [sic] up to two further claims be permitted and in each case only if there has been a deterioration of whole person impairment of at least 5 per cent since the last determination.⁹⁴²

110 The Government of the day decided not to implement that recommendation. It gave no reason for that decision.⁹⁴³

111 It is obvious that a once for all assessment and claim may cause injustice for a worker whose medical condition subsequently deteriorates after the assessment. As the Law Society and icare both said, a single assessment is particularly unfair where its outcome is a critical threshold for accessing ongoing medical benefits.⁹⁴⁴ It is hardly surprising to learn that this encourages workers to put off the assessment for as long as possible.

112 It is also hardly surprising that the deferral of WPI assessment might lead to unnecessary medical interventions during the period when compensation is available. Workers with an injury that may or may not require further medical treatment in future years have an obvious and understandable incentive to seek that treatment during the period, rather than waiting to see if it is needed. As icare has noted, the assessment of

⁹³⁸ icare, *Submission – Assessment of the Whole Person Impairment*, 10 February 2021 at [22].

⁹³⁹ Ibid at [23]-[30]

⁹⁴⁰ Ibid at [26]

⁹⁴¹ *Joint Select Committee on the NSW Workers Compensation Scheme*, 13 June 2012, 79

⁹⁴² Ibid

⁹⁴³ *Government Response to Report of the Joint Select Committee on the NSW Workers Compensation Scheme*, 13 Dec 2012

⁹⁴⁴ icare, *Submission – Assessment of the Whole Person Impairment*, 10 February 2021 at [25]; and Law Society of NSW, *Submission to the Independent Review*, 4 February 2021, 2

WPI might also itself encourage some forms of intervention, such as spinal surgery, which increase the assessed WPI regardless of its clinical outcome.⁹⁴⁵

- 113 Such perverse incentives could be addressed by providing a mechanism for a further WPI assessment, and the subsequent availability of applicable benefits, under appropriate but carefully controlled circumstances. Such an amendment is likely to encourage earlier resolution of claims because workers can be assured that there is some safety net if their needs change in the future.
- 114 The fact that the former WCC (now PIC) and legal practitioners have already identified avenues to preserve this opportunity reinforces the need for such a mechanism. That need should be addressed in legislation to ensure that it is fairly available to all who require it in appropriate circumstances.
- 115 I accept that there is a significant value to the certainty which comes with the finalisation of a claim through a single assessment. However, in my view, that certainty ought not be preferred to the achievement of the scheme objective referred to at [78 above](#). Nor should it be preferred to fairness to the worker.
- 116 The Law Society identified a problem that could arise if there were to be more than one assessment of WPI. It recognised that the backdating of benefits in the period between the first and any subsequent WPI assessment is likely to cause significant and uncertain strain on the scheme.⁹⁴⁶ It may very well be that the balancing process necessarily involved in deciding to make the change I am about to recommend requires that benefits be available only prospectively, from the date of the new determination.

- 117 I recommend:

Recommendations	
Assessment of whole person impairment	
38	That the legislature give consideration to amending the <i>Workplace Injury Management and Workers Compensation Act 1998</i> to provide for a further assessment of whole person impairment where there is a significant deterioration in a compensable injury.

Other concerns with WPI

- 118 I received one further submission in this area, from icare. It submitted that the current version of the Guidelines for assessing WPI are contributing to low value care and thus to increased medical expenses. That was so, icare submitted, because the present Guidelines apply AMA 5, which provides for an immediate uplift of WPI following certain surgeries, rather than AMA 6 which (in icare's submission) applies a more balanced test.
- 119 The AMA Guides are widely used in evaluating permanent impairment. They set out diagnostic and evaluative criteria, expressed as a percentage for an associated degree of impairment. They also specify how multiple impairments are combined to produce a

⁹⁴⁵ icare, *Medical Costs Submission – Final*, February 2021, 64

⁹⁴⁶ Interview with Law Society, 20 January 2021, at Notes 6-7

total value. The interpretation of the Guides and the exercise of clinical judgment is a matter for medical practitioners who have completed the approved training course for their application.

- 120 The WorkCover Medical Assessment Guidelines (now the NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment)⁹⁴⁷ are based on a template developed through a national process facilitated by Safe Work Australia, including methodology based largely on AMA 5 and drawing on work originally done in NSW.
- 121 The development of the Guidelines involved input from a large range of relevant stakeholders. The template on which they are based has been adopted at a national level. When the Guidelines were adopted at a national level, AMA 6 had been published. There must have been a decision not to adopt it. My Review has not identified any publicly available reasons for that apparent decision. However, it must be assumed that the decision to adopt of AMA 5 instead of AMA 6 was deliberate and reasoned. I should not recommend that it be changed without equivalent consideration.
- 122 Thus, I agree with the AMA's submission that any change to the Guidelines that are adopted should be undertaken after wide consultation, including of course with medical practitioners in the relevant specialties.
- 123 In the circumstances I have outlined, I do not propose to make any recommendation on this particular question. I do however suggest that SIRA consider icare's submission in the context of its ongoing work following the 2020 Healthcare Review.

29.3.3 '*Reasonably necessary*' test for medical expenses

- 124 Another matter raised by icare in its submission related to the test for medical intervention in section 60(1) of the WC Act 1987, that medical treatment need be '*reasonably necessary*'.⁹⁴⁸
- 125 icare submitted that there were three difficulties with the reasonably necessary test:
 - a) it allows for all types of treatments to be approved, including treatments considered to be '*low value*' or potentially '*harmful*',
 - b) it has led to the deemed pre-approval of a wide range of services and incidental expenses, which in turn has led to increased medical expenditure and costs for the schemes; and
 - c) its use as a test is inconsistent with the use of a '*reasonable and necessary*' test in similar personal injury schemes in NSW, and in Commonwealth schemes such as the NDIS.⁹⁴⁹
- 126 icare submitted that there should be a legislative change, to replace the '*reasonably necessary*' test with the '*reasonable and necessary*' test. icare referred to 'A Best Practice Workers Compensation Scheme' paper published by the ICA in May 2015, which states:

⁹⁴⁷ SIRA, *NSW workers compensation guidelines for the evaluation of permanent impairment – Fourth edition*, 1 March 2021.

⁹⁴⁸ WC Act 1987 s 60(1)

⁹⁴⁹ icare, *medical costs Submission to the Independent Review*, February 2021, 18-19

A best practice scheme will provide medical and other treatment that is 'reasonable and necessary', with payments made as costs are incurred. This definition has established jurisprudence. Treatment will include doctor visits, physiotherapy, surgery, other hospital, pharmaceuticals prostheses, occupational therapy, vocational rehabilitation and associated travel.⁹⁵⁰

- 127 icare also suggested the introduction of a new definition which 'supports value-based care for assessing and approving medical treatment within the NSW workers compensation system'.⁹⁵¹
- 128 As an interim measure, icare recommended that SIRA should introduce 'operational guidelines which clearly outline how the 'reasonably necessary' test should be applied, similar to the Lifetime Care and Support Guidelines or the Planning Operational Guidelines from the NDIS'.⁹⁵²

Legislative history

- 129 The *Workers Compensation Act 1926* provided for medical benefits as follows (emphasis added):

*Where total or partial incapacity for work results from the injury the compensation payable by the employer shall also include the cost of such medical, surgical and hospital treatment as may in the opinion of the commission reasonably be required to relieve the worker from the effects of the injury.*⁹⁵³
- 130 In 1929, the *Workers Compensation (Amendment) Act*⁹⁵⁴ amended section 10(1) to replace the 'reasonably be required' test with one referring to both necessity and reasonableness (emphasis added):

Where an injury is received by a worker, and medical or hospital treatment or ambulance service thereby becomes necessary the employer shall, subject to this section, and to the extent therein prescribed, be liable to pay in addition to any compensation otherwise provided the cost of such treatment or service as may be reasonably necessary, having regard to the injury received by the worker.
- 131 The phrase 'reasonably necessary' was subsequently adopted in section 60 of the WC Act 1987. It has remained the applicable test.

⁹⁵⁰ Insurance Council of Australia, *A Best Practice Workers Compensation Scheme*, May 2015, 34.

⁹⁵¹ icare, *Medical Costs Submission – Final*, February 2021, at 62

⁹⁵² icare, *Submission to the Independent Review - Financial Sustainability*, 18 November 2020, at [32-42] 8-9

⁹⁵³ *Workers Compensation Act 1926*, s 10(1).

⁹⁵⁴ *Workers' Compensation (Amendment) Act (No 36) 1929 (NSW)*

Meaning and impact of the definition

132 The meaning of reasonably necessary has been considered in several decisions, including *Rose v Health Commission (NSW)*⁹⁵⁵, *Diab v NRMA Limited*⁹⁵⁶, and *Bartolo v Western Sydney Area Health Service*⁹⁵⁷.

133 icare submitted that the reasonable and necessary test presents a ‘*higher burden*’ than the reasonably necessary test.⁹⁵⁸ It cited the decision of the NSW Court of Appeal in *State Super SAS Trustee Corporation v Perrin*.⁹⁵⁹ In that case, the Court affirmed the interpretation of the primary judge in *Rose v Health Commission* that ‘...the words “reasonably necessary” do not require absolute necessity... rather, the adverb “reasonably” modifies the strictness or exactitude of the adjective “necessary”’.⁹⁶⁰

134 The AMA also expressed the view that the reasonable and necessary test sets a higher bar than the test of reasonably necessary.

135 Decisions of the former WCC have stated on more than one occasion (although without clear reasons why) that the ‘*reasonable and necessary*’ test is a ‘*more demanding*’ test than ‘*reasonably necessary*’.⁹⁶¹ They did so by adopting the interpretation that ‘*the words “reasonably necessary” do not require the absolute necessity*’.⁹⁶² So far as my researches show, there has been no other superior court consideration of this question.

136 I start with the observation that the ‘*reasonable and necessary*’ test is plain as a matter of English. The meaning of each adjective is clear. There is no inconsistency in their dual application. They state two independent qualifications. Each must be applied, consecutively, to the subject they qualify: the proposed medical treatment. Together, they set a dual test it must satisfy if its cost is to be compensable.

137 By contrast, in my view, the adjectival phrase ‘*reasonably necessary*’ is unclear. In general, the test of necessity is an all or nothing one. Something cannot be partially necessary, any more than a person can be partially dead. However, the statutory language disregards that. It introduces a concept of modified necessity – the modification coming from the addition of the qualification ‘*reasonably*’ to the test of necessity. There is now but one, although compound, test for compensability.

138 The necessity for some particular form of medical treatment is a matter to be informed by expert opinion, by which the decision of a claims manager on the question of necessity ought be guided. Whether some form of treatment, being necessary, is reasonable is not purely a matter for experts. No doubt their views will assist in deciding the question of reasonableness. But in many, if not most, cases, there will be other relevant matters beyond the competence of medical experts to advise.

⁹⁵⁵ [1986] 2 NSWCCR 32 (4 July 1986).

⁹⁵⁶ [2014] NSWWCCPD 72.

⁹⁵⁷ (1997) 15 NSWCCR 233.

⁹⁵⁸ icare, *Submission to Independent Review– Financial Sustainability*, November 2020, [32-32] 8-9

⁹⁵⁹ *State Super SAS Trustee Corporation Ltd v Perrin* [2016] NSWCA 232 (1 September 2016)

⁹⁶⁰ *Ibid* at [58].

⁹⁶¹ *Diab v NRMA* [2014] NSWWCCPD 72; *Patrick Stevedores Holdings Pty Ltd v Fogarty* [2014] NSWWCCPD 76; *Lymbery v Shoalhaven City Council* [2016] NSWWCCPD 38.

⁹⁶² For example, *State Super SAS Trustee Corporation Ltd v Perrin* [2016] NSWCA 232

139 Thus, whilst I do not for a moment suggest that the reasonable and necessary test is one that is easy to resolve in all cases, the process leading to its resolution is dependent only on a consideration of the two elements.

140 By contrast, the resolution of the reasonably necessary test is unlikely to be straightforward. It involves the application of a compound adjectival phrase, the satisfaction of which requires a balancing of two mutually confusing elements with no indication as to which should have primacy.

141 Having said all that, I must say that I struggle to see why, in the great majority of cases, the application of one test rather than the other would produce significantly different outcomes. I accept that this is the view of the former WCC, icare and others. As a matter of legislative interpretation there is an available argument that the two tests use different language and therefore ought to be applied differently. But it is, I think, not insignificant that no-one has been able to produce a clear example of a situation in which the application of the two tests would lead to two different outcomes.

142 In my view, the test of reasonable and necessary has much to recommend it. The phrase is readily comprehensible as a matter of language. Any difficulty in its application is a product not of its verbal formulation, but of the factual circumstances in which it falls to be applied. The test has been judicially considered. It appears to be well understood, and readily applied in practice, in other schemes. And I repeat that I see no reason why it should be understood to set a more restrictive test than the current alternative.

143 That alternative, the reasonably necessary test applies only in the workers compensation scheme. It is not found in other schemes managed by icare, such as Lifetime Care and Support. This was perhaps unproblematic when the schemes operated independently, but that is no longer the case. The WC scheme, Lifetime Care and Support and CTP now fall within a shared operational and judicial structure. They share the same service provider and regulator, and are all subject to the jurisdiction of the (now) PIC. There are obvious benefits to having a consistent test applied across all schemes.

144 The AMA suggested that amending section 60 of the WC Act 1987 in the manner proposed by icare would add to delays in the provision of care for injured workers.⁹⁶³ Despite being given an opportunity to do so, the AMA provided no reasoned basis to support this assertion.

145 To the extent that the AMA identified delays in obtaining approval to treatment, they would appear to be consequences of the lack of appropriately qualified claims staff to consider and make swift decisions on the request for approval. That is something to be addressed by training and resourcing (as I have identified in *Part 1A*), not by fiddling with the definition.

146 I am strongly of the opinion that a definition that is easy to understand is more likely to be quickly applied than one that is not. That, in my view, is another consideration supporting the change I am about to recommend. Before I come to that recommendation, however, I should deal with some other submissions that were put on this issue.

⁹⁶³ AMA, *Submission to the Independent Review*, 18 March 2021, 1-2

147 The AMA also objected to a change in the test on the basis that the change would introduce a more restrictive test that would raise the bar for medical benefits to be paid. That submission was unsupported by reasons or evidence. For the reasons I have indicated, I do not accept it.

148 The AMA disputed icare's submission that use of the reasonably necessary test had led to increases in medical costs and in negative patient outcomes.⁹⁶⁴

149 In my view, icare is likely to better informed as to the impact that the test is having on medical expenses. However, there is insufficient evidence to allow me to come to a clear decision one way or the other on the cost issue. Likewise, I cannot come to a clear decision on the relationship (if any) between the present test and medical outcomes.

150 On my understanding of the two tests, I see no reason to think that the adoption of the reasonable and necessary test would be likely to have a significant adverse effect on patients' outcomes. However, against the possibility that it may, those outcomes ought to be monitored.

151 I recommend:

Recommendations	
Medical treatment	
39	That the legislature give consideration to amending section 60 of the <i>Workers Compensation Act 1987</i> to replace the words 'reasonably necessary' with the words 'reasonable and necessary'.

29.3.4 Other medical-related issues

152 icare submitted that the 21 day time period under section 279 of the WIM Act to accept or decline liability for a medical expense claim creates difficulties for case managers to make appropriate decisions either to approve or to decline requests for treatment.⁹⁶⁵ If no decision is made within that time, medical expenses are deemed to have been approved.

153 I see nothing inherently unreasonable in a 21 day period. Difficulties in making a decision within that time appear to be a matter for staff training, which I have commented on in *Part 1A*. Further, and bearing in mind the AMA's advice emphasising the importance of swift treatment, I consider that extending the period could lead to serious detriment to injured workers.

154 icare also raised a concern as to the pre-approval of some allied health provider services. In brief, SIRA's Guidelines effectively give injured workers 'pre-approval' for a certain number of treatments from allied health providers.⁹⁶⁶ Where those Guidelines apply, injured workers do not require the insurer's approval for the services in question.

⁹⁶⁴ Interview with AMA, 24 February 2021, at Notes 2-3

⁹⁶⁵ icare, *medical costs submission to the Independent Review*, February 2021, at [48] 16

⁹⁶⁶ SIRA, *Workers Compensation Guidelines*, March 2021 at Table 4.2 13-14.

155 icare submitted that SIRA should increase the number of services which require the insurer's approval, thereby reducing the number which are automatically available under SIRA's Guidelines. It submitted that this change could save of the order of \$6.6 million to \$10.0 million in annual medical expenditure across the workers compensation schemes.⁹⁶⁷

156 That submission must be balanced against other submissions made to me, that workers continue to experience delays in receiving access to medical treatment. I have concluded previously that it is unclear whether there are any systemic delays, and that such delays as there are may be improved by better claims management. However, given the continued concerns about delays I do not think it either necessary or advisable to increase the number of medical services which require pre-approval by an insurer. Such a change would increase delays in approvals, and put further pressure on claims management.

29.4 Other issues raised with the Review

29.4.1 Compromise of disputed claims

157 A number of submissions to my Review referred to various kinds of dispute as to entitlement which are not able to be compromised, or areas where the process of compromising and finalising a claim could be improved.

158 The former WCC noted that neither the WC Act 1987 nor WIM Act contains any mechanism which allows the parties to compromise disputed lump sum death benefit claims. The lump sum death benefit (and associated compensation entitlements) are either payable in full, or they are not payable at all, depending on the outcome of proceedings in the Commission.

159 This position has obvious potential to cause significant distress to the families of workers who are killed in workplace accidents. There is no principled reason why they should not be able to compromise claims, so long as there is appropriate oversight of the compromise. The PIC is well placed to carry out that function, and to make a determination as to approval of a compromise.

160 I recommend that the legislation be amended to give parties the power to compromise disputed death benefit claims, subject to approval of the compromise by the PIC.

161 icare noted that commutation, a procedure whereby an ongoing entitlement to benefits can be commuted to a single lump sum payment, '*has become almost obsolete under the current criteria*'.⁹⁶⁸

162 Commutations, in icare's submission, can provide greater choice and flexibility to injured workers, allowing them to remove themselves from ongoing contact with the scheme, and encouraging timely resolutions of claims.⁹⁶⁹ icare propose, that eligibility criteria be made less stringent, so as to encourage greater take-up of commutation by injured workers. icare recommend that the pre-conditions for commutation should be no likelihood of RTW and a WPI of greater than 10 per cent.⁹⁷⁰

⁹⁶⁷ icare, *medical costs Submission to the Independent Review*, February 2021; *interview with icare - medical costs follow up*, 11 December 2020, at Transcript 24:Q52

⁹⁶⁸ icare, *Submission on potential legislative amendments*, 10 February 2021 at [65].

⁹⁶⁹ *Ibid* at [61-63]

⁹⁷⁰ *Ibid* at [67]

163 As with compromises, it is my view that any commutations should be subject to approval by the PIC.

164 The Law Society suggested that both employers, particularly those who self-insure, and employees would be supportive of a statutory mechanism to facilitate settlement of claims.⁹⁷¹ The submission was not developed in detail, and there is no other material before me supporting a recommendation that this be done. Nonetheless, I agree that any measures that may increase the early resolution of claims, and decrease disputes, are desirable.

165 I suggest that when (if it happens) my recommendations as to amendment of the WPI test are considered, this proposal be considered as well.

166 No-one would contest the proposition that disputes as to benefits should be minimised as far as possible, consistent with fairness to all concerned. This goal has guided significant legislative changes in the past, including to benefit tests and the creation of independent review and dispute resolution avenues.

167 There are also significant psychosocial benefits in allowing workers and their families to settle claims, avoid the ongoing stress and difficulty that pursuit of a claim can create, and get on with their lives.

168 I accordingly recommend:

Recommendations	
Commutation and settlement	
40	That the legislature give consideration to expanding the powers of commutation and settlement of lump sum death benefits, subject to the approval of the Personal Injury Commission.

29.4.2 Other matters

169 A number of additional matters have been raised in individual submissions throughout the course of this review.

170 Some related to specific concerns about benefits or claims management under the legislation. Some do not appear relate to broader systemic issues within the workers compensation scheme. Although those issues are beyond the scope of my review, they are clearly significant to those who raised them. They should be considered by SIRA and the legislature as appropriate. I have listed those submissions in *Appendix 3*.

30 Review of the government-managed schemes

171 My Terms of Reference require me to review the NI and TMF and the legislative framework that supports them. This includes reviewing their policy objectives, financial sustainability, and legislative and regulatory structures.

⁹⁷¹ Interview with Law Society, 20 January 2021, at Notes 6-7

172 In this section of the Report, I consider the policy objectives of the legislation, and whether the structures of the two schemes are suitable for achieving those objectives. In [31 below](#), I consider the financial sustainability of the schemes.

30.1 Nominal Insurer

30.1.1 History of the NI

173 The Nominal Insurer was established in 2003 by the *Workers Compensation Amendment (Insurance Reform) Act 2003*.⁹⁷² That legislation was based on a review carried out by McKinsey and Company ‘Partnerships for Recovery: Caring for injured workers and restoring financial stability to workers compensation in New South Wales’.⁹⁷³

174 Prior to 2003, general insurers provided all elements of workers compensation insurance, on open-ended contracts. The scheme funds were held separately from the funds of the insurer, and on trust for the employers. The insurers otherwise conducted all insurance activities: managing the assets of the fund; issuing premiums; and managing and paying claims.

175 In 2003, the scheme was facing a major deficit. This created the context for the McKinsey Review and the reforms that resulted. McKinsey concluded that the structure of the scheme needed improvement, in particular to improve claims management and thereby financial performance.⁹⁷⁴

176 McKinsey advised that the necessary improvements required separating:

- the role of managing the investment fund, to be carried out by the NI, operated by WorkCover; and
- the role of claims management, to be carried out by specialist claims agents engaged by WorkCover, on behalf of the NI, on fixed-term, incentive-driven contracts.⁹⁷⁵

177 The underlying intention was that the increased specialisation of functions and active management of claims would deliver financial benefits for the scheme and improved outcomes for workers.⁹⁷⁶

30.1.2 Structure and purpose of the NI

178 The NI is established as a legal entity by section 154A of the WC Act 1987 (as amended in 2003). The current version of that section states:

154A Establishment of Nominal Insurer

- There is established by this Act a Workers Compensation Nominal Insurer.
- The Nominal Insurer—

⁹⁷² *Workers Compensation Amendment (Insurance Reform) Act 2003 (NSW) No 81*

⁹⁷³ McKinsey and Company, *Partnerships for Recovery: Caring for injured workers and restoring financial stability to workers compensation in New South Wales*, 2003, 11

⁹⁷⁴ *Ibid*

⁹⁷⁵ *Ibid* 11-13

⁹⁷⁶ Legislative Assembly, *Workers Compensation Amendment (Insurance Reform) Bill Second Reading Speech, NSW Legislative Assembly*, 12 November 2003, 1

- (a) is a legal entity, and
- (b) may take proceedings and be proceeded against in the name of the Workers Compensation Nominal Insurer, and
- (c) may, for the purpose of enabling it to exercise its functions, purchase, exchange, take on lease, hold, dispose of and otherwise deal with property, and
- (d) may do and suffer all other things that persons may, by law, do and suffer and that are necessary for, or incidental to, the exercise of its functions.

(3) The Nominal Insurer is not and does not represent the State or any authority of the State.

(4) For the avoidance of doubt, the Nominal Insurer is not a government agency for the purposes of Part 11 of the *Public Works and Procurement Act 1912*.

179 By section 154B, the NI was granted an unconditional licence to operate, and granted broad powers and functions to allow it to operate to the fullest extent:

154B Functions of Nominal Insurer

- (1) The Nominal Insurer is taken to be a licensed insurer as if it were the holder of a licence in force under Division 3 of Part 7 and as if that licence were not subject to any conditions.
- (2) The Nominal Insurer has such functions as may be necessary or convenient for enabling the Nominal Insurer to function and operate to the fullest extent as a licensed insurer.
- (3) Without limiting subsection (2), the Nominal Insurer may issue directions to any employer with respect to the insurance arrangements of the employer.
- (4) The Nominal Insurer has such other functions as may be conferred or imposed on the Nominal Insurer by or under this or any other Act or law or by the regulations.
- (5) The liabilities of the Nominal Insurer as insurer under a policy of insurance can only be satisfied from the Insurance Fund and are not liabilities of the State, ICNSW or any authority of the State.

180 As can be seen, the NI is formally separated from the State. No Minister is appointed as Responsible Minister for the NI.

181 WorkCover, which formerly acted for the NI, was subject to the direction and control of the Responsible Minister. WorkCover was also the regulator of the NI, being the regulator of the scheme as a whole.

182 It was expected that the NI would both manage scheme funds and be the vehicle for contracting with service providers to provide claims management and other necessary services for the scheme. The design involved a move away from independent insurers towards a model where the entirety of the insurance functions were controlled ultimately by WorkCover, while keeping insurance funds and liabilities separate from government.

183 The legislative structure appears to reflect three broad policy objectives:

- a) establishment of a government default insurer, or insurer of last resort, for employers who do not self-insure and do not have access to specialised insurance.
- b) Financial separation of the scheme's assets and liabilities from the assets and liabilities of the State.
- c) A means to provide government with effective oversight of workers compensation operations, by giving a government agency direct control over the

delivery of workers compensation insurance. It was expressly anticipated that this would improve performance of the scheme.⁹⁷⁷

- 184 It is possible that in 2003, the status and independence of the NI were not perceived as unusual, and not likely to result in any risk to the scheme. The context is important. The NI was set within the well-established organisational structure of WorkCover as the functional vehicle for delivering the reforms that McKinsey recommended.
- 185 When icare was established, no substantive adjustments were made to the status or structure of the NI. icare was appointed instead of WorkCover to act for the NI. The underlying structure remained unchanged.⁹⁷⁸

30.1.3 Delivery of policy objectives

A single statutory default insurer

- 186 I note that privatisation was last considered in 2015. Treasury provided detailed advice on how a privately underwritten scheme would work: see its '*Strategic Insurance Review*'⁹⁷⁹ that preceded the SICG Act. Having considered this advice, the government made the decision to maintain public underwriting.
- 187 Some stakeholders suggested that privatisation might have benefits.⁹⁸⁰ For example, the NIBA submitted that legislative arrangements which include private insurers as underwriters '*generally deliver better outcomes to injured workers and their employers*'.⁹⁸¹ This is based on the idea that market competition would drive improved performance. Stakeholders also suggested that private insurers would be more accountable.
- 188 Those propositions are at best debateable. It is entirely unclear how the economics and performance of the scheme can be improved if some of the underwriting participants are seeking to make profits for shareholders. There is no reason to think that a proliferation of management activity would do anything other than increase costs overall. Nor is there reason to think that closer management, aimed at cutting costs, would do anything other than cut down on the payment of benefits.
- 189 In my view, this policy objective - a single default statutory insurer - is as sound today as it was in 2003.

Financial separation from the State

- 190 In 2003, when Parliament created the NI, the then Minister said that it was the '*longstanding position of Government that the workers compensation funds are the responsibility of the employers of New South Wales*'.⁹⁸²

⁹⁷⁷ Legislative Assembly, *Workers Compensation Amendment (Insurance Reform) Bill Second Reading Speech*, 12 November 2003, 1-2

⁹⁷⁸ Save for the addition of the exemption of the NI from the public sector procurement rules via s 154A(4).

⁹⁷⁹ NSW Treasury, *Strategic Insurance Review*, May 2015, 51-59

⁹⁸⁰ Business NSW, *Submission to the Independent Review*, November 2020, 4; and NIBA, *Submission to the Independent Review*, October 2020, 5

⁹⁸¹ NIBA, *Submission to the Independent Review*, October 2020, 5

⁹⁸² Legislative Assembly, *Workers Compensation Amendment (Insurance Reform) Bill Second Reading Speech*, NSW Legislative Assembly, 12 November 2003, 2

191 This position remains relevant today. The NI scheme insures private sector employers for the benefit of their workers. Those employers should pay the cost of that insurance, if only to avoid the obvious moral hazard flowing from cost-free indemnity. It should not fall on the State.

192 Treasury has advised me that it continues to support the financial separation of the NI from the State's finances.⁹⁸³ There are clear policy reasons to keep a workers compensation fund, provided for the benefit of private employers and workers, structurally separate from state finances.

193 As noted in *Part 1A*, the financial position of the NI is at present sustainable. If claims and other costs are managed properly, and premiums are set at realistic levels, there should never be a need for government to intervene.

194 I therefore find that this policy objective remains sound. I have identified no legislative changes necessary to achieve this outcome.

Effective facilitation of the operation of the scheme

195 Business NSW and NIBA made submissions as to the unique legal position of the NI – that is, its position as a statutory insurer without a number of the accountability mechanisms which apply to private insurers. Both entities have suggested this structure be further examined.

196 Business NSW expressed concern that under the current legislative framework, there is no trustee who could be held liable for the WCIF, nor is there any mechanism to hold directors personally liable in the event of a breach of provisions relating to the WCIF.⁹⁸⁴

197 Prior to 2002, the WC Act 1987 established a statutory fund, and provided that in the event of a breach of provisions relating to conduct of the fund, directors of the licensed insurers would be held liable as if they were trustee and policy holders were the beneficiaries. Following the *Workers Compensation Amendment (Insurance Reform) (No 81) Act 2003*, provisions relating to liability of directors as a trustee were removed from the WC Act 1987.

198 Although the WCIF is a statutory trust,⁹⁸⁵ the State, the Nominal Insurer, icare, and any authority of the State are expressly declared not to be trustees. Nor are they either liable to meet any deficit, or entitled to any surplus. The legislation provides that the NI is a legal entity and that icare, as agent for the NI, manages its funds. Business NSW suggests that this framework is akin to that of a trust, and that '*this implies that either the nominal insurer or the manager of the Insurance Fund is the trustee*'.⁹⁸⁶

199 Business NSW suggests further that '*[i]n the interests of clarity and to strengthen the level of accountability within the NSW workers' compensation system, the identity of the trustee needs to be confirmed*'.⁹⁸⁷ It has suggested this could be achieved, either through declaration of the Supreme Court or by amending the legislation.⁹⁸⁸

⁹⁸³ NSW Treasury, *Treasury response to Independent Reviewer request*, 22 February 2021, 10

⁹⁸⁴ Business NSW, *Submission to the Independent Review*, November 2020, 4

⁹⁸⁵ See section 154D of the WC Act 1987

⁹⁸⁶ Business NSW, *Submission to the Independent Review*, November 2020, 4

⁹⁸⁷ *Ibid*

⁹⁸⁸ *Ibid*

200 I do not understand how the Supreme Court could make such a declaration in the absence of a justiciable controversy which it would quell. More importantly, I do not think that the interposition of an express trust with an express trustee would have any beneficial impact on supervision.

201 Treasury commented that:

The legislated separation [of the NI] from the state departs from the practical reality of an entity managed by a government agency, that is a near-monopoly provider of government-mandated insurance. The experience of the media and Parliamentary interest in 2020 shows that public expectations see the NI as fundamentally a NSW Government entity. Treasury considers that it must create challenges for icare in balancing these expectations with the legislative intent.⁹⁸⁹

202 The legislature's intention in 2003 was to move the operation of the scheme away from general insurers carrying out all the functions of the scheme. Instead, specialisation was seen as a key means to drive improvement. The NI was created to facilitate this.

203 It is understandable that there is a public perception that the NI is an entity of government. It is, after all, the product of the radical change to the scheme effected in 2003. That change removed any scope for private underwriting except in the limited areas of self-insurance and specialised insurance. Further, the NI had always been managed by a Government agency, and icare, the current manager, is answerable to the Treasurer.

204 Nonetheless, as the legislation makes clear, the NI, although a creature of government is not supported, financially or otherwise, by government. The extent of Governmental responsibility is limited to the exercise of the regulatory, management and oversight powers for which the legislation provides. It is difficult to disagree with the concluding sentence of the quotation set out in [201 above](#).

205 The context for accountability has changed. In 2003, the NI, with its unusual features, was set in a well-established organisational structure, with close links to the Responsible Minister and therefore government.

206 In 2015 the NI's new manager, icare, was given organisational independence from government. Ministerial powers over it are indirect. This effectively places the NI at significantly greater distance from government than it was in 2003. That is not entirely consistent with the 2015 structural reforms' stated objective of achieving greater transparency and accountability.⁹⁹⁰

207 There are differing views as to whether the current structure of the NI's operations meets the objectives of transparency and accountability that were central to the 2015 structural reforms. However, I do not recommend fundamental structural change. There has been more than enough upheaval over the last 20 years, some of it resulting from legislative amendments and some, in the past six years, resulting from the matters that led to this Review.

208 My present view is that icare should be given time to establish itself as a prudent, competent and accountable manager. I understand the frustration of those who say it

⁹⁸⁹ NSW Treasury, *Treasury response to Independent Reviewer request*, 22 February 2021, 10-11

⁹⁹⁰ Legislative Assembly, *Workers Compensation Amendment Bill 2015 and State Insurance And Care Governance Bill 2015 Second Reading Speech*, 5 August 2015, 3

has been given more than enough time to do so. But there are very persuasive signs that icare's belated acceptance of the problems of the past, and its desire to refashion itself, will lead to belated fulfilment of the objectives of the 2015 structural reforms.

- 209 On balance, I think that if the changes recommended in this Report, and by the various consultants who have been retained, are implemented, the result should be a workers compensation system in this State that delivers fairly to injured workers the full measure of their statutory entitlements, and does so efficiently and at the least cost possible to employers. However, until that happy situation is reached, careful and continuous oversight of icare's operations will continue to be essential.
- 210 The reason I commenced the preceding paragraph with the words "on balance" is that the alternative to continuing with icare as manager of the NI is further upheaval. That can only result in additional short-term cost, and more importantly, a further loss of confidence in the system. Until there is clear evidence that the present model is broken beyond repair (and in my view there is not), there is no justification for its wholesale replacement.
- 211 In short, I consider that the current operational structure is capable, with careful oversight, of facilitating the efficient operation of the scheme.

30.1.4 Unconditional licence

- 212 One significant and controversial aspect of the current scheme is the deemed unconditional licence granted to the Nominal Insurer under section 154B of the WC Act 1987. The NI '*is taken to be a licensed insurer*', but as if the licence were not subject to conditions.⁹⁹¹
- 213 SIRA, Business NSW, the Ai Group, Australian Lawyers Alliance and Treasury all expressed concern over the NI's unconditional licence. Their submissions propounded the view that because the NI's licence was unconditional, there was insufficient oversight of its operations. That suggested lack of oversight was said to have contributed to the issues seen in the delivery of services.
- 214 These submissions largely agreed on the need for greater control, transparency and oversight of the NI. However, there were significant differences as to what should be done to address this issue.
- 215 Business NSW suggested the WC Act 1987 be amended to clarify that the NI and its agents should be subject to conditions imposed by SIRA.⁹⁹² Treasury also noted in principle support for the NI's being made subject to the same regulatory regime as other insurers.⁹⁹³
- 216 The Ai Group, while noting that there were problems arising from the NI's unconditional, said that '*...it is unclear how a better option could be implemented*'.⁹⁹⁴ It concluded that '*...it is highly unlikely that any legislative option would create a real lever associated with SIRA being in a position to remove the licence from icare*'.⁹⁹⁵

⁹⁹¹ WC Act 1987 s 154B

⁹⁹² Business NSW, *Submission to the Independent Review*, November 2020, 6

⁹⁹³ NSW Treasury, *Treasury response to queries raised in the icare Independent Review*, 22 February 2021, 11

⁹⁹⁴ Australian Lawyers Alliance, *Submission to the Independent Review*, 28 October 2020, 4,

⁹⁹⁵ *Ibid*

217 I agree (as I will discuss in *Part 3*) that there is merit in enhancing SIRA's powers to regulate the NI, and to regulate icare more directly. SIRA is at present in the invidious position of having power to regulate the NI without having any direct method of enforcing that power through licence conditions.

218 However, there remains one fundamental limitation to any suggestion that the Nominal Insurer be subject to licence conditions. If the NI is to operate as a default insurer and insurer of last resort, it is not realistically possible for the NI's licence to be revoked. It is a situation analogous to the '*too big to fail*' problem that has bedevilled governments world-wide over the past 20 years. If a breach of a condition cannot in the real world lead to revocation, the power to impose conditions lacks the ultimate sanction of loss of licence.

219 Is that real world position unassailable? For the present, I think, it is. Any change to the position of the NI as default and last resort insurer – and this would be the result of cancellation of its licence – would mark a fundamental move away from the policy objectives of the 2003 and 2005 amendments. That is not an insurmountable obstacle to change, but it is a change that requires very detailed consideration, far beyond the scope of this Review

220 I should make it clear that I do not hold the view that any conditions are valueless in the absence of effective coercive powers for breach. The imposition of conditions, if well drafted, would provide clear guidance as to expected behaviour. The breach of a condition would lead to significant public pressure. Executives could be made responsible for performance of conditions by tying fulfilment of licence conditions to their remuneration, and by making a finding of breach punishable by loss of employment.

221 On balance, in my view, the privileged status of the NI, as the deemed holder of an unconditional licence, should be removed. I think that the knowledge that conditions may be imposed is capable of being of itself a spur to proper performance. And if conditions are imposed, their breach may have at least the consequences just outlined.

222 The imposition of conditions should not be seen as an alternative to the enhancement of existing oversight of the NI. On the contrary, the two should work in symbiosis. I have made a number of recommendations throughout this report that are intended to strengthen effective regulation of the NI, whilst avoiding over-regulation. The implementation of those recommendations in conjunction with the imposition of appropriate and well drafted licence conditions should do much to strengthen effective oversight of the NI's operations, public confidence in the NI, and icare's accountability for its management of the NI.

223 I therefore recommend:

Recommendations	
Unconditional licence of the NI	
41	That the legislature give consideration to amending section 154B of the <i>Workers Compensation Act 1987</i> by deleting from subsection (1) the words 'and as if that licence were not subject to any conditions'.

30.1.5 The NI's exemption from Part 11 of the *Procurement Act 1912*

224 Section 154A(4) of the WC Act 1987 has the effect of exempting the NI from the obligation to comply with a number of government procurement rules. The existence and use of this exemption has been the subject of considerable media attention and submissions.

225 I have addressed icare's use of the NI exemption in detail in *Parts 1A and 1B* of this Report. As I state there:

- a) there was an organisational focus on getting things done: what icare termed a 'transformational' approach. This was accompanied by, and is likely to have contributed to, an understanding within icare that the NI exemption should be used as much as possible to avoid '*red tape*'. That created a culture that saw icare and the NI disregard, and fail to embed within the organisation, sound procurement practices;
- b) the NI exemption was relied upon in a number of large procurements. I have found that the use of the exemption gave rise to significant concerns as to the transparency not only of the procurements themselves but also of the procurement process overall;
- c) the reports of RSM and PWC make it clear that the existence of the NI exemption, and the apparent understanding of it held by staff, contributed directly to the deficiencies in process that were exemplified in the procurement examples they considered; and
- d) icare has since attempted to limit its use of the NI exemption, including by requiring Board approval of all uses of the exemption.

226 I have made recommendations directed towards ensuring that icare's procurement practices and culture improve.

227 I note that although the express exemption (section 154C(4)) was added to the Act in 2015 '*for the avoidance of doubt*', it appears to be clear that the exemption had applied, or had been understood to apply, to the NI since its inception. There are sound policy reasons why the NI should have that exemption available to it. It is not a state agency (WC Act 1987 section 154C(3)), and its funds are separate to the funds of the State. As a result, the NI does not have the same policy imperative to follow government procurement rules which apply to an agency which draws on government funds. The NI also competes, in a limited sense at least, with self and specialised insurers who are not subject to government procurement rules.

228 The exemption supports the policy aim of allowing the NI to compete in the market for services, and contract flexibly with service providers for the efficient delivery of workers compensation services. It is arguable that, without the exemption, scheme agents and others acting for on behalf of the NI might also be subject to government procurement requirements.

229 Further, as icare submitted to me,⁹⁹⁶ the removal of the exemption might have unintended consequences. I should not lightly recommend any changes to it if the same outcome can be achieved by other means.

⁹⁹⁶ icare, *Submission – Nominal Insurer Exemption from Procurement Act*, 18 March 2021

230 There is no doubt that the NI exemption – more accurately, the way in which it was understood and used - contributed to poor procurement practices in the past. Those practices cannot continue. Although icare and the Nominal Insurer are separate from government, they exist and act for the benefit of employers and workers. The funds they spend are provided by employers for the benefit of workers. It is essential that those funds be spent with appropriate attention to sound probity and procurement policies.

231 However, the problems of the past do not compel a conclusion that the NI exemption must go. On balance, I consider that there is no present need for its removal. icare's recent steps to limit reliance on the exemption, supported and informed by the recommendations set out in this Report, should be sufficient to avoid a repetition of the issues identified.

232 I should make it clear that this book is not, as it were, closed. If the steps that icare has taken prove ineffective, or if poor probity and procurement practices resurface, it may be necessary to reconsider the exemption.

30.1.6 icare support solutions Pty Ltd

233 In its submission to this Review, SIRA noted that there is a range of persons and entities that it is unable to regulate. SIRA submitted that:

SIRA has broad powers to issue directions and conduct performance audits under section 194 and 202A of the Workers Compensation Act 1987. Both provisions, however, are limited to licensed insurers and self-insurers. These powers do not extend to SI Corp (who is not an insurer), icare (it would only apply to icare insofar as icare is acting for the Nominal Insurer) or scheme agents of IC1 Pty Ltd (a created corporate subsidiary of icare, that holds the contracts with scheme agents).⁹⁹⁷

234 Business NSW appears to suggest that the contractual arrangements which icare, through a subsidiary company icare Support Solutions Pty Ltd, has made with EML may help to circumvent regulation by SIRA.⁹⁹⁸

235 icare no longer use subsidiaries to contract with claims management providers. icare Support Solutions Pty Ltd was deregistered on 21 January 2021. icare has confirmed that contracts with claims management providers are entered into directly by icare, the NI or SI Corp, depending on the relevant scheme.⁹⁹⁹

236 Nonetheless, there remains a possibility that if the use of such structures resumes, it may thwart the effective performance of SIRA's role. That is a matter to be addressed when I turn to the issue of SIRA's regulatory powers in *Part 3* of this Report.

30.2 Treasury Managed Fund

30.2.1 Structure and purpose of the TMF

237 The TMF was established in 1989 to replace and centralise the insurance that individual NSW Government agencies previously arranged separately.

⁹⁹⁷ SIRA, *Submission to the Independent Review*, November 2020, 24-25

⁹⁹⁸ Business NSW, *Submission to the Independent Review*, November 2020, 7-8

⁹⁹⁹ icare, *Response to Parts C and D of Draft Report*, 21 April 2021, 3

238 The TMF is a vehicle for self-insurance, not insurance in the traditional sense. The government provides and holds money within the Fund for risks and costs that would otherwise have been addressed by traditional insurance. Self-insuring allows government to it avoid the costs of private insurance, such as brokerage and the insurer's profit margin. It is standard practice for governments across the world.

239 The current legislative form of the TMF is established by the *NSW Self Insurance Corporation Act 2004*.¹⁰⁰⁰ That Act, in section 11, creates a self-insurance fund as one of SI Corp's functions. As noted elsewhere, the self-insurance fund covers both workers compensation claims and general lines claims (property, motor, liability, etc).

240 Division 5 of the WC Act 1987 recognises that the TMF will cover workers compensation claims. Section 211B provides:

211B Government employers covered by Government managed fund scheme to be self-insurers

(1) Any Government employer covered for the time being by the Government's managed fund scheme is taken to be a self-insurer for the purposes of this Act.

(2) The Government's managed fund scheme is any arrangement under which the self-insurer liabilities (within the meaning of section 216) of particular Government employers covered by the arrangement are paid by the Government of the State or by the Self Insurance Corporation on its behalf.

(3) The Self Insurance Corporation may enter into an arrangement with the Authority under which the Corporation acts on behalf of Government employers for the purpose of paying contributions under this Act and for other purposes of this Act.

(4) The other provisions of this Division do not apply to self-insurers referred to in this section. However, the Authority may, with the approval of the Treasurer, impose conditions on the authority conferred by this section on such self-insurers (being conditions of a kind that the authority could impose on the licence of a self-insurer under this Division).

(5) This section does not apply to any Government employers who are separately licensed under this Division as self-insurers.

241 Almost all NSW Government agencies cover their workers compensation liabilities under subsections (1)-(4) above.

242 The SICG Act¹⁰⁰¹ appoints icare to 'provide services' to the TMF.

243 In contrast to the NI, there is clear ministerial accountability for SI Corp. Section 4 (3) of the *NSW Self Insurance Corporation Act 2004* states that the corporation is 'subject to the control and direction of the Minister in the exercise of its functions'.

244 The 2015 structural reforms that brought icare into existence made no substantive change made to the underlying form of the TMF or SI Corp.

30.2.2 Policy objectives

Self-insurance

245 It is beyond the scope of this review to consider whether self-insurance is an appropriate approach to managing the government's liabilities. I do however note that no stakeholder has suggested to me that there is any fundamental issue. Nor do I see

¹⁰⁰⁰ NSW Self Insurance Corporation Act 2004 (NSW) No 106.

¹⁰⁰¹ SICG Act s 10(10(b))

one. As previously noted, Treasury considers that the financial arrangements of the scheme are working well from its perspective.¹⁰⁰²

Powers of SIRA over the TMF

246 SIRA has highlighted what it says are problems with the structure of the TMF. It submitted that:

The workers compensation legislation provides that the NSW Government employer is the self-insurer. This means that SIRA does not have adequate compliance and enforcement power over SICorp, icare, or a claims agent engaged by icare. Instead, SIRA's enforcement powers are focused on the deemed Government self-insurers, who may have little control and influence over claims management under current arrangements.

SIRA is unable to impose licence conditions on the TMF government employers in the same way that it can with other self-insurers licensed by SIRA. SIRA contends that the legislation should enable SIRA to impose licence conditions independently on all insurers, including government self-insurers ... to remove legislative ambiguities and provisions that reduce SIRA's ability to hold insurers accountable.

*The existing lack of clarity and functional ownership in the TMF structure limits SIRA's ability to enforce the legislation, regulation, and guidelines.*¹⁰⁰³

247 Treasury has advised me that it supports a review of these structures, directed to finding ways of improving accountability for their operations.¹⁰⁰⁴

248 In the context of the QBE – Corrective Services claims mismanagement issue discussed in *Part 1A*, SIRA has provided an illustration of both the complexity of the structures and its limited powers:¹⁰⁰⁵

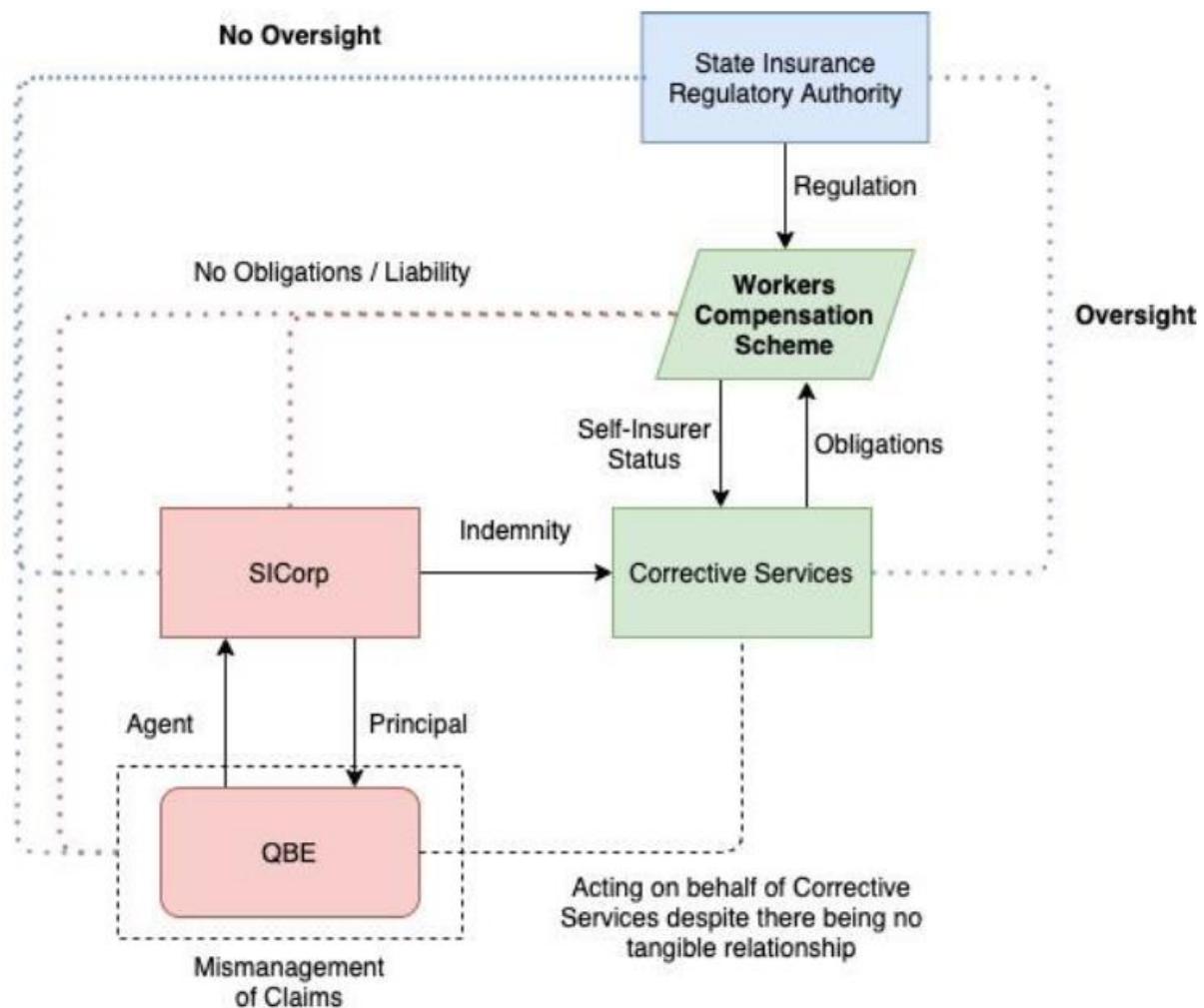
¹⁰⁰² NSW Treasury, *Treasury response to Independent Reviewer request*, 22 February 2021, 6-8

¹⁰⁰³ SIRA, *Submission to the Independent Review*, November 2020, 24-25, .

¹⁰⁰⁴ NSW Treasury, *Treasury response to Independent Reviewer request*, 22 February 2021, 11

¹⁰⁰⁵ SIRA, *Response to questions*, 25 February 2021, 3

Figure 45: Relationship between the parties involved in the QBE-Corrective Services claims mismanagement issue



Source: SIRA, *Response to questions*, 25 February 2021, at 3

- 249 I accept that these arrangements are not entirely consistent with the objectives of accountability and transparency that underpinned the 2015 structural reforms. I can see no reason why icare (and for that matter any other agent providing claims management services to a government employer) should not be directly accountable to the regulator for the management of a TMF workers compensation claim.
- 250 Further, the structure outlined above does not meet government's intention, appearing in the Second Reading speech for the SICG Act, that there should be a '*consistent and robust approach to the monitoring and enforcement of insurance and compensation legislation in this State*'.¹⁰⁰⁶
- 251 I recommend in *Part 3* that the power of SIRA in respect of a licensed insurer ought to be extended to icare, SICorp and government self-insurers unless expressly excluded, although only to the extent necessary for SIRA to perform its functions. In my view, that, if done, will resolve the present problem.

¹⁰⁰⁶ Legislative Assembly, *Workers Compensation Amendment Bill 2015 and State Insurance And Care Governance Bill 2015 Second Reading Speech*, 5 August 2015, 3

31 Financial sustainability of the schemes

31.1 Financial sustainability of the NI

252 The NI scheme does not have the benefit of an explicit or implicit guarantee from the State. In this, it differs from the TMF (and from workers compensation schemes in some other jurisdiction). Thus, if the financial sustainability of the NI is threatened, there are only two ways to correct the situation. Premiums can be increased, or benefits can be reduced. Neither is palatable.

253 In 2012, when the scheme was facing a \$4 billion deficit¹⁰⁰⁷, the legislature decided to address that problem by reducing benefits rather than by increasing premiums. That was affected by the 2012 amendments,¹⁰⁰⁸ following the recommendations of a Parliamentary Select Committee.¹⁰⁰⁹ As I have noted already in *Part 1B*, premiums have reduced since 2012.¹⁰¹⁰

31.1.1 Current financial position of the scheme

254 The media allegations and SCLJ hearings have raised concerns about the financial sustainability of the NI. Many submissions to my Review raised similar concerns, some, no doubt, influenced by the media coverage.

255 As noted in *Part 1A*, NSW Treasury engaged an independent firm of consulting actuaries, CS to assist this Review. I refer to the conclusions of their work throughout this section.

256 CS concluded that icare's estimate of the current liabilities of the scheme, which as I have noted in *Part 1A*, has been audited and in effect doubly checked, was reasonable.¹⁰¹¹ CS further found that, if premiums increase as icare plans, the financial sustainability of the scheme should be maintained.¹⁰¹² That of course will require the close and careful monitoring of operational costs – in particular, claims costs.

257 I accept that the Accounting Funding Ratio (AF Ratio) has fallen substantially in recent years from its historic high in the mid-2010s. However, when the sustainability of the scheme is considered using the EF Ratio, so that liabilities and assets are assessed on a common and realistic basis, there is no immediate risk that the NI will be unable to pay benefits. To the extent that there is a solvency risk, it exists in the longer term, and with appropriate premium rates and effective management of claims, the time and the tools to avert that risk are available.

258 However, there is no room for complacency. It is essential that the stability of the NI be monitored continuously, and that icare take prompt and effective action should any existing risks crystallise, or new risks be identified. That action must start with the careful management of claims. Next, if and to the extent necessary, premiums should be increased to a level that will ensure that the scheme remains sustainable. I do not

¹⁰⁰⁷ NSW Parliament, *Joint Committee on the NSW Workers Compensation Scheme – Final Report*, 13 June 2012

¹⁰⁰⁸ *Workers Compensation Legislative Amendment Act 2012*

¹⁰⁰⁹ NSW Parliament, *Joint Committee on the NSW Workers Compensation Scheme – Final Report*, 13 June 2012

¹⁰¹⁰ icare, *Submission to the Independent Review – Financial Sustainability*, November 2020, at [53]

¹⁰¹¹ Cumpston Sarjeant, *Independent Review of icare – Financial Sustainability*, March 2021, 2

¹⁰¹² *Ibid*

agree that savings ought be achieved at the expense of injured workers, by reductions in benefits.

259 The CS review¹⁰¹³ identified the principal risks to the financial stability of the NI as follows, in descending order of financial significance:

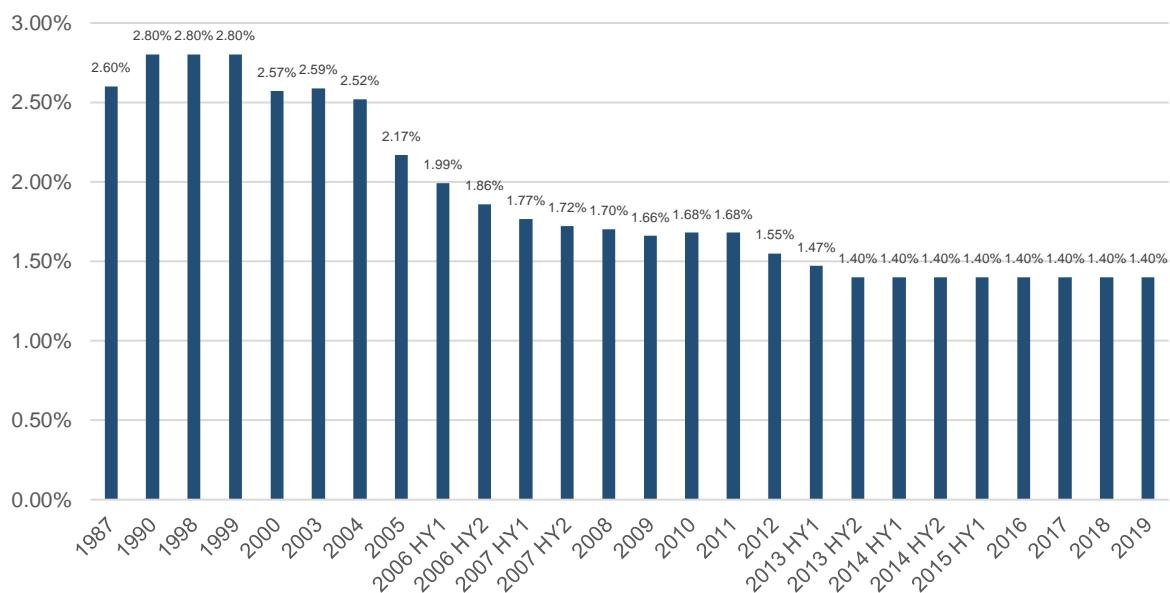
- a) the amount of premiums that will be collected;
- b) the investment return on financial assets;
- c) claims costs (of both existing claims and future underwriting); and
- d) other expenses of the NI.

260 I discuss each of these factors below.

31.1.2 Key drivers of financial sustainability: premiums

261 In recent years, the NI's premium rates have been at decades-long lows, as shown below. icare advises that the NI's current premium rates are below the national average.

Figure 46: NSW Average Premium Rates, as a percentage of wages, 1987 - 2020



Source: icare, *Submission to the Independent Review– Financial Sustainability*, November 2020, at [53]

262 On the face of things, low premiums are good for employers. However, that assumes that the levels are realistic. They are not; nor have they been for some time. CS concluded that premiums have been artificially low, below the true operating costs of the scheme and thus below the OBEP;

263 in 2017-18 and 2018-19, with hindsight, because the actual costs of claims proved to be much higher than forecast;¹⁰¹⁴ and

¹⁰¹³ Cumpston Sarjeant, *Independent Review of icare – Financial Sustainability*, March 2021, 2

¹⁰¹⁴ Ibid

264 in 2020-21 as the result of a deliberate decision by icare,¹⁰¹⁵ encouraged by the Treasurer,¹⁰¹⁶ to freeze premiums in an effort to support the economy in the context of COVID-19.

265 SIRA, as regulator, has the power to reject premium filings submitted by icare for the NI.¹⁰¹⁷ SIRA has therefore implicitly accepted the premiums set by the NI in recent years. SIRA has advised me that it has nevertheless had concerns about the level of premiums in recent years.¹⁰¹⁸ Naturally and appropriately, premiums have been the subject of substantial discussions between icare and SIRA over the years.¹⁰¹⁹

266 icare has announced¹⁰²⁰ its intentions to raise premiums gradually, by 2.9 per cent in each of the next two financial years. It is essential that premiums be set at levels that will cover the costs of the scheme (ie, at or above the OBEP), just as it is essential that those costs be closely controlled. Except in the most exceptional of circumstances, premiums should not be kept artificially low. Basic considerations of fairness dictate that current employers should bear the current cost of the scheme. Losses should not be passed on to future employers to remedy.

31.1.3 Key drivers of financial sustainability: investment returns

267 icare, through its legislative mandate to act for the NI,¹⁰²¹ is responsible for managing the WCIF. This fund is substantial. Its assets at 30 June 2020 exceeded \$17 billion.¹⁰²²

268 The investment income on the WCIF totalled \$1.7 billion in 2018-19. That fell to \$423 million in 2019-20,¹⁰²³ due to the impacts of COVID-19.

269 icare's annual reports show that icare's management of the WCIF has delivered consistently healthy investment returns, broadly in line with benchmarks, with the understandable exception of 2019-20.

¹⁰¹⁵ icare, 2.2.1e *Letter to icare CEO Premium Filing Deferral FY20-21*, 29 June 2020

¹⁰¹⁶ icare, 2.2.1c *Treasurers BN and Response*, 30 April 2020

¹⁰¹⁷ WC Act 1987 s 169.

¹⁰¹⁸ *Interview with SIRA*, 25 November 2020, at Notes 6-7

¹⁰¹⁹ SIRA, *Chronology of SIRA's supervision of the NI and decisions and deliberations of the SIRA Board*, September 2020

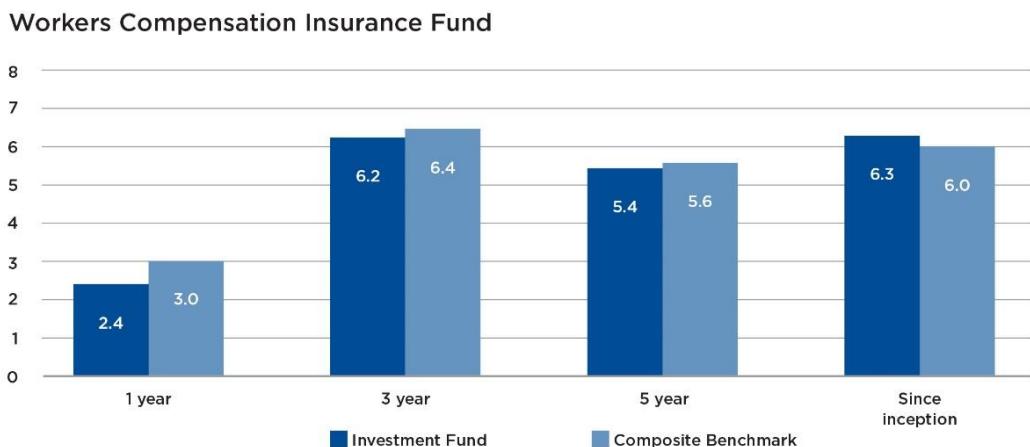
¹⁰²⁰ icare, *Workers compensation premiums adjust to future risks*, 24 March 2021, at icare website

¹⁰²¹ SICG Act 2015 s 10

¹⁰²² icare, *Annual Report 2019-20*, 27 November 2020, 41

¹⁰²³ icare, *Annual Financial Report 2019-20*, 27 November 2020, 273

Figure 47: WCIF investment return performance



Source: icare, *Annual Financial Report 2019-20*, 27 November 2020, 273

270 Ms Dore highlighted in her 2019 Report that '*reliance on investment returns is inherently risky*'.¹⁰²⁴ That depends of course on the extent of the reliance, and on the nature of the fund under consideration.

271 For a not-for-profit scheme, it is sensible in principle to take projected investment returns into consideration in assessing the ability of the fund to meet its liabilities. However, as 2019-20 showed, investment returns cannot be relied upon, year in year out, to prop up the fund. That is why cost control, coupled with appropriate premium rates, are essential to safeguard against unforeseeable shocks.

272 As I have just indicated, the nature of the insurance fund is also relevant. I accept that for short-tail insurance, it is essential that premiums be charged at least the OBEP level. That is the only way to ensure financial stability. Investment returns may enhance stability, and of course may help to drive profit margins, but no more. However, for a long-tail scheme, the significance of investment returns should be considered in a more nuanced way. That is why I have recommended elsewhere in this Report that icare should consider the use of the EF Ratio for capital management purposes, and for assessing what must be done to ensure the NI's long-term financial stability.

273 I discuss concerns as to icare's management of expenses at [23.5 above](#), and that is relevant to its management of the WCIF. There is no other evidence before me to suggest that there is any other material problem with the way icare is managing the WCIF. It should be understood that I am talking about the WCIF in its own right, and not of the NI. Otherwise, it is beyond the scope of this Review to comment further on icare's management of the WCIF.

31.1.4 Key drivers of financial sustainability: claims costs

274 There are several drivers of claims costs, split between those that result from claims volume and those that reflect unit costs.

¹⁰²⁴ Janet Dore, *Independent Reviewer Report into the Nominal Insurer*, December 2019 at 5.3.3, p39 (1.2.3).

275 Claims volumes derive from new claims coming into the scheme and the number of injured workers leaving the scheme. The former is largely outside the control of icare and SIRA, although I note that there are substantial efforts by both parties on prevention work. The latter is affected substantially by the RTW performance of the scheme. That in turn is affected by the design of the incentives and support that facilitate RTW. I consider both of these below.

276 The cost of a claim reflects the cost of the statutory benefits available to workers, including medical and related treatment.

277 I do not propose to address the level of statutory benefits available. Changes to benefits should only be considered if they are seen to create perverse disincentives to recovery, or if, even if properly controlled, they are placing an unmanageable burden on the scheme. Nobody has suggested to me that either of those alternatives exists.

278 I address the areas that I consider to be, to some extent, functionally controllable. They are:

- claims management;
- incentives in the scheme design – I have considered this by exception in [29 above](#); and
- medical costs.

Claims management

279 I have discussed at length the historical inadequacies in icare's management of claims. That inadequacy has had significant adverse impacts on injured workers, and on the financial position of the scheme arising in part from declining RTW Rates.

280 CS found that: '*the scheme[s] financial position suffered dramatically when claims management processes were not occurring in a timely manner*'.¹⁰²⁵

281 Claims management and RTW rates must improve. icare is committed to achieving these objectives. The recommendations I make in [Part 1B](#) are intended to assist icare in this work.

Medical costs

282 CS found that growth in medical costs was one of the key reasons for the NI's recent financial underperformance.¹⁰²⁶ icare¹⁰²⁷ and by SIRA¹⁰²⁸ also highlighted this as a key issue.

283 The causes of rises in medical costs have been well demonstrated through the detailed work of SIRA's Healthcare Review.¹⁰²⁹ They are:

¹⁰²⁵ Cumpston Sarjeant, *Independent Review of icare – Financial Sustainability*, March 2021, 11

¹⁰²⁶ Ibid 2

¹⁰²⁷ icare, *Media Issues Response*, September 2020, 4 at [2]

¹⁰²⁸ SIRA, *Submission to the icare and SICG Act independent review*, November 2020, at 18

¹⁰²⁹ SIRA, *Healthcare Review Final Report*, December 2020. at 10

- a) ‘healthcare leakage’¹⁰³⁰, including... ‘over-servicing, payments for noncoverage, non-investigation of anomalous claims, overcharging and weaknesses in payment management’¹⁰³¹ and
- b) regulated medical fees for some classes of treatment being higher than those charged in comparable or analogous areas.

284 I drew on this analysis in *Part 1A*, where I found that there is some truth to the allegations that icare could be managing medical costs more effectively.

285 The recent deterioration in claims management performance is partly responsible for the recent substantial rises in medical costs. Likewise, improvements in claims management generally will lead inevitably to reductions in medical costs.

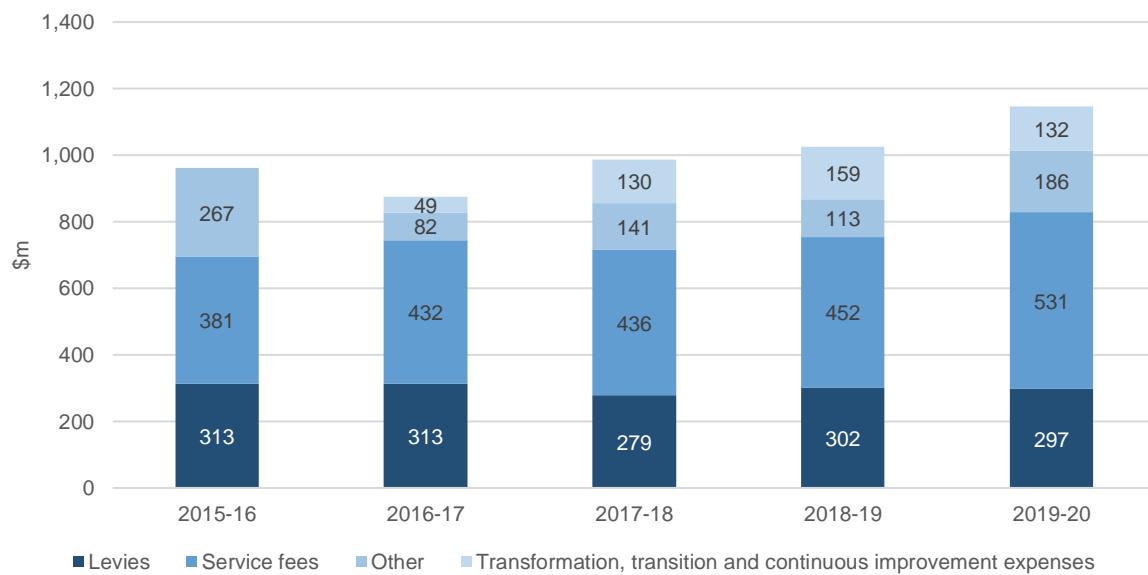
286 However, there is more to be done than general improvement. icare must improve specifically its management of medical costs. icare advises me that it is already making substantial efforts in this area,¹⁰³² as discussed in *Part 1A*.

287 I have discussed the possibility for changes at the whole of scheme level that should help to address increases in medical costs in areas that are outside icare’s control, in *29.3 above*.

31.1.5 Key drivers of financial sustainability: other expenses of the NI

288 The other expenses of the NI are shown below:

Figure 48: Other expenses of the NI, 2015-16 to 2019-20



Source: icare Annual Financial Reports, 2015-16 to 2019-20. Note that transformation expenses are only reported separately from 2016-17 onwards.

289 I have discussed in *Part 1B* the costs that are the responsibility of icare (that is, all costs excluding the statutory levies), and concluded that those costs appeared to have

¹⁰³⁰ SIRA, *Healthcare Review Final Report*, December 2020. at 10

¹⁰³¹ Ibid

¹⁰³² icare, *Medical Costs Submission – Final*, February 2021, 9-13

increased substantially, and beyond what would seem to be a reasonable rate. icare accepts that the expenses of the NI have increased since icare's inception, but it does not accept that they have increased beyond a reasonable rate.¹⁰³³ For the reasons I give in *Part 1B*, I do think there is evidence that there has been some excessive increase in costs.

290 At the time of my Review, icare had commenced a review of its expenses.¹⁰³⁴ icare has recently announced that it is looking to achieve \$100 million in annual savings.¹⁰³⁵ It is difficult to see how that much money could be saved if the present costs are not excessive.

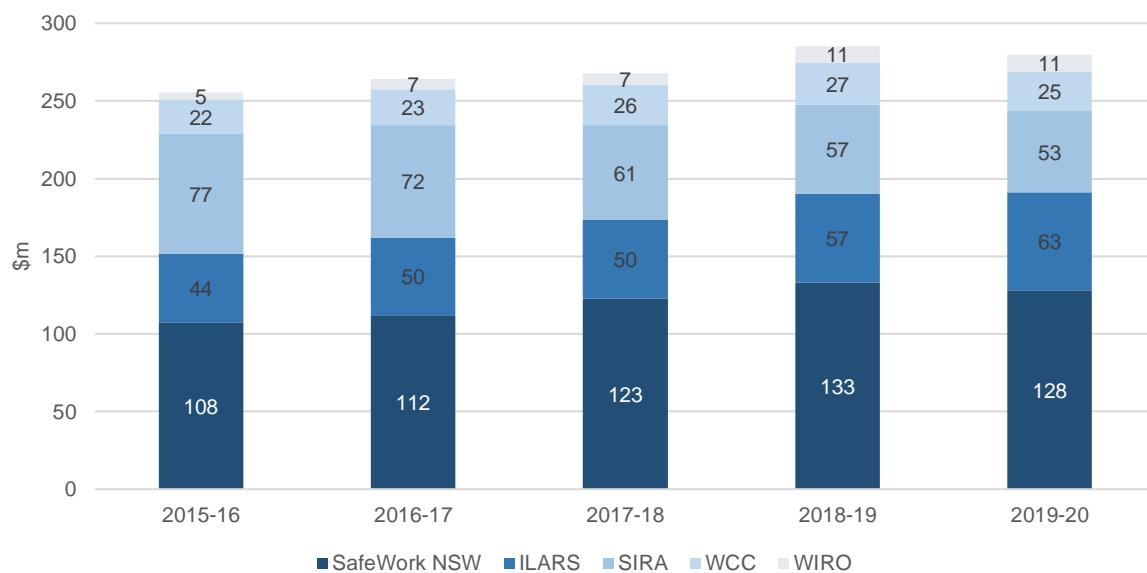
291 While the other expenses of the NI are the smallest of the categories of costs I have examined so far, they cannot be ignored. It is imperative that icare take comprehensive action to address and reduce them. I have made recommendations in this regard in *Part 1B*.

292 The remaining element of the other expenses is the statutory levies. Their largest element is the levy to the Workers Compensation Operational Fund (WCOF), administered by SIRA. That levy supports the operating costs of SafeWork NSW, ILARS, SIRA, the PIC (formerly WCC), and the IRO.

293 The statutory levies that are not for the WCOF, go to the costs of the Dust Diseases Authority and towards the Mine Safety Levy.

294 The NI, in line with its market share, pays around 80-85 per cent of the total income of the WCOF. The expenses paid from the WCOF are set out below.

Figure 49: Expenses of the WCOF by entity, 2015-16 to 2019-20



Source: SIRA, *Submission to the Independent Review*, November 2020, at 23

295 The largest element of those expenses is for SafeWork NSW. Its costs have increased modestly, by 9 per cent in total, over the years 2015-16 to 2019-20. The role of

¹⁰³³ icare, *Response to Parts C and D of Draft Report*, 21 April 2021, 3-4

¹⁰³⁴ icare, *explanatory note - Transformation and staffing number*, 24 February 2021, at [36-37]

¹⁰³⁵ icare, *Workers compensation premiums adjust to future risks*, 24 March 2021, at icare website

SafeWork NSW is outside the scope of my Review. The next largest element, at the start of the five-year period, is SIRA's own costs, which have reduced in absolute terms over the years. In contrast, the costs of ILARS have increased materially, by 43 per cent over the five-year period.

296 No evidence has been presented to my Review to suggest that any of these costs are excessive.

31.1.6 Measurement of financial sustainability

297 I discussed in *Part 1A* the difference between:

- AF Ratio on which the media and parliamentary coverage has focused; and
- EF Ratio which may give a better picture the real-world performance and stability of a long-tail scheme such as the NI.

298 Accordingly, I recommend that icare give consideration to adopting the EF Ratio for the purposes of the NI's capital management planning. Of course, unless and until there is a change in applicable accounting and auditing standards, icare must use the AF Ratio to prepare the NI's financial statements.

299 If icare is to make this change, it must be explained clearly and carefully. Otherwise, it may not answer, or dispel the disquiet arising from, prior public criticism of the NI's financial position. The media focus to date (including, it must be said, some less than accurate commentary) demonstrates the importance of ensuring that reasons for any change are well understood.

Recommendations	
Measurement of financial sustainability of the NI	
42	<p>icare should consider the explicit use of an Economic Funding Ratio for the purposes of assessing the NI's capital management needs including the assessment of premium rates, and planning for the NI's long term financial sustainability.</p> <p>icare should report publicly on the financial health of the NI scheme using the new measure(s), at least annually.</p>

31.1.7 Oversight and regulation of financial sustainability

300 The present regulatory framework is piecemeal. There is no clear and direct prudential oversight of icare. The NI is not subject to regulation by the APRA. SIRA's regulatory powers and functions in respect of the NI are limited. The Responsible Minister has not exercised the power given by section 16C of the SICG Act to prescribe prudential or other standards for any of the funds administered by icare.

301 A number of submissions to my review touched on this question. Some suggested that the NI should be regulated by APRA, by reason of that body's experience in prudential regulation.

302 As I have concluded, there is no doubt that the financial position of the NI has declined in recent years. That is one of the reasons that this Review was initiated. Prudential oversight of the schemes managed by icare is therefore a legitimate issue to be examined.

Current oversight

303 Such oversight or regulation, in the broad sense, as currently exists of the financial sustainability of the NI, is achieved through a range of measures.

304 The Board of icare has primary responsibility and accountability for icare, including therefore its management of the NI. The financial sustainability of the NI is, self-evidently, a key area for the Board's focus. The Board receives regular reports on the NI and the WCIF. It makes strategic decisions about the financial management of the scheme.

305 SIRA receives regular reports on the liabilities of the NI and its financial performance. It has some specific legislative powers that allow it to influence the financial performance of the NI:

- a) SIRA may reject a premium filing for the NI;¹⁰³⁶
- b) icare, acting for the NI, must provide a business plan in line with guidelines provided by SIRA;¹⁰³⁷ and
- c) SIRA may conduct audits using its broad power to audit all or any workers compensation activities of an insurer. SIRA advises me that it intends to use this power to conduct an audit of the WCIF.¹⁰³⁸

306 There is also a degree of ministerial oversight. Presently, the SICG Act¹⁰³⁹ requires icare to file an annual Statement of Business Intent (effectively a business plan) with the Responsible Minister each year. This can, and currently does, include financial plans and projections. Section 11(3) of the SICG Act provides that: '*[i]f the Minister or the Treasurer is not satisfied with a statement submitted under this section, the Minister may direct [icare] to amend and resubmit the statement in the manner and time specified.*'

307 In addition, there is the existing statutory power to which I have referred, that authorises the making of a prudential regulation.

16C Prudential standards or reporting and auditing requirements

- (1) The Minister may, by order published in the Gazette, declare that prudential standards, or reporting and auditing requirements, specified or described in the order are standards or requirements that apply to an authority responsible for the administration of a scheme fund and ICNSW in the exercise of any functions in relation to that fund described in the order.
- (2) Before making an order under this section, the Minister is to consult ICNSW on the proposed standards or requirements.
- (3) An order under this section takes effect on the day specified in the order.
- (4) A responsible authority, ICNSW and any person carrying out a function on behalf of the responsible authority must comply with any standard or requirement applied under this section to the exercise of a function in relation to a scheme fund.

308 A similar power exists in the WC Act 1987.

¹⁰³⁶ WC Act 1987, s 169

¹⁰³⁷ Ibid s 202B

¹⁰³⁸ SIRA, *Submission to the Independent Review*, November 2020, at 22

¹⁰³⁹ SICG Act s 11

202C Prudential standards

The regulations may make provision with respect to prudential standards and the application of such standards to insurers.

- 309 Neither of those powers has been exercised. In my opinion, if there is a concern as to the adequacy of the available prudential oversight of any of the schemes managed by icare, the remedy should come from the exercise of the powers provided by those sections.
- 310 My own view is that on the evidence before my Review, there is no presently justified need for different or more extensive prudential regulation. If, however, the government of the day at any time comes to a different view, it will be a matter for that government to decide on the form or manner of that oversight.

Stakeholder views on improved oversight

- 311 SIRA made no specific recommendation for prudential regulation. It did however suggest that '*APRA may be well placed to provide such supervision as might be thought to be necessary*'.¹⁰⁴⁰ SIRA noted that it and APRA co-regulate all licensed CTP insurers, and four of the specialised workers compensation insurers.¹⁰⁴¹
- 312 In those cases, of course, APRA is regulating private insurers. There would be obvious difficulties in APRA's regulating a State-run insurer, particularly one with the unique governance and financial arrangements of the NI. For example, how would any exercise of APRA's powers interact with a Ministerial direction given pursuant to section 7 of the SICG Act, or with a prudential requirement made pursuant to section 16C?
- 313 Other stakeholders were more forthright in supporting regulation by APRA:
 - a) The Insurance Council of Australia submitted that APRA regulation would deliver more '*robust*'.¹⁰⁴² oversight.
 - b) An anonymous stakeholder supported APRA regulation as '*tried and trusted*'.¹⁰⁴³
 - c) The NIBA stated that '*where liabilities are owned within an organisation (as occurs in privately owned insurance companies, which are subject to external prudential regulation and oversight by the Australian Prudential Regulation Authority) management is required to be fully accountable for the management strategies that are adopted and implemented, and the financial outcomes of those strategies. This has not occurred in relation to New South Wales workers compensation for many years.*'¹⁰⁴⁴
 - d) The Australian Lawyers Alliance noted the '*limitations SIRA has when exercising its powers over the NI, as compared to either self or specialised insurers.*'¹⁰⁴⁵ It questioned '*[i]f the regulator is hamstrung and APRA oversight is not required, it*

¹⁰⁴⁰ SIRA, *Response to questions*, 25 February 2021, 1

¹⁰⁴¹ Ibid

¹⁰⁴² Interview with Insurance Council of Australia, 11 December 2020, Notes 5

¹⁰⁴³ Interview with Anonymous Stakeholder

¹⁰⁴⁴ NIBA, *Submission to the Independent Review*, 5

¹⁰⁴⁵ icare, *Submission to the Independent Review –Financial Sustainability*, 30 October 2020, 162

*seems fair to ask "Where is the independent prudential assurance which is normally a regulatory function?"*¹⁰⁴⁶

314 icare indicated that it was supportive of the use of section 16C of the SICG Act to make prudential standards that were aligned to APRA's approach. It said:

In icare's respectful submission section 16C of SICG Act...reflects the legislature's intention to...provide for the regulation of those schemes through the making of prudential standards by the Minister. Such standards would clarify governance and compliance objectives for icare, SIRA, the Nominal Insurer and other stakeholders, with the aim of ensuring sustainability of the schemes in accordance with legislative objectives.

Prudential standards may be supplemented by the issuance by SIRA of Guidelines where administrative guidance is required... Together, the legislation, prudential standards and Guidelines would provide a clear regulatory framework in which icare, the Nominal Insurer, SI Corp and SIRA could operate more effectively.

*In icare's respectful submission the prudential standards made, and the guidance given, by the Australian Prudential Regulation Authority (APRA) are the relevant benchmark for prudential regulation of financial institutions in Australia. The adoption under s16C of the SICG Act of relevant APRA standards, modified as required to meet the attributes and needs of the relevant schemes, would greatly assist in clarifying the respective roles, responsibilities and accountabilities of icare, SIRA, the Nominal Insurer, scheme agents and the other schemes that fall within the legislation.*¹⁰⁴⁷

315 icare's submission goes beyond the issuing of prudential standards to safeguard financial sustainability. It advocates use of the section 16C power to clarify the regulatory framework more generally. I consider the effectiveness of SIRA's regulatory powers in *Part 3*.

316 The establishment of some form of prudential regulation, widely supported as it is, may assist in alleviating stakeholders' concerns about the financial position of the NI. Nonetheless, as I have said, I do not perceive a present need for that regulation. If it were seen to be desirable, however, there is no reason why it should not adopt such elements of APRA's standards as are considered appropriate. And that could be done through use of the powers conferred by section 16C of the SICG Act.

317 It is well beyond the scope of my review to tell the Responsible Minister to exercise a statutory power or discretion, and far less how to do so. I do however acknowledge that there is a consensus that there would be benefit to the setting of prudential standards (whether by using the section 16C power or otherwise). Although I do not think that this is presently necessary to do so to safeguard the financial stability of the NI, I do accept that it could be seen as a positive step towards the enhancing the nebulous objectives of transparency and accountability that the 2015 structural reforms regarded as desirable.

¹⁰⁴⁶ Australian Lawyers Alliance, *Submission to the Independent Review*, 28 October 2020, 4

¹⁰⁴⁷ icare, *Supplementary Submission to the Independent Review*, January 2021, 3

318 If that were to be considered (and I stress, at the cost of repetition, that in my view it is not presently necessary to do so for the purpose of ensuring the financial sustainability of the NI), I would make recommendation to the following effect:

319 That icare, SIRA and NSW Treasury jointly develop advice for the Treasurer on the desirability of using section 16C of the SICG Act to establish prudential standards for the NI.

320 That advice should assess, among other considerations including the purposes for which those standards might be required or beneficial, whether APRA standards, suitably adjusted, could be adopted, and the nature and extent of any such adjustments.

31.2 Financial sustainability of the TMF

321 I have explained the statutory background and the operation of the TMF in *Part 1A*, and concluded that the media reports as to the financial position of the TMF were based on an incorrect understanding of the way that the TMF is funded and operates.

322 The TMF is explicitly backed by the government. Over many years, including the exceptional year of 2019-20 that attracted the media attention, the government has shown its readiness to ensure that the TMF is appropriately funded.¹⁰⁴⁸ At the most fundamental level then, there can be no doubts about the financial sustainability of the TMF.

323 There is absolutely nothing in the submissions made or evidence given to my Review that raises any concerns about the financial position or sustainability of the TMF. No recommendation is necessary.

31.2.1 Net Asset Holding Level Policy

324 The TMF is funded by and provides cover to government agencies. It is for the government of the day to decide what is the appropriate level of funding for the TMF, and how that is to be maintained. The risks that government entities face are both broad and uncertain. It may happen that the level of funding decided at the beginning of a financial year will prove to be insufficient. That may necessitate a contribution from consolidated revenue. Conversely, any over-funding may justify a payment to consolidated revenue.

325 When considering the funding position of the TMF, it is important to understand that it comprises two separate portfolios of risks and claims:

- workers compensation – on behalf of the NSW government agencies who are, in law, self-insured employers for workers compensation risks; and
- general lines – covering property, motor, liability and other risks for government agencies.

326 The former portfolio is, like the NI, long-tail in nature. Workers compensation is subject to long-duration trends that change the financial position over time, but do not vary much from year to year. The latter portfolio is different. General lines cover is much

¹⁰⁴⁸ NSW Treasury, *Treasury response to Independent Reviewer request*, 22 February 2021, 8

more volatile and exposed to large, essentially one-off financial pressures such as the damage from the 2019 – 2020 bushfires, and material single liability claims.

327 As noted in Part 1A, the inherent volatility in the TMF is managed through Treasury's Net Asset Holding Level Policy (NAHLP), which determines the funding level of the TMF. It sets the floor for funding at 105 per cent of liabilities and a ceiling at 115 per cent. Liabilities are measured on the AF Ratio but, unlike the NI, with no risk margin added to the central estimate of liabilities. This means that, in any year where actual claims vary from the central estimate, there will be a change in the funding ratio. Accordingly, the NAHLP provides that contributions can be made to or from consolidated revenue.¹⁰⁴⁹

328 Both icare¹⁰⁵⁰ and Treasury¹⁰⁵¹ have advised me that they work together to monitor the TMF's funding position and the requirement for contributions. Decisions on the latter are made by the Treasurer, having been considered and endorsed previously by the State's Asset and Liability Committee, which is a group of senior officials from Treasury and relevant government agencies.

329 icare and Treasury reviewed the NAHLP in 2019 and 2020, along with some of other key elements of the arrangements for management of the funding position and risks of the TMF. Incremental changes were implemented to improve the management of the TMF.¹⁰⁵²

330 I can see no difficulty, let alone danger, in the way the NAHLP is designed or in the way that it operates. Treasury advises me that '*[o]verall, the NAHLP as a mechanism has worked well, having broken even over the last 15 years, while enabling the TMF and other scheme funds to manage the volatility they have faced during that time.*'¹⁰⁵³ Nothing in the evidence before me suggests that this advice is incorrect.

31.2.2 Impact of workers compensation portfolio on the financial position of the TMF

331 The existence of a mechanism to provide additional funding to the TMF when required does not of course free icare from its responsibility for prudent management of the TMF. Nor does it free Treasury from the obligation to satisfy itself that this is being done. Those costs are ultimately paid by taxpayers. Thus, must every effort be made to achieve the TMF's objectives at the lowest possible cost.

332 The general lines portfolio is explicitly outside my Terms of Reference. I shall therefore consider only the impact of the workers compensation portfolio.

333 icare submitted that the financial position of the TMF has been '*impacted by the same factors that have impacted the [NI].*'¹⁰⁵⁴ Those factors include both external economic events, rising medical costs, and the prevalence of increasing psychological claims.

¹⁰⁴⁹ NSW Treasury, *Treasury response to Independent Reviewer request*, 22 February 2021, 7

¹⁰⁵⁰ icare, *Submission to the Independent Review – Financial Sustainability*, 30 October 2020, 117-132

¹⁰⁵¹ NSW Treasury, *Treasury response to Independent Reviewer request*, 22 February 2021, 6-8

¹⁰⁵² icare, *Submission to the Independent Review – Financial Sustainability*, 30 October 2020, 129-132

¹⁰⁵³ NSW Treasury, *Treasury response to Independent Reviewer request*, 22 February 2021, 8

¹⁰⁵⁴ icare, *Submission to the Independent Review – Financial Sustainability*, 30 October 2020, 135

334 The measures recommended elsewhere in this Report in relation to management of the NI and the workers compensation system generally would, if applied to the management of the TMF, have a positive impact on its finances as well:

- a) Improved claims management – although RTW rates for the TMF are higher than for the NI, they have declined in recent years. Improvements must therefore be delivered in the management of TMF, as well as NI, claims.
- b) Better management of medical costs.
- c) Potential regulatory and legislative change to improve scheme incentives and management of medical costs.

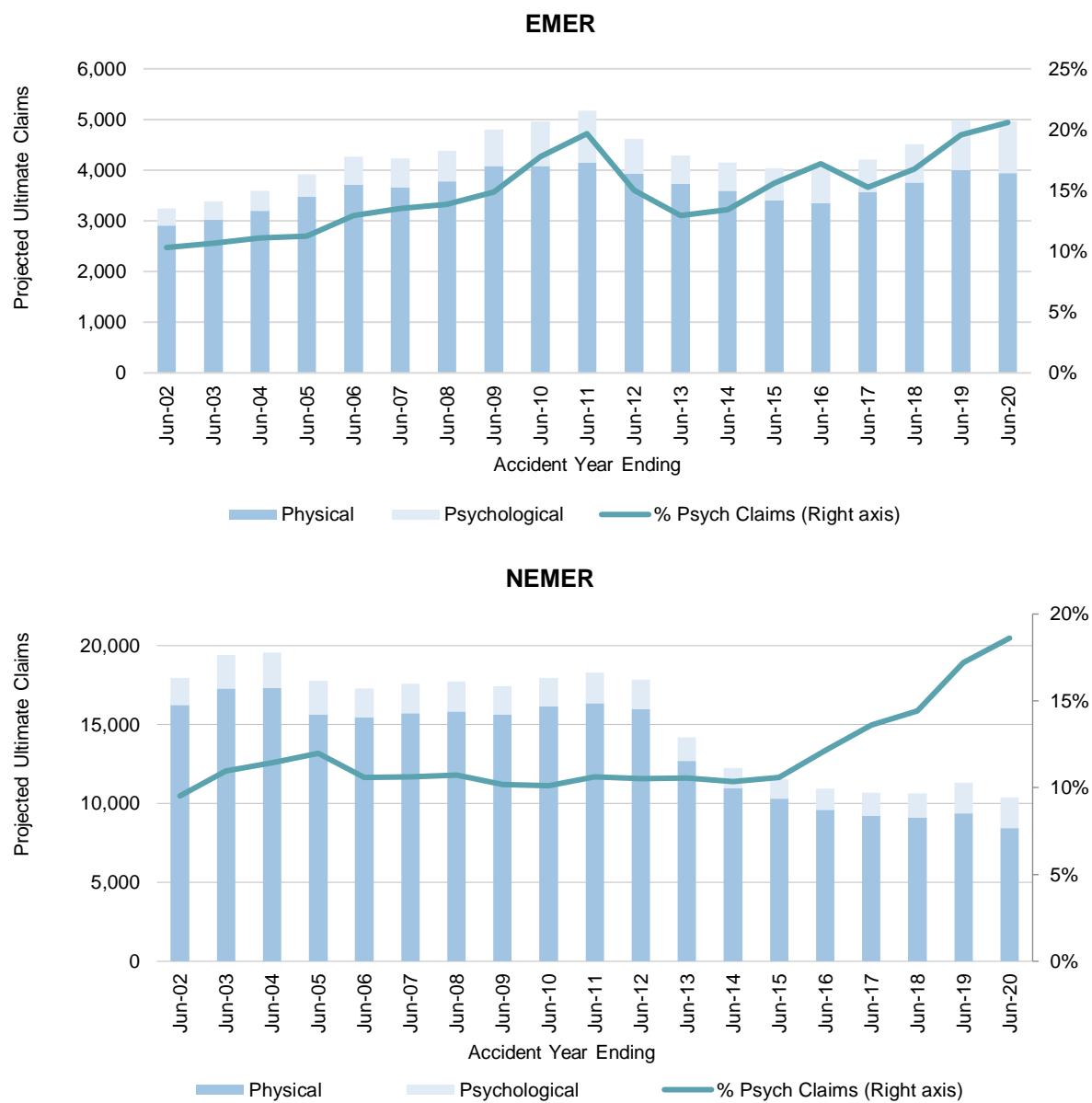
335 The other material issue that icare submitted is affecting the TMF is the increasing prevalence of claims for psychological injury,¹⁰⁵⁵ which are having a significant impact on the TMF's financial performance.

336 The following graphs for the emergency worker (EMER) and non-emergency worker (NEMER) claims shows the sharp increase in the proportion of psychological claims recent years:¹⁰⁵⁶

¹⁰⁵⁵ icare, *Submission to the Independent Review – Financial Sustainability*, 30 October 2020, 158-168

¹⁰⁵⁶ Ibid 162

Figure 50: Proportion of psychological injury in TMF claims



Source: icare, *Submission to the Independent Review –Financial Sustainability*, 30 October 2020, at [162]

337 It is not just the incidence of psychological claims that is worsening, but their severity. icare stated that '*the proportion of psychological injury claims reaching the 15 per cent WPI threshold has shifted significantly upwards over the past ten years.*'¹⁰⁵⁷

338 icare noted the challenges in managing psychological claims: "*long term tail strategies to redeploy workers is more difficult for psychological injury than physical, and vocational training is often less effective.*"¹⁰⁵⁸

339 The Teachers Federation highlighted issues with finding suitable duties, stating:

¹⁰⁵⁷ icare, *Submission to the Independent Review – Financial Sustainability*, 30 October 2020, 163

¹⁰⁵⁸ Ibid 161

Employers covered by the TMF have an obligation to provide suitable work to injured workers who are able to return to work with medical restrictions. The obligation arises under Section 49 of the 1998 Act. Suitable work must be provided when requested by the injured worker who is seeking workplace rehabilitation.

Federation members tend to experience difficulties in accessing suitable work on request mostly when recovering from psychological injury... This is not usually provided in a timely manner, which impacts adversely on the injured worker's rehabilitation.... This could be remediated by SIRA working with scheme agents for the TMF to compel employers to provide timely suitable work to improve return to work timeframes and outcomes.¹⁰⁵⁹

340 EML highlighted a similar issue in other agencies, saying:

The nature of operations as first responders impacts the capability and capacity of NSW Police and to a lesser extent, Fire and Rescue NSW, to provide sustainable and meaningful long-term return to work to personnel who are unable to fulfil active operational duty. Opportunity presents to revisit the TMF Policy Objectives to align more closely with the operational complexity of the Emergency Services Agencies.¹⁰⁶⁰

341 icare advised that it:

...provides support to NSW Government agencies on psychological injury prevention through the Risk Education Express (REX) program and the provision of specialist workplace risk consulting services and education resource development, as well as through specific programs provided to certain agencies to support mental health.

In the past 12 months, icare has also piloted a number of programs including the Connect & Care program to support managers who have a staff member with a psychological injury, and pilot programs for first responders. The implementation of successful components of these pilot programs, along with a more comprehensive plan to address psychological injuries, are currently in development.¹⁰⁶¹

342 It is beyond both my competence and my Terms of Reference to consider what may be the root causes of psychological injuries, and the reasons for their apparent increasing prevalence and severity. Thus, I cannot say whether the measures that icare is taking, as outlined in the preceding paragraph, will be effective to reduce the incidence and severity of psychological injuries.

343 I do however note that icare suggested¹⁰⁶² that section 11A of the WC Act 1987 should be amended. That section reads as follows:

11A No compensation for psychological injury caused by reasonable actions of employer

(1) No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on

¹⁰⁵⁹ Teachers Federation, *Submission to the Independent Review*, 34 November 2020, 6-7 and 10

¹⁰⁶⁰ EML, *Submission to the Independent Review*, 30 October 2020, 8

¹⁰⁶¹ icare, *Response to Part C and D of Draft Report*, 21 April 2021, 4-5

¹⁰⁶² icare, *Submission on potential legislative amendments*, 10 February 2021 at [97-108]

behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.

(3) A **psychological injury** is an injury (as defined in section 4) that is a psychological or psychiatric disorder. The term extends to include the physiological effect of such a disorder on the nervous system.

(4) This section does not affect any entitlement to compensation under this Act for an injury of a physical nature even if the injury is a physical symptom or effect of a psychological injury, so long as the injury is not merely a physiological effect on the nervous system.

(5) (Repealed)

(6) This section does not extend the definition of **injury** in section 4. In particular, this section does not affect the requirement in section 4 that a disease is not an injury unless it is contracted by the worker in the course of employment.

This section does not affect section 9A (No compensation payable unless employment substantial contributing factor to injury).

(7) In the case of a claim for weekly payments of compensation in respect of incapacity for work resulting from psychological injury, the medical certificate required to accompany the claim must (in addition to complying with the requirements of section 65 of the 1998 Act) use, for the purpose of describing the worker's condition, accepted medical terminology and not only terminology such as "stress" or "stress condition".

(8) If a claim is deficient because subsection (7) has not been complied with and the insurer or self-insurer concerned notifies the worker in writing of the deficiency (including details of what is required to comply with that subsection) as soon as practicable after receiving the deficient claim then (unless the insurer or self-insurer waives that requirement)—

(a) the claim is not considered to have been duly made for the purposes of section 93 of the 1998 Act until subsection (7) is complied with, and

(b) proceedings before the Commission cannot be commenced in respect of the claim until subsection (7) is complied with.

344 icare submitted that amendment was necessary 'to strengthen the defence for reasonable actions of employers with respect to psychological injury claims...in order to support employers and NSW Government agencies enforcing transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal'.¹⁰⁶³

345 I do not agree with that submission. Section 11A is clear in its terms. If, as icare or employers suggest, there is some difficulty in enforcing its terms, that would seem to reflect the pusillanimous attitude of claims managers rather than inherent weakness in the legislation. icare's submission does not go so far as to suggest what amendments might be necessary. Nor does it provide any evidence that the section, in its present form, is making it difficult for claims managers to apply its terms.

346 On the material before me, there is no need to consider any amendment to the language of section 11A.

¹⁰⁶³ icare, *Submission on potential legislative amendments*, 10 February 2021 at [105]

Part 3: Statutory review of the SICG Act

32 Overview of the SICG Act

32.1 Purpose of the Act

- 1 The SICG Act was established in August 2015. It fulfilled an election commitment made by the Baird Government to undertake a review of the State's workers compensation scheme.¹⁰⁶⁴ The SICG Act created three new organisations: one to operate and one to regulate the State's insurance schemes, and one to regulate workplace safety.¹⁰⁶⁵ Hitherto, all three functions had been performed by WorkCover, although other authorities had operational or regulatory responsibilities for some other State schemes.¹⁰⁶⁶

32.2 Policy objectives of the SICG Act

- 2 The policy objectives of the SICG Act are not set out in the Act itself. The second reading speech and other materials suggest that the Act was intended to deal with a perceived conflict of interest in a single agency's having concurrent responsibilities for operating the workers compensation scheme, regulatory oversight of that and other schemes and scheme agents, and workplace health and safety.¹⁰⁶⁷
- 3 The SCLJ considered this in its 2017 review of the SICG Act. The Committee's Report, after looking at the policy context and explanatory material, identified the Act's primary policy objective as being '*to reform the governance and regulatory arrangements for the state's insurance and compensation schemes by creating three structurally separate organisations to operate and regulate the schemes, and to regulate workplace safety.*'¹⁰⁶⁸
- 4 That Report concluded, further, that:

...the Act was also intended to achieve the following policy objectives:

The new structure will be far more transparent and accountable and, most importantly, lead to better outcomes for injured workers. The new

¹⁰⁶⁴ Legislative Assembly, *Second Reading Speech – Workers Compensation Legislation Amendment Bill 2015 State Insurance and Care Governance Bill 2015*, 5 August 2015, 1

¹⁰⁶⁵ *Ibid*

¹⁰⁶⁶ Prior to 1 September 2015, WorkCover was responsible for the a) operation of the NI workers compensation portfolio b) regulation of the NSW workers compensation scheme more broadly, and c) regulation of workplace safety across NSW. The operation and regulation of other State Insurance and compensation schemes were performed by other authorities including SI Corp and those grouped within SRWS.

¹⁰⁶⁷ Legislative Assembly, *Second Reading Speech – Workers Compensation Legislation Amendment Bill 2015 State Insurance and Care Governance Bill 2015*, 5 August 2015, 1; NSW Treasury, *Strategic insurance Review, (Final Report, May 2015)*, 1-2; and Standing Committee on Law and Justice, Legislative Council, *Review of the exercise of the functions of the WorkCover Authority*, September 2014, xii

¹⁰⁶⁸ Standing Committee on Law and Justice, Legislative Council, *Statutory review of the State Insurance and Care Governance Act 2015*, December 2017, 2

*organisations will be more customer-centric, streamlined and efficient, building economies of scale and focusing on clear objectives.*¹⁰⁶⁹

- 5 icare articulated the policy objectives of the SICG Act in similar terms:
 - a) to create greater transparency and accountability by separating regulatory and operational functions;
 - b) to consolidate functions so as to generate operational efficiencies and enable economies of scale; and
 - c) to establish less adversarial, ‘*customer-centric*’ organisations, leading to better return to work and quality of life outcomes.¹⁰⁷⁰
- 6 Business NSW expressed the objectives in largely similar terms, although it placed greater emphasis on clear operational and statutory separation of functions between the three agencies. It identified the key objectives of the SICG Act as:

“clear statutory and operational separation between the functions of providing government insurance services and the regulation of those services”

*“for the new structure to be “far more transparent and accountable” and “lead to better outcomes for injured workers” with the new organisations being “more customer-centric, streamlined and efficient, building economies of scale and focusing on clear objectives.”*¹⁰⁷¹
- 7 The Ai Group suggested that the key policy objective of the Act was to ‘*...remove any conflict of interest that arose by WorkCover being the nominal insurer and also the regulator of health and safety and workers compensation.*¹⁰⁷²
- 8 There is substantial consistency in these expressions of the legislative purpose and policy objectives of the SICG Act.
- 9 Some submissions called for a clear statement of policy objectives to be inserted into the SICG Act.¹⁰⁷³ Other submissions outlined difficulties said to arise from the co-existence of regulatory and policy functions within SIRA, and an overlap in functions between icare and SIRA.¹⁰⁷⁴
- 10 Although there seems to be little, if any, significant dispute as to the statutory purposes of the legislation, I consider it desirable to include such a statement when next the SICG Act is amended. I say that because in my view, a clear statement, in the SICG Act itself, of its objects and purposes would assist in understanding and differentiating the roles, functions and powers of the entities that the Act has created.

¹⁰⁶⁹ Standing Committee on Law and Justice, Legislative Council, *Statutory review of the State Insurance and Care Governance Act 2015*, December 2017, 3

¹⁰⁷⁰ icare, *Submission - Review of the SICG Act*, 18 November 2020, 5

¹⁰⁷¹ Business NSW, *Submission to the Independent Review*, November 2020, 8)

¹⁰⁷² Ai Group, *Submission to the Independent Review*, October 2020, 17-18

¹⁰⁷³ *Submissions to the Independent Review*: Law Society of NSW, 29 October 2020, 2; The Australian Federation of Employers and Industries, November 2020; SIRA, November 2020, 20

¹⁰⁷⁴ Anonymous, *Submission to the Independent Review*, 4 February 2021, 3-4; Business NSW, November 2020, 8-9; *Interview with Anonymous Stakeholder*, 10 December 2020, at 8-9; icare, *Submission – Legislative and Regulatory Structure*, 16 November 2020; *Interview with Anonymous Stakeholder Group*, 18 December 2020, 46

- 11 If my recommendation is accepted, the amendment to include a statement of statutory purposes could be introduced when (if they are) the recommendation that I make for overhaul and consolidation of the legislative framework for workers compensation, including the SICG Act, is implemented.
- 12 As part of that process, I recommend that the functions, powers and purpose of each agency (that is, SIRA, icare and Safework NSW) be clarified. I say that for the following reasons.
- 13 The three agencies operate, or should operate, in close cooperation. It is almost inevitable that there will be some degree of overlap in their day to day operations. That is not something which is likely to be (or perhaps even possible to be) fully resolved by defining the functions, powers and objects for each agency. It follows that all three agencies, and icare and SIRA in particular, should work together to achieve the objectives of the legislative scheme by which they were created. An overall statement of those objectives, including for the structural arrangements governed by it, should assist in resolving any residual doubt as to the functions powers and objects of each agency.
- 14 Secondly, the purposes that I have identified above include a mix of objectives. Some appear to be relevant to the SICG Act as a whole (for example, greater transparency and accountability, and the separation of regulatory and operational functions). Some are relevant to the way in which the bodies created ought to operate (for example, by being less adversarial and more “customer-centric”). And some appear to be a mixture of the first two (for example, achieving efficiencies and economies of scale, which should be in part the aim of structural consolidation, and in part an operational aim for the organisation).
- 15 The combination of general statutory objectives with specific agency functions adds complexity to the task of assessing the operation of the legislation in practice. A clear statement of objectives for the SICG Act, and separately for each agency, is likely to assist the performance of future reviews of the operation of the Act. It will provide a clear standard by which the future operation of the Act and the agencies it governs may be assessed.
- 16 A statement of statutory purpose is, of course, only one tool in the process of statutory interpretation. It is an aid to, not a substitute for, the proper consideration of the terms of an Act as a whole in the light of whatever relevant extrinsic material there is.¹⁰⁷⁵ In this case, I consider that such a statement is likely to assist in the application of the SICG Act in practice, by providing an incontestable framework within which icare, SIRA, and all other stakeholders must operate and cooperate.
- 17 That will be assisted if, as I think should be done, the specific purposes of each agency are also addressed in the legislation.

¹⁰⁷⁵ Herzfeld and Prince, *Interpretation*, Lawbook Co 2020, at [7.80]

18 Accordingly, I recommend:

Recommendations	
Objectives of the SICG Act and the three agencies	
43	That the legislature give consideration to including in the <i>State Insurance and Care Governance Act 2015</i> a statement of policy objectives for the Act.
44	That the legislature give consideration to amending the <i>State Insurance and Care Governance Act 2015</i> , <i>Workers Compensation Act 1987</i> and <i>Workplace Injury Management and Workers Compensation Act 1998</i> to state clearly the objectives sought to be achieved by the creation, and the roles, powers and functions, of icare, SIRA and SafeWork NSW as legally distinct entities.

32.3 Background - overview of the key provisions of the SICG Act

- 19 The SICG Act provides the governance and regulatory arrangements for the statutory insurance and compensation schemes in NSW. It creates icare, SIRA and SafeWork NSW as three separate agencies, and defines their respective roles, functions and powers.
- 20 Part 2 of the Act establishes icare, sets out the arrangements for its management and governance, and prescribes its functions and powers.¹⁰⁷⁶ icare is an independent statutory corporation with a Board and a CEO.¹⁰⁷⁷ The Board of icare comprise up to nine directors, including the CEO.¹⁰⁷⁸ The Board's functions include giving the Minister any information about icare's activities that the Minister requests; keeping the Minister informed of any significant development in icare's activities; determining general policies for icare; and giving directions to the CEO in relation to icare's activities.¹⁰⁷⁹ Schedule 1 makes provision for directors' terms of office, remuneration and the like.¹⁰⁸⁰
- 21 icare's primary functions are to 'act for' the NI, and to 'provide services to' the Lifetime Care and Support Authority, the NSW Self-Insurance Corporation, the Building Insurers' Guarantee Corporation and the Workers Compensation (Dust Diseases) Authority.¹⁰⁸¹
- 22 Other key provisions of the SICG Act include:
 - a) The power of the Minister to give the Board a written direction in relation to icare if it is necessary in the public interest to do so. Before giving such a direction, the Minister must consult with the Board and ask it to advise if complying with the

¹⁰⁷⁶ SICG Act Part 2

¹⁰⁷⁷ Ibid ss 4, 5

¹⁰⁷⁸ Ibid s 6(3)

¹⁰⁷⁹ Ibid s 6

¹⁰⁸⁰ Ibid sch 1

¹⁰⁸¹ Ibid s 10

direction would not be in the best interests of icare. The Minister must publicly notify the reasons for a direction and why it is in the public interest.¹⁰⁸²

- b) icare can employ such staff as it requires to exercise its functions, but such staff are not public service employees under the GSE Act¹⁰⁸³; nor is icare's CEO.¹⁰⁸⁴
- c) The board determines the remuneration and conditions of employment of icare's CEO.¹⁰⁸⁵ The board may remove the CEO from office at any time for any or no stated reason, and without notice.¹⁰⁸⁶
- d) icare may delegate any of its functions, apart from the power of delegation, to an authorised person, and a delegate may sub-delegate any of their functions to an authorised person if so authorised by icare. An '*authorised person*' means the CEO, a director, member of staff, member of a board committee, or other person prescribed by regulation.¹⁰⁸⁷

23 Part 3 of the SICG Act establishes SIRA. SIRA is also a statutory corporation with a Board and a CEO.¹⁰⁸⁸ The Board consists of the CEO of SIRA, the Secretary of the relevant Department or their nominee (in contrast to icare, which does not have to have a departmental representative on the Board), and up to five Ministerial appointees.¹⁰⁸⁹ The Board's functions include determining the general policies and strategic direction of SIRA, overseeing the performance of SIRA's activities, and informing the Minister of SIRA's activities.¹⁰⁹⁰ Schedule 3 contains provisions about Board members and procedure.

24 Unlike icare, SIRA's CEO is employed directly by the relevant Department, rather than by the corporate entity itself. SIRA's staff are employed under the terms of the GSE Act.¹⁰⁹¹

25 Section 23 sets out the principal objectives of SIRA. They include (and this is not an exhaustive statement):

- a) to promote the efficiency and viability of the insurance and compensation schemes;
- b) to promote workplace injury prevention, effective injury management and return to work measures and programs; and
- c) to supervise effectively claims handling and disputes under the workers compensation, motor accident and home building legislation.

26 SIRA's functions are those conferred on it by the SICG Act and by any other Act.¹⁰⁹² SIRA's functions under the SICG Act include collecting and analysing information on

¹⁰⁸² SICG Act s 7

¹⁰⁸³ Ibid s 14

¹⁰⁸⁴ Ibid sch 2 cl 6

¹⁰⁸⁵ Ibid sch 2 cl 2

¹⁰⁸⁶ Ibid sch 2 cl 4

¹⁰⁸⁷ Ibid s 13

¹⁰⁸⁸ Ibid s 17, 18

¹⁰⁸⁹ Ibid s 18(2)

¹⁰⁹⁰ Ibid s 18(5)

¹⁰⁹¹ Ibid s 19(1), 21

¹⁰⁹² Ibid s 24(1)

prudential matters in relation to insurers under the workers compensation and motor accidents legislation, and the *Home Building Act 1989*, and promoting sound prudential practices by insurers under that legislation.¹⁰⁹³

- 27 Part 2 of the WIM Act gives SIRA some objectives and general functions under workers compensation legislation. Those objectives include promoting safe workplaces and the prevention of workplace injuries, and ensuring the efficient operation of workers compensation insurance arrangements and effective dispute resolution.¹⁰⁹⁴ The general functions include ensuring compliance with workers compensation legislation, establishing complaint handling procedures for complaints made by employers and injured workers, and monitoring the financial viability of the scheme.¹⁰⁹⁵
- 28 In addition, SIRA has several specific workers compensation functions, such as investigating workplace accidents, identifying disincentives for injured workers to return to work, developing policies for injury management and worker rehabilitation, and monitoring the operation of requirements under the scheme legislation, such as the licensing of workers compensation insurers.¹⁰⁹⁶
- 29 SIRA is also subject to oversight and direction, in certain circumstances, by its Responsible Minister. Section 20 provides that the Minister may give SIRA a written direction in respect of its functions if it is in the public interest to do so. Unlike the comparable power in respect of icare, there is no requirement that the Minister consult with SIRA's Board before issuing such a direction. Each direction and its particulars must be included in SIRA's annual report.
- 30 Otherwise, SIRA is not subject to the control or direction of the Minister.¹⁰⁹⁷ Under section 25, IPART may, at the request of the Minister, investigate matters about the operational costs and expenses of SIRA.
- 31 The SICG Act as enacted also amended the *Work Health and Safety Act 2011* (WHS Act) to 'establish' SafeWork NSW. Those amendments did not create a new agency. Instead, they designated the Secretary of the Department of Finance, Services and Innovation as regulator under the name 'SafeWork NSW', with the consequence that SafeWork NSW is a NSW government department. The various functions of the regulator under the WHS Act were thus transferred from the former WorkCover to Safework NSW. SafeWork NSW is subject to the control and direction of the Minister except in relation to:
 - a) the contents of any advice, report or recommendation given to the Minister;
 - b) any decision that relates to proceedings for offences under this Act; or
 - c) any decision that relates to a Work Health and Safety (WHS) undertaking.
- 32 Section 27 of the SICG Act requires that a Parliamentary Committee of the Legislative Council be designated for the purposes of the section, and that its terms of references relate to the supervision of the operation of the workers compensation and motor accidents insurance and compensation schemes.

¹⁰⁹³ SICG Act s 24(2)

¹⁰⁹⁴ Ibid s 22(1)

¹⁰⁹⁵ Ibid s 22(2)

¹⁰⁹⁶ Ibid s 23

¹⁰⁹⁷ Except of course such measure of control as may flow from the exercise of the Minister's power to appoint SIRA's Board.

33 Under section 32, the Minister is to review the SICG Act as soon as possible after five years from the date of assent, to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. A report must be tabled in each House of Parliament within 12 months after the end of the five-year period.¹⁰⁹⁸

¹⁰⁹⁸ SICG Act s 32.

33 Submissions

33.1 Survey

- 34 There were 201 responses to the survey that was conducted as part of the consultation process for my Review. Only a quarter of survey respondents chose to give a detailed response to the question seeking feedback about the SICG Act's policy objectives, and whether the Act's terms remained appropriate for achieving its objectives.
- 35 Of those people who did respond, most indicated their view that the legislation did not support injured workers. Many referred to the complicated nature of the workers compensation process, and recommended an expansion of the governance and oversight mechanisms for SIRA's regulation of the schemes.

33.2 Written submissions

- 36 In their written submissions to this Review, many stakeholders suggested that the policy objectives of the SICG Act require clarification.¹⁰⁹⁹ In addition, icare, SIRA and other stakeholder submissions identified the need for greater clarity in the separation of roles and functions between icare, SIRA and SafeWork NSW under the SICG Act, and under the WC Act 1987 and WIM Act more broadly.¹¹⁰⁰
- 37 Some of the submissions, including SIRA's, noted the limited legislative provisions relating to the oversight of the NI and icare.¹¹⁰¹ Some stakeholders suggested that, as a solution, SIRA's current regulatory constraints be removed. That was said to be conducive to improving oversight of icare.¹¹⁰²
- 38 Additional comments relating to the SICG Act's statutory provisions include the clarification of ministerial oversight,¹¹⁰³ which I discuss at [35.3 below](#). SIRA's submissions, and those from some other respondents, raised issues with icare's exemption from the GSE Act,¹¹⁰⁴ which I address at [35.4 below](#).
- 39 All the submissions I received addressed the SICG Act in the context of the workers compensation scheme and the NI. This is unsurprising, given the context in which my

¹⁰⁹⁹ *Submissions to the Independent Review*: Law Society of NSW, 29 October 2020, 2; The Australian Federation of Employers and Industries, November 2020, 8-12; Teachers Federation, 4 November 2020, 9; Business NSW, November 2020, 8-9; Ai Group, October 2020, 17-18; and NSW Treasury, *Treasury response to queries raised in the icare Independent Review*, 22 February 2021, 9

¹¹⁰⁰ icare, *Submission to the Independent Review - Legislative & Regulatory Structure*, 18 November 2020, 5-8; *Interview with Anonymous Stakeholder*, 10 December 2020, 8-9; NSW Treasury, *Treasury response to queries raised in the icare Independent Review*, 22 February 2021, 9; Business NSW, Submission, November 2020, 8-9; *Interview with Anonymous Stakeholder Group*, 18 December 2020, 46

¹¹⁰¹ *Submissions to the Independent Review*: The Australian Federation of Employers and Industries, November 2020, 8-12; Business NSW, November 2020, 8-9; SIRA, November 2020, 22 and 24; and NSW Treasury, *Treasury response to queries raised in the icare Independent Review*, 22 February 2021, 9

¹¹⁰² For example: *Submissions to the Independent Review*: Unions NSW, October 2020, 6-7; Australian Federation of Employers and Industries, November 2020, 11-12

¹¹⁰³ For example: Business NSW, *Submission to the Independent Review*, November 2020, 8; SIRA, *Submission to the Independent Review*, November 2020, 21

¹¹⁰⁴ *Submissions to the Independent Review*: Public Service Association, November 2020, 7; Anonymous, 13; SIRA, November 2020, 21-22

Review was set up. I received no submissions dealing with the operation of the SICG Act in respect of the other schemes managed by icare and regulated by SIRA, except by way of contrast to experiences relating to the NI. In the absence of evidence, I cannot comment on the Act's effectiveness in relation to those other schemes.

34 Delivery of policy objectives

40 The key points raised with my Review are the:

- a) lack of clarity in the separation between and functions of the relevant agencies; and
- b) insufficient transparency of and accountability for icare's operations. This point was linked to comments as to the adequacy of SIRA's powers to act as an effective regulator.

41 There was also a small number of concerns as to differences in the operational structures between icare and SIRA, such as remuneration constraints and powers to ministerial direction.

42 The SICG Act's primary objective, of removing the inherent conflict of interest in the multiple roles of the former WorkCover, has been in substance achieved through its structural separation into three new entities. I say in substance, as there remains a degree of confusion and overlap in particular between icare and SIRA, and because (as discussed at [113 below](#)) SIRA itself retains both regulatory and policy-setting functions.

43 I note that the changes to dispute resolution functions and processes identified in the appear to have been effective. (The previous parliamentary review of the SICG Act had identified some problems in this area.¹¹⁰⁵) Most submissions to my Review did not express concerns as to dispute resolution arrangements. icare, however, submitted that there was a continuing overlap in functions between SIRA and WIRO in this area (as to which, see further below).

44 Nonetheless, it is clear to me that some further amendment is needed to ensure that the Act achieves its remaining objectives.

45 The SICG Act has provided an operational structure that should facilitate the achievement of operational efficiencies and economies of scale. I did not receive any submissions suggesting that the consolidation of schemes under the management of a single organisation ought to be reversed (except to the extent that they criticised icare's operations). The fundamental principle remains valid and the terms of the Act remain suitable to achieve that aim.

46 As I discussed in [Part 1B](#), there is evidence that icare's overall costs have increased by what appears to be an excessive extent (although icare did not accept that the increases were excessive), and that those costs increases have outweighed the efficiencies that have been achieved. That, however, would appear to be the outcome of shortcomings in icare's management of the NI, not a result of some defect in the structural separation of the three entities and the consolidation of management of the schemes under icare.

47 To the extent that regulation and oversight can facilitate the efficiency of icare's operations, a considered enhancement of SIRA's powers to regulate icare would achieve this (see [35.2.1 below](#)).

¹¹⁰⁵ Standing Committee on Law and Justice, *Final Report - Statutory review of the State Insurance and Care Governance Act 2015*, 15 December 2017, at [1.87]

48 I received submissions to the effect that private underwriting ought to be considered as a structural response to icare's operational problems.¹¹⁰⁶ Leaving to one side, as always, the cases of self-insurance and specialised insurance, I do not understand why this would be so. No submission has explained how, as opposed to asserted that, the inevitable duplication of services and resources, with associated increases in management costs and dilution of management resources would achieve any benefit.

49 Private insurers, conducted for the benefit of their shareholders, strive to deliver a profit to those shareholders through their investment of premiums and their dealings with insureds and claimants. icare operates on a not for profit basis. Its sole purpose is to deliver service to insureds and claimants at the lowest possible cost. Investment returns on the WCIF do not go towards a profit for shareholders, but to support the delivery of services.

50 There is nothing in the material submitted to my Review to support a recommendation for a return to the days of private sector underwriting.

51 The objective of reducing the adversarial nature of the system appears to have been achieved in part (see *Part 1B*). Again, that achievement is largely a result of icare's and SIRA's operations rather than the terms of the SICG Act.

52 icare submits that it has become more "*customer-centric*".¹¹⁰⁷ I confess to some difficulty in understanding, let alone ascribing any meaningful content to, this concept. If it means that icare is listening to claimants and employers, there may be some truth in the claim, at least if NPS scores are any guide. If it means that claimants are getting better service, then the claim is contestable. If it means that employers have received lower premiums, the claim is correct, but at least in part because premiums have been set too low for some years past.

53 I have addressed the operations of icare in *Part 1B* of this report, and do not propose to return to that topic. Likewise, having addressed the legislative and structural features of the workers compensation schemes in *Part 2* of this Report, I do not propose to return to it. Accordingly, the following section of this Report focuses on the terms of the SICG Act.

¹¹⁰⁶ Anonymous submission; NIBA, *Submission to the Independent Review*, 5

¹¹⁰⁷ icare, *Submission to the Independent Review – Review of the SICG Act*, November 2020, [82-86]

35 Issues raised for this Review

35.1 Objects and functions of icare, SIRA and Safework NSW

54 A significant number of submissions asserted that the objects, purposes and functions of each agency (icare, SIRA and SafeWork NSW) were not clearly defined in the SICG Act, and the cognate workers compensation legislation. This in turn was said to contribute to confusion and dispute as to the proper role of, and relationship between, each agency.

55 The SICG Act defines the functions of icare,¹¹⁰⁸ and the principal objectives and functions of SIRA,¹¹⁰⁹ both of which include any other function given under any other Act.

56 The SICG Act amended the WC Act 1987 and the WIM Act to transfer various functions and responsibilities under those Acts to SIRA or to icare, gave icare '*such additional functions as may be necessary or convenient for enabling [icare] to act for the Nominal Insurer*'.¹¹¹⁰

57 The SICG Act described a large number of objectives, and provided a list of general functions for SIRA as set out in sections 23 and 24 respectively.

58 As I have noted, whilst the SICG Act constitutes icare and SIRA as two distinct corporate entities, it does not clearly define the purposes and objects of icare, and it prescribes the functions and responsibilities of SIRA only in broad and inclusive terms. The submissions I received describe how this has led to confusion and duplication of roles.

59 icare submitted that:

...As between the SICG Act, the 1987 Act and the 1988 (sic) Act, there is some overlap and ambiguity in the respective responsibilities of icare, the Nominal Insurer and SIRA. Many of the statutory functions previously conferred on WorkCover under the 1987 and 1988 Acts were not clearly delegated to either icare, the Nominal Insurer or SIRA. As a result, in addition to fulfilling a supervisory function in respect of the workers compensation system and ensuring compliance with the workers compensation legislation, SIRA was also given very specific functions in respect of the operation of the workers compensation legislation and particular elements of the workers compensation system in NSW. In particular, many of SIRA's powers appear to require SIRA to engage in certain operational actions more readily ascribed to an insurer, rather than a regulator.¹¹¹¹

60 icare pointed to disputes as to the basis for concluding that an injured worker has returned to work, and the method of determination of PIAWE, as specific examples of

¹¹⁰⁸ SICG Act s 10

¹¹⁰⁹ Ibid ss 22 and 23

¹¹¹⁰ Sch 5 of SICG Act as made, s 154CA of WC Act 1987

¹¹¹¹ icare, *Submission to the Independent Review Legislative & Regulatory Structure*, 18 November 2020, 5

overlap. It suggests that the overlaps have given rise to a lack of clarity in demarcating the functions of icare, the NI and SIRA.¹¹¹²

61 icare also submitted that the powers given to SIRA under the SICG Act allow SIRA to engage in operational matters rather than regulation. icare submits:

... many of SIRA's powers appear to require SIRA to engage in certain operational actions more readily ascribed to an insurer, rather than a regulator. For example pursuant to sections 22 and 23 of the 1998 Act, SIRA is responsible for the following functions, among others: a. the day to day operational matters relating to the workers compensation scheme; b. to initiate and encourage research to identify efficient and effective strategies for the prevention and management of work injury and for the rehabilitation of injured workers; to ensure the availability of high-quality education and training in such prevention management and rehabilitation; to develop equitable and effective programs to identify areas of unnecessarily high costs in or for schemes to which the workers compensation legislation relates; to identify (and facilitate or promote the development of programs that minimise or remove) disincentives for injured workers to return to work or for employers to employ injured workers, or both; to develop programs to meet the special needs of target groups, including workers who suffer severe injuries, are unable to return to their pre-injury occupation, are unemployed, live in remote areas, women, persons of non-English speaking backgrounds and who have a disability; and to facilitate and promote the establishment and operation of return-to-work programs.¹¹¹³

62 The Law Society stated:

While the SICG Act legislates a separation of the functions, the Law Society is of the view that this separation is not appropriately maintained in practice. As a result, the separation of functions is often unclear or not apparent. For example, it has been the case that (in the absence of guidance from SIRA), icare has issued its own guidance on various aspects of the scheme for the use of insurers. The result of this is that, despite apparent structural separation, the roles of icare and SIRA may be confused and service providers can be uncertain about where to obtain definitive guidance on the scheme. This operational confusion undermines the statutory separation between these agencies.¹¹¹⁴

63 At a more general level, the Law Society also noted that it:

a) *...considers that making insurance structures in NSW easier to understand and navigate continues to be a valid objective of the SICG Act, but that the Act, in its current form, has not achieved this objective. In particular, by importing the terms of underlying workers compensation legislation, the Act does not address the inherent and wide-ranging complexities of the workers compensation scheme. The establishment of separate agencies, without further consideration of the*

¹¹¹² icare, *Supplementary submission*, 29 January 2021, 2

¹¹¹³ SIRA, *Submission to the Independent Review*, November 2020, 25-26

¹¹¹⁴ Law Society of NSW, *Submission to the Independent Review*, 29 October 2020, 2

*underlying complexity of the scheme, is not sufficient on its own to make those insurance structures easier to understand.*¹¹¹⁵

64 Treasury was asked to provide its response to a number of queries raised in the course of the Review. In its response, Treasury noted that:

...unusually, icare is given no statutory objectives as an organisation. Most other statute-created entities are given objectives in their legislation to set out the fundamental aims and purpose of the organisation.

*Absent this, wide latitude is given to the Board and executive to determine the organisation's approach and areas of focus. Coupled with inconsistent legislated accountability... this runs the risk of departure from public expectations and those of the Government.*¹¹¹⁶

65 The Australian Federation of Employers and Industries (AFEI) echoed the views of Treasury. It submitted that the absence of statutory obligations has limited transparency and accountability to NSW employers of the workers compensation schemes:

*The SICG Act has been drafted in the broadest possible terms, without clear and specific obligations for SIRA or ICNSW as to the manner in which they discharge their statutory functions. The nominal insurer is not required by the SICG Act or by the 1987 Act (s 154A - 154CA) to be accountable for its performance. Section 10(1)(d) of the SICG Act merely requires ICNSW to "monitor" the performance of the schemes for which it provides services. As a consequence, both bodies are able to conduct their operations without any requirement to be transparent or accountable to NSW employers who own the scheme liabilities 1987 Act 154D(4)).*¹¹¹⁷

66 Further, Business NSW submitted that:

Clear statutory separation has not been achieved. This is due to the way in which the 2015 Act has abolished bodies and simply transferred 'assets, rights and liabilities' of the Board instead of enumerating the functions. This is particularly problematic with respect to the Return to Work and Support Board.

While there is operational separation between icare and SafeWork NSW, this is not accompanied with clearly defined boundaries of each organisation's responsibilities with respect to the prevention of harm.

*icare's focus on harm prevention has not only led to increased inefficiencies throughout the system due to a duplication of resources, but it has also meant that insufficient attention is being directed towards injury management and improving return to work outcomes. This has been borne out by the Dore Report.*¹¹¹⁸

67 icare submitted that these issues have arisen because:

¹¹¹⁵ Law Society of NSW, *Submission to the Independent Review*, 29 October 2020, 2

¹¹¹⁶ NSW Treasury, *Treasury response to queries raised in the icare Independent Review*, 22 February 2021, 9

¹¹¹⁷ The Australian Federation of Employers and Industries, *Submission to the Independent Review*, November 2020, 8

¹¹¹⁸ Business NSW, *Submission to the Independent Review*, November 2020, 9

[t]he designation of operational matters to the regulator is a carry-over of the old structure of WorkCover and the historical nature of the interaction between WorkCover and the Nominal Insurer... Removal of this overlap and further clarification of the respective roles of SIRA as regulator, the Nominal Insurer as the nominated workers compensation insurer and icare as the single provider of services to the Nominal Insurer and other relevant authorities would complete the "statutory and operational separation between the functions of providing government insurance services and the regulation of those services" intended to be achieved by the passing of the SICG Act and 2015 amendments.¹¹¹⁹

- 68 Stakeholders also raised the overlap of functions during their interviews. An anonymous stakeholder group considered that 'confusion about powers and relationship'¹¹²⁰ was a theme that often arises in its observations of the working of the relationship between icare and SIRA.
- 69 SafeWork NSW confirmed that it too has received feedback from stakeholders about the overlap of functions between SIRA and icare, and to a lesser degree, SafeWork NSW.¹¹²¹ However, from the perspective of SafeWork NSW, this overlap did not cause any particular concerns.
- 70 During an interview conducted as part of this Review, an anonymous stakeholder group expressed the view that:

...the role of the moderator is so important and critical and the role of the moderator is SIRA in NSW...

Difficulties of the moderator where they take on the operational aspects and merging can lose the identity. Advantage to SIRA as a moderator and then icare as the statutory body is that as long as each understands their roles and as long as the culture is right, it can work. What icare have done is the overreach in operations as you don't want icare doing case management and don't want agents doing the governance. Otherwise it can muddy the waters.¹¹²²
- 71 To address these concerns, Business NSW, the AFEI and Treasury supported legislative amendment. Treasury considered that 'icare would benefit from being given clear objectives by the Government, through legislation. These could either be at the organisational level or specific to certain schemes'.¹¹²³ In similar vein, Business NSW suggested that '...the legislation be amended so it clearly outlines the rights and responsibilities properly attributable to each of the three newly created entities, given that together, they are supposed to achieve the statutory objectives of the NSW workers' compensation system'.¹¹²⁴

¹¹¹⁹ icare, *Submission to the Independent Review - Legislative & Regulatory Structure*, 18 November 2020, 8

¹¹²⁰ *Interview with Anonymous Stakeholder Group*, 18 December 2020, 46

¹¹²¹ *Interview with SafeWork*, 4 February 2021, 2-3

¹¹²² *Interview with Anonymous Stakeholder Group*, 10 December 2020, 4-7

¹¹²³ NSW Treasury, *Treasury response to queries raised in the icare Independent Review*, 22 February 2021, 9

¹¹²⁴ Business NSW, *Submission to the Independent Review*, November 2020, 9

72 In Ai Group's view, further structural changes could be too disruptive. Instead, it suggested that '*the best way forward is to enhance the implementation of the Act through better relationships between SIRA and icare.*'¹¹²⁵

73 icare and SIRA agree that the distribution of functions between them has been unclear. Each has sought external legal advice on the extent of their powers and functions.

74 SIRA, in its submission to me, stated that '*[t]he SICG Act provides specific objectives for SIRA but does not include policy objectives for the administration of the State's compensation schemes or icare. It would be useful and instructive for the legislation to clearly articulate the core purpose in relation to scheme sustainability, optional results for claimants, and public trust in compensation schemes.*'¹¹²⁶

75 icare provided a number of examples of what it considered to be overlap in the legislation, including:

- SIRA's objectives include the promotion of the prevention of injuries and promoting effective workplace injury management;
- under section 22 of the WIM Act, SIRA is said to be '*responsible for the day to day operational matters relating to the workers compensation scheme*';
- SIRA, icare and SafeWork NSW all have some functions in relation to workplace safety and the resolution of complaints (with the former WIRO and the former WCC); and
- icare and SIRA have issued conflicting guidance on some operational points, such as PIAWE calculations and the effect of relevant Court of Appeal decisions.¹¹²⁷

76 icare further identified a number of specific operational examples of the perceived overlap, including:

- SIRA has commissioned various reviews and audits which '*could be characterised as operational, rather than regulatory, in nature*',¹¹²⁸ including review of icare's financial performance;
- SIRA has been given the function under the WIM Act of '*facilitating and promoting the establishment and operation of return-to-work programs*'.¹¹²⁹ SIRA has done so by developing its own program offering return to work support to employers, in this, arguably overlapping with the work of a claims manager or insurer; and
- SIRA continues to act on complaints from injured workers, where icare considers the WIRO is properly responsible for addressing the complaint.¹¹³⁰

77 I have considerable difficulty in seeing that any of these matters are outside SIRA's role as a regulator (either as the legislation stands, or as a matter of policy). In any

¹¹²⁵ Ai Group, *Submission to the Independent Review*, October 2020, 17

¹¹²⁶ SIRA, *Submission to the Independent Review*, November 2020, 20

¹¹²⁷ icare, *Submission to the Independent Review - Legislative & Regulatory Structure*, at [25]

¹¹²⁸ icare, *Supplementary Submission*, 29 January 2021, at Appendix 2, 1

¹¹²⁹ WIM Act 1998, s23(i)

¹¹³⁰ icare, *Supplementary Submission*, 29 January 2021, at Appendix 2, 2

event, as I have said already, some degree of overlap is inevitable, and in some areas such as the promotion of workplace safety, may be desirable.¹¹³¹ Regardless, it is desirable that SIRA's role as regulator be clearly defined. All scheme participants should be able to understand who is responsible for the operation or for the regulation of any given aspect of the scheme.

78 It is clear from the evidence before me that the terms of the SICG Act have not fully achieved the policy objective of creating structurally separate organisations, nor of promoting transparency. The SICG Act does not '*create a clear statutory and operational separation between the functions of providing government insurance services and the regulation of those services*',¹¹³² as stated in the Second Reading Speech. Although the organisations themselves are separate, so that the fundamental conflict of interest has been addressed, the terms of the SICG Act do not effectively demarcate the roles and responsibilities of each agency.

79 One of the comments made to the Strategic Insurance Review by the Productivity Commission was that separating regulatory from operational functions has '*the potential to enhance the quality of service provided to consumers and the effectiveness of service provision*'.¹¹³³ The evidence before me suggests the reverse is also true; at least, if the separation is unclear or incomplete.

80 The existence of both unclear and incomplete separation of functions is exemplified in the complaints framework that now exists. Following the 2018 amendments¹¹³⁴ to the WC Act 1987, the WIRO (now IRO) commenced handling enquiries and complaints made by injured workers about their insurer.¹¹³⁵ SIRA continues to respond to injured workers' complaints about their employer or healthcare provider.¹¹³⁶

81 SIRA suggested that the complaints framework is complex and that the complaints process can be unclear to employers and injured workers:

*In the first instance, complaints can be made to the insurer and, in some cases, icare. In 2018, WIRO commenced handling all escalated enquiries and complaints from injured workers about their insurer. SIRA has continued to respond to escalated enquiries and complaints from workers complaining about their employer or healthcare provider, and escalated enquiries and complaints from employers, insurers, and other stakeholders. SIRA also has a role in responding to complaints that require regulatory action, however customers seeking a regulatory response have expressed that it is now more difficult to understand how to access the regulator.*¹¹³⁷

82 SIRA noted that it does not have access to detailed worker complaints data, including matters relating to suspected non-compliance, that are reported to WIRO. It has suggested that it be given access to system-wide complaints data to improve its

¹¹³¹ Of course, as long as any co-regulation of workplace safety (or any other topic) is complementary and not conflictual.

¹¹³² Legislative Assembly, *Workers Compensation Amendment Bill 2015 and State Insurance And Care Governance Bill 2015 Second Reading Speech*, 5 August 2015, at 3

¹¹³³ NSW Treasury, *Strategic Insurance Review*, May 2015, at section 2.5

¹¹³⁴ *Workers Compensation Legislation Amendment Act 2018*

¹¹³⁵ SIRA, *Submission to the Independent Review*, November 2020, 26-27

¹¹³⁶ *Ibid*

¹¹³⁷ *Ibid*

regulatory oversight of the workers compensation scheme.¹¹³⁸ However, icare suggests that the WIRO should be solely responsible for addressing such complaints, to the exclusion of SIRA.¹¹³⁹

- 83 While the IRO was established (as the WIRO) to deal with the complaints of injured workers, no equivalent legislative pathway was established to deal with the complaints of employers.¹¹⁴⁰ As there is no designated agency responsible for such functions, employers' complaints are dealt with by SIRA.
- 84 Timely access to accurate and up to date complaints data is essential for SIRA's exercise of its regulatory role. Specific consideration should be given to clarifying roles in relation to the complaints process and data support to address the matters raised by SIRA. The availability of, and consistency as to data have been ongoing issues. They arose out of the separation of SIRA from WorkCover, and are discussed further in *Part 1B*.
- 85 icare submitted that it and SIRA have made efforts to clarify their roles and responsibilities following the Dore 2019 Review.¹¹⁴¹ There has not yet been enough time to assess the effectiveness of those efforts.
- 86 The separation of functions is a significant policy objective of the SICG Act. It is unsatisfactory for the functions and responsibilities of the statutory agencies created by the legislation to be left to negotiation and agreement between them, particularly where one is the regulator and the other is the regulatee. That is why, in my view, the legislature should intervene.
- 87 As I have discussed in more detail in *Parts 1A and 1B* of my report, and as is evident from icare's examples set out above, the confusion has contributed to uncertainty over the proper scope of SIRA's regulatory oversight, and to the disagreements between icare and SIRA. It is therefore desirable that the roles and responsibilities of the two entities be made clear in the legislation. That will avert future conflicts, and as well provide an objective position against which their actions may be assessed.
- 88 The inclusion of a clear statement of objectives and a clear description of functions should also assist icare to avoid a recurrence of some of the organisational concerns identified elsewhere in my review. I have made a recommendation to this effect at *0 above*.

35.2 SIRA's regulatory powers

- 89 Numerous submissions commented on the extent of SIRA's regulatory powers. Largely, these submissions expressed the view that there has been insufficient oversight of the workers compensation system. Most related to the deficiency of powers, some to the exercise of existing powers. I consider both issues below.
- 90 I have already considered the issue of prudential regulation in *Part 2*. I have therefore do not address it in this Part.

¹¹³⁸ SIRA, *Submission to the Independent Review*, November 2020, 26-27

¹¹³⁹ icare, *Supplementary Submission*, 29 January 2021, at Appendix 2, 2

¹¹⁴⁰ Australian Federation of Employers and Industries, *Submission to the Independent Review*, November 2020, 7-8

¹¹⁴¹ icare, *Submission to the Independent Review – Review of the SICG Act*, November 2020, at [55]

91 The complexity of the legislative framework, which I have discussed in some detail in *Part 2*, means that there is no single source for SIRA's regulatory powers. Instead, they arise under the SICG Act, the WC Act 1987 and the WIM Act. In this Part of my Report I propose to deal with the submissions I have received in relation to SIRA's regulatory powers regardless of their statutory source. Thus, some of the matters I am about to discuss relate to powers derived from the WIM Act or the WC Act 1987.

92 In so doing, I keep in mind, as applicable by analogy although not directly, the prescription in the Australian Government Best Practice Regulation Handbook, that law reform should aim to '*deliver effective and efficient regulation—regulation that is effective in addressing an identified problem and efficient in terms of maximising the benefits to the community, taking account of the costs*'.¹¹⁴² In the field of regulation, efficiency is served by proportionality: the regulation should not go beyond what is necessary to address the problem.

35.2.1 SIRA does not regulate icare as an entity

93 As pointed out in SIRA's submission, '*[w]hile SIRA regulates workers compensation [schemes] and has regulatory oversight of icare's management of those schemes, SIRA does not regulate icare as an entity.*'¹¹⁴³

94 SIRA, as that submission correctly states, does have responsibility for regulating a number of the schemes managed by icare, including the NI and the workers compensation portfolio of the TMF.

95 As I discuss in *Part 2*, this appears to be in part the result of the history leading to SIRA's creation. The NI, when it was created, was subject to direct control by WorkCover, which performed both operational and regulatory functions. When SIRA was created, it took over the regulatory functions previously performed by WorkCover (and, therefore, those applicable to the NI) relating to insurers, the NI, scheme agents and related bodies. SIRA was not given specific regulatory powers over icare in its own right.

96 It does not appear to me to be a necessary part of SIRA's role that it have power to oversee icare generally. The Act provides for a degree of oversight of icare through the Minister's relationship with the Board; a position comparable to ministerial oversight of state-owned corporations, or the oversight by a minister of a departmental agency. Further, there is the requirement for the SCLJ to conduct regular reviews of the operation of the SICG Act.

97 SIRA has oversight powers over the NI and the WCIF. I address each of these aspects of oversight below. It is unclear what more is needed.

98 In one respect, however, SIRA's powers in respect of icare should be clarified. At present, SIRA's investigative powers apply to insurers.¹¹⁴⁴ It appears that icare's resistance to SIRA's oversight in some matters was exacerbated by a lack of clarity about SIRA's power to obtain information.

¹¹⁴² Australian Government, *Best Practice Regulation Handbook* (2010); *Australian Law Reform Commission Act* (1996) (Cth) s 24(2)(b)

¹¹⁴³ SIRA, *Submission to the Independent Review*, November 2020, 22,

¹¹⁴⁴ See, for example, the power to require specified information be provided by an insurer, s 189 WC Act 1987.

99 It is obvious that where SIRA is exercising a power or function in relation to an insurer (including the NI), it should be able to obtain relevant information from those who manage the insurer's business.

100 While the disagreement referred to above appears to have been resolved as between icare and SIRA, it is prudent that the legislation make it clear that SIRA's investigative powers extend to icare, to the extent necessary to enable SIRA to perform its functions in respect of any insurer or scheme agent. I note that this recommendation should be implemented in conjunction with my recommendation above in relation to clarifying the objectives of the agencies.

Recommendations	
SIRA's investigative powers	
45	That the legislature give consideration to amending the <i>State Insurance and Care Governance Act 2015</i> , <i>Workers Compensation Act 1987</i> and <i>Workplace Injury Management and Workers Compensation Act 1998</i> to extend SIRA's investigative powers to icare, to the extent necessary to enable SIRA properly to perform its functions.

35.2.2 Limitations on regulatory powers

101 SIRA contended that it has observed significant gaps in accountability, responsiveness and transparency of the NI's operations. Those gaps, in SIRA's view, are related to the NI's statutory, governance and regulatory structure. SIRA summarised those gaps as follows in its submission:

The Nominal Insurer is the largest insurer in the NSW workers compensation system and is established under Division 1A Part 7 of the Workers Compensation Act 1987...

The Nominal Insurer holds an unconditional licence, except for the need to comply with the Market Practice and Premiums Guidelines. While SIRA can impose conditions on other insurer licences, the contravention of which is an offence, SIRA is not able to impose conditions on the Nominal Insurer's licence to encourage compliance and drive improved performance.

The Nominal Insurer does not require authorisation under the Commonwealth Insurance Act 1973 to operate. This means that it is not regulated by the Australian Prudential Regulation Authority (APRA) and does not have to adhere to its minimum capital ratio requirements like other workers compensation insurers. The principal purpose of a minimum capital ratio is to protect policyholders and claimants from insurer insolvency, which would leave them financially disadvantaged. The power of the Workers Compensation Act 1987 to make a prudential regulation for the Nominal Insurer has never been enacted to set capital adequacy standards. Under the SICG Act, icare is responsible for administering the Nominal Insurer. However, icare only "acts for" the Nominal Insurer and does not itself have any obligations under the workers compensation legislation. icare is not regulated by SIRA. The Nominal Insurer does not have its own governance

*framework and there are no officers or directors who can be held accountable for its actions.*¹¹⁴⁵

102 SIRA submitted that as a result of ambiguities in and limitations on its powers, it is unable to regulate a range of persons and entities who perform functions or deliver services in the NI and TMF schemes. It submitted that its powers should be expanded to address such limitations:

SIRA does not have a uniform power to impose licence conditions, consistent with the legislation, on all insurers. Licence conditions can be applied to self and specialised insurers, but SIRA does not have any powers to impose licence conditions on the Nominal Insurer, SiCorp or the TMF agencies.

Licence conditions can relate to conduct, governance, claims administration and finances, and are an important regulatory tool for SIRA to effectively manage performance. A uniform power to impose licence conditions, across all insurer types, could be used to reduce risk and correct non-compliance or poor performance more proactively than by way of enforcement action...

*These legislative ambiguities, among others, limit SIRA's ability to fulfil its legislative functions and regulate actors in the workers compensation scheme in a way that would deliver optimal outcomes.*¹¹⁴⁶

103 The AFEI supported amendment of the SICG Act to provide certainty as to the extent of 'SIRA's power to compel icare's performance'¹¹⁴⁷ (whatever that might mean, although the submission appeared to suggest that the AFEI wanted SIRA to have a power in the nature of the common law order of *mandamus*¹¹⁴⁸). It submitted that:

We need amendment of the SICG Act to provide certainty about the rigour of SIRA's power to compel icare's performance. If SIRA does not actually operate a comprehensive and effective oversight of ICNSW and the scheme, then what is its purpose?

*If the legislation does not empower and require SIRA to command that result, it should be amended. Alternatively, start again: repeal the legislation; create new structure(s) with new rules designed for discipline and balance, and consider the possibility of privatising workers compensation insurance.*¹¹⁴⁹

104 SIRA identified three areas where, in its view, its powers should be expanded: its power to issue directions and conduct performance audits; its powers of enforcement and examination; and its power to regulate health providers engaged by insurers:

SIRA has broad powers to issue directions and conduct performance audits under section 194 and 202A of the Workers Compensation Act 1987. Both provisions, however, are limited to licensed insurers and self-insurers.

These powers do not extend to SiCorp (who is not an insurer), icare (it

¹¹⁴⁵ SIRA, *Submission to the Independent Review*, November 2020, 24,

¹¹⁴⁶ Ibid 24-25

¹¹⁴⁷ AFEI, *Submission to the Independent Review*, November 2020, 11-12

¹¹⁴⁸ A judicial writ issued as a command to an inferior court or ordering a person to perform a public or statutory duty.

¹¹⁴⁹ AFEI, *Submission to the Independent Review*, November 2020, 11-12

would only apply to icare insofar as icare is acting for the Nominal Insurer) or scheme agents of IC1 Pty Ltd (a created corporate subsidiary of icare, that holds the contracts with scheme agents).

Similarly, SIRA's legislative powers of enforcement and examination are limited to insurers and in some cases the scheme agents but do not extend to all the participants in the scheme. The limitations in the TMF construct have been provided as an example above.

In circumstances when SIRA identifies non-compliance with the legislation, its powers to impose penalties are in many cases limited to penalties of 100 penalty units. When considering the size of this penalty directed at large corporate insurers, the legislation provides an insufficient deterrent for legislative non-compliance. In addition, the cost of penalties on the Nominal Insurer is ultimately payable by NSW employers.

There are also a range of health providers engaged by insurers, employers, and workers throughout the life of a claim that SIRA has relatively little power to regulate. This includes but is not limited to nominated treating doctors and other treatment providers, rehab service providers, independent consultants, and assessors of work capacity and permanent impairment. SIRA does not have the power to suspend or exclude these providers from operating in the workers compensation system when SIRA rules are repeatedly breached.¹¹⁵⁰

- 105 Unions NSW similarly supported an expansion of SIRA's powers. It suggested that SIRA should be given the 'power to prosecute'¹¹⁵¹ and 'strong investigative powers'¹¹⁵² to prevent further '... uncertainty around how SIRA is able to enforce the objectives [of the WIM Act], or whether these objectives should or can be enforced at all.'¹¹⁵³
- 106 In my opinion, there is no justification for the NI's privileged position as an insurer whose licence is unconditional. It is plain, in my view, that SIRA ought to have powers (with the exception of licence suspension or cancellation) in respect of the NI equivalent to those that it has for other insurers.
- 107 My attention has been drawn to legislative provisions where SIRA's powers apply as conditions of a licence.¹¹⁵⁴ If it is not clear from what I have said already, those provisions should be extended expressly to include the NI and government self-insurers and their agents. While it may have been understandable that WorkCover did not have the power to regulate the management of claims by other arms of government, that situation no longer exists. It is difficult to see why the regulator of a scheme ought not have full power to oversee the management of claims covered by the TMF as well as those covered by the NI.
- 108 It may be said that these changes are essentially useless, because there is no real sanction available for, by way of example, breach of a condition attached to the NI's licence, in circumstances where any pain will be borne by employers or injured

¹¹⁵⁰ SIRA, *Submission to the Independent Review*, November 2020, 25-26

¹¹⁵¹ Unions NSW, *Submission to the Independent Review*, October 2020, 6-7

¹¹⁵² Ibid

¹¹⁵³ Ibid

¹¹⁵⁴ See for example, ss168(6), 192A(5) and 194 of the WC Act 1987.

workers. That is correct in principle, but I think the change I am recommending will send a clear message to icare and all its directors and staff as to the importance of compliance with SIRA's proper requirements.

109 Further, and to avoid any residual doubt, SIRA ought to have clear powers to give direction to all participants who are involved in managing claims under the workers compensation scheme, even in the absence of a relevant licence condition. In short, while the regulatory power has as part of its armoury any relevant licence provisions, it ought not be limited to those provisions.

Recommendations	
Clarification of SIRA's regulatory reach	
46	That the legislature give consideration to amending the <i>Workers Compensation Act 1987</i> and <i>Workplace Injury Management and Workers Compensation Act 1998</i> to state that all statutory provisions expressed to apply to a licensed insurer apply to the NI, icare and any subsidiaries (to the extent necessary for SIRA to perform its functions), SI Corp (to the extent necessary for SIRA to perform its functions) and any government self-insurer (to the extent necessary for SIRA to perform its functions), unless expressly exempted.

35.2.3 SIRA's use of its regulatory powers

110 Several submissions criticised SIRA's regulation of the workers compensation system. Unions NSW submitted that SIRA has been slow to use its regulatory powers in the past, stating: '*[s]ince the establishment of the three bodies [under the SICG Act] Unions NSW felt the State Insurance and Regulatory body (SIRA) was very slow to understand its role as Regulator and for many years did very little to oversee the running of the scheme agent.*'¹¹⁵⁵

111 In its submission, the Self Insurers Association expressed the view that: '*..objectives found in S.23(a), (b) and (e) [of the SICG Act] are not being met and rather the regulatory oversight by SIRA is making the workers compensation system much less efficient and significantly costlier.*'¹¹⁵⁶

112 The Public Service Association suggested that '*..there is a reluctance or inability of the SIRA to publicly take action against icare or its scheme agents that significantly alter the outcomes for injured workers.*'¹¹⁵⁷

113 These submissions echo concerns raised before the SCLJ in its 2017 review of the SICG Act. It appears to me to be likely that the consistent resistance to regulation that SIRA historically experienced from icare may have created and perpetuated a perception that SIRA was reluctant to use its powers vis a vis icare. Given that icare's resistance to SIRA has abated, and that SIRA's actions have become more interventionist from 2019, those perceptions may fade.

¹¹⁵⁵ Unions NSW, *Submission to the Independent Review*, October 2020, 6

¹¹⁵⁶ SIRA, *Submission to the Independent Review*, November 2020, 24

¹¹⁵⁷ Public Service Association, *Submission to the Independent Review*, November 2020, at [61-64] 10-11

114 It is to be hoped that SIRA's use of its powers will stabilise as the recommendations from this Review are implemented, and as SIRA and icare continue the development of the more positive relationship seen recently. In light of my recommendations so far, I do not see that further recommendations are necessary at this stage. However, the relevant Ministers, the Boards, and the SCLJ should monitor the relationship between icare and SIRA, to ensure that this issue does not reappear.

35.2.4 SIRA's dual policy and regulatory roles

115 Some submissions to my Review queried whether it was appropriate for SIRA to have both regulatory and policy setting-roles.

116 As noted in [35.1 above](#), a large number of objectives and functions set out in the WC Act 1987 and the WIM Act were assigned to SIRA following the introduction of the SICG Act. This meant that SIRA was given, in addition to its regulatory functions, some policy responsibilities for workers compensation legislation. Section 22(2) of the WIM Act provides:

22 Objectives and general functions of Authority under workers compensation legislation

(2) The general functions of the Authority under the workers compensation legislation are as follows—

- (d) to monitor and report to the Minister on the operation and effectiveness of the workers compensation legislation and on the performance of the workers compensation scheme,
- (e) to undertake such consultation as it thinks fit in connection with current or proposed legislation relating to the workers compensation scheme,

117 Treasury submitted that this aspect of SIRA'S functions gives it a role in setting policy, involving the following responsibilities:

- a) preparation of advice for Government on the functioning of an area of government policy;
- b) assessment of the effectiveness of existing policy including whether desired outcomes have been created for the beneficiaries (generally citizens of the respective state or jurisdiction);
- c) identification of areas for reform; and
- d) development and implementation of policy and legislative change.¹¹⁵⁸

118 Treasury suggested that is not typical for the policy function of an area of government responsibility to be assigned to an entity that has operational or regulatory responsibilities in that area.

119 Thus, Treasury submitted, SIRA's dual policy and regulatory functions have the potential to create disadvantages including potential conflict of interest; the diversion attention and resources away from regulation; and challenges associated with advocating for reform or change, when the entity is part of the system that is to be reformed.¹¹⁵⁹

¹¹⁵⁸ NSW Treasury, *Treasury response to queries raised in the icare Independent Review*, 22 February 2021, 11

¹¹⁵⁹ Ibid

120 This appears to be the view of the WIRO. During an interview for this Review, Mr Simon Cohen said that '*...the role of SIRA as the policy advisor can present some issues around it being both the writer and regulator. Its [best for] SIRA to do the regulatory and not to do the policy role.*'¹¹⁶⁰

121 Both Treasury and an industry body¹¹⁶¹ submitted that the workers compensation system would benefit if the regulatory and policy functions in respect of workers compensation legislation were separated.

122 Treasury submitted that '*...consideration be given to adopting a more standard model, where the policy responsibility function is given to a neutral government department, rather than the regulator. This would further deliver on the intent of the SICG Act reforms, to separate operator and regulator.*'¹¹⁶²

123 The industry body submitted that '*[w]hile we acknowledge that there are other examples of government agencies having dual regulatory and policy functions, we note that this is not the typical model. Rather, regulatory functions are usually performed by an independent authority or agency, while policy and legislative functions are performed by the relevant policy department (in consultation with the regulatory agency).*'¹¹⁶³

124 I received similar submissions from NIBA and an anonymous stakeholder.¹¹⁶⁴ Those submissions suggested that the problem would disappear, or more accurately would not arise, if there were a return to a privately underwritten system of workers compensation insurance. That is not germane to the present point, and to the extent it raises the merits of private underwriting, is something with which I have dealt already.

125 Such evidence as I have does not suggest that SIRA's dual roles have had any, let alone any adverse, impact on SIRA's performance of its various responsibilities and functions. Nor is there any basis for a conclusion that in some way, the co-existence of those roles has in some way impeded achievement of the objectives of the SICG Act or of the workers compensation legislation more generally.

126 On the evidence before me, there is no demonstration of a present need for the splitting of SIRA's regulatory and policy functions. Indeed, on one view, a regulator that in the exercise of its regulatory functions becomes aware of issues in the functioning of the scheme it regulates is well placed to formulate policy solutions, and should be permitted to do so.

127 However, bearing in mind the conceptual problem adverted to in the Treasury submission, it is desirable that SIRA's performance of its dual roles be kept under review. Likewise, it is important that if it should become apparent in the future that the duality of roles is impeding SIRA's ability to perform its regulatory function, then appropriate action be taken.

¹¹⁶⁰ Interview with WIRO, 23 November 2020, 5.

¹¹⁶¹ Anonymous Stakeholder Group, *Submission to the Independent Review*, 4 February 2021, 4

¹¹⁶² NSW Treasury, *Treasury response to queries raised in the icare Independent Review*, 22 February 2021, 12

¹¹⁶³ Anonymous Stakeholder Group, *Submission to the Independent Review*, 4 February 2021, 4

¹¹⁶⁴ Anonymous Stakeholder, *Submission to the Independent Review*, 6 November 2020, 6; NIBA, *Submission to the Independent Review*, 5

35.3 Ministerial oversight

128 The relationship between the Minister and icare was much canvassed in media reports and in the SCLJ hearings. However, it did not feature heavily in submissions to my Review. In *Part 1B*, I considered, although briefly, ministerial oversight of icare. In what follows, I discuss submissions relating to that oversight insofar as they relate to the provisions of the SICG Act.

35.3.1 Ministerial directions

129 SIRA and Business NSW queried the degree of ministerial oversight of icare. Both entities suggest that section 7(3) of the SICG Act creates uncertainty, or is inconsistent with other provisions of the SICG Act.

130 Sections 7 and 20 of the SICG Act give the relevant Minister power to issue directions to icare and SIRA respectively. The Minister for the purposes of section 7 is the Treasurer. The Minister for the purposes of section 20 is the Minister for Customer Service. Those sections provide:

7 Power of Minister to give directions in public interest

- (1) The Minister may give the ICNSW Board a written direction in relation to ICNSW if the Minister is satisfied that it is necessary to do so in the public interest.
- (2) The ICNSW Board must ensure that the direction is complied with.
- (3) Before giving a direction under this section, the Minister must:
 - (a) consult with the ICNSW Board, and
 - (b) request the Board to advise the Minister whether, in its opinion, complying with the direction would not be in the best interests of ICNSW.
- (4) The Minister is required to cause a notice to be published in the Gazette setting out the reasons why a direction was given under this section and why it is in the public interest that the direction was given. Any such notice is to be published in the Gazette within 1 month after the direction is given.

20 Ministerial directions

- (1) The Minister may give SIRA a written direction with respect to the functions of SIRA if the Minister is satisfied that it is necessary to do so in the public interest.
- (2) SIRA must ensure that the direction is complied with.
- (3) SIRA must include in its annual report particulars of each direction given under this section during the year to which the report relates.
- (4) Except as provided by this section, SIRA is not, in the exercise of its functions, subject to the control and direction of the Minister.

131 Business NSW suggested that section 7(3) of the SICG Act '*...introduces a level of uncertainty over the degree of oversight the Treasurer, in his capacity as the responsible Minister, has over the Board of icare.*'¹¹⁶⁵

132 SIRA's submission pointed out the distinction between sections 7(3) and 20(1). It noted that under section 20 of the SICG Act, '*[t]he Minister is not required to consult*

¹¹⁶⁵ Business NSW, *Submission to the Independent Review*, November 2020, 5

*with SIRA about any intention to give a written direction with respect to SIRA's functions, nor does SIRA have the opportunity to provide advice on whether the direction would be in the public interest.*¹¹⁶⁶

133 SIRA suggested that '*it* would benefit from the opportunity to provide the Minister with advice on whether an intended direction is in the public interest.'

¹¹⁶⁷ This, it submitted, could be achieved by introducing consultation provisions into section 20 equivalent to those in section 7(3). However, SIRA also submitted that '*...all decisions related to the workers compensation scheme should be taken in the public interest over the interest of any one entity.*'¹¹⁶⁸

134 There does seem to me to be a difficulty in the drafting of section 7, insofar as a comparison of subsections (1) and (3) could suggest that the interests of icare may offer a valid reason for overriding the public interests that underpin the proposed direction under subsection (1). In this, I agree with SIRA that it must be the public interest that is the focus of and reason for any direction, and that conflicting institutional interest should not prevail. Thus, I recommend:

Recommendations	
Ministerial directions	
47	<p>That the legislature give consideration to amending section 7(3)(b) of the <i>State Insurance and Care Governance Act 2015</i> to read as follows:</p> <p>'(b) request the Board to advise the Minister whether, in its opinion, the proposed direction would be in the public interest.'</p>

135 That amendment would, in my view, emphasise the primacy of the public interest, whilst leaving it open to the Board to include in its advice to the Minister reference to the possible impact of the direction on icare. The two interests may coincide, or they may not; but the Minister should have the benefit of considering advice from a body having a different perspective. It is at least arguable that a direction that, if implemented and obeyed, would have a significant adverse impact on the operations of icare could be inimical to the wider public interest.

136 I see no residual problem in section 7, so amended. It seems to me to be reasonable for an independent body such as icare to have the ability to make representations about the possible impact on its business of a proposed direction from its "owner". It should not be assumed that the Minister, acting as "owner", is omniscient. Nor should the independent and effective operation of icare be imperilled by a proposed direction that, by oversight flowing from want of consultation, could have the potential to do so.

137 I turn to section 20 and to SIRA's submission. SIRA and icare are very different creatures in their functions and areas of operation. Nonetheless, it does not follow that there is no need for or value in SIRA's input on a proposed direction from its Minister. On the contrary, and for reasons similar to those set out above in the case of icare, I consider that section 20 should be amended to include a requirement for SIRA's

¹¹⁶⁶ SIRA, *Submission to the Independent Review*, November 2020, 21

¹¹⁶⁷ Ibid

¹¹⁶⁸ Ibid

Board's advice on any proposed direction, in terms equivalent to the proposed section 7(3)(b).

Recommendations	
Ministerial directions	
48	<p>That the legislature give consideration to amending section 20 of the <i>State Insurance and Care Governance Act 2015</i> to add a new subsection as follows:</p> <p>'Before giving a direction under this section, the Minister must:</p> <p>(a) consult with the SIRA Board, and</p> <p>(b) request the Board to advise the Minister whether, in its opinion, the proposed direction would be in the public interest.'</p>

35.3.2 Ministerial advisory function

- 138 Business NSW outlined its concern that there was insufficient accountability within the structure of the SICG Act.¹¹⁶⁹ It submitted that the efficacy of current ministerial oversight arrangements be examined, and legislative amendment be made to strengthen those arrangements where deficiencies are found.¹¹⁷⁰
- 139 Prior to 2012, businesses (along with unions and medical and legal practitioners) had been represented on a Ministerial Advisory Council. In 2012, that Council was abolished when the SRWS Board was established. That seems to have been done in the expectation that the SRWS Board would establish advisory committees, and that the Minister would appoint *ad hoc* committees, as needed.
- 140 The second reading speech referred to this change in the following terms:

The bill also abolishes a number of advisory councils and industry reference groups which currently have a broad remit of advising the Minister and the authorities on the various schemes. Two mechanisms will replace the advisory councils and the industry reference groups. First, the board will have the power to establish committees to assist it in connection with the exercise of its functions. ... Secondly, the Minister will be empowered to appoint advisory committees on an ad hoc basis. The functions of an advisory committee may include investigating and reporting to the Minister on specific matters arising under or in connection with the compensation and other related legislation or any other Act under which a relevant authority exercises functions.

The Government has also implemented recommendation 16 of the Joint Select Committee on the NSW Workers Compensation Scheme that a committee of the Parliament conduct ongoing oversight of the New South Wales workers compensation scheme and conduct an extensive review of the scheme, and have the capacity to engage actuarial expertise to assist it

¹¹⁶⁹ Business NSW, *Submission to the Independent Review*, November 2020, 5

¹¹⁷⁰ Ibid

*to perform its functions. Proposed part 4 of the Safety, Return to Work and Support Board Bill provides for this parliamentary oversight, which is expected to improve accountability for the scheme.*¹¹⁷¹

- 141 In like manner, the SICG Act gives the Board of icare the power to form committees to ‘give advice and assistance to’ it.¹¹⁷² There is no specific power reserved to the Minister to appoint an advisory council.
- 142 Business NSW submitted that the abolition of the Ministerial Advisory Council, coupled presumably with the failure to appoint equivalent bodies, ‘...allowed icare to establish its Claims Management Model without being held to account for the resultant level of non-compliance and under-performance within that part of the scheme being managed by icare.’¹¹⁷³
- 143 If I may say so, that is an overly simplistic analysis. It confuses advisory and supervisory functions. As to the former, there is no reason to think that icare would have acted otherwise than it did when it set up the NCOM, because its management at the time was bent on transformation. And as to the latter, there is no lack of mechanisms to hold icare accountable for the deficiencies in the design and implementation of that model that are discussed elsewhere in this report. Nor is there any reason to think that those mechanisms would have been engaged more quickly, or more effectively, by the involvement of advisory committees or bodies.
- 144 Business NSW proposed the formation of a tripartite Ministerial Advisory Committee, including representatives from employers and workers among its members. It submitted that the Committee should be empowered to appoint sub-committees and industry reference groups to assist in the performance of its functions.
- 145 In November 2020, after Business NSW made that submission, icare established the Nominal Insurer Advisory Committee (NIAC), an industry consultative group comprised of unions, industry groups and government bodies and intended to inform adjustments to claims services.
- 146 Representatives of an anonymous stakeholder group interviewed as part of this review, welcomed the establishment of the NIAC. However, that group remained concerned that icare’s Chair ‘will only discuss matters raised by the NIAC representatives with the Treasurer where he believed they were relevant’.¹¹⁷⁴
- 147 As I understand that submission, the concern is two-fold: icare has not appropriately sought or considered the input of business and other stakeholders; and there is no longer a direct opportunity for business (and others) to advise the Minister on the policies conducted by icare. I have addressed the first point in *Part 1A* of my report.
- 148 Since the Treasurer declined my invitation to be interviewed, I do not know if he considers that he is adequately advised on policy matters.
- 149 I do not support the appointment of the proposed Ministerial Advisory Committee. It seems to me that the proliferation of advisory bodies is more likely to hinder than to facilitate icare’s efficient and lawful operation, if only because no matter how wide its

¹¹⁷¹ Legislative Assembly, *Workers Compensation Legislation Amendment Act 2012 and Safety, Return to Work and Support Act 2012 Second Reading Speech*, 19 June 2012, 7

¹¹⁷² SICG Act s 9

¹¹⁷³ Business NSW, *Submission to the Independent Review*, November 2020, 5

¹¹⁷⁴ Anonymous stakeholder group, *Submission to the Independent Review*, December 2020, 2

membership, it will not have the full picture of icare's activities. In my view, the NIAC is an appropriate forum for the discussion of problems that stakeholders perceive to exist.

- 150 If the concern of any interested party is that its legitimate concerns may be or are being ignored, it is not without remedy. It could take the matter up with SIRA, or indeed could make representations direct to the Minister.
- 151 For the present, I see no need for action beyond ensuring that there is a mechanism in place to ensure that icare's Board is kept informed of matters of concern that have been raised at NIAC meetings. If there is no such mechanism, one should be created immediately.

35.4 Executive remuneration

- 152 I have addressed, in *Part 1A* of this Report media reports alleging the payment of excessive remuneration to senior executives. That issue did not feature heavily in the submissions to my Review. However, a small number of those submissions raised concerns about the differing levels of remuneration available to employees of icare and SIRA.
- 153 In addition, Unions NSW and one former employee of icare who wishes to remain anonymous suggested that the payment of what was perceived to be excessive executive remuneration may have had an adverse impact on the financial viability of the workers compensation schemes.
- 154 The former employee also suggested, as did SIRA, that icare's exemption from the GSE Act in section 14 of the SICG Act should be re-examined. The former employee raised concerns that the exemption from the GSE Act gave the opportunity for executives to prefer the interests of icare over those of the schemes which it managed, and of their beneficiaries.
- 155 SIRA, while noting that its role as regulator did not extend to permit it to determine the salaries of icare executives, outlined some concerns relating to levels of remuneration:
 1. *the extent to which the reported bonuses and salaries are an appropriate use of funds from the Workers Compensation Insurance Fund*
 2. *the lack of transparency on executive salaries, particularly for employers who are essentially the shareholders of icare*
 3. *the impact on public trust in the workers compensation scheme.*

*While the case for paying a premium for commercial insurance skills may be valid in some cases, SIRA understands that some icare staff and executives were already working for the NSW Government and remunerated as public servants in icare's predecessor organisation before the changes in 2015.*¹¹⁷⁵
- 156 I have concluded in *Part 1A* that neither icare's approach to setting executive remuneration nor the remuneration levels that have been fixed are unreasonable, having regard to both public sector and comparable private sector practices. I add that Cumpston Sarjeant, in work done for the purpose of my review, did not identify the

¹¹⁷⁵ SIRA, *Submission to the Independent Review*, November 2020, 21-22

levels of executive remuneration as a significant driver of the financial underperformance of the scheme.

- 157 There are two relevant reviews under way. SIRA is conducting a review of the use of the WCIF, and icare is conducting a review of its expenditure. Those reviews will no doubt look at, among many other things, the approach to setting and the levels of executive remuneration. In those circumstances, it does not seem appropriate for me to say more on this topic than I have already.
- 158 I do however note that one submission¹¹⁷⁶ suggested that section 16 of the SICG Act risked undermining the independence of senior public servants. That section gives icare the power to terminate the employment of a senior executive without notice or reason, subject to any compensation payable under the contract of employment.
- 159 While I understand the nature of this concern, it seems to me to overlook the fact that icare's employees are not employed under the GSE Act.¹¹⁷⁷ In any event, as recent events have shown, public servants at the most senior level may be treated in exactly the same way.
- 160 I was not provided with any example or evidence to demonstrate that the section 16 power had been used in some way that was thought to have been motivated by malign purpose. Nor was there any evidence that any use of that power had contributed to other concerns raised about icare's management. In those circumstances, I make no recommendation that section 16 be amended. However, I accept that the justification for the existence of this power should be reconsidered should any such evidence come to light.
- 161 The GSE Act provides the statutory framework for NSW government sector employment and workforce management. Under the GSE Act, the Public Service Commissioner has authority to issue statutory instruments known as GSE Rules which establish consistent, transparent and sector level requirements about employment matters.
- 162 GSE Rules are made at a high level of principle. Among other things, they are intended to provide the '*foundation for a single, leaner, flatter and more mobile executive structure for the Public Service.*'¹¹⁷⁸
- 163 The Public Service Commission suggests that '*[d]ue to the unique and independent nature of their functions, some organisations will remain outside the government sector and the GSE Act will not apply to them.*'¹¹⁷⁹
- 164 Other NSW public sector entities, including public financial corporations such as TCorp, are exempt from the GSE Act. Some state-owned Corporations are also outside the government sector, and so the GSE Act does not apply to them except in limited areas unrelated to salary.¹¹⁸⁰
- 165 As I have said in *Part 1A* and *Part 1B*, I consider icare's approach to executive remuneration to be reasonable. I think that there is benefit in allowing icare to set

¹¹⁷⁶ Public Service Association, *Submission to the Independent Review*, November 2020, 7-8

¹¹⁷⁷ It is noted, while parts of the GSE Act relating to the employment of Public Service employees do not apply to the staff employed by icare, parts of the GSE Act applicable to NSW Government Sector agencies do apply to staff employed by icare.

¹¹⁷⁸ Public Service Commission, *Government Sector Employment Act 2013 Information Booklet*, 8

¹¹⁷⁹ Ibid 7

¹¹⁸⁰ Ibid

salaries at levels that are competitive with the broader insurance market. That allows it to attract appropriate talent and expertise. I am also satisfied that icare has reviewed its policies on remuneration and incentives and has moved to place greater focus on the outcomes for injured workers. icare ought to continue that focus and be held to account for ensuring that continues.

- 166 Whilst there is, as I acknowledge, public concern as to icare's staffing costs and its payment of incentives, the evidence before me does not establish that the levels of remuneration are excessive.¹¹⁸¹ That concern does not mean that icare's exemption from the GSE Act is inappropriate. On the contrary, in my view in all the circumstances, it is.
- 167 I do not consider that any legislative change is required, in light of the changes implemented by icare and discussed in *Part 1A*.
- 168 For completeness, I note that on 25 March 2021, a Bill¹¹⁸² which if enacted would have had the effect of removing icare's capacity to pay incentives, and reserving to the Minister and Governor a number of additional appointment and regulatory powers over staff and salaries, was debated in the NSW Parliament.¹¹⁸³ It was not passed. The terms of that Bill, and the debate upon it, are matters for the Parliament. I have not had regard to them, or to the fate of the Bill, in forming my own view.

35.5 Other observations

- 169 SIRA identified other areas of what it perceived to be ambiguity that exist under the SICG Act. While these matters have not been identified in other submissions, I consider it important to discuss them, given SIRA's role within the workers compensation framework.

35.5.1 SIRA's operational structures

- 170 SIRA made submission to this Review proposing amendment of the SICG Act relating to the role of SIRA's Board and the independence of its Chief Executive. It suggested there is ambiguity in section 18 of the SICG Act regarding the degree to which the SIRA Board is a governing board. SIRA's submission stated that:

The SIRA Board is appointed by the Minister to determine the general policies and strategic direction of SIRA. Its role is largely to oversee, not direct nor manage, SIRA's activities. The SIRA Chief Executive controls the day to day operations of the organisation, including the independent regulatory functions. This position is deemed to be the 'accountable authority' under the Government Sector Finance Act 2018. The SIRA Chief Executive openly and actively shares information with the Board and appropriately seeks advice on a range of matters. In turn, the Board lends its collective expertise to assist the Chief Executive in her role. Recently, the SIRA Board has served as the Steering Committee for the Independent Compliance and Performance Review of the Nominal Insurer (managed by icare). In that capacity, the Board has been more closely involved than usual

¹¹⁸¹ The staffing levels are another matter altogether, and I have commented on those in *Part 1B*.

¹¹⁸² State Insurance and Care Governance Amendment (Employees) Bill 2020

¹¹⁸³ Legislative Assembly, *First session of the fifty-seventh parliament – votes and proceedings* No.92, 25 March 2021, 2-4.

*in advising on regulatory matters, including monitoring the Nominal Insurer's performance and considering SIRA's regulatory response.*¹¹⁸⁴

171 I have to say that I do not understand the problem, if indeed there is one, to which this submission adverts. Section 18 of the SICG Act states:

18 SIRA Board

- (1) There is to be a Board of the State Insurance Regulatory Authority.
- (2) The SIRA Board is to consist of the following members:
 - (a) the chief executive of SIRA,
 - (b) the Secretary of the Department of Finance, Services and Innovation or a person nominated by the Secretary,
 - (c) up to 5 other members appointed by the Minister (the *appointed members*).

Note—

Schedule 3 contains provisions relating to the members and procedure of the SIRA Board.

- (3) The appointed members are to be persons who, in the opinion of the Minister, have skills and experience relevant to matters arising under the workers compensation and motor accidents legislation and the *Home Building Act 1989* and that will assist SIRA in attaining its objectives.
- (4) A person who is an appointed director of the ICNSW Board is ineligible to be appointed as a member of the SIRA Board.
- (5) The SIRA Board has the following functions:
 - (a) to determine the general policies and strategic direction of SIRA,
 - (b) to oversee the performance of the activities of SIRA,
 - (c) to give the Minister any information relating to the activities of SIRA that the Minister requests,
 - (d) to keep the Minister informed of the general conduct of SIRA's activities and of any significant development in SIRA's activities,
 - (e) such other functions as are conferred or imposed on it by or under this or any other Act or law.

172 I do not perceive any ambiguity in those words.

173 In addition, SIRA notes that neither it nor its Chief Executive has the power to employ its own staff. That power rests with the Department of Customer Service. SIRA's Chief Executive reports to the Secretary of the Customer Service cluster. The Chief Executive of SIRA is not a statutory officer, in contrast to the Chief Executives a number of other statutory bodies which SIRA considered comparable.

174 SIRA has suggested the provisions of the SICG Act be reviewed:

This review may consider the provisions in the SICG Act regarding the independence of the SIRA Chief Executive given the accountabilities of the role, which includes:

- 1) regulation of workers compensation matters related to NSW Government employees*

¹¹⁸⁴ SIRA, *Submission to the Independent Review*, November 2020, 20-21

2) regulation of Government self-insurers

3) regulation of a large Government quasi-monopoly insurer in icare.¹¹⁸⁵

175 SIRA, and its CEO, did not provide any specific example of the way in which these matters limited its ability to perform its regulatory function. The CEO considered that she had been willing and able to perform her role despite the potential risks to her own position.¹¹⁸⁶ However, the lack of examples of such instances is not determinative. It is of concern if there are matters going to the independence of a statutory regulator such as SIRA.

176 The employment of the Chief Executive of SIRA mirrors closely that of the CEO of the Education Standards Authority. See section 8 of the *Education Standards Authority Act*¹¹⁸⁷:

8 Chief Executive Officer

- (1) The Chief Executive Officer of the Authority is the person who, having regard to any advice of the Chairperson, is employed in the Public Service as the Chief Executive Officer of the Authority.
- (2) The Chief Executive Officer is responsible for the day to day management of the activities of the Authority.
- (3) The Chief Executive Officer is, on the request of the Minister or on the Chief Executive Officer's own initiative, to report to the Minister on matters relating to the activities of the Authority.

177 The Education Standards Authority is, like SIRA, a public agency. It is expressly subject to the direction and control of the Minister except in the content of any advice or recommendation to the Minister or others, and in its functions under the *Education Act 1990*. Just as for SIRA, members of the Board (of which the CEO is one) may be replaced at any time.

178 SIRA is also comparable in some ways to the NSW Environment Protection Authority (EPA). I note that the Chair of the EPA's Board may be removed only by the Governor, for incompetence, incapacity and misbehaviour. That does not seem to me to be a relevant comparison.

179 Other examples identified by SIRA relate to officers holding judicial or quasi-judicial office, such as members of the PIC, or bodies holding a unique and fundamentally independent position in the machinery of government, such as the Electoral Commission. I am not convinced that these office holders are an appropriate comparator for the CEO of SIRA.

180 I agree that the independence of SIRA is a matter of substantial importance, given its functions and responsibilities. However, it is not clear to me that the legislative provisions to which SIRA adverts in its submission are inimical to that independence. Thus, I do not think that there is any justification for changes to those provisions of the SICG Act.

¹¹⁸⁵ SIRA, *Submission to the Independent Review*, November 2020, 20

¹¹⁸⁶ SIRA, Interview on 2 February 2021, at Notes 10-11

¹¹⁸⁷ *Education Standards Authority Act 2013 (NSW)* No 89

35.5.2 Oversight of SafeWork NSW

181 A further matter raised in the course of my Review, and related to a recommendation made following the 2017 parliamentary review of the SICG Act, concerned the third of the statutory agencies – SafeWork NSW.

182 Recommendation 5 of the 2017 Statutory Review of the State Insurance and Care Governance Act 2015 states:

That the NSW Government note the evidence received in this review concerning the relationship between icare and SIRA, and SIRA and SafeWork NSW's effectiveness in carrying out their enforcement and compliance functions, and keep a watching brief on these issues for consideration as part of the five-year statutory review of the State Insurance and Care Governance Act 2015.¹¹⁸⁸

183 That recommendation arose from evidence given by several union stakeholders to that review that 'SafeWork NSW was not adequately fulfilling its enforcement and compliance functions'.¹¹⁸⁹

184 Union representatives raised similar concerns with me in the course of my Review. The Construction, Forestry, Mining and Energy Union (CFMEU) made the following submission, expanded upon in interview with me:

The CFMEU is concerned that the split in WorkCover has allowed the WHS regulator to become complacent in its role. SafeWork NSW is not subject to the same level of oversight as WorkCover. In fact there is currently no parliamentary oversight committee allowing the standards of safety regulation in NSW to deteriorate... The CFMEU submit that independent oversight, such as that provided by the Standing Committee of Law and Justice in the workers compensation system, is the only way to encourage SafeWork NSW to take its regulator role seriously and to fulfill its functions effectively.¹¹⁹⁰

185 This submission was supported by Unions NSW, who stated:

It is clear from anecdotal evidence we are presented with regularly from affiliates such as the CFMEU, that independent oversight, such as that provided by the Standing Committee of Law and Justice in the workers compensation systems, is the only way to encourage SafeWork to take its regulator role seriously and to fulfill its functions effectively... Unions NSW strongly endorses independent oversight of SafeWork NSW.¹¹⁹¹

186 Those bodies proposed that section 27 of the SICG Act be amended to provide for oversight of the work health and safety regime and its regulator. That section, as currently drafted, provides only for oversight by Parliamentary Committee of the 'operation of the insurance and compensation schemes established under the workers compensation and motor accidents legislation'.

¹¹⁸⁸ Standing Committee on Law and Justice, *Statutory review of the State Insurance and Care Governance Act 2015*, December 2017

¹¹⁸⁹ Standing Committee on Law and Justice, Sydney, December 2017, 18

¹¹⁹⁰ CFMMEU, *Submission to the Independent Review*, November 2020, 14

¹¹⁹¹ Unions NSW, *Submission to the Independent Review*, 30 October 2020, 8

187 I do not propose to comment on the particular incidents which the CFMEU cited as evidence of inadequate action by SafeWork NSW, as I have not had an opportunity of hearing full evidence on them. However, that leaves as a distinct issue the question of oversight of SafeWork NSW in general.

188 It is beyond the scope of this Review to consider the operations of SafeWork NSW, or work health and safety in NSW more generally. However, the SICG Act (as passed) had the effect of creating SafeWork NSW as an entity separate from the former WorkCover. Its oversight and structural separation from other aspects of the former WorkCover are within my terms of reference.

189 SafeWork NSW expressed the view that the oversight of its operations is adequate:

The purpose of the amendments was to create a body (SafeWork NSW) that is structurally removed from the workers compensation function and focused instead on harm prevention and improving the safety culture in New South Wales workplaces. These functions differ considerably to those undertaken by icare and SIRA and do not give rise to a need for further supervision by Parliamentary Committee.¹¹⁹²

190 SafeWork NSW also submitted that any further formal oversight would place an additional burden on its work. The nature and extent of any such burden is relevant, as imposing further oversight is not free from consequences.

191 It is important to bear in mind that the structure of SafeWork NSW differs markedly from that of either icare or SIRA, or of the former WorkCover. WorkCover was a statutory corporation representing the Crown. icare and SIRA are corporate entities. There is no corporate entity known as 'SafeWork'. Instead, the Work Health and Safety Act (as amended by the SICG Act) designates the Secretary of the Department of Finance Services and Innovation as the regulator, under the name 'SafeWork NSW'.

192 There is some parliamentary oversight of SafeWork NSW, through specific parliamentary reviews of particular aspects of the WHS system and related matters. As an agency wholly within a government department, it appears before Budget Estimates regularly, and the Responsible Minister is subject to questions in Parliament. SafeWork also publishes annual reports, and reports WHS data to SafeWork Australia. In these ways its operations are subject to some degree of oversight.

193 I am unable to identify any provision in either the SICG Act or the *Work Health and Safety Act 2011* which provides for oversight of the operations of the work health and safety system as a whole. That may well reflect, or result from, its unique structure. The evidence before me does not justify a recommendation for a formal and continuous supervisory regime of the kind proposed.

194 However, in light of the complaints and concerns put to my Review, I think it would be desirable to conduct a formal review of the overall operation of the work health and safety system following the changes made by the SICG Act. There have been fundamental changes to the regulatory function in that area. It would not be surprising if those changes had, quite inadvertently, led to problems of the kind raised with my Review.

¹¹⁹² Safework, *Response to Information Request*, 17 February 2021, 2

195 Further, in my view, it is essential that the review I am about to recommend be a public review, with its report made available to the public. That is necessary if the review is to be seen as addressing the concerns that have been expressed both in the 2017 statutory review and to me.

196 I recommend:

Recommendations	
Review of SafeWork NSW	
49	The Responsible Minister for SafeWork NSW should conduct, or commission, a public review of that agency's performance of its regulatory and educational functions under the <i>Work Health and Safety Act 2011</i> , and that the report on that review be made publicly available once it is completed.

Part 4 – Recommendations for improvements

- 1 The fourth and final part of my Terms of Reference requires me to make recommendations for improvements following from my conclusions in Parts 1 to 3. I have done so throughout this Report. For convenience, those recommendations are collected in the introduction, at *section 4 above*.

Appendix 1 - Probity and procurement issues raised in the media and parliamentary coverage

- 1 This appendix sets out the various procurement- and probity-related allegations made in the media and in Parliament.
- 2 The first column sets out the allegation. I emphasise that this is not my view, but my best understanding of the allegation.
- 3 The second column summarises my understanding of icare's response, based on documents that they have provided to me. It also addresses factual inaccuracies in the allegations. Where allegations have been discussed in more detail in the main body of the report, I give a cross-reference.

Issue	icare response
Specific contractual issues	
That a consultant, Tony Pescott, managed a project involving a contract with a company, Perceptive, in which he and his son held shares. These interests were not disclosed at the time of the contract, during the first year of Mr Pescott's consultancy, and only partially disclosed at a later time ¹¹⁹³	<p>Accepted.</p> <p>icare states the conflict was disclosed and managed, but that its management was inadequate, and was not properly documented. After an ICAC review and an internal review, icare terminated Mr Pescott's engagement. icare carried out an external review of the NPS project (that was the project that was the subject of the contract with Perceptive). Following that review, icare engaged a new provider.¹¹⁹⁴</p> <p>Mr Pescott was the trustee of a family trust that owned shares in Perceptive. He personally had no beneficial interest in the trust and received no management fees.¹¹⁹⁵</p> <p>See <i>Part 1A, section 16</i>.</p>

¹¹⁹³ Sydney Morning Herald, 'Snouts in the trough circle \$60b workers' compensation scheme', 27 July 2020; Standing Committee on Law and Justice, Sydney, 9 September 2020; 13 November 2020; 23 November 2020

¹¹⁹⁴ icare, *Media Issues Response*, September 2020, at Item 9 15-21

¹¹⁹⁵ Ibid at [18]

Issue	icare response
<p>The contract for the new Nominal Insurer Single Platform (NISP), worth over \$260 million, was awarded after an unreasonably short tender program.¹¹⁹⁶</p>	<p>Accepted in part.</p> <p>The tender period was very short. icare states that there had been substantial market engagement before the call for tenders.¹¹⁹⁷</p> <p>The value cited in the media relates to the overall NISP program, whereas the cost of the relevant contracts were much lower. They were however still substantial, initially costed at \$31.4 million for CapGemini and \$17.4 million for Guidewire.¹¹⁹⁸</p> <p>See <i>Part 1A, section 16</i>.</p>
<p>icare paid more than \$18.3 million to IVE Group under a 'head contract' arrangement, did not properly declare the contract on the NSW Government e-tender website, and did not use proper tender process for work of that value.¹¹⁹⁹</p>	<p>Accepted in part.</p> <p>The contracts with IVE were procured through a single-source procurement method, relying on the NI exemption.¹²⁰⁰</p> <p>See <i>Part 1A, section 16</i>.</p>
<p>The then CEO, Mr Bhatia, approved a contract with Shape Australia to build a 'wellbeing centre'. The contract was later investigated due to improper conduct on the part of associated employees.¹²⁰¹</p>	<p>Accepted in part.</p> <p>icare procured an external investigation of the matter, after the employee accused of improper conduct resigned. The investigation identified a number of procurement weaknesses, which icare has taken steps to address.¹²⁰²</p> <p>The 'wellbeing centre' was in fact a medical screening clinic for the Dust Diseases Care scheme.¹²⁰³</p>

¹¹⁹⁶ Daily Telegraph, *icare's tender process for \$140 million IT contract slammed*, 1 December 2020

¹¹⁹⁷ icare, *Media Issues Response*, September 2020, at Item 9 22-29

¹¹⁹⁸ icare, *Explanatory Note 14 - Interim GE, PI interests and NISP Delegation*, February 2021, at [10b]

¹¹⁹⁹ Sydney Morning Herald, *icare awards \$18m in contracts to firm with extensive Liberal Party ties*, 7 September 2020

¹²⁰⁰ icare, *Media Issues Response*, September 2020, at Item 9 75-94

¹²⁰¹ Standing Committee on Law and Justice, Sydney, 2 December 2020, 38-40

¹²⁰² *Ibid*

¹²⁰³ icare, *Response to draft Procurement and Probity Appendix*, 23 April 2021, 2

Issue	icare response
<p>icare has spent \$235 million with Comensura, a labour hire firm, which included costs for office fit out and leasing. This contract may have been designed to 'hide' icare's spending from scrutiny.¹²⁰⁴</p>	<p>Not accepted</p> <p>The contractual arrangements were not designed to hide expenditure. icare has commissioned an external review, which found no evidence to support that allegation.</p> <p>However, there were unrelated deficiencies in the contracting process, which required subsequent correction.¹²⁰⁵</p> <p>See <i>Part 1A, section 16</i>.</p>
Procurement policies and practices	
<p>icare failed to comply with its obligations under the GIPA Act and did not properly disclose contracts.¹²⁰⁶</p>	<p>Accepted.</p> <p>icare has conducted a rectification program.¹²⁰⁷</p> <p>See <i>Part 1A, section 16</i>.</p>
<p>Mr Craig was granted an unlimited delegation to enter into contracts in connection with the NISP.¹²⁰⁸</p>	<p>Accepted in part.</p> <p>On 15 July 2016, Mr Bhatia delegated to Mr Craig and Mr Nagle the authority to enter into contracts related to the NISP of unlimited value and term, subject to the fees and procurement of such software and services contracts being approved by the Board.¹²⁰⁹ The Board had oversight of the budget and implementation of the NISP and related software.¹²¹⁰</p> <p>The Board was not aware of the delegation.¹²¹¹</p> <p>No other such delegation exists or existed within icare.¹²¹²</p>

¹²⁰⁴ Sydney Morning Herald, *icare paid \$235 million to a labour hire firm, including for office fit-out*, 8 March 2021

¹²⁰⁵ Allens Linklaters, *External Report – Insurance and Care NSW/Comensura Pty Ltd*, 9 April 2021

¹²⁰⁶ Sydney Morning Herald, *icare has spent more than \$8 million with one executive recruiter*, 27 October 2020

¹²⁰⁷ icare, *Media Issues Response*, September 2020, at Item 9 75-94

¹²⁰⁸ Sydney Morning Herald, *icare executive defends 'side hustles' while in charge of workers comp scheme*, 2 December 2020

¹²⁰⁹ icare, *NISP Delegation*, 15 July 2016, at email

¹²¹⁰ icare, *Explanatory Note 14 - Interim GE, PI interests and NISP Delegation*, February 2020

¹²¹¹ Standing Committee on Law and Justice, Sydney, 2 December 2020

¹²¹² icare, *NISP Delegation*, 30 March 2021, at email

Issue	icare response
Potential conflicts of interest	
icare engaged Mr Nagle's wife on a contract for services. Mr Nagle was not then the CEO. That potential conflict of interest was not properly recorded at the time. ¹²¹³	Accepted. ¹²¹⁴ See <i>Part 1A, section 16</i> .
When Mr Nagle later became CEO, that conflict was not properly declared. Subsequently, Mr Nagle was sanctioned by the Board. ¹²¹⁵	Accepted. ¹²¹⁶ See <i>Part 1A, section 16</i> .
Mr Craig had a number of financial and non-financial interests outside of icare which were not properly disclosed or recorded. ¹²¹⁷	Accepted in part. Mr Craig's interests were disclosed to each CEO, but were not recorded on any central register until August 2019 ¹²¹⁸ . See <i>Part 1A, section 16</i> .
IVE Group shared a common director with icare, namely Mr Bell. ¹²¹⁹	Accepted. Mr Bell properly declared his interest. He was not involved in any procurement activities relating to IVE. ¹²²⁰ See <i>Part 1A, section 16</i> .

¹²¹³ Sydney Morning Herald, *icare boss quits after failing to adequately declare wife's involvement*, 3 August 2020

¹²¹⁴ icare, *Media Issues Response*, September 2020, at Item 9 40-47

¹²¹⁵ Sydney Morning Herald, *icare boss quits after failing to adequately declare wife's involvement*, 3 August 2020; Standing Committee on Law and Justice, Sydney, 3 August 2020; 24 August 2020; 13 November 2020; and 23 November 2020

¹²¹⁶ icare, *Media Issues Response*, September 2020, at Item 9 40-47

¹²¹⁷ Standing Committee on Law and Justice, Sydney, 2 December 2020

¹²¹⁸ icare, *Response to draft Procurement and Probity Appendix*, 23 April 2021, 2

¹²¹⁹ Sydney Morning Herald, *icare awards \$18m in contracts to firm with extensive Liberal Party ties*, 7 September 2020

¹²²⁰ icare, *Media Issues Response*, September 2020, Item 9 at 32

Issue	icare response
<p>Mr Bhatia had a personal connection with Capgemini, one of the parties for the eventually successful tender for the NISP, and this interest was not disclosed.¹²²¹</p>	<p>Accepted in part.</p> <p>Mr Bhatia states that his personal connection was well known, and that he recused himself from decision making. No record of any disclosure has been located.¹²²²</p> <p>See <i>Part 1A, section 16</i>.</p>
<p>Mr Craig was employed both by Internal Consulting Group (ICG) and by icare and therefore had a conflict of interest.¹²²³</p>	<p>Accepted in part.</p> <p>Mr Craig has worked as a consultant to ICG and received referral fees for new work.</p> <p>icare initially engaged Mr Craig through his own private company. icare subsequently employed Mr Craig directly.</p> <p>icare later engaged ICG for other work. One of those ICG contractors reported to Mr Craig. Steps were taken to manage the potential conflict of interest but neither the potential conflict nor actions said to have been taken were properly documented, as there was then no conflicts of interests policy or register.¹²²⁴</p> <p>See <i>Part 1A, section 16</i>.</p>
Gifts and benefits	
<p>A large number of gifts received by the former CEO, Mr Bhatia, were not declared until months after his departure from icare.¹²²⁵</p>	<p>Accepted.¹²²⁶</p> <p>See <i>Part 1A, section 16</i>.</p>

¹²²¹ Standing Committee on Law and Justice, Sydney, 3 August 2020; 24 August; 9 September 2020; and 13 November 2020

¹²²² icare, *Media Issues Response*, September 2020, at Item 9 22-29

¹²²³ Standing Committee on Law and Justice, Sydney, 3 August 2020

¹²²⁴ icare, *Media Issues Response*, September 2020, at Item 9 33-39

¹²²⁵ Sydney Morning Herald, *Highest ever paid NSW public servant and former CEO fronts icare inquiry*, 13 November 2020; Standing Committee on Law and Justice, Sydney, 2 December 2020

¹²²⁶ Interview with V Bhatia, 1 February 2021, at Notes 8

Issue	icare response
<p>Mr Nagle and another executive travelled to Las Vegas at the expense of Guidewire. That travel was not declared in the annual report or gifts and benefits register.¹²²⁷</p>	<p>Accepted.</p> <p>The purpose of the travel was for presenting at and attending a conference. The travel was approved by the then Chair of icare.¹²²⁸</p> <p>See <i>Part 1A, section 16</i>.</p>
<p>In 2017, the Chief Risk Officer (CRO) attended a conference paid for by RSA Archer, a supplier of software to icare. That travel was not recorded on the gifts and benefits register until months after the trip was taken.¹²²⁹</p>	<p>Accepted.¹²³⁰</p> <p>See <i>Part 1A, section 16</i>.</p>
<p>Other probity matters</p>	
<p>Mr Nagle and another senior icare executive appeared in a ‘promotional video’ for Guidewire despite failings in the IT system of which Guidewire was a fundamental part.¹²³¹</p>	<p>Accepted in part.</p> <p>icare accepted that Mr Nagle and a senior executive appeared in the video providing a ‘customer testimonial’.</p> <p>icare state that Guidewire’s performance had met agreed performance indicators. While there were delays and issues with implementation of the NISP, these were related to CapGemini, not to Guidewire.¹²³²</p>
<p>Two icare workers were allowed to resign despite being reported to the police and ICAC over a recruitment scam.¹²³³</p>	<p>Accepted in part.</p> <p>The matter was reported by icare to ICAC and was also investigated by icare. This was found to be an isolated incident of wrongdoing. icare is pursuing civil proceedings against the individuals. Some deficiencies in processes were also identified and icare is taking steps to address these.¹²³⁴</p>

¹²²⁷ Sydney Morning Herald, *icare executives spruiked software company despite delays and blowouts*, 31 August 2020

¹²²⁸ icare, *Media Issues Response*, September 2020, at Item 10 11-15

¹²²⁹ Sydney Morning Herald, *Perrottet’s ‘baby’ is now his problem child*, 8 August 2020

¹²³⁰ icare, *Media Issues Response*, September 2020, at Item 10

¹²³¹ Sydney Morning Herald, *icare executives spruiked software company despite delays and blowouts*, 31 August 2020

¹²³² icare, *Media Issues Response*, September 2020, at Item 9 59-63

¹²³³ Sydney Morning Herald, *icare workers reported to NSW Police, ICAC over recruitment scam*, 1 December 2020

¹²³⁴ Standing Committee on Law and Justice, 2 December 2020, Sydney, 35-37; icare, *Clarification to transcript of 2 December 2020 – Ms S Liston – icare*, 25 January 2021; icare, *Response to Draft Procurement and Probity Appendix*, 23 April 2021, 4

Appendix 2: External Advisor Recommendations

Approach to recommendations

- 1 Each of the external advisers that NSW Treasury engaged on my behalf for the purpose of my Review provided me with recommendations, as did PwC following its CGA Review.
- 2 I have given careful consideration to all those recommendations. Some of them go to a level of detail or operational management that is unnecessary for me to address in my Report. Nonetheless, they form part of the body of evidence that I considered in the course of my Review. I add that although I have not specifically adopted them, I regard it as essential that icare's Board and executive consider whether to adopt them. To the extent that any are not adopted, the reasons should be recorded.
- 3 However, where in my view the advisers' recommendations are of general application and relevant to the organisation as a whole, I have adopted them as recommendations of my Review. Recommendations thus adopted have been specifically highlighted in the body of this Report.
- 4 I should note that I have from time to time altered the wording of an adopted recommendation. In almost every case, that did not alter its substance. I have noted in the body of this Report the few instances where, for one reason or another, I either altered the substance, or did not adopt the whole, of a particular recommendation.

Section 5 of the Executive Summary sets out every recommendation made in this Report, including those adopted from the advisers' reports.

Claims management review – Janet Dore¹²³⁵

Recommendations	Response
Investment in skills and professional development through Personal Injury Education Foundation (PIEF) or other education resources in conjunction with wider insurance industry, to build on icare and EML's current commitments.	Adopted In <i>Part 1B, 22.7</i> <i>Recommendations of the Dore 2021 Report.</i>
icare to examine the Internal Audit Report on EML from a major risk perspective to clearly identify actions, timelines and responsibilities for overcoming the shortcomings identified in the report.	Adopted In <i>Part 1B, 22.7</i> <i>Recommendations of the Dore 2021 Report.</i>
icare to review competitive strategy timing and prioritise stability and performance outcomes.	Adopted In <i>Part 1B, 22.7</i> <i>Recommendations of the Dore 2021 Report.</i>
icare to reconsider the potential impacts of a 12-month contract with EML in the context of performance requirements and expectations.	Adopted In <i>Part 1B, 22.7</i> <i>Recommendations of the Dore 2021 Report.</i>

¹²³⁵ Janet Dore, *Operational Review of Insurance and Care NSW and Delivery of recommendations of the Dore Report*, 5 March 2020, 15

Recommendations	Response
The three points of data quality, skills and capacity and sustainability be affirmed by icare as essential priority work for management with detailed timelines for achievement.	Adopted In <i>Part 1B, 22.7 Recommendations of the Dore 2021 Report.</i>
icare should remove the Customer Advocate role in light of existing internal capability to support business change projects.	Adopted with modification In <i>Part 1B, 22.7 Recommendations of the Dore 2021 Report.</i>
SIRA and Treasury should 'stress test' the assumptions in icare's NI FY21 Business Plan with icare to verify their veracity.	Adopted In <i>Part 1B, 22.7 Recommendations of the Dore 2021 Report.</i>
Heads of WC should consider proposing a nationally convened approach to achieving more consistency in, and application of, health costs founded on value-based health care principles.	Adopted In <i>Part 1B, 22.7 Recommendations of the Dore 2021 Report.</i>
SIRA should continue its work on improving fee structures to simplify the framework, eliminate perverse incentives and enable consistency of application for better health outcomes in the WC system.	Adopted In <i>Part 1B, 22.7 Recommendations of the Dore 2021 Report.</i>

Board governance review – Effective Governance¹²³⁶

Recommendations	Response
That the division of responsibilities between icare as operator and the SIRA as regulator be clearly defined in the State Insurance and Care Governance Act 2015.	Considered as evidence in <i>Part 2</i> and <i>Part 3</i> .
That a Board succession plan be drafted for approval by the Portfolio Minister which provides for a staggered set of director terms rather than having all or a majority of NEDs' appointments expiring at the same time.	Adopted In <i>Part 1B, 23.3 Governance and Board Effectiveness.</i>
That the Board include one or more members who possess extensive public sector experience and workers compensation insurance experience.	Adopted In <i>Part 1B, 23.3 Governance and Board Effectiveness.</i>
That specialist members be recruited to join Board Committees to ease the Board members' Committee workload and to make up for any shortfall in expertise in any area by Board members.	Adopted In <i>Part 1B, 23.3 Governance and Board Effectiveness.</i>
That the ARC be split into a separate Audit and a separate Risk Committee.	Adopted In <i>Part 1B, 23.3 Governance and Board Effectiveness..</i>
That the Foundation Committee be wound up and its functions transferred to management.	For icare to consider

¹²³⁶ Effective Governance, *icare Governance Review*, December 2020, 13

Recommendations	Response
That the Governance Committee monitor and report to the Board on outstanding recommendations from this and other governance reviews until the Board is confident the changes have been embedded in icare's organisational culture.	For icare to consider
That the Board induction program provide detailed briefings on the key legislative, Ministerial, Treasury and other relevant agencies' expectations of Board members.	For icare to consider
That the Board develop and adopt a robust CEO assessment policy, with consideration of the principles recommended in section 4.3 of this report.	For icare to consider
That the Board hold the CEO to account for leadership effectiveness, role modelling of the icare Code of Conduct and achievement of agreed KPIs through a periodic and rigorous assessment process.	For icare to consider
That the CEO's direct reports also be assessed in terms of their leadership effectiveness, role modelling of icare's Code of Conduct and attainment of agreed KPIs.	For icare to consider
That a change management program be implemented to disseminate, educate and review effective implementation of the new Board paper template reporting and the new policies across all levels of the organisation.	For icare to consider
That consideration be given to the IIA's Three Lines Model with respect to the roles and responsibilities and reporting lines in the Risk Management Framework.	For icare to consider
That progress towards using one GRC system remain a high priority.	For icare to consider
That the Risk Management Framework contain a 'Commitment' section to further reinforce the Board and GET's commitment to risk management.	For icare to consider
That the core documents supporting the risk management framework be reviewed and re-drafted to clarify the high-level principles (Risk Management Framework), to set out the more detailed processes (Risk Management Policy) and to ensure that all documents are consistent and aligned. This includes removing any documents which no longer apply.	For icare to consider
That the consequences of a policy breach be included in all relevant policies.	For icare to consider
That the Board determine its desired level of maturity for each of the 20 Board Maturity Benchmark Assessment (BMBA) governance dimensions and implement a plan to move from its current level of maturity to the desired level of maturity.	For icare to consider
That a dedicated and appropriately resourced change management program be implemented to embed the recommendations from this and other governance reviews into icare's organisational culture.	For icare to consider

Probity and Procurement Review – RSM¹²³⁷

Recommendations	Response
<p>A Chief Procurement Officer be appointed to be responsible for the significant procurement process and cultural changes that are required and to ensure their successful and sustainable permeation throughout the organisation.</p>	<p>Adopted In <i>Part 1B, 23.1 Probity and Procurement</i></p>
<p>icare should be bound to a procurement and probity framework equal to or better than other agencies and have in place robust procurement processes. These processes should align with the existing procurement obligations of government agencies and require as a minimum, that:</p> <ul style="list-style-type: none"> • Procurement processes establish value for money as the primary objective; • Conflicts of interest are declared, assessed, recorded, managed and monitored; and • Full and accurate records of the procurement activity should be maintained.... 	<p>Adopted In <i>Part 1B, 23.1 Probity and Procurement</i></p>
<p>A regular education program should be established demonstrate to staff how governance systems help improve performance and achieve goals and ensure they understand the expected behaviours and requirements that need to be adhered to, under icare's policies and procedures and applicable NSW Government policies and guidelines....</p> <p>Probity and Procurement education should include, but not be limited to:</p> <ul style="list-style-type: none"> • Educating all employees on the accepted behaviours and requirements under the icare Code of Conduct, Travel Policy, Gifts and Benefits Policy and Conflict of Interest Policy; • Providing practical examples when travel / gifts / benefits can be accepted; • The internal approval processes required prior to accepting any of the above; and • Why, How and When conflicts/relationships need to be declared. 	<p>Adopted In <i>Part 1B, 23.1 Probity and Procurement</i></p>

¹²³⁷ RSM, *Independent Review of icare – Probity and Procurement*, March 2021, 43-44

Recommendations	Response
<p>For employees with authority to carry out procurement across the Business Units, a more tailored program should be developed and delivered on an annual basis. The program should as a minimum, addresses the following topics:</p> <ul style="list-style-type: none"> • Probity requirements; • When an internal or external probity advisor / probity auditor is required; • Direction Negotiation (Sole Sourcing) requirements; • Templates that must be completed for all procurements; • When and how the procurement team should be engaged; • Minimum records to be maintained across all procurement; • Where procurement/contract related documentation should be stored; • Any recent changes to the existing policies and procedures; • When and how the NI exemptions (procurement and record-keeping) can be applied; and • How things can go wrong, escalation of issues to the right people at the right time, and any lessons learnt. 	<p>Adopted In <i>Part 1B, 23.1 Probity and Procurement</i></p>

NI Financial Sustainability Review – Cumpston Sarjeant¹²³⁸

Recommendations	Response
<p>We recommend that icare consider explicit use of an Economic Funding Ratio or some analogous best estimate basis of liability measurement in their capital management and long term financial sustainability monitoring framework.</p>	<p>Adopted Discussed in <i>Part 1A</i>, recommended in <i>Part 2</i>.</p>

Culture, Governance and Accountability Review – PwC¹²³⁹

Recommendations	Response
<p>Role of the Board</p> <p>The board should continue providing a clear tone from the top on icare's role as a NSW government agency with adherence to the standards expected of such an agency, including by tracking regulatory requirements, requiring management reporting on compliance, and engaging with regulatory bodies to build positive working relations that cascade through icare.</p>	<p>For icare to consider</p>

¹²³⁸ Cumpston Sarjeant, *Independent Review of icare – Financial Sustainability*, March 2021, 2

¹²³⁹ PwC, *Independent Review of icare governance, accountability and culture*, February 2021, 7-12

Recommendations	Response
<p>The board to:</p> <ul style="list-style-type: none"> strengthen and refine the board skills matrix including mapping skills and capabilities at the committee level review the composition of board committees and ensure that there are adequate skills and experience aligned to the remit and purpose of the committee develop strategies for addressing any ongoing skills gaps, such as through the appointment of external advisers, board development and future succession planning. 	<p>Adopted In <i>Part 1B, 23.3 Governance and Board Effectiveness..</i> (consistent with Effective Governance's recommendations)</p>
<p>Consult further with NSW Treasury to set up a separate risk committee or risk sub-committee to provide adequate focus and time to manage the risk issues facing icare. Once established; review the role and remit of the Governance Committee to ensure clarity.</p>	<p>Adopted In <i>Part 1B, 23.3 Governance and Board Effectiveness..</i> (consistent with Effective Governance's recommendations)</p>
<p>Update the charter for the ARC (or separate Audit and Risk Committees) to include the requirement to form a view on icare's risk culture and to assess the adequacy of icare's risk management framework (both its design and effective implementation).</p>	<p>For icare to consider</p>
<p>Customer Innovation and Technology Committee (CITC) to increase the time it spends on the voice of the customer and customer outcomes.</p>	<p>For icare to consider</p>
<p>Enhance management reporting, most notably in the areas of customer outcomes, non-financial risk, root cause analysis, regulator engagement, management of material issues and remediation monitoring, and scheme-based dashboards.</p>	<p>Adopted In <i>Part 1B, 23.3 Governance and Board Effectiveness..</i>, as part of a broader recommendation on improved information flow to the Board and GET.</p>
<p>Adopt a more rigorous approach to actions arising, including naming accountable persons, setting a time for delivery of actions and ensuring effective monitoring completion.</p>	<p>For icare to consider</p>
<p>icare board to introduce a regular agenda item at board meetings to receive reports on the regulator relationship and ensure the voice of the regulator is understood and being addressed.</p>	<p>Adopted <i>In Part 1B, 24.1 Oversight by SIRA</i></p>
<p>Update the board charter to reflect the requirement to regularly report to the NSW Treasurer in accordance with s6(3) of the SICG Act. Governance processes should:</p> <ul style="list-style-type: none"> consider, at regular intervals, whether it should inform the Treasurer of an issue because it is a material development in icare activities table correspondence received from the Treasurer requesting information from the board on the activities of icare. 	<p>Adopted <i>In Part 1B, 24.3 Ministerial Oversight</i></p>
<p>Senior leadership oversight</p>	
<p>icare GET to set a clear tone from the top on the importance of the role of risk management and the role of SIRA as the regulator, by role-modelling expected behaviours and attitudes.</p>	<p>For icare to consider</p>

Recommendations	Response
GET meetings to be governed by established terms of reference with mapped collective accountabilities to ensure that material decisions are made with appropriate GET oversight.	For icare to consider
Challenge behaviours of making decisions 'outside the room' and ensure GET brings its full capability and diversity of experience to the issues brought before it.	For icare to consider
GET governance to ensure that decisions, risks and issues are discussed and decided at the right levels of the organisation using timely and relevant data and reporting.	For icare to consider
Establish a financial risk management sub-committee and a non-financial risk management sub-committee with all GET members as standing members; committee meetings to be of a length to allow sufficient agenda time to discuss, manage and oversee icare risks and issues.	For icare to consider
Enhance customer outcome reporting provided to GET by incorporating broader leading and lagging metrics on an individual scheme basis to complement NPS reporting.	For icare to consider
Risk management & compliance	
Review and update the Risk Management Framework (RMF) to ensure there is a consistent approach to identifying, measuring and monitoring risks that reflects appetite. Consideration should be given to incorporating better practice guidance from other key regulators eg. APRA, ASIC, and ensure the RMF is rolled out and communicated.	For icare to consider
icare to create, strengthen and update risk profiles for each business unit using a bottom-up approach and roll out procedures, controls and other mechanisms to support implementation and operating effectiveness.	For icare to consider
In relation to the Risk Appetite Statement (RAS), review and refine metrics to reflect the key risks, metrics and tolerance levels relevant to a business of icare's nature and complexity, and ensure tolerances reflect the appetite of icare's refreshed board.	For icare to consider
Take action regarding the various financial risks that require improvement via better documentation, oversight and assurance, including medical cost payment, compliance and leakage and the integrity of operating cost allocation between schemes.	For icare to consider
Develop comprehensive compliance registers and implement procedures, controls and other mechanisms to ensure compliance and effective risk mitigation.	For icare to consider
Strengthen the non-financial risk framework and operationalise this through the development and implementation of policies and procedures, leveraging external better practice.	For icare to consider
Further strengthen policies and procedures in relation to conflicts of interest and ensure this has been communicated and effectively implemented.	Adopted <i>In Part 1B, 23.1 Probity and Procurement</i> (consistent with RSM's recommendation)
Significantly strengthen the reporting of operational risk, compliance risk and conduct risk to enable consistent oversight of emerging risks, thematic control weaknesses, issues identified through internal audit, conduct risk and incident root causes and trends.	For icare to consider

Recommendations	Response
Update the RMF to reflect the TPP 20-08 attestation process and increase the level of rigour and assurance to support the signing of this.	For icare to consider
Enhance and roll out education and awareness activities to lift employees' understanding of icare's and individuals' risk and compliance obligations, the management of risk, key operational risk processes, systems and tools, incidents management, and relevant consequences for non-compliance.	For icare to consider
Establish and implement a Line 1 risk committee to oversee risk and compliance in each business unit.	For icare to consider
Build the capability and resourcing of Line 1 (including the Assurance and Quality (A&Q) team), by equipping and enabling people with greater risk awareness and an understanding of icare's frameworks, and encourage their use. Review the reporting line of A&Q.	For icare to consider
Provide sufficient resources for Line 2 to design and communicate the risk management framework to employees to build awareness and understanding of their role in risk.	For icare to consider
Install the CRO as a permanent, standing member of GET meetings with a direct reporting line to the CEO to ensure the voice of risk is heard.	For icare to consider
The CRO to be made accountable for management of the regulator relationship.	For icare to consider
Internal Audit's reporting line to be changed from a dotted to a hard line into the ARC and the ARC Charter to be amended state that Internal Audit has unfettered access to that committee, to support its independence.	For icare to consider
Internal Audit to strengthen record keeping in relation to investigations commenced due to ICAC referral or other relevant stakeholders. The ARC to improve its oversight of the closure of high rated actions arising from audit reports	For icare to consider
Issue identification, escalation & resolution	
Expand the incident management policy to describe the roles, responsibilities and accountabilities for: <ul style="list-style-type: none"> • effective identification and escalation of incidents • the risk assessment and rating of incidents 	For icare to consider
Also reconsider the roles, responsibilities and reporting of the Regulatory & Affinity Partners (RAP) team in light of the 3LoD principles.	
Add a risk rating to all incidents in the incident register and take the necessary action required based on the rating and significance of the incident.	For icare to consider
Improve record-keeping over incidents and ensure appropriate monitoring and oversight over closure.	For icare to consider
Improve awareness and training of icare employees on the importance of escalating incidents in a timely way. Update the incident management policy to better define both an incident and governance roles, to support effective escalation and response actions including remediation.	For icare to consider

Recommendations	Response
Extend the incidents management policy to incorporate root causes analyses of material or high rated incidents by Line 2, 3 or an independent reviewer (where relevant) to bring an objective and unbiased approach to identifying root causes.	For icare to consider
Define and document a remediation framework which sets the guiding principles, roles, responsibilities and accountability for when and how a remediation program should be established and the governance required to oversee remediation activities.	For icare to consider
Improve Line 1 and Line 2 reporting on incident identification, management and closure and feed into consequence management as appropriate.	For icare to consider
Establish a significant matter committee to assist with expediting decision-making regarding what should be reported. This should be supported by terms of reference and appropriate composition.	For icare to consider
Uplift employee awareness of icare's commitment to report significant matters to the regulator SIRA within five days.	For icare to consider
Improve coordination of complaints management to provide oversight/reduce duplication and ensure learnings from complaints are more routinely sought as feedback loops into design and execution.	For icare to consider
Update and implement policies and procedures in relation to wrongdoing to enable and better support 'speak-up'. Ensure reporting channels are in place to support the anonymity, safety from potential reprisal and independence of the wrongdoing process. Any changes should be communicated to all staff.	Adopted <i>In Part 1B, 23.2 Culture</i>
Coordinate and report to ARC on the complete set of material grievance and wrongdoing issues to provide oversight and an understanding of systematic themes. Implement a system of feedback to help inform future behaviours and ensure lessons are learned.	Adopted <i>In Part 1B, 23.2 Culture</i>
Ensure that management takes action efficiently and effectively in formal and informal matters of wrongdoing and other complaints and there is effective communication in support of this.	Adopted <i>In Part 1B, 23.2 Culture</i>
Scheme agents	
Strengthen and further embed the outsourcing policy and design the underpinning processes and procedures to fully operationalise and implement the updated policy.	For icare to consider
Set up the proposed outsourcing committee with standing members of GET members and relevant executives involved in outsourcing, with a terms of reference providing a clear remit which considers the committee's interfaces with other committees and roles and includes the requirement to escalate material issues to the GET and ARC.	For icare to consider
Review existing key material outsourcing contracts against the revised outsourcing policy requirements and update accordingly.	For icare to consider
Improve the governance over scheme agent adherence to relevant internal icare policies and ensure that scheme agents are performing to these standards.	For icare to consider
Review the KPIs used to measure scheme agent performance. Ensure they adequately capture compliance with regulatory requirements and include leading measures as well as lagging measures focused on the injured worker.	For icare to consider

Recommendations	Response
Identify and map the key obligations, risks and controls related to claims management and how roles and responsibilities are delineated between icare and the scheme agents.	For icare to consider
Once obligations, risks and controls have been documented: <ul style="list-style-type: none"> document assurance roles and responsibilities in relation to scheme agents across the 3LoD significantly improve assurance activities by the 3 LoD over scheme agents in accordance with a documented framework, supported by procedures, reporting and governance oversight.	For icare to consider
GET meetings to receive regular individual scheme agent scorecards to ensure visibility and accountability of scheme performance.	For icare to consider
Prioritisation & decision-making	
Review and update icare's Instrument of Delegations to ensure it considers the materiality of risk in addition to project financials. Examples of this are risk to strategy, brand and reputation risk, operational risk (eg. IT, cybersecurity, delivery) and customer (eg. experience, outcomes, retention).	For icare to consider
Document icare's approach to strategic planning and prioritisation of projects.	For icare to consider
Define and embed multi-dimensional criteria that consider customer outcomes, financial impacts, strategic alignment, risk appetite and alignment to icare's ethical Decision-Making Framework (DMF). This will allow independent evaluation of the feasibility of each project, as well as support trade-off decisions across projects.	For icare to consider
Line 2 to establish a formalised 'risk in change' approach. This should consider the nature and types of change that can affect the risk environment and the need to assess icare's capacity, appetite, impact, complexity, interdependencies and dependencies as it relates as a result of change (including project change).	For icare to consider
Ensure Line 2 risk capability has a continuing presence and is embedded as a standing member of material steering committees and in prioritisation forums.	For icare to consider
Clarify and operationalise accountabilities for risk management within program roles and improve the management and oversight of risk in project decision-making and delivery.	For icare to consider
GET to bring a stronger risk management and governance lens to decision-making on the magnitude and complexity of change across multiple programs of work.	For icare to consider
Further embed the key elements of the Program Management Handbook and ensure key project principles (eg. post implementation reviews, benefits realisations, risk assessment) are adhered to and with sufficient quality/depth or documentation so that lessons can be learned for future projects.	For icare to consider

Recommendations	Response
Accountability	
<p>Adopt a better practice accountability framework that provides clarity on standards, holds people to account with strict board and GET governance and oversight, cascades accountabilities through the organisation, and effectively applies consequence management. Ensure these accountabilities are documented and communicated and consideration given to leveraging practices and requirements set by other regulators.</p>	For icare to consider
<p>Amend the People and Remuneration Committee's (PRC) charter to include a role to oversee the setting-up of an effective accountability framework for icare complementing a new consequence management framework, and including the cascade of this through the organisation.</p>	For icare to consider
<p>Improve role descriptions of the GET and their teams to ensure that accountabilities for scheme agents, risk and other matters are clearly captured and then cascaded through the organisation. Ensure there is a process of regular review.</p>	For icare to consider
<p>As part of the better practice framework, develop an accountability map for icare as a whole, referencing how accountabilities come together from individual schemes to ensure there are no gaps or overlaps.</p>	For icare to consider
<p>Define and document a consequence management policy and/or approach that considers other levers besides financial consequences.</p>	For icare to consider
<p>Continue to reinforce balancing of performance measurement with reward through increased risk assessment monitoring, guidance over the inclusion of customer and risk metrics in individual performance goals, and enhanced leadership capability in managing performance.</p>	For icare to consider
<p>icare to implement a regime imposing individual accountability on the CEO, CRO and GET executives to engage with SIRA in an open, constructive and cooperative way.</p>	For icare to consider
<p>Develop a formal stakeholder accountability framework and develop and communicate to employees clear expectations on how icare must engage with its stakeholders in a positive, open and constructive way.</p>	For icare to consider
Culture	
<p>icare should translate its strategic priorities into cultural aspirations and make them tangible for individuals across the organisation.</p>	Adopted Via a broader recommendation for a cultural change plan in <i>Part 1B, 23.2 Culture</i>
<p>Create a greater understanding of the expectations for all icare employees with respect to governance and accountability and align these to processes, policies and tools set around incident management, issue management and risk management. This supplements recommendations made in Chapter 5. Risk management & compliance, Chapter 6. Issues identification, escalation & resolution, and Chapter 9. Accountability.</p>	Adopted Via a broader recommendation for a cultural change plan in <i>Part 1B, 23.2 Culture</i>
<p>Build and promote further learning and feedback mechanisms and both project and team levels both formally and informally. This supplements recommendations made in Chapter 6. Issues identification, escalation & resolution.</p>	Adopted Via a broader recommendation for a cultural change plan in <i>Part 1B, 23.2 Culture</i>

<p>Build leadership (GET, Chiefs and SLT) capability around effective risk, governance and accountability practices, but also in how they role model and communicate change to their teams as a collective. This supplements recommendations made in Chapter 4. Senior leadership oversight, and Chapter 5. Risk management & compliance.</p>	<p>Adopted Via a broader recommendation for a cultural change plan in <i>Part 1B, 23.2 Culture</i></p>
<p>Enhance its performance management system, with particular focus on clarifying individual expectations so as they can overcome the diffusion of responsibility and hold people to account. In doing so, icare should confirm the KPIs, scorecards, charters, accountability frameworks and cascade that exist to support this. This supplements recommendations made in Chapter 9. Accountability.</p>	<p>Adopted Via a broader recommendation for a cultural change plan in <i>Part 1B, 23.2 Culture</i></p>
<p>Identify and embed the critical few behaviours it needs to drive effective governance and accountability practices. These may include behaviours associated with constructive challenge, speaking up and safety in doing so, listening to other areas of expertise, learning and responding, but also to further embed collaborative partnering.</p>	<p>Adopted Via a broader recommendation for a cultural change plan in <i>Part 1B, 23.2 Culture</i></p>
<p>Implement a robust behavioural measurement framework that enables monitoring of behavioural change to drive governance, accountability and performance outcomes. This supplements recommendations made in Chapter 9. Accountability.</p>	<p>Adopted Via a broader recommendation for a cultural change plan in <i>Part 1B, 23.2 Culture</i></p>

Appendix 3: Other submissions and proposed amendments

- 1 A number of additional matters have been raised in individual submissions throughout the course of this review that relate to specific concerns about benefits or claims management under the legislation, or do not appear relate to broader systemic issues within the workers compensation scheme. Such issues are beyond the scope of my review.
- 2 These issues are set out below. While I do not address these issues in my review, they are clearly significant to those who have raised them and should be considered by SIRA and the legislature as appropriate.

Stakeholder	Issue	Response suggested by stakeholder
Injury management		
ARPA ¹²⁴⁰	Non-accredited providers are operating in the NSW workers compensation scheme and this compromises injured workers outcomes.	Non-accredited providers should be banned from the NSW scheme and this should be monitored by SIRA for non-compliance.
Anonymous stakeholder group ¹²⁴¹	Alternative delivery models for access to independent specialist engagement should be considered, rather than the adversarial Injury Management Consultation used in the NSW Workers Compensation System.	Referrers, treating doctors and examinees have access to an independent medical specialist to utilise in a manner that is seen to be mutually beneficial to all stakeholders.
NIBA ¹²⁴²	Treatment of psychological claims different from physical claims. Section 11A makes it hard to prove injury, and places the onus on the employer	<i>No specific response proposed</i>
Police Association of NSW ¹²⁴³	Strategies need to be put in place to reduce the number of officers being injured at work, as well as further programs to assist injured officers in recovering quickly.	PANSW endorses strategies that will contribute to reducing psychological trauma for police officers.
Police Association of NSW ¹²⁴⁴	Police officers making a claim are often required to recount traumatic events outside of a clinical setting which can exacerbate original injuries.	Introduce a presumption of psychological injury, and of the existence of a causal relationship between traumatic events and some cancers for police officers.
RACP ¹²⁴⁵	IME's are creating tension, distrust and conflict in the RTW process and may delay recovery.	Complex claims management should be evidence based. This includes fair and transparent

¹²⁴⁰ ARPA, *Submission to the Independent Review*, October 2020, 10-11 and 18

¹²⁴¹ Anonymous stakeholder group, *Submission to the Independent Review*, October 2020, 3

¹²⁴² Interview with NIBA, 21 February 2021, 2

¹²⁴³ Police Association of NSW, *Submission to the Independent Review*, November 2020, 2

¹²⁴⁴ Ibid

¹²⁴⁵ RACP, *Submission to the Independent Review*, 30 October 2020, 7

Stakeholder	Issue	Response suggested by stakeholder
		process for sharing information between stakeholders.
Benefits for Injured Workers		
Anonymous ¹²⁴⁶	The five-day timeframe to decide on claims slows down the process.	48 hours to make a decision is appropriate.
Anonymous ¹²⁴⁷	2012 amendments has meant the injured worker became not entitled to weekly benefits, which he was previously entitled to until retirement age.	<i>No specific response proposed</i>
Dr Arthur Chesterfield Evans ¹²⁴⁸	Certificate of Capacity' only allows for a single diagnosis due to the small time period in which a patient can be diagnosed. Certain criteria means that workers will get less weekly benefits (i.e. partially fit) even if the injured worker is unlikely to ever get a job.	<i>No specific response proposed</i>
icare	PIAWE calculations require further simplification to achieve their aims.	The PIAWE the calculation process could be enhanced, having regard to the information typically available at the time of a claim. Alternatively, the necessary calculation could be simplified,
icare	Thresholds for work injury damages are not aligned with other thresholds – being 15% rather than 20%	Consideration be given to increasing the WPI thresholds for lump sum compensation
icare ¹²⁴⁹	There are inconsistencies in the accreditation and training of service providers in the workers compensation scheme, including IME's	Consideration be given to the extension fo approval and accreditation requirements to all medical and allied health service providers.
icare ¹²⁵⁰	Section 11A is a difficult defence to uphold, and does not support employers and NSW Government agencies enforcing discipline, performance appraisal, management or transfer of employees.	Section 11A should be reformed to strengthen the defence and support employers, such as by removing the words "wholly or predominantly" to align the defence with the definition of a compensable disease injury, and providing clarity on the conditions of 'reasonable action'
icare ¹²⁵¹	The decision in <i>Hee v State Transit Authority of NSW [2019] NSWCA 175</i> has expanded the application of s 38A beyond the legislative intent.	S 38A should be clarified in light of the decision in Hee

¹²⁴⁶ Anonymous Stakeholder

¹²⁴⁷ Anonymous Stakeholder

¹²⁴⁸ Dr Chesterfield Evans, *Submission to the Independent Review*, 6

¹²⁴⁹ icare, *Legislative Amendment Submission to the Independent Review*, February 2021, at [75–88] 20 - 22

¹²⁵⁰ Ibid at [97–108] 25 - 27

¹²⁵¹ Ibid at [111–115] 28

Stakeholder	Issue	Response suggested by stakeholder
icare ¹²⁵²	Ss 39 and 41 of the WC Act 1987 have the effect of arbitrarily increasing the benefit cap to 273 weeks for some workers and disincentivises early treatment.	Consideration be given to amending s 39 of the WC Act 1987 to clarify payments for incapacity following surgery.
Law Society of NSW ¹²⁵³	Linking eligibility to medical benefits to the degree of WPI and to the cessation of weekly payments, is problematic and results in many injured workers not being able to access the benefits they need to return to work or to recover.	The scheme should be simplified and revert to a straightforward system, in which reasonably necessary medical expenses are payable to all injured workers. Pre-approval requirements in subsection 60(2A) of the 1987 Act should be repealed, as they prevent the scheme from fulfilling its fundamental functions of providing prompt, effective and proactive treatment of injuries.
NSW Bar Association ¹²⁵⁴	Workers have fewer rights to medical treatment than they did 90 years ago due to the 2012 legislative amendments.	It is suggested that the Scheme should revert to the situation that existed between 1928 and 2012. The costs associated with reasonably necessary medical expenses resulting from injuries should simply be paid. There should be no artificial limits created by time periods, age or the degree of permanent impairment. Doing this will enable the Scheme to attain one of its most important "system objectives".
NSW Bar Association ¹²⁵⁵	It is unclear whether section 38 assessments made by insurers regarding work capacity and the length of a worker's incapacity are reviewable or appealable or whether the insurer's decision is final in those regards.	The Association suggests that the simplest and best approach to the current confused situation is to simply remove the words "is assessed by the insurer" from section 38 where they currently appear. Doing this will remove any doubt about the ability of the WCC and the new PIC from making any determinations and orders relating to section 38.
Legislative framework		
ARPA ¹²⁵⁶	The NI is not operating within the purpose of the legislation, including	Ban practices that do not align with the scheme's objectives. SIRA

¹²⁵² icare, *Legislative Amendment Submission to the Independent Review*, February 2021, at [116–123] 29 - 30

¹²⁵³ Law Society of NSW, Submission to the Independent Review, 4 February 2021, 2

¹²⁵⁴ NSW Bar Association, *Submission to NSW Legislative Council's Standing Committee on Law and Justice of the NSW Workers Compensation Scheme*, 27 July 2020, 6-7

¹²⁵⁵ NSW Bar Association, *Submission to NSW Legislative Council's Standing Committee on Law and Justice of the NSW Workers Compensation Scheme*, 1 February 2021, 1-4

¹²⁵⁶ ARPA, *Submission to the Independent Review*, October 2020, 12

Stakeholder	Issue	Response suggested by stakeholder
	giving direction which limit access to WRP treatment.	should monitor, manage and regulate this.
NSW Bar Association ¹²⁵⁷	2012 Amendments have limited medical expenses and income support payments made by employers to employees and longer-term medical costs and income support is borne by the taxpayers of the Commonwealth and NSW.	<i>No specific response proposed</i>
Privacy Laws		
Business NSW ¹²⁵⁸	icare's interpretation of privacy laws is causing delay in access to appropriate treatment	The legislation be amended to clarify how the privacy laws intersect with the workers compensation legislation
AFEI ¹²⁵⁹	Privacy legislation is used as a means to withhold information from employers under ss 46 and 270 of the WIM Act	
NIBA ¹²⁶⁰	There are difficulties in obtaining and providing information which requires the consent of the worker, such as from federal agencies like centrelink	
Miscellaneous		
NSW Bar Association ¹²⁶¹	If a worker achieves a WPI threshold of 15% they can sue their employer for damages limited to economic loss. However, people who have public liability claims are entitled to other categories of damages.	<i>No specific response proposed</i>
NSW Bar Association ¹²⁶²	Undermining the solicitor and client relationship, through informing the injured that they can act on their own, results in unjust outcomes.	<i>No specific response proposed</i>
Police Association of NSW ¹²⁶³	RTW decisions and medical discharge being left solely to the employer.	The insurer should have a greater role in the provision of suitable duties, identification and securing of permanent positions, and medical discharge processes.

¹²⁵⁷ NSW Bar Association, *Submission to NSW Legislative Council's Standing Committee on Law and Justice of the NSW Workers Compensation Scheme*, 27 July 2020, 10

¹²⁵⁸ Business NSW, *Submission to the Independent Review*, November 2020, 10

¹²⁵⁹ Australian Federation of Employers and Industries, *Submission to the Independent Review*, November 2020, 5-6

¹²⁶⁰ *Interview with NIBA*, 21 February 2021, 2

¹²⁶¹ NSW Bar Association, *Submission to NSW Legislative Council's Standing Committee on Law and Justice of the NSW Workers Compensation Scheme*, 27 July 2020, 11

¹²⁶² *Ibid* 12

¹²⁶³ Police Association of NSW, *Submission to the Independent Review*, November 2020, 5

List of Stakeholder Submissions to this Review

Stakeholders who have requested to stay anonymous have not been listed.

Stakeholder
Australian Education Union - New South Wales Teachers Federation Branch
Australian Federation of Employers & Industry (AFEI)
Australian Industry Group (Ai Group)
Australian Medical Association (AMA)
Australian Lawyers Alliance (ALA)
Australian Rehabilitation Providers Association – NSW Council (ARPA)
Business NSW
Construction, Forestry, Maritime, Mining and Energy Union (CFMEU)
Employers Mutual Limited (EML)
Individual submissions
Insurance and Care NSW (icare)
Insurance Council of Australia (ICA)
Joint Dynamics Pty Limited
Law Society of New South Wales
National Insurance Brokers Association (NIBA)
New South Wales Bar Association
N.S.W. Workers' Compensation Self Insurers Association Inc
Police Association of New South Wales
Public Service Association (PSA)
State Insurance Regulatory Authority (SIRA)
The Royal Australian College of General Practitioners (RACGP)
The Royal Australian College of Physicians (RACP)
Unions NSW
Workers Compensation Commission (WCC) (former)

Glossary

Organisational

Term	Description
Budget Estimates	Budget Estimates inquiry is conducted by the Legislative Council's seven Portfolio Committees and is a key process for government accountability and transparency. Ministers and senior public servants attend an annual Budget Estimates inquiry to answer questions about the expenditure, performance and effectiveness of their agencies.
Group Executive Team (GET)	The senior icare executives who report to the CEO. Collectively they are responsible for executive leadership of icare.
Guidewire System	Insurance management system (for policy, billing and claims) that icare uses as one of its core systems.
Insurance for NSW	The name used by icare for the part of icare's business that manages the SI Corp funds.
Lifetime Care and Support Scheme (LTCS)	Pays for treatment, rehabilitation and care for people who have been severely injured in a motor accident in NSW, funded by a levy on CTP insurance. Under the SICG Act, icare 'provides services' to LTCS.
Net Promoter Score (NPS)	Willingness of icare's customers or employees (eNPS) to recommend icare to others. Scored on an index ranging from -100 to 100.
Nominal Insurer (NI)	Established under the WC Act 1987 to provide insurance for NSW private sector employers. Under the SICG Act, icare 'acts for' the NI.
Nominal Insurer Single Platform (NISP)	Insurance platform that includes various integrated systems, including the Guidewire System.
Public Interest Disclosure (PID)	Reporting about wrongdoing in the public sector that serves the public interest. Persons making a PID receive protection under the <i>Public Interest Disclosures Act 1984</i> .
People Matter Employee Survey (PMES)	Survey open to all NSW Public sector employees to answer questions on their experiences with work, workgroup, managers and organisation.
Self Insurance Corporation (SI Corp)	Established under the Self Insurance Corporation Act 2004, it is the legal entity that administers a number of managed fund schemes serving NSW government agencies and their employees. Under the SICG Act, icare 'provides services' to SI Corp.
Treasury Managed Fund (TMF)	NSW Government's self-insurance scheme which insures the risk of NSW government agencies. The TMF is one of the funds administered by SI Corp.

Claims management

Term	Description
Authorised Provider Model	icare's offering to larger employers which enable them to receive a choice of claims service providers. These are Allianz, GIO and QBE.
Claims model	The rules and processes that apply to how claims will be managed on a systemic basis, including how claims will be segmented and what resources will be applied to support injured workers.

Term	Description
Decision rights	The system under which those involved in claims management have the right to make decisions relating to a claim. Examples include rights over the approach to case management, approval of medical treatment and management of litigation.
Independent Medical examination	Using a qualified medical examiner to reassess the nominated treating doctor's assessment of injuries, decision or recommendation of treatment.
Injury Management Plan	An outline of treatments for a significant injury developed in consultation with the worker, employer, and treating doctor
Pre Injury Average Weekly Earnings (PIAWE)	The basis for calculating entitlement to weekly income replacement benefits, based on actual earnings prior to the injury.
Reasonably necessary	Established under the WC Act 1987, practitioners are required to use this term to assess an injured worker's eligibility to treatment and care.
Return to work	The outcome where an injured worker has recovered and has returned to work.
Return to work rate	The proportion of injured workers who have returned to work after a given period of time. For example, a 26 week RTW rate of 85% means that 85% of injured workers have returned to work by the time 26 weeks have elapsed from the time of their claim.
Scheme Agent	An insurer's selected outsourced providers to deliver workers compensation claims services.
Significant injury	The worker is totally or partially incapacitated for work for more than seven consecutive calendar days.
Whole person impairment	A whole person impairment assessment is an assessment of the degree of permanent impairment of any body part, system or function which is impaired as a result of an injury.
Work capacity assessment	Legislated under the WC Act 1987 to determine the extent to which an injured worker is able to return to pre-injury employment.
Worker with high needs	Defined in the WC Act 1987 as an injury has resulted in permanent impairment and the degree of impairment is more than 20 percent.
Worker with highest needs	Defined in the WC Act 1987, where an injury has resulted in permanent impairment and the degree of impairment is more than 30 percent.

Financial

Term	Description
Accounting Funding Ratio (AF Ratio)	Measure of scheme financial position based on ratio of scheme assets to scheme liability as reported in financial statements
Assets	Resources owned by an entity. These are often cash and investments (i.e. shares, government bonds, property or infrastructure).

Term	Description
Economic Funding Ratio (EF Ratio)	Measure of scheme financial position based on ratio of scheme assets to scheme liability, with liability measured on best-estimate basis using economic assumptions consistent with the asset based of the scheme. Specifically, discount rates are based on expected earning rate on scheme assets.
Funding ratio	Ratio of scheme assets to scheme liability which helps to assess the long-term financial sustainability of a scheme
Investment Returns	The percentage gain from an investment relative to the cost of investing.
Liabilities	Resources that an entity owes. These include current or future claim costs and operating costs which are valued by actuaries.
Net result	A calculation to determine a scheme's overall financial result for the year, equivalent to the profit or loss made by a company. This is calculated by underwriting result plus investment income earned on assets.
Probability of adequacy (PoA)	The level of confidence a scheme has that the outstanding claims liability will be sufficient to meet claims when they are due. A 75% PoA is the standard measure used across Australia, including by APRA and SIRA.
Strategic Asset Allocation (SAA)	The high level description of the percentage of assets invested in different asset classes.
Underwriting result	A calculation to determine a scheme's financial outcomes of its insurance decisions. This is calculated by premium revenue less scheme costs less claims costs.

Premium

Term	Description
Breakeven Premium	The premium expected to be sufficient to cover the incurred cost of claims related to accidents that occur during the period of premium coverage, including an allowance for claims handling.
Experience rating	A rating applied to employers based off their claims performance. Applied for any employer with an average performance premium of over \$30,000. Ratings affect an employer's annual premium payment.
Premium	The payment employers make to be insured for workers compensation. It is calculated based off an employer's industry, number of employees and other risk factors.
Premium capping	A limit placed on how much a premium can change in an experience-rated employer's premium rate.

Abbreviations

Abbreviation	Term
AF Ratio	Accounting Funding Ratio
AMA 5	American Medical Association Guidelines, 5th Edition
AMA 6	American Medical Association Guidelines, 6th Edition
APRA	Australian Prudential Regulation Authority
ARC	Audit and Risk Committee
CEO	Chief Executive Officer ¹²⁶⁴
CS	Cumpston Sarjeant
COVID-19	Novel coronavirus SARS-CoV2
CTP	Compulsory Third Party Insurance
EF Ratio	Economic Funding Ratio
EML	Employers Mutual NSW Limited
FTE	Full Time Equivalent
GET	Group Executive Team
GSE Act	Government Sector Employment Act 2013
icare	Insurance and Care NSW
ICNSW	icare
ILARs	Independent Legal Assistance and Review Service
IRO	Independent Review Office (replaces WIRO from 1 March 2021) formerly WIRO ¹²⁶⁵
NCOM	New Claims Operating Model
NI	Nominal Insurer
NIAC	Nominal Insurer Advisory Committee
NPS	Net Promoter Score
NPV	Net Present Value
OBEP	Operational Breakeven Premium
PIAWE	Pre-injury average weekly earnings
PoA	Probability of Adequacy
RFP	Request for Proposal
RTW	Return to Work
SCLJ	Standing Committee Law and Justice
SI Corp	Self Insurance Corporation
SICG Act	State Insurance and Care Governance Act (No 19) 2015 (NSW)
SIRA	State Insurance Regulatory Authority
SPA	Service Provider Agreement
SRWS	Safety, Return to Work and Support
SR	
TMF	Treasury Managed Fund
WC	Workers Compensation

¹²⁶⁴ CEO is used to also used to refer to the 'Chief Executive'.

¹²⁶⁵ WIRO is used to refer IRO in this report, except where this Review describes the current structure of the NSW Workers Compensation Scheme.

Abbreviation	Term
WC Act 1987	Workers Compensation Act (No 70) 1987 (NSW)
WCC	Workers Compensation Commission
WCIF	Workers Compensation Insurance Fund
WCOF	Workers Compensation Operational Fund
WHS	Work Health and Safety
WHS Act	Work Health and Safety Act (No 10) 2011 (NSW)
WIM Act	Workplace Injury Management and Workers' Compensation Act (No 86) 1998 (NSW)
WIRO	Workers Compensation Independent Review Office (replaced by the IRO from 1 March 2021) ¹²⁶⁶
WorkCover	WorkCover Authority of NSW
WPI	Whole person impairment

¹²⁶⁶ WIRO is used throughout this report to refer to IRO, as WIRO still existed during the drafting of this report.

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