

NOMINAL INSURER'S CONFIDENTIAL INFORMATION

The Nominal Insurer stands in the shoes of the Employer of an injured Worker and is directly liable to compensate Workers for Injuries. This principle is derived from the general law of insurance, and from the Workers Compensation legislation and regulation.

This Operational Instruction provides information as to the release of the Nominal Insurer's Confidential Information. Schedule 14 of the Deed defines Nominal Insurer's Confidential Information as including all Records and Insurance Records (but is not limited to them).

"Records" means all information that is made or kept, or received and kept, by the Scheme Agent in the exercise of its functions on behalf of the Nominal Insurer.

"Insurance Records" has the same meaning as in clause 7 of Schedule 6, Part 19A of the 1987 Act.

[Note: Clause 7 of Part 19A of Schedule 6 of the 1987 Act defines Insurance Records as all records that are the property of the insurer and that relate to policies of insurance issued by the insurer or to any claim, judgment or award made in respect of any such policies.]

In making a claim, the Worker consents to the collection, disclosure and release of personal and health information between WorkCover, the Employer and the Third Party Service Provider. This consent has the effect of expressly authorising disclosure of Records for the purposes of handling the Worker's Claim. In considering the disclosure of Confidential Information, the Scheme Agent must also consider its fiduciary duty to the Nominal Insurer described in the Deed as well as the requirements prescribed in the relevant Laws.

The Nominal Insurer is exempt from the Freedom of Information Act 1989 the relevant exemption is in Schedule 2 – Freedom Of Information Act - Exempt Bodies and Offices. The exemption is confined to insurance Policies and Premiums (but limited to individual Employers); the management of specific Claims; and asset management and funds management and investment.

The exemption in relation to Claims is not intended to override the rights conferred on Workers elsewhere in the Workers Compensation legislation to obtain access to their Claims information. For example, sections 73, 119 and 126 of the Workplace Injury and Workers Compensation Act 1998 require an insurer to provide copies of reports to Workers as required by the regulations.

Records related to medical examinations

There is no legal obligation for the Scheme Agent to provide copies of medical reports to the injured Worker's Employer (Policyholder). Accordingly, a Policyholder is not entitled to copies of medical reports, however medical information may be released to an Employer where it is relevant to support the development of an injured Worker's Return To Work plan.

The Scheme Agent should ensure that access to medical information is on a confidential basis and aligns with the Governing Principle in relation to privacy as described within *WorkCover Guidelines for Claiming Compensation Benefits* (October 2006).

The Scheme Agent is to ensure consistency with the principle in limiting the disclosure of information relating to medical examinations of a Worker.

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In particular, when providing the information to the Employer, care must be taken to ensure that the medical information provided is not out of context, cannot be misinterpreted and aids the development of the Worker's Return To Work plan. Therefore, the information provided is to be quoted or extracted verbatim from the medical report.

Records related to Injury Management

Medical reports may be provided to a person who would normally be required to have access to the report for Injury Management purposes, such as an authorised rehabilitation provider or Nominated Treating Doctor.

Records related to investigations (factual statement or surveillance)

Confidential Information related to investigations (factual statement or surveillance) should not be released, except as provided in operational instruction 1.3 (Private Investigators).

Paraphrased comments may be provided where clarification or confirmation of facts is required from an Employer.

Surveillance may be shown to an Employer for the limited purpose only of confirming the identity of a Worker.

Where the Scheme Agent is of the opinion that there may well be circumstances where the release of Confidential Information related to an investigation may be necessary (e.g. threats to individual safety), approval should be sought from the Nominal Insurer prior to releasing.

Records related to litigation

The Scheme Agent is required to ensure that arrangements with Third Party Service Providers providing legal services state that the legal provider owes its contractual and professional obligations to the Nominal Insurer.

Release of information to workers

Section 54 of the 1987 Act and s74 of the 1998 Act together with clauses 15, 34 and 37 of the *Workers Compensation Regulation 2003* require disclosure to a Worker of all reports relevant to a decision to dispute liability. Part 5 of the *WorkCover Guidelines for Claiming Compensation Benefits* (October 2006) contains a similar requirement for disclosure to a Worker where there is an exchange of offers in respect of a Claim for permanent impairment. Alternative disclosure provisions apply where release of reports would pose a serious threat to the life or health of a Worker or any other person. These allow for disclosure of a medical report to a medical practitioner or other report to a legal practitioner (clause 37(5) of the *Workers Compensation Regulation 2003*).

Clause 37(6) of the *Workers Compensation Regulation 2003* allows for WorkCover to make directions regarding the release of reports where the Scheme Agent is of the opinion that supplying a Worker with a copy of the report would pose a serious threat to the life or health of a Worker or any other person and the other available options are inappropriate. It is the responsibility of the Scheme Agent to seek a direction from WorkCover, not the Worker or their representative. When the Scheme Agent seeks a direction from WorkCover on this issue, it is the Scheme Agent's duty to provide WorkCover with the relevant information required to make an informed decision.

The Scheme Agent should make its application for a direction in writing to the Scheme Agent's mailbox at WorkCover and include the following information:

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- a) the nature of the threat that may arise
- b) evidence as to the potential threat
- c) the information that may give rise to the threat
- d) any possible measures by which the information may be de-identified, or otherwise remove the potential threat
- e) reasoning behind not releasing information to a medical practitioner nominated by the worker or the Worker's legal representative if otherwise applicable
- f) identify if the Worker is self represented
- g) any other information relevant or requested by WorkCover or the Nominal Insurer.

Confidential Information containing legal information relating to a Claim, Worker or an Employer is not to be released to Employers or Workers, unless prior Approval is obtained from the Nominal Insurer.

Records related to medical examinations, Injury Management and factual or surveillance investigations may be provided to a person who would be required to have access to the report for the provision of expert testimony in legal proceedings in a court, commission or tribunal of competent jurisdiction. Similarly, notices for production and subpoenas should be complied with subject to requesting restricted access in appropriate cases relating to particular issues of confidentiality or personal safety.

The Scheme Agent may provide feedback to Employers concerning safety and other issues arising from Claims. Such feedback may include providing a general summary of advice to Employers that addresses Return To Work and other issues associated with the Claim. When providing feedback to Employers, the Scheme Agent must consider the following conflicts of interest:

- An Employer's Injury Management and Return To Work obligations;
- Impact the Claim may have on the Employer's Premiums;
- Whether the information provided is intended to be used by the Employer for disciplinary or other irrelevant purposes;
- Whether the Employer's conduct is a contributing factor in the Claim through negligence or other conduct (e.g. in a claim for psychological injury); and
- Any potential breach of the Employer's OHS obligations which WorkCover may be reviewing.

Use of Records for the purposes of marketing and related communications

The Nominal Insurer's Confidential Information is not to be used by the Scheme Agent for the purposes of marketing or promoting the Scheme Agent to Employers unless those materials contain information that has already been published in the public domain by the Nominal Insurer. For avoidance of doubt, when issuing renewal notices to Employers, the Scheme Agent is not permitted to use information which is sourced from the Nominal Insurer's Confidential Information relating to an Employer's Policy, Claims, and related history.

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In accordance with the Deed, the Nominal Insurer may Direct the Scheme Agent to immediately withdraw any marketing or related communications material that has involved the use of such information.

References

Deed, Clause 20, Clause 30, Clause 25.8, Schedule 14

Freedom of Information Act – Schedule 2 - Exempt Bodies and Offices

Operational Instruction 1.3 – Private Investigators

Operational Instruction 4.4 – Litigation Policy

Operational Instruction 4.5 – Nominal Insurer Model Litigant Policy

WorkCover Guidelines for Claiming Compensation Benefits

WorkCover Guidelines on Independent Medical Examinations and Reports

Workers Compensation Act 1987, section 54

Workplace Injury Management and Workers Compensation Act 1998, sections 74, 119 and 126

Workers Compensation Regulation 2003, clauses 15, 34 and 37.

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