

BUSINESS NSW

10 February 2023

Mr Christian Fanker
Director, Scheme Design, Policy and Performance
Workers Compensation Regulation
State Insurance Regulatory Authority
By email: PolicyDesignWHBCR-SIRA@sira.nsw.gov.au

Dear Mr Fanker

CONSULTATION ON PROPOSED INCREASE TO PENALTY NOTICE AMOUNTS

As NSW's peak business organization, Business NSW has more than 40,000 member businesses across NSW. We work with businesses spanning all industry sectors including small, medium and large enterprises. Operating throughout a network in metropolitan and regional NSW, Business NSW represents the needs of business at a local, state and federal level.

Business NSW welcomes the opportunity to provide input to SIRA's consultation on *Workers Compensation Regulation 2016 – Proposed increase to penalty notice amounts* and notes that the penalty notice amounts are being reviewed to consider if they:

- are proportionate to the harm involved in the offending,
- consistent, and
- provide an effective deterrent to committing the offences and re-offending.

Business NSW strongly opposes any increase in these penalty notice amounts as they apply to employers and the Nominal Insurer for the reasons outlined in this submission.

Proposed penalties for employers

Lack of evidence

SIRA's [regulatory approach principles](#) includes 'accountability', which is described as "*SIRA takes strong enforcement action when needed, based on the degree of harm or negligence, or the need for deterrence.*"

Yet, during this consultation, no evidence has been provided to substantiate the need to increase the penalty notice amounts,

Justification for the increases

The increases appear to be justified on the basis that there is a need to increase the relative percentage of the penalty notice amount vis-à-vis the maximum penalty amount.

Especially in the current economic climate, with both inflation and interest rates on the rise, coupled with the real possibility that Australia is heading for a recession, Business NSW is more interested in:

- how the increase compares with the current penalty amounts, and
- the context of the underlying behaviour that is the subject matter of the penalties.

Example #1 – Not having a policy of insurance

The proposed increase in penalty notice amount for not having a policy of insurance is 67%.

Business NSW is pleased to see that icare has removed its online tool, which was misleading in that it indicated that if a business did not ‘employ’ a worker, it did not need to take out a workers compensation policy.

However, we also note that SIRA has published a worker status tool.

However, there is a disclaimer to the tool, namely that

“This material contains general guidance information only. SIRA does not guarantee, and accepts no liability and responsibility whatsoever arising from or connected to, the accuracy, reliability, currency or completeness of any assessment made on this site. SIRA recommends that users apply their own skill and care with respect to their use of and reliance on any information provided on this site. Professional advice in relation to your specific situation should be obtained before any action or decision is taken on the basis of any assessment made by this tool. You must always comply with the relevant legislation. Current laws are available from the NSW legislation website”.

Yet, another of SIRA’s regulatory approach principles is that of ‘customer focus’ where *“Everything SIRA does is guided by protecting the interests of its customers – policyholders and people who make claims, now and in the future.”*

It is in the interests of potential policy holders to understand whether, and if so when, they need to take out a policy.

Unfortunately, this type of guidance and assistance for potential policy holders does not seem to be readily available from SIRA.

Recommendation 1: That SIRA wait until it provides clear guidance and assistance regarding the need to take out a workers’ compensation policy before it considers (and provides evidence of the need to) any increase in penalty notice amounts.

Example #2 - failing to produce a certificate of currency or notify the insurer of any errors with respect to the premium in the certificate of currency

In this case, the proposed increase in penalty notice amount is one of 120% (from \$500 to \$1,100).

Only last year, Business NSW had to request SIRA to get involved in a case where our member was a labour hire business and provided up to date wage estimates every year, which the Nominal Insurer failed to take into account (over a number of years) when issuing the business with its premium notice.

Our member paid each year's premium in good faith, only to receive an 'adjustment' premium notice some years later which recalculated the amount owing after including those estimates provided years before.

Given the lack of transparency surrounding the premium formula, Business NSW is of the view that it is inappropriate to increase this penalty notice amount.

Recommendation 2 That, before deciding whether or not to increase the penalty notice amounts contained in the *Workers Compensation Regulation 2016*, SIRA provide evidence of the need for such increases in light of the nature of the offence and the degree of non-compliance within the scheme.

Proposed penalties for the Nominal Insurer

Example #3 Increasing penalty notice amounts for insurer breaches

Some of the increases are in the order of 450% (from \$200 to \$2,200).

Insofar as the penalties apply to the Nominal Insurer, these costs are paid out of the Workers Compensation Insurance Fund¹.

Business NSW cannot see how simply increasing these penalty notice amounts will provide a deterrent effect to the Nominal Insurer and improve its level of compliance with the legislation.

Further, according to the Nominal Insurer's valuation dated 31 December 2021, on an accounting basis, the Insurance Fund is in deficit (refer Figure 1 on page 4).

¹ Section 154(2) of the Workers Compensation Act 1987 No 70 [NSW]

Table 3: Financial Position (\$m's)	Accounting basis	Insurance basis
Investments	17,854	17,854
Outstanding claims recoveries (incl. RM on recoveries)	345	301
Other assets	2,541	2,541
Total assets	20,740	20,696
Gross outstanding claims liability (incl. CHE and RM)	19,598	15,785
Unearned premium reserve	1,524	1,524
Unexpired risk reserve	832	480
Other liabilities	272	272
Total liabilities	22,226	18,061
Funding ratio	93%	
Insurance ratio		115%

Figure 1: Source: icare.nsw.gov.au

Therefore, these increased costs will simply be passed onto the beneficiaries of the Insurance Fund (being NSW employers and their injured workers) through increased premiums and decreased benefits.

Recommendation 3: That to provide an effective deterrent to committing the offences and re-offending on the part of the Nominal Insurer, SIRA adopt a policy of issuing a letter of censure in preference to imposing a monetary penalty.

If you would like to discuss the enclosed submission in more detail, please contact Elizabeth Greenwood, Policy Manager, Workers' Compensation, WHS and Business Regulation either by email (elizabeth.greenwood@businessnsw.com) or by telephone on 0419 758 779.

Yours Sincerely,



DAVID HARDING
Executive Director