POTENTIAL AMENDMENTS TO WORKERS COMPENSATION LEGISLATION

Executive summary

1. This submission is intended to respond to the Independent Reviewer's request for icare's views on potential amendments to the *Workers Compensation Act 1987* (the **1987 Act**) and the *Workplace Injury Management and Workers Compensation Act 1998* (the **1998 Act** as well as the significant volume of supplementary primary and subordinate legislation, Guidelines and guidance materials that deal with premium setting, benefits, claims management, regulation, information sharing and numerous other matters.

2. icare welcomes the opportunity to provide submissions on this topic and would welcome the opportunity to work with the Independent Reviewer, the State Insurance Regulatory Authority (**SIRA**) and Parliament on progressing any of the potential amendments discussed in this submission.

3. A more detailed history of workers compensation legislation in NSW is set out in icare's submissions in response to Term of Reference 2(a) dated 18 November 2020 and the Background to those submissions. As described in those submissions, the NSW workers compensation system has experienced many reforms over the past four decades. These changes have largely been made in response to fluctuations in financial position and following various significant and comprehensive reviews and overhauls of the system, with a view to striking a balance between the interests of employers, workers and other stakeholders.

4. In particular, in 2012, the (then) Government introduced significant reforms, which were described by the (then) Treasurer as a fundamental shift towards meeting the needs of the most seriously injured workers while strongly incentivising return to work for those who have the capacity to do so.[1] Specifically, the 2012 reforms restricted entitlements to weekly and some categories of lump sum compensation, introduced tougher return to work obligations on both employers and workers, limited the scope of injuries captured by the scheme and tightened the criteria to access medical treatment. These reforms were adopted following a review of the NSW workers compensation scheme that recommended that the most effective

[1] Second reading speech of the *Workers Compensation Legislation Amendment Bill 2012*

workers compensation measures from around Australia should be adopted, benefits calculations should be simplified, and workers' entitlements should be made more transparent and easier for workers and employers to understand.[2]

5. More recently, in 2015, the (then) Government introduced further reforms, which abolished WorkCover and established icare, SIRA and SafeWork NSW, as the three separate agencies to deliver in tangent the following policy objectives for the NSW workers compensation scheme:[3]

    a. supporting injured workers to recover and return to work;

    b. providing proper assistance to workers with the highest needs; and

    c. making sure that all changes to benefits will not compromise the financial sustainability of scheme.

6. The goal was to introduce a system that was fair, sustainable and customer-centric.

7. Based on icare's extensive experience in understanding and applying the NSW workers compensation legislation, it has identified a number of areas in which the current legislation could be improved by legislative reform. Broadly speaking, there are three categories of potential amendments discussed in this submission:

    a. to improve outcomes for injured workers, including by incentivising return to work (**RTW**) outcomes and driving health outcomes which matter most to workers, providing injured workers with greater choice and control, and promoting consistency in customer experience;

    b. to respond to the changing nature of workplace; and

    c. to clarify legislative intent.

8. This submission does not discuss the opportunity for regulatory design and reform to clarify the roles of SIRA, icare, the Workers Compensation Nominal Insurer (the **Nominal Insurer**)

[2] See page 4 of NSW Workers Compensation Scheme Issues Paper (http://dev.injuredworkerssupport.org.au/wp-content/uploads/2012/04/WorkCover-NSW-Workers-Compensation-Issues-Paper-1.pdf)
[3] Workers Compensation Amendment Act 2015 Second Reading Speech https://www.parliament.nsw.gov.au/bill/files/292/2R%20Workers%20Compensation%20and%20cognate.pdf

or self-insurers (such as the NSW Self Insurance Corporation), which have been the subject of separate submissions.[4]

9. An overview of the potential amendments within each category has been included in the table following this section.

10. icare considers that the reforms of the highest priority are the potential amendments to:

    a. pre-injury average weekly earnings (**PIAWE**) (item 1 in the table);

    b. section 11A of the 1987 Act (item 9 in the table); and

    c. the "*reasonably necessary*" test (item 2 in the table).

11. Many of these potential amendments will also achieve significant cost savings and improve the financial sustainability of the workers compensation system, including by the reduction of medical expenses or adjustment of thresholds for entitlements and benefits in response to changes in claims profiles since the last major reforms to the NSW workers compensation legislation in 2012 and 2015.

12. This submission primarily focusses on potential legislative amendments, noting that the effectiveness of any legislative reform would also be supported by amendments to subordinate legislation, including Regulations, Guidelines and Fee Orders, or changes to regulatory approach. The table below identifies the different mechanisms by which such reform could be achieved.

13. Some additional amendments, such as pre-approval limits to treatment,[5] the automatic acceptance of treatment following the 21 day treatment approval timeframe,[6] and issues relating to choice of provider,[7] have been addressed in detail in icare's submission on the management of medical costs for injured workers dated 2 February 2020 and have not been repeated in this submission. In addition, potential amendments regarding the measures used to assess impairment in the NSW workers compensation scheme, including the assessment methods used, the use of bespoke individual assessments and the number of permitted

[4] See icare's supplementary submissions in response to Terms of Reference 2(a) and 2(c) dated 1 February 2021, and advice provided by Ms Brenda Tronson and Ms Anya Poukchanski of Counsel included as Appendix 1 to those submissions
[5] See paragraph [47] of icare's submission on the management of medical costs for injured workers dated 2 February 2020
[6] See section 279 of the 1998 Act and paragraph [48] of icare's submission on the management of medical costs for injured workers dated 2 February 2020
[7] See section 47(3) of the 1998 Act and paragraphs [52] and [88] of icare's submission on the management of medical costs for injured workers dated 2 February 2020

assessments, have been separately addressed in icare's accompanying submission on the assessment of whole person impairment (**WPI**).

14. Finally, icare also notes that this submission focusses on refinement of the current benefits structure. However, with the changing nature of work, the policy objectives of the workers compensation scheme may be best met through a more substantive overhaul that maintains a capped scheme and places more emphasis on RTW rather than relying on measures of impairment as the primary determinant of entitlement. To do so, the capping could be determined through limiting the period of weekly benefits, or alternatively through a capped total benefit similar to that adopted by Western Australia.[8]

Potential amendments

No.	Issue	Options for reform	Mechanism(s)
Improved outcomes for injured workers			
1.	Pre-injury average weekly earnings (**PIAWE**)	Further simplification of PIAWE processes and calculation	Legislative amendment / Regulations / Guidelines and guidance material[9]
2.	"*Reasonably necessary*" test	Introduction of a new definition for assessing and approving medical treatment that supports value-based care	Legislative amendment / Regulations / Guidelines and guidance material
3.	WPI thresholds for work injury damages (**WID**)	Increase of the WPI threshold for lump sum compensation required to claim WID from 15 per cent to 20 per cent	Legislative amendment
4.	Commutation criteria	Less stringent eligibility criteria for commutation to encourage greater uptake of commutation by injured workers, including the reduction of the	Legislative amendment / Regulations / Guidelines and guidance material

[8] See section 5A(1A) and Schedule 1, clause 18A(1d) of the *Workers' Compensation and Injury Management Act 1981* (WA)
[9] 'Guidance material' refers to any standards of practice, guidance notes or other instructions released by SIRA that is not in the form of Regulation or Guideline

No.	Issue	Options for reform	Mechanism(s)
		WPI eligibility for commutation from 15 per cent to 10 per cent	
5.	Method of WPI assessment	Amendment of the NSW workers compensation guidelines for the evaluation of permanent impairment to require the use of *American Medical Association's Guides to the Evaluation of Permanent Impairment, 6th Edition* (**AMA 6**)	Guidelines
6.	Number of permitted WPI assessments	Introduction of greater clarity to reinforce the intent of only allowing one WPI assessment under section 322A of the 1998 Act	Legislative amendment / guidance material
7.	Approval and accreditation of healthcare providers and Independent Medical Examiners (**IMEs**)	Extension of approval and accreditation requirements to all medical and allied health service providers who may provide medical or related treatment under section 60(1) of the 1987 Act, as well as the accreditation and training requirements of IMEs	Legislative amendment / Regulations / Guidelines and guidance material
Response to changes in the workplace			
8.	Changing nature of work	Reform to mitigate or eliminate the Nominal Insurer's increased exposure to financial risk for uninsured liabilities due to the expanding gig economy	Legislative amendment / Regulations

No.	Issue	Options for reform	Mechanism(s)
Clarification of legislative intent			
9.	Section 11A of the 1987 Act	Reform to strengthen the defence for reasonable actions of employers in order to support employers and NSW Government agencies enforcing transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal processes	Legislative amendment / guidance material
10.	Section 38A of the 1987 Act	Amendment to deliver the intent of the provision so that workers with highest needs are not entitled to the full special provision amount under section 38A ($788.32 as indexed) in addition to their post-injury earnings, in response to the NSW Court of Appeal decision in the matter of *Hee v State Transit Authority of New South Wales [2019] NSWCA 175* (***Hee***)	Legislative amendment / guidance material
11.	Weekly payments during surgery	Amendment to section 39 of the 1987 Act to clarify that weekly payments are not available for any period of incapacity resulting from surgery after entitlements cease under that section	Legislative amendment
12.	Other clarifications	Various other amendments to simplify or clarify provisions that remain unclear	Legislative amendment

Potential amendments to improve outcomes for injured workers

Pre-injury average weekly earnings (PIAWE)

Background

15. In October 2012, reforms introduced by the *Workers Compensation Legislation Amendment Act 2012* (the **2012 reforms**) inserted detailed provisions for the calculation of PIAWE into the 1987 Act[10] in order to determine the amount of any loss of income for injured workers by reference to the amount of pre-injury earnings and, accordingly, quantify their weekly benefits.[11]

16. Industry consensus is that PIAWE determinations are complex due to the challenges of interpreting and applying the relevant statutory provisions (including requirements relating to the date of injury, particular classes of workers and non-monetary benefits),[12] as well as the significant amount of detailed information required to be provided by employers and workers, covering, amongst other things, salary, overtime, bonuses, pecuniary and non-pecuniary benefits, leave (paid and unpaid), salary sacrifice arrangements, earnings from multiple jobs, and changes to salary or role.[13]

17. In addition, pursuant to section 267(1) of the 1998 Act, insurers are required to commence provisional weekly payments within seven days of being notified of the injury. As a result, initial payments are often made based on incomplete information, to avoid being in contravention of the legislation. In some cases, additional information is later provided by employers or injured workers and the PIAWE is then redetermined and payments adjusted.

18. Due to the complexities in the approach, PIAWE has been the subject of several legislative amendments since its inception.

19. In September 2019, the *Workers Compensation Amendment (Pre-injury Average Weekly Earnings) Regulation 2019* (the **PIAWE Regulation**) changed the way an injured worker's

[10] In accordance with clause 4 of Division 1 of Part 19H of Schedule 6 to the 1987 Act, these provisions do not apply for the purposes of the *Workers Compensation (Dust Diseases) Act 1942* or the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*
[11] Prior to the 2012 reforms, a worker's weekly benefits were calculated by reference to the current weekly wage rate (under an applicable award) or average weekly earnings over a 12 month period
[12] See Clauses 4 and 5 of Schedule 3 to the 1987 Act; Parts 19H and clause 7 of Part 19L of Schedule 6 of the 1987 Act; and Clause 7 of Schedule 3 to the 1987 Act
[13] See Clause 2(2), Schedule 3 of the 1987 Act; and Clauses 6 and 7, Schedule 3 of the 1987 Act

PIAWE is calculated. These changes came into effect on 21 October 2019 and allowed the worker and employer to agree the basis on which earnings could be calculated and used to assess weekly compensation.[14] The reforms also permitted an interim PIAWE calculation to be relied on in the event an insurer did not have enough information by Day 7, which could be recalculated at a subsequent date.

20. The intention of the PIAWE Regulation was to allow for the prompt commencement of weekly payments at a rate closest to the injured worker's pre-injury earnings, with full determinations still required when agreement was not documented between the worker and employer within five days. In particular, providing the injured worker and employer the opportunity to agree on PIAWE was designed to empower both parties to take a positive and active role in respect of key decisions directly impacting the management of their claim, encouraging collaboration in the first instance (where possible), thereby reducing the potential for the claim to be subject to a dispute and the time consumed resolving any such disputes (including sourcing relevant information and process calculations). The reforms were also designed to positively impact RTW, mark a shift from the more adversarial workers compensation mentality and contribute to the preservation of a positive working relationship between the injured worker and their employer.

Need for reform

21. While icare agrees with the intent of the current PIAWE provisions to link income benefits with the amount of pre-injury earnings, implementation of the legislation continues to be problematic. The calculation of PIAWE remains extremely complex, time-consuming and confusing for all parties.

22. Additionally, while intended to reduce the complexity of the PIAWE determination process, the PIAWE Regulation has not had the effect anticipated as it still requires substantial information from the employer and a PIAWE determination must still be made in every case, as the agreement between injured worker and employer only extends to the basis upon which PIAWE is calculated, not the amount of PIAWE altogether. Moreover, in the first six months following the reforms, less than 100 agreements were reached in the Nominal Insurer scheme, despite over 20,000 PIAWE calculations being performed.

[14] See Schedule 3 of the *Workers Compensation Legislation Amendment Act 2018* and the *Workers Compensation Amendment (Pre-Injury Average Weekly Earnings) Regulation 2019*

23. The complexities involved in the PIAWE determination methodology result in inconsistencies in outcomes for injured workers. Because of difficulties employers and injured workers have in providing the required information to determine PIAWE, insurers often find it necessary to rely on incomplete information and judgement calls. In particular, there are significant difficulties and complexities in obtaining the relevant information for and calculating the unpaid leave and 'relevant period' components of PIAWE.

24. Practically speaking, based on direct observation by icare and feedback from claims management providers and employers, it currently takes about 30 minutes to complete simple PIAWE determinations, however the many more complex calculations determinations (which draw on a large range of source materials) can require up to six hours each to complete.

Options for reform

25. icare considers that the PIAWE process can be enhanced in order to improve outcomes for injured workers and proposes that alternative methodologies are explored to determine pre-injury earnings. icare supports an approach that has regard to the typical data available at the time a claim is lodged, the need for a swift initial determination and flexibility for reassessment depending on the duration of a worker's entitlement to weekly benefits.

26. If the existing PIAWE methodology is maintained, consideration should be given to placing greater onus on employers to provide the necessary data for PIAWE calculations in order to better reflect the intent of the current PIAWE provisions, for example through the introduction of enforceable obligations for employers to:

    a. capture and retain all the information required for a PIAWE calculation for all workers during the course of their employment or engagement (i.e. prior to any claim being lodged); and

    b. provide this data at the time of a claim is lodged.

27. An alternative approach would be to consider simplifications in the PIAWE calculation process and allow for a simplified data set to be used. While easier to apply, the resulting estimate of pre-injury earnings may not be as precise, noting that the existing PIAWE process also results in imprecise estimates based on incomplete information.

"Reasonably necessary" test

Background

28. The 1987 Act uses the "*reasonably necessary*" test to determine whether treatment or services are appropriate.[15] In addition, section 61(1) of the 1987 Act provides:

> *The amount for which an employer is liable in respect of the medical or related treatment of a worker is such amount as is reasonably appropriate to the treatment given, having regard to the reasonable necessity for the treatment.*

29. This test differs from similar personal injury schemes in NSW,[16] as well as Commonwealth schemes like the National Disability Insurance Scheme (**NDIS**), which apply a "*reasonable and necessary*" test.

30. In most Australian workers' compensation jurisdictions, the test for determining whether treatment or services are appropriate is based on that treatment being "*reasonable and necessary*".[17] For example:

    a. Victoria requires reasonable costs supported by clinical framework based on the necessity of the medical service;[18]

    b. Queensland requires treatment to be both necessary and reasonable based on the "benefit", "appropriateness" and "cost-effectiveness";[19] and

    c. South Australia requires treatment to be both reasonable and necessary as detailed by the fee schedules and clinical framework.[20]

Need for reform

31. As detailed further in icare's submissions on the management of medical costs for injured workers dated 2 February 2020, healthcare costs in the NSW workers compensation system have been steadily and dramatically increasing over the last few years. There is little scope

[15] Section 60(1) of the 1987 Act; see also sections 59, 60A, 60AA, 61, 62 and 63 of the 1987 Act
[16] See e.g. the *Motor Accidents Injuries Act 2017*; *Motor Accident (Lifetime Care and Support) Act 2006*
[17] See e.g. *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic); *Workers' Compensation and Rehabilitation Act 2003* (Qld); *Workers' Compensation and Injury Management Act 1981* (WA); *Return to Work Act 2014* (SA); *Workers Rehabilitation and Compensation Act 1988* (Tas); *Return to Work Act* (NT); *Workers' Compensation Act 1951* (ACT); *Safety, Rehabilitation and Compensation Act 1988* (Cth)
[18] Section 224 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic)
[19] Section 5(4) of the *Workers' Compensation and Rehabilitation Act 2003* (Qld)
[20] Section 33 of the *Return to Work Act 2014* (SA)

for insurers to decline treatment, and inflated fees paid in the system drive perverse outcomes (including over-claiming and over-billing without proportional benefits to the injured worker). This is driven, in part, by the lenient *"reasonably necessary*" test applicable for the acceptance of medical treatment. The Workers Compensation Independent Review Officer has called for a review of this legal test.

32. The "*reasonably necessary*" test applied by the 1987 Act allows all manner of treatment to be approved, including those considered as being of low value or potentially harmful. In particular, the application of the "*reasonably necessary*" test enables the provision of healthcare interventions for which there is limited supporting medical evidence, or where the risk of harm and cost may outweigh any perceived benefits. This has contributed to the steadily increasing medical spend, and persistent non-improvement in patient outcomes, over the years. The "*reasonably necessary*" test has therefore had profound and potentially unforeseen consequences for claimants by creating incentives for medical and allied health service providers in respect of fee-for-service, rather than encouraging the system to take a holistic view of a person's ability to 'function and recover'.

33. Use of the words "*reasonably necessary*" in the legislation on medical treatments funded under the Nominal Insurer scheme is therefore leading to the approval of some non-evidence-based treatments that may jeopardise workers' recovery and well-being. These treatments are predominantly surgery related, including spinal surgery and spinal revision surgery, but may also include other allied health interventions.

34. One example which demonstrates the implications of the "*reasonably necessary*" test is the number of spinal fusions being approved and undertaken within the workers compensation system for back injuries, despite the evidence suggesting this is not best practice.[21] In some cases, spinal fusion may even result in permanent reduction of function, which may limit future work ability. In the NSW workers compensation system, these surgical interventions continue to be approved as they are considered "*reasonably necessary*" pursuant to the accepted interpretation of section 60 of the 1987 Act.

35. There are numerous other examples where the application of the "*reasonably necessary*" test may trump evidence based or best practice approaches.[22]

[21] Choosing Wisely Australia; Faculty of Pain Medicine, ANZCA: tests, treatments and procedures clinicians and consumers should question; 13 February 2018; http://www.choosingwisely.org.au/recommendations/fpm
[22] Other examples of when application of the "reasonably necessary" test may trump evidence based or best practice include:

36. The current system therefore provides a financial incentive for providers to recommend surgery, rather than consider conservative treatment options that may lead to better health outcomes in the long-term.

37. By application of the "*reasonably necessary*" test for medical treatment, icare estimates that NSW businesses have had to:

    a. contribute an extra $600 million into the Nominal Insurer in recent years; and

    b. annually pay premiums that are $80 million (3%) higher than they should otherwise be.

38. The Workers Compensation Guidelines (October 2019),[23] which expanded the list of pre-approved medical treatments, have relaxed the "*reasonably necessary*" test even further, as workers are able to access services and incidental expenses with limited scope for denial under the legislation.

39. These changes have a direct impact on the increase in medical expenditure. As an example, if every claim managed by the Nominal Insurer used the allowable $110 per claim for reasonable incidental expenses (such as strapping tape, TheraBand, exercise putty, disposable electrodes and walking sticks), this would add an additional $6.6 million to annual medical expenditure (based on 60,000 claims per year). If applied across all NSW workers compensation claims, this figure alone would exceed $10 million.[24]

Options for reform

40. icare's view is that the wording of the legislation, and associated case law, puts pressure on the workers compensation scheme and Workers Compensation Commission (**WCC**)[25]

a. knee arthroscopy/meniscectomy in those with degenerative changes;
b. cervical/lumbar spine disc replacement;
c. cervical/lumbar spine fusion;
d. pain management;
e. Ketamine infusion;
f. peripheral nerve stimulators;
g. spinal cord stimulators;
h. PRP injections;
i. scrambler therapy; and
j. stem cell therapy

[23] '*Workers Compensation Guidelines, Requirements for insurers, workers employers and other stakeholders*'; State Insurance Regulatory Authority, October 2019; Table 4.1; https://www.sira.nsw.gov.au/workers-compensation-claims-guide/legislation-and-regulatory-instruments/guidelines/workers-compensation-guidelines

[24] See Recommendation 2 of icare's Healthcare Submission dated November 2019

[25] Note that the WCC will shortly be replaced by the Personal Injury Commission: see https://www.nsw.gov.au/media-releases/new-personal-injury-commission-passes-parliament

Approved Medical Specialists to accede to requests for certain treatment when the interventions are not evidence-based, best practice and/or may result in worsening functional outcomes and other harm.

41. icare considers that improved outcomes for injured workers could be achieved by the introduction of a new definition that supports value-based care for assessing and approving medical treatment within the NSW workers compensation system, rather than the current "*reasonably necessary*" test. Consideration should also be given to providing regulatory guidance on how to apply the definition in practice, as well as to amending the definition of what constitutes "*medical or related treatment*" in section 59 of the 1987 Act and allowing for prescription to limit what is payable for an injury.

42. The primary impact of this reform would be to protect injured workers against approval of non-evidence-based medical and surgical interventions that do not serve to improve functional capacity or symptomatology, and might in some instances lead to greater WPI and worsening function.

43. To illustrate this point, if low-value surgical interventions such as spinal fusion surgery were reduced by 10 per cent, and workers offered alternative, evidence-based interventions instead, the NSW workers compensation system could realise net savings of $2.1 million annually. If the rate of approval of knee arthroscopies was reduced by 15 per cent, where evidence suggests the outcomes are equivocal, net annual savings of $400,000 could be realised, taking into account the cost of alternative, evidence-based interventions.

44. As an interim measure, SIRA could also consider the introduction of enforceable, operational Guidelines which clearly outline how the "*reasonably necessary*" test should be applied, similar to the Lifetime Care and Support Guidelines (see Part 6, section 2) or the Planning Operational Guidelines from the NDIS.[26]

45. Section 60(2C)(a) of the 1987 Act allows for the Guidelines to set rules for determining whether medical or related treatment, as defined by section 59 of the 1987 Act, is reasonably necessary.[27] There is also opportunity to enhance the existing Guidelines by including in legislation or regulation the criteria that needs to be applied when assessing the appropriateness and approving healthcare treatments and interventions funded through the NSW workers compensation system.

[26] See Recommendation 2 of icare's Healthcare Submission dated November 2019
[27] https://www.sira.nsw.gov.au/workers-compensation-claims-guide/legislation-and-regulatory-instruments/guidelines/workers-compensation-guidelines

46. These criteria could include:

    a. defining "*artificial aid*" in section 59A(6)(a) of the 1987 Act. Introduced by the 2015 reforms, the "*artificial aid*" was intended to be confined to specific items but has been more broadly interpreted by the WCC to extend to items such as pedicle screws, leading to unintended consequences. Specifically, the broader interpretation has meant that other types of hardware inserted during surgery are more likely to constitute an "*artificial aid*", entitling a worker to lifetime-related treatment expenses for an injury that would not have otherwise met the section 59A thresholds for the continuation of entitlements. Based on a high level impact analysis undertaken by icare's actuarial team, defining "*artificial aid*" in section 59A(6)(a) would be expected to realise an additional $62 million in for the Nominal Insurer scheme through reducing future claims liabilities; and

    b. defining acceptability for new and innovative treatments and confirming the limited circumstances in which they should be considered. In particular, the acceptability of new and innovative treatments needs to be aligned with the emphasis on value-based care, to be supported by policy statements and guidance that allows insurers to make decisions appropriately.

Whole permanent impairment (WPI) thresholds for work injury damages (WID)

Background

47. Under the 1987 Act, various entitlements of injured workers (including weekly payments and medical benefits) are set depending on the assessment of their level of WPI.

48. The 2012 reforms included the introduction of a five-year (260 week) cap on weekly payments for injured workers with an assessed level of WPI of 20 per cent or less.[28] The intent of these amendments was to ensure that the workers compensation system remained financially sustainable and that workers with less severe injuries would be encouraged to return to and recover at work.

[28] Sections 38, 39 and 59A of the 1987 Act

49. A WPI threshold is also used to determine which injured workers are entitled to claim lump sum compensation for WID, which can be pursued if the relevant injury results from an employer's negligence. Currently, the WPI threshold required to claim WID is 15 per cent.[29] Accordingly, there is a misalignment between the 20 per cent WPI threshold required for entitlements to continue beyond 5 years and the 15 per cent WPI threshold required in order to make a WID claim.

Need for reform

50. icare's view is that increasing the threshold for accessing WID to align with the threshold for workers who are able to access benefits beyond the 260-week cap provides customers with a clearer choice on whether to remain on the scheme or seek to resolve future economic loss as part of resolution of a WID claim.

51. Further, lower thresholds for lump sum compensation can increase perverse behaviours that do not promote recovery, such as additional medical procedures in order to achieve higher levels of impairment and a reduced incentive to RTW.

52. In practice, WPI creep is resulting in the 15 per cent WPI threshold being reached more readily, including due to the operation of the *American Medical Association's Guides to the Evaluation of a Permanent Impairment, 5th Edition* (**AMA 5**) which is currently used in workers compensation.[30] Accordingly, WID claims can be pursued more easily, resulting in increased costs to the scheme and excess payouts, with adverse impacts on financial sustainability, contrary to the intent of the 1987 Act and subsequent reforms.[31] The current employment environment and lower availability of employment options increases this risk. With an increase in WID claims, legal costs also necessarily escalate.

53. By comparison:

    a. in Tasmania, the injured worker must have at least 20 per cent WPI before they can commence proceedings for an award of damages;[32] and

[29] Section 66 of the 1987 Act
[30] https://www.sira.nsw.gov.au/resources-library/workers-compensation-resources/publications/health-professionals-for-workers-compensation/workers-compensation-guidelines-for-the-evaluation-of-permanent-impairment
[31] See for example Workers Compensation Amendment Act 2015 Second Reading Speech https://www.parliament.nsw.gov.au/bill/files/292/2R%20Workers%20Compensation%20and%20cognate.pdf
[32] Section 138AB of the *Workers Rehabilitation and Compensation Act 1988* (Tas)

b. in Victoria, the injured worker must first be granted a 'serious injury' certificate, i.e. 30 per cent WPI or more to obtain common law damages.[33]

54. Addressing WPI creep enables maintenance of a focus on RTW.

Options for reform

55. Consideration should be given to increasing the WPI threshold for lump sum compensation required to claim WID from 15 per cent to 20 per cent in line with the WPI threshold for high needs workers.

56. In particular, such reform will result in the reduction in the number of WID claims. It may also result in a signification reduction in legal costs, as well as the number of litigated matters initiated by plaintiff lawyers.

57. Based on current experience, icare's actuarial team undertook a high-level impact analysis and estimated that this change would result in a saving of $230 million per year for the Nominal Insurer scheme and $40 million per year for Treasury Managed Fund (**TMF**) workers compensation non-emergency agencies.

Commutation criteria

Background

58. Commutation refers to the lump sum 'buy-out' of future liabilities of an injured worker's future entitlements to weekly payments and medical expenses resulting from their injury. There are several potential advantages associated with commutation, including allowing injured workers to exit the scheme and take control of their financial futures.

59. The current criteria for commutation are as follows:[34]

a. the injured worker has been assessed as having a permanent impairment that is 15 per cent or above;

b. permanent impairment compensation to which the injured worker is entitled in respect of the injury has been paid;

[33] Section 327 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic)
[34] Section 87EA of the 1987 Act

c. a period of at least two years has elapsed since the worker's first claim for weekly payments of compensation in respect of the injury was made;

d. all opportunities for injury management and return to work for the injured worker have been fully exhausted;

e. the worker has received weekly payments of compensation in respect of the injury regularly and periodically throughout the preceding six months;

f. the worker has an existing and continuing entitlement to weekly payments of compensation in respect of the injury (whether the incapacity concerned is partial or total); and

g. the injured worker has not had weekly payments of compensation terminated under section 48A of the 1998 Act.

60. The current process requires SIRA approval prior to submission to the WCC. SIRA approval only considers compliance with the commutation criteria.[35]

Need for reform

61. A commutation outcome for a customer is beneficial in a number of ways:

a. it is voluntary and non-adversarial;

b. it provides an opportunity to exit the NSW workers compensation scheme with dignity and choice, and minimises financial distress; and

c. it provides an injured worker with control over their future.

62. In particular, in the case of injured workers impacted by the cessation of weekly entitlements pursuant to section 39 of the 1987 Act, the option to commute their medical entitlements may provide injured workers with greater financial choice. Further, commutation is often a superior alternative to WID disputes, as it encourages a more timely resolution of the claim from time of offer to payment.

63. For exempt workers,[36] including emergency workers who have been medically discharged with some capacity, even if RTW is achieved, there is often ongoing make up pay which

[35] See Part 3, Division 9 of the 1987 Act; Part 9 of the Workers Compensation Guidelines
[36] Exempt workers refer to a specific category of workers who are exempt from the capping components of the 2012 reforms, and include police officers, paramedics or firefighters who have sustained injuries (see clause 25 of Part 19H in Schedule 6 of the 1987 Act)

means the worker is required to maintain a connection with the scheme, driving up future costs for the TMF portfolio.

64. However, there are a number of barriers to accessing commutation under the current criteria, including:

    a. pre-requisite criteria relating to rehabilitation.[37] The main reason for SIRA's rejection of commutation requests is that the claims show continued rehabilitation activity. Introduction of a requirement of 'no likelihood of return to work' would remove this dependence on rehabilitation activity and, if implemented, would allow the majority of commutations supported by icare to progress;

    b. potential incentives for legal providers to advise the WID pathway over commutation. The removal or reduction of the WPI threshold for commutation would make commutation the only, or at least a more accessible, option that legal providers could recommend to customers below the WID threshold (which as described above, could also be increased to 20 per cent above to further encourage the use of commutation); and

    c. the requirement for SIRA approval. Removal of the SIRA approval step, while maintaining the role of the WCC (soon to be replaced by the Personal Injury Commission) to confirm a worker's likely ongoing incapacity, will support a more timely resolution.

65. While uptake of commutation has varied over time dependent on changing eligibility criteria, it has become almost obsolete under the current criteria. The NSW workers compensation scheme now sees less than 50 (often as low as 10) commutations per year. In the 2019/20 financial year, only 28 commutations were approved.

Options for reform

66. icare considers that eligibility criteria for commutation should be less stringent to encourage greater uptake of commutation by injured workers.

67. On the basis of preliminary modelling and business consultation, icare suggests consideration of the following criteria as the main pre-conditions for commutation:

[37] Pursuant to the requirement in section 87EA(1)(d) of the 1987 Act that all opportunities for injury management and return to work for the injured worker have been fully exhausted

a. no likelihood of RTW (in place of the requirement for exhausting all opportunities for injury management and RTW); and

b. WPI is greater than 10 per cent (down from 15 per cent).

68. Alternatively, commutation could be made available specifically to certain classes of claims, such as emergency workers who have been medically discharged with some capacity and particular types of psychological injury claims (e.g. post-traumatic stress disorder or trauma-based injury).

69. While it is possible to address this change through other regulatory instruments, there is benefit in creating stability of interpretation and some administrative efficiency through legislative amendment to the criteria in section 87EA of the 1987 Act.

70. As an illustration of the financial impact of such a reform, icare estimates that approximately 200 of the injured workers who ceased weekly entitlements between June and December 2019 due to the operation of section 39 of the 1987 Act would have fulfilled icare's proposed amended requirements for commutation. This would have represented a total potential net saving of $1,660,800 to the NSW workers compensation scheme (based on average savings per claim for a commutation outcome).

71. Further, inclusion of non-catastrophic claims for commutation creates opportunity for liability release in emergency portfolios. For example, as at April 2020, in NSW Police, there were 2,292 claims where medical commutation would be a possible claim outcome, which would have resulted in a potential net saving of $5,709,800. Coupled with a shift in WID threshold (as discussed above), this would significantly increase the number of police officers who could safely resolve their workers compensation claims and continue their lives with dignity.

72. There is also the opportunity to amend legislation to allow for approval of commutations by the WCC only (soon to be replaced by the Personal Injury Commission), without requiring the stage gate of SIRA approval, which may also lead to increased uptake of commutation.

Method of WPI assessment

73. icare's recommendation that the NSW workers compensation guidelines for the evaluation of permanent impairment be amended to require the use of AMA 6 has been addressed in icare's accompanying submission on the assessment of whole person impairment.

Number of permitted WPI assessments

74. icare's recommendation for further reforms to reinforce the intent of only allowing one WPI assessment under section 322A of the 1998 Act has been addressed in icare's accompanying submission on the assessment of whole person impairment.

Approval and accreditation of healthcare providers and Independent Medical Examiners (IMEs)

Background

75. Currently, there are inconsistencies in the accreditation and training of service providers within the NSW workers compensation scheme.[38]

76. For example, SIRA accredits only injury management consultants (**IMCs**), certain allied health providers (including physiotherapists, chiropractors, osteopaths, exercise physiologists, psychologists and counsellors)[39] and medical practitioners who undertake WPI assessments. Other healthcare providers, such as general practitioners and Independent Medical Examiners (**IMEs**), do not require accreditation.

77. Section 60(2A)(b) of the 1987 Act stipulates that the employer is not liable to pay the cost of any treatment or service if provided by a person who is not appropriately qualified[40] to give or provide the treatment or service. SIRA defines "*appropriately qualified*" for certain allied health practitioners who require approval to work in the scheme, e.g. exercise physiologists and counsellors who are not registered with the Australian Health Practitioner Regulation Agency (**AHPRA**).[41] However, a number of non-SIRA or non-AHPRA approved health providers (such as massage therapists) are still able to provide services under the NSW workers compensation scheme if their services have been deemed "*reasonably necessary*". There is no rigour or accountability for these providers to adhere to SIRA accreditation guidelines, nor adhere to requirements outlined by AHPRA.

[38] See paragraphs [89] and [90] of icare's submission on the management of medical costs for injured workers dated 2 February 2020
[39] See section 45A(2) of the 1998 Act
[40] "Appropriately qualified" is defined in the Act as "approved or accredited by the Authority"
[41] See https://www.sira.nsw.gov.au/workers-compensation-claims-guide/legislation-and-regulatory-instruments/guidelines/guidelines-for-the-approval-of-treating-allied-health-practitioners-2016-no-2#qualifications

Need for reform

78. Poor governance of medical specialists and allied health professionals working in the NSW workers compensation scheme promotes inconsistency of treatment and can undermine optimum outcomes for injured workers. Consistent treatment offers a better experience for all injured workers in the scheme and ensures a fair and non-biased approach, regardless of which healthcare provider a worker uses.

79. Specifically, icare has observed patterns of negative feedback about some IMEs. For example, icare's Net Promoter Score (NPS) program captures data relating to workers and their experience with IMEs. NPS feedback from February 2017 to January 2018 indicated a serious problem in relation to a small group of IMEs working on icare claims. One third (33 per cent) of 21 injured worker respondents gave a rating of zero out of 10 for their IME experience. The most common complaints were:

    a. the IME was biased toward the employer/insurer perspective;
    b. the IME did not believe what was said by the injured worker; and
    c. dishonest or rude behaviour by the IME.

80. While icare has limited direct survey data, experiences reported by the Victorian Ombudsman[42] and in the media suggest that similar experiences occur in other jurisdictions.

81. These experiences directly impact trust in the decision-making process where an IME is involved.

Options for reform

82. icare acknowledges that the overwhelming majority of medical and allied health providers who deliver services within the NSW workers compensation system do so in a professional and timely manner.

83. icare therefore believes that implementing a robust and enforceable Clinical Governance Framework is vital in supporting those who do the right thing, and drive individual and organisational behaviour towards optimal clinical care.

84. Such a framework should require all healthcare providers to meet clearly defined skills, qualifications, experience and performance expectations and/or obligations to support them

[42] *WorkSafe 2: Follow-up investigation into the management of complex workers compensation claims.* December 2019

to perform their roles, as outlined in paragraphs [85] to [97] of icare's submission on the management of medical costs for injured workers dated 2 February 2020.

85. In the short term, icare has previously made submissions to SIRA on opportunities to strengthen the *Workers Compensation Guidelines for allied health treatment and hearing service provision* and other applicable guidelines, Fee Orders and schedules, regulations, instructions and training – see Allied Health Provider Approval Guidelines Feedback dated August 2020, a copy of which is **annexed** as **Annexure A**.

86. In this submission, icare submitted to SIRA that priority should be given to expanding approval and accreditation to podiatrists, occupational therapists, speech pathologists, remedial massage therapists and IMEs as these make up a significant volume of spend in the NSW workers compensation system.

87. icare remains of the view that, over the long term, consideration should also be given to the extension of approval and accreditation requirements to all medical and allied health service providers who may provide medical or related treatment under section 60(1) of the 1987 Act.

88. To improve consistency of treatment and outcomes for injured workers, and to maintain confidence in insurance decisions, icare submits that priority consideration should also be given to the accreditation of IMEs and requirements that they undergo a minimum level of training to ensure they understand their role and responsibilities within the NSW workers compensation scheme.[43] Given IMEs are providers of medical investigation services for the NSW workers compensation scheme, rather than the providers of treatment and medical services, there is a constructive opportunity to define and enforce expectations in respect of the accreditation and training requirements for this particular group of providers.

Potential amendments to respond to changes in the workplace

Changing nature of work

Background

89. Both the 1987 Act and 1998 Act include definitions to determine who is a worker and who is an employer,[44] but the language used has not kept pace with changes in the nature of work

[43] See icare's submission to SIRA on Independent Medical Examiners dated September 2017; see also Appendix B of icare's Healthcare Submission dated November 2019
[44] Section 4 and Schedule 1 of the 1998 Act; section 3(1AA) of the 1987 Act

in recent years. This creates uncertainty and sometimes disadvantage for certain workers, including those in the 'gig' economy, for example:

a. certain gig platforms do not consider themselves employers; and

b. self-employed gig economy workers who have no access to medical benefits through their private income protection policies.

90. These changes also result in financial exposure for the Nominal Insurer given that the Nominal Insurer acts as the insurer on risk for uninsured liabilities[45] and many gig workers are not covered in case of accident or injury on the job by the online gig platforms they work for (e.g. Uber).

Need for reform

91. icare submits that addressing the structural changes that have occurred in work and employer relationships since the commencement of the 1987 Act is critical. These relationships and changing ways of working are likely to accelerate in the coming months and years, with the expectation that many of our previous ways of working will no longer be relevant.

92. Other than the increasing exposure to uninsured liability for the Nominal Insurer due to the expanding gig economy, other areas that have changed markedly are exposure to different and flexible working environments, 'always on' working created by electronic communication and the escalation in remote working, as well as changes to the industrial relations system (for example in relation to part time and casual workers).

93. At this stage, the Nominal Insurer's Uninsured Liabilities Indemnity Scheme (**ULIS**) has received three claims from gig workers, and icare is currently seeking legal advice on whether certain claimants are deemed workers or independent contractors. If they are independent contractors, liability for their claims cannot be accepted under the legislation.

94. The Nominal Insurer has not been able to assess the potential cost impact of ULIS claims from gig workers with certainty as it is contingent on:

a. legislative issues that have yet to be tested in court (for example, whether gig workers are "*deemed workers*" under the 1998 Act or independent contractors);

[45] Section 140 of the 1987 Act

b. the varying contractual approaches taken by gig platforms to engage their workers (e.g. Uber, Deliveroo, Airtasker); and

c. the growth rate of the gig economy in NSW.

95. Any actuarial consideration of the potential impact of icare's exposure to increased ULIS claims should take into account the following factors:

a. the nature of the tasks performed by gig workers is generally of a higher risk (e.g. on-road drivers, heavy manual work);

b. a lack of understanding by employers of the various working relationships that require workers compensation coverage is likely to result in employers failing to take out workers compensation insurance policies;

c. existing insurance products (e.g. Airtasker, Roobyx) may not prevent an entitlement to workers compensation, meaning the scheme is still exposed and workers could potentially claim under both ULIS and those insurance products;

d. employers entering into complex contracts with workers to limit or remove their own liability (e.g. Uber, Airtasker), but not that of the Nominal Insurer, thus limiting ULIS's ability to recover against the uninsured employer;

e. claims and administrative costs for uninsured liabilities are generally higher than other claims, which is compounded by lost premiums and a low percentage of recovery;

f. the significant impact on customers (workers and employers) due to the lack of certainty over coverage and entitlements, often resulting in increased litigation and adversarial relationships; and

g. when there is lack of clarity over coverage, the claims process is often delayed by many months until an injured worker consults a legal representative for guidance. This is another factor that can contribute to higher claims costs. It also means there is an existing level of exposure for the Nominal Insurer that cannot be quantified.

Options for reform

96. Reform to the NSW workers compensation legislation to better suit the nature of the modern workforce should be considered to mitigate or eliminate the Nominal Insurer's increased exposure to financial risk due to the expanding gig economy. For example, this could include:

a. amendments to section 4 of the 1998 Act definition of a worker to define whether a person in work that could be classified as part of the gig economy is considered a worker;

b. amendments to Schedule 1 of the 1998 Act to explicitly identify whether a person in work that could be classified as part of the gig economy is considered a deemed worker;

c. consequential amendments to enable the efficient calculation of PIAWE where a person is found to be a worker within the gig economy and where wages may fluctuate on a daily or weekly basis; and

d. consideration of the effects of sections 4 and 9A of the 1987 Act when assessing whether employment is a substantial contributing factor when working remotely or from home and outside of standard business hours (noting that case law may, in time, reflect this).

Potential amendments to clarify legislative intent

Section 11A of the 1987 Act

Background

97. Historically, psychological injury claims tended to be most common for individuals in frontline positions, particularly first responders, and those in caring and customer service roles. Recent years have seen a significant increase in the proportion of primary psychological injury claims in other portfolios and industries in both the Nominal Insurer and TMF schemes.

98. Psychological injury claims are complex and are often influenced by non-work factors and RTW challenges, resulting in longer durations and higher costs. Almost 50 per cent of psychological injury claims arise because of poor workplace relationships.

99. Section 11A of the 1987 Act is a defence available to employers with respect to claims for psychological injury made by workers if the injury was a result of reasonable actions taken by the employer in respect of transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal. The majority of psychological claims arise in these circumstances.

100. However, the defence is difficult to uphold, with a success rate of less than 20 per cent on defended matters. This figure does not include disputes where parties have settled or reinstated payments at the WCC after the Arbitrator gives a preliminary view that a successful reliance on the defence is unlikely.

Need for reform

101. Employers have consistently expressed frustration in the narrow interpretation of the defence in section 11A of the 1987 Act. Between 1 July 2018 and 9 December 2019, 32 out of 41 matters relying on this defence heard at the WCC found in favour of the injured worker. The legislation does not support employers and NSW Government agencies enforcing discipline, performance appraisal, management or transfer of employees.

102. By comparison:

    a. in Victoria, the corresponding defence in section 40 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) provides for a broader range of management actions; and

    b. in New Zealand, mental injuries are not compensable unless the mental injury is caused by a physical injury, a sudden traumatic event or as a consequence of certain criminal acts.[46]

103. Across the TMF portfolio, the projected number of psychological injury claims is expected to continue to rise from approximately 12 per cent in 2014 to over 20 per cent in the 2020/21 financial year. This has adversely impacted the overall RTW outcomes and the cost of workers compensation for the State of NSW.

104. The average cost per month for each psychological injury claim in the TMF scheme is $6,847, nearly double the non-psychological injury cost of $3,314, arising from the typically longer duration of psychological injury claims. As the incidence of poor mental health increases in the community, workplaces run the risk of bearing this cost and allowances for an increasing number of claims receiving weekly benefits contributed to a deterioration in the financial position of the TMF as at December 2020.

[46] Section 20 and 21 of the *Accident Compensation Act 2001* (NZ)

Options for reform

105. Reform to section 11A of the 1987 Act should be considered to strengthen the defence and support employers and NSW Government agencies enforcing reasonable management actions, including transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal, and/or expand the categories of actions covered by reasonable actions.

106. In particular, a successful section 11A defence currently requires that the injury is "*wholly or predominantly*" related to the performance of the reasonable action. If the worker is able to work and the event that causes the condition to result and a claim arise can be defended by one of the reasonable actions in section 11A, prior interpersonal matters should not be relevant. However, under the current defence, if prior interpersonal matters contributed to the condition, the defence may not apply as the injury is no longer "*wholly or predominantly*" related to the performance of the reasonable action.

107. In the circumstances, one option would therefore be to remove the "*wholly or predominantly*" requirement entirely and align the defence with the disease injury requirements in section 4(b) of the 1987 Act, i.e. that the performance of the reasonable action was the main contributing factor to the injury. In the alternative, the defence could also be aligned with the requirement in section 9A of the 1987 Act that the performance of the reasonable action was a substantial contributing factor to the injury.

108. Providing tighter clarity on the conditions of reasonable action and how that is demonstrated will further support this section, e.g. where the cause was interpersonal conflicts over which the employer has no control.

Section 38A of the 1987 Act

Background

109. Section 38 of the 1987 Act provides that a worker has no entitlement to weekly payments after 130 weeks of payments unless:

    a. the insurer has made an assessment that the worker has current work capacity and the worker is either working 15 hours or more a week or earning at least $176 per week, and has been assessed by the insurer as indefinitely incapable of undertaking further employment to increase their earnings;

b. the insurer has made an assessment that the worker has no current work capacity, and this is likely to continue indefinitely; or

c. the insurer has determined that the worker is a worker with high needs (more than 20 per cent permanent impairment).

110. Section 38A of the 1987 Act makes special provision for workers with highest needs (more than 30 per cent permanent impairment) by specifying that if the determination of the amount of weekly payments of compensation payable to a worker with highest needs results in an amount that is less than $788.32, the amount is to be treated as $788.32.

111. In 2019, the NSW Court of Appeal in *Hee v State Transit Authority of NSW* [2019] NSWCA 175 (***Hee***) found that section 38A of the 1987 Act does not take into account post-injury earnings of a worker.

112. In arriving at this conclusion, the NSW Court of Appeal considered the formulas provided for in sections 36 to 38 of the 1987 Act and the definitions of work capacity in section 32A of the 1987 Act and found that the question of work capacity for a worker who has returned to pre-injury employment is to be determined by reference to post-injury earnings, their ability to perform their pre-injury duties to the same extent as before their injury, and their ability to partake in overtime work if made available to them.

Need for reform

113. icare's view is that the finding in *Hee* is contrary to the words in the Explanatory note and the Minister's Second Reading Speech as to the intent of section 38A of the 1987 Act,[47] which was intended to introduce a cap on weekly payment entitlements for workers with highest needs ($788.32 as indexed) taking into account their post-injury earnings.

Options for reform

114. icare's view is that legislative reform is required to address the finding in *Hee* in order to deliver the intent of section 38A of the 1987 Act.

[47] Workers Compensation Amendment Act 2015 Explanatory Note (https://www.parliament.nsw.gov.au/bill/files/292/XN%20Workers%20Compensation.pdf) and Second Reading Speech (https://www.parliament.nsw.gov.au/bill/files/292/2R%20Workers%20Compensation%20and%20cognate.pdf)

115. Specifically, consideration should be given to amending section 38A of the 1987 Act so that workers with highest needs are not entitled to the full special provision amount under section 38A ($788.32 as indexed) in addition to their post-injury earnings.

Weekly benefits during surgery

Background

116. Section 39 of the 1987 Act provides that weekly payments will cease after a worker has received payments of weekly compensation for 260 weeks (5 years), unless the insurer has determined that the worker is a worker with high needs (more than 20 per cent permanent impairment).

117. Under section 41 of the 1987 Act, injured workers are currently entitled to the continuation of weekly payments for any incapacity resulting from surgery for 13 weeks after they have exited the scheme under section 39 of the 1987 Act.

Need for reform

118. Currently, the wording and application of sections 39 and 41 of the 1987 Act allow for weekly payments to continue for any incapacity resulting from surgery.

119. This benefit arbitrarily increases the benefit cap to 273 weeks, and provides a disincentive to get appropriate treatment for recovery in an earlier timeframe. Additional surgery also can result in further complications and can lead to an increase in WPI.

120. This also gives rise to an increased potential for legal dispute as a result of the current legislative ambiguity.

Options for reform

121. Consideration should be given to amending section 39 of the 1987 Act to clarify that weekly payments are not available for any period of incapacity resulting from surgery after entitlements cease under that section.

122. The impact on injured workers of this clarification would be minimal. As injured workers and providers adjust to the five-year capped scheme, the management of surgeries and additional treatments will begin to occur earlier in the life of the claim, and the number of compensable surgeries occurring beyond 260 weeks of payments should decline.

123. There would also be no administrative or cost impact on icare or claims management providers if this reform was implemented, as it reflects current practice. The outcome would be to remove any ambiguity in the case of section 39 of the 1987 Act.

Additional clarifications

Background

124. There are a number of other provisions within the 1987 Act that are currently unclear and would benefit from simplification and/or clarification.

125. Some of these include:

    a. the safety net for workers with high needs;

    b. the simplification of the Work Capacity Decision review process;

    c. fairer notice period for all workers;

    d. the interaction between the terms "*total and partial incapacity*" and "*current or no current work capacity*" in terms of entitlement to weekly payments;

    e. the requirement for Injury Management Plans, the purpose of which is largely redundant with the introduction of Standards of Practice and additional guidelines;

    f. the entitlement to lump sum death benefit as well as compensation for WPI;

    g. plaintiff law firms contracting out of Schedule 7 of the 1987 Act for WID;

    h. counsel costs in complex statutory matters; and

    i. claims under section 39 of the 1987 Act for injured workers who have not yet reached maximum medical improvement.[48]

126. Some of these matters have already been considered by SIRA and discussed in recent consultations between icare and SIRA.

[48] Clause 28C of Part 2A in Schedule 8 of the *Workers Compensation Regulation 2016* provides that section 39 of the 1987 Act will not apply to an existing recipient of weekly payments who has been assessed as not having reached maximum medical improvement

Need for reform

127. Application of these provisions within the NSW workers compensation scheme could result in ambiguity, with the potential to lead to legal disputes.

128. Amendments to clarify or simplify these provisions would create greater clarity of legislative intent and lead to better outcomes for injured workers, employers and insurers.

Options for reform

129. icare has set out the most important clarifying amendments to the workers compensation legislation earlier in this submission. For the purposes of this submission, icare does not propose to go into detail into the further clarifying amendments listed in this section, which are more granular in nature and not as urgent in terms of priority.

130. However, icare would be happy to provide more information on any of the matters identified in this section if it would assist, and will continue to work with SIRA on implementing such amendments as appropriate.