BUSINESS NSW

18 May 2020

Ms Bronwyn Martin
Manager Regulatory Policy
State Insurance Regulatory Authority

By email: PolicyDesignWHBCR-SIRA@sira.nsw.gov.au

Dear Ms Martin

Business NSW response to New SIRA Standard of Practice for COVID-19

Business NSW welcomes the opportunity to comment on the Consultation Draft of the new SIRA Standard of Practice in response to COVID-19 dated May 2020.

Business NSW supports a COVID-19-specific standard of practice if it ensures the required nexus between the worker contracting COVID-19 and the workplace is both preserved and protected.

Recent legislative amendments were made to deem COVID-19 to be an occupational disease. Accordingly, significant features of the draft standard are now redundant including protections which might otherwise shield employers from bearing costs associated with transmission unrelated to the workplace.

Business NSW is not confident that the standard, when taken together with this most recent amendment, will sufficiently protect employers from undue burden at a time when employers are under considerable financial distress.

Businesses in NSW remain concerned about the efficiency of the workers compensation system. Business NSW welcomed SIRA's decision to commission an independent review into the Nominal Insurer and to develop and publish its *Standards of practice: expectations for insurer claims administration and conduct* (effective from 1 January 2019). These developments are essential steps towards remedying our members' concerns about ineffective claims management practices.

Despite these developments, there has been very little improvement in the way claims are being managed. This appears to be supported by the scheme's return to work outcomes and valuation still being in decline.

To ensure reasonable protection of employer interests, Business NSW has identified the following amendments to the proposed standard set out at Annexure 1.

If you have any questions about this submission or would like to discuss it further, please don't hesitate to contact me on elizabeth.greenwood@businessnsw.com or 0419 758 779.

Yours sincerely

Elizabeth Greenwood
Policy Manager, Workers Compensation, WHS and Regulation

BUSINESS NSW

ANNEXURE 1 – PROPOSED AMENDMENTS TO THE DRAFT STANDARD

Liability decisions for COVID-19 claims

Recommendation 1: Clause S32.2 (Provisional acceptance of liability)

Amend Clause 32.2 as follows:

Insurers are to provisionally accept liability and commence provisional payments without delay upon receiving a claim from a worker:

- *who has been diagnosed with COVID-19; and*
- *whose occupation is one requiring close contact with people already diagnosed with COVID-19 in order to protect the general community from COVID-19. ~~where there is a high risk of exposure to the virus within the workplace. This applies to following specified class:~~*

~~• workers diagnosed with COVID-19, and~~

~~• workers whose employment requires them to come into direct contact (hands-on or closer than 1.5m) with people diagnosed with COVID-19, and / or~~

~~• workers whose employment requires them to administer diagnostic testing for COVID-19, and /or~~

~~• workers whose employment requires them to provide treatment and care to people diagnosed with COVID-19.~~

Note: the specified class outlined above will include, but is not limited to doctors, nurses, health care and other workers involved in the diagnostic testing, treatment and care of people diagnosed with COVID19.

If the insurer has strong indication that a reasonable excuse still applies in accordance with the Workers Compensation Guidelines, this is to be clearly documented on the claim file and included in daily reporting to SIRA.

Business NSW is strongly opposed to any form of deeming COVID-19 to be an occupational disease, believing the current statutory provisions to be sufficient to protect those workers who can prove the relevant nexus between contracting COVID-19 and their workplace.

Pages 11 to 12 of the draft standard explain that for '*supporting workers at higher risk of exposure (including doctors, nurses and other allied health workers) and who are protecting the community from COVID-19*', due to the '*elevated risk of exposure to COVID-19*', should be promptly supported by having their claim for contracting COVID-19 provisionally accepted.

Business NSW does not disagree with this underlying policy position.

In its current form, Clause 32.2 is too broad because it does not include any reference to the worker being in such a high-risk environment because their role:

- is designed to protect the community from COVID-19
- can only be performed by coming into close contact with people who have been diagnosed with COVID-19.

Recommendation 2: Clause S32.3 (Full liability decision)

Amend Clause 32.3 as follows:

Insurers are to expedite decisions on full liability for a claim made by a worker with a confirmed diagnosis of COVID-19 as soon as enough information is available.

Proactive steps should be taken to obtain further information if this is required and to notify both the worker and their employer of the decision and the evidence relied upon to support that decision.

Note: an insurer is not prevented from accepting liability before the end of the provisional liability period (section 278 of the 1998 Act).

Business NSW is aware that NSW employers still have ongoing concerns about the way liability decisions are being made by insurers. One of these relates to the lack of detail being provided by an insurer to support its decision to accept liability.

It is particularly important that any claims accepting liability for contracting COVID-19 clearly set out the reasons for the decision together with a description of the evidence received by the insurer in support of that decision.

The JobKeeper Scheme

Recommendation 3: The text on page 13 relating to the 'JobKeeper payment'

Amend the text contained in the 'Context' section on page 13 under the heading 'JobKeeper payment' to include a reference to the fact that JobKeeper payments are based on a fortnightly claims process.

An employer (who has applied for JobKeeper) must submit claims for JobKeeper on a fortnightly basis and is paid the JobKeeper amount in arrears.

Circumstances from one fortnight to the next may change. For example, an injured worker on light duties may need to go back onto full workers' compensation benefits due to a set-back in recovery. In these circumstances the injured worker will no longer be eligible for JobKeeper.

It is important for all parties concerned to be aware of any change in circumstances from one fortnight to the next as any change in circumstance may have important implications for insurers managing COVID-19 workers compensation claims.

Recommendation 4: Clause S32.4 (JobKeeper Scheme)

Amend the second dot point contained in Clause S32.4 as follows:

Insurers are to determine the impact, if any, to weekly payments as a result of the JobKeeper Scheme. The insurer is required to:

- *contact the employer to determine whether they have applied for the JobKeeper payment for the worker (the employer's eligibility to claim the JobKeeper payment on behalf of their workers is determined by the Australian Tax Office)*
- *maintain contact with the worker and the employer <u>on a fortnightly basis</u> to stay informed about whether a worker commences, is no longer entitled, or ceases to receive the JobKeeper payment.*

Weekly benefits

Recommendation 5: The text on page 12 relating to 'Weekly payments'

Insurers should not be taking irrelevant considerations into account when making an administrative decision under an Act.

Page 12 of the consultation draft notes:

> *For some workers, the processing of weekly payments may be impacted due to additional challenges with obtaining a current certificate of capacity. ~~Some workers may also be affected by a loss of employment and income due to the pandemic.~~ It is important that insurers consider the individual circumstances of each worker*...

When compared with the other circumstances referred to in this section of the text (for example, '*challenges with obtaining a current certificate of capacity*'), whether or not an injured worker has been affected by *'loss of employment and income due to the pandemic*' is not a circumstance covered by the legislation and is therefore an irrelevant consideration.

Insurers should not be taking irrelevant considerations into account when making an administrative decision under an Act.

Recommendation 6: Clause S32.6 (Weekly payments in advance)

Remove Clause S32.6.

Business NSW opposes any discretion being afforded an insurer to agree to payment of weekly benefits in advance for a period of up to six weeks because it:

- undermines the legislative intent that all reasonable efforts be made on the part of an employer, to provided suitable duties and, on the part of an injured worker who has the capacity to do so, to return to work
- does not provide flexibility in the event that interactions with JobKeeper payments have unforeseen impacts on future compensation payable to the worker.

Recovery at work

Recommendation 7: Clause S32.8 (Recovery at Work Support)

Amend Clause S32.8 to:

- require the insurer to proactively contact the employer as well as the worker; and
- include a note explaining what is meant by 'services'.

Such an amendment would:

- provide clarity
- reflect the legislative intent that all reasonable efforts be made on the part of an employer, to provided suitable duties and, on the part of an injured worker who has the capacity to do so, to return to work.

Insurers scheduling independent assessments and/or medical examinations

Recommendation 8: Clauses S32.9 (Independent consultations, work capacity assessments) and S32.10 (Independent Medical Examinations and assessments of permanent impairment)

Amend Clauses S32.9 and S32.10 to include a requirement on the part of the insurer to notify the employer of:

- any upcoming assessment or examination
- the results of such an assessment or examination.

Business NSW is aware that NSW employers still have ongoing concerns about the way workers compensation claims are being managed by insurers.

These concerns include the lack of notification being given by the insurer (to the employer) that

- the injured worker has been scheduled to attend an assessment and/or a medical examination
- the results of such assessment and/or examination.

Such information is necessary for an employer to manage its statutory obligations under the Act and the lack of such notification adversely affects the injured worker's return to work outcome.