



## LITIGATION POLICY

This operational instruction provides the Scheme Agent with details of the procedures and policy for litigation. Note: litigation includes matters conducted in the Workers Compensation Commission.

### 1.1 SCHEME AGENT RESPONSIBILITY

The Scheme Agent is responsible for ensuring that:

- (a) the Scheme Agent's arrangements for legal services, especially any litigation for which the Scheme Agent is responsible, are handled efficiently and effectively and in accordance with the Nominal Insurer's Model Litigant Policy, Operational Instruction 4.5;
- (b) appropriate management strategies and practices are adopted so as to achieve compliance with this operational instruction or other Directions issued by the Nominal Insurer;
- (c) lawyers (whether from the Scheme Agent, private practice, counsel or in-house lawyers) providing legal services to the Scheme Agent are aware of, and are required to assist in ensuring that the Scheme Agent complies with this operational instruction and the Model Litigant Policy, Operational Instruction 4.5;
- (d) the Nominal Insurer is notified of any significant legal issue in accordance with part 1.3 of this operational instruction;
- (e) any breaches of this operational instruction are remedied and details reported to the Nominal Insurer;
- (f) any matters required to be Approved by the Nominal Insurer or the Nominal Insurer's delegate are raised promptly, and
- (g) any matters of which the Nominal Insurer is required to be informed are notified promptly.

Where the Scheme Agent is conducting any litigation of behalf of the Nominal Insurer, the Nominal Insurer may require the Scheme Agent to remit conduct of that litigation to the Nominal Insurer or the Nominal Insurer's delegate.

The Nominal Insurer may decide that the Scheme Agent is not required to comply with some or all of this operational instruction, or is to do so in accordance with modified obligations that are Directed to the Scheme Agent.

### 1.2 LEGAL SERVICES

The Scheme Agent is authorised to engage solicitors and barristers to act on behalf of the Nominal Insurer to provide legal services, and to instruct in the conduct of litigation relating to Claims and Policies administered by the Scheme Agent.

The Scheme Agent will be responsible for the management and provision of legal services, and for ensuring that the legal services are delivered in an efficient and effective manner.

The Nominal Insurer or the Nominal Insurer's delegate is entitled to access any legal advice obtained by the Scheme Agent (subject to any legislative restriction).

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This operational instruction extends to any legal services that the Scheme Agent has the ability to control as a result of an indemnity given to, or an arrangement made with, an Other Scheme Agent, body or person.

### 1.2.1 Use of in-house lawyers for litigation

The Scheme Agent may only use an in-house lawyer to conduct litigation as solicitor on the record or as counsel with the express Approval of the Nominal Insurer. Factors relevant to giving Approval include whether:

- (a) the Scheme Agent is able to demonstrate a capacity to conduct the litigation properly and efficiently, and
- (b) the Scheme Agent is able to conduct the litigation at a lower cost than by using external solicitors.

The use of in-house lawyers may be approved, either in specific cases or generally, subject to compliance with conditions specified by the Nominal Insurer.

### 1.2.2 Engagement of counsel

Counsel is to be engaged by or on behalf of the Scheme Agent in accordance with Directions or guidelines that may be issued by the Nominal Insurer.

### 1.2.3 Use of the Nominal Insurer's Name in Litigation

Unless otherwise Directed by the Nominal Insurer, the Scheme Agent is to ensure that in any legal proceedings involving the Nominal Insurer, the full legal name "Workers Compensation Nominal Insurer" is used. The full legal name should be used as the relevant party's name in all court documents, such as statements of claim, defences, affidavits, subpoenas and other documents. The Scheme Agent should not use the name "NSW WorkCover Scheme" in court documents or in other documents used in litigation. The phrase "NSW WorkCover Scheme" is a valid trading and business name of the Nominal Insurer, but it is not the name of a legal entity.

The Scheme Agent should not use its own name as a party's name in court documents, or describe itself as "agent for" or "acting for" the Nominal Insurer in such documents. For example, it is not acceptable to use in court documents the expression "[Scheme Agent] A.C.N. 123 456 789, as Agent for the NSW WorkCover Scheme A.B.N. 83 564 379 108 002".

This operational instruction is binding on the Scheme Agent only in regard to legal proceedings that are commenced **after** the date of commencement of this operational instruction. The Scheme Agent may, but is not obliged, to implement this operational instruction in respect of legal proceedings that were commenced **before** the date that this operational instruction commenced. The Scheme Agent may use its reasonable discretion when deciding whether to implement the policy in regard to legal proceedings that were commenced before the date that this operational instruction commenced. The Scheme Agent should have reasonable regard to any expense or inconvenience that may arise from attempting to change the name of the relevant party during current legal proceedings.

If the Scheme Agent is involved in current legal proceedings where the Nominal Insurer's name is not being used, **and** this issue causes difficulties for the Scheme Agent or the Nominal Insurer then the Scheme Agent must contact the Nominal Insurer immediately for further instructions. In this context, "difficulties" for the Nominal Insurer could include another party, or a court, objecting to the fact that the Nominal Insurer's name is not being used in the legal proceedings.

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**1.2.3.1 Statutory Demands**

It is acceptable for the Scheme Agent’s Personnel to sign statutory demands on behalf of the Nominal Insurer, provided that the individual who signs the statutory demand has proper written authority to do so. The Nominal Insurer must be named as the creditor in the statutory demand and the full legal name “Workers Compensation Nominal Insurer” must be used. The Scheme Agent is not the creditor and should not be named as such, even as “agent for” the Nominal Insurer

**1.3 REPORTING ON SIGNIFICANT LEGAL ISSUES**

The Scheme Agent is to report to the Nominal Insurer, within five Business Days, any significant legal issues that arise in the provision of legal services or in the conduct of litigation (including threatened or proposed litigation). Significant legal issues will arise in matters where there is a whole-of-Scheme dimension, for example, because a significant precedent could be established or because the nature of the matter, the size of the claim or the identity of the parties raise sensitive legal, political, or policy issues.

Set out below are particular indicators which will guide the Scheme Agent in assessing whether a matter involves significant legal issues for the Nominal Insurer. A matter must be reported to the Nominal Insurer if any of the indicators set out below are present. The indicators apply in respect of all Policies and Claims, including Common Law Claims and claims for Work Injury Damages. However, there may be other matters in which none of these indicators are present, but significant legal issues arise as set out above. If in doubt, the Scheme Agent should report the matter to the Nominal Insurer.

**1.3.1 Indicators for assessment**

A matter will involve significant legal issues for the Nominal Insurer if any of the following indicators are present:

- a) the litigation involves an appeal to the Workers Compensation Commission, or an appeal to the Court of Appeal or to the High Court, or an application for special leave to the High Court
- b) the litigation involves novel or complex questions of law
- c) the litigation gives rise to constitutional issues
- d) the litigation seeks to challenge the validity of the Scheme Agent Deed, the Schedules to the Scheme Agent Deed or the Operational Document Set
- e) a party to the litigation seeks judicial review of an administrative decision (in particular, where a party seeks an order for the issue of writs of certiorari, mandamus or prohibition or orders in the nature of certiorari, mandamus or prohibition)
- f) the matter involves questions of statutory interpretation of the workers compensation legislative scheme, in which arguments are made about the intention of the provisions of that scheme
- g) the matter is set down for more than 5 hearing days
- h) it is proposed to brief Senior Counsel
- i) a dispute exists between scheme agents, or between scheme agents and government
- j) the litigation involves, or arises as a result of the fatality of a Worker
- k) any other type of matter that the Nominal Insurer advises the Scheme Agent is significant
- l) the litigation may attract or does attract media attention

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- m) bankruptcy proceedings are brought as a result of claim debt recovery action
- n) Common Law Claims, or claims for Work Injury Damages, or any other matter brought at common law under contract or tort giving rise to a claim for damages, where the expected settlement range is \$500,000 or more.

### **1.3.2 Advice on legislation administered by the Nominal Insurer or WorkCover**

If legal advice is required (whether from the Scheme Agent, private lawyers, counsel or in-house lawyers) on the interpretation of legislation administered by the Nominal Insurer or WorkCover, the Scheme Agent is to:

- (a) provide the Nominal Insurer with a reasonable opportunity to consult on the matter prior to the advice being obtained, and
- (b) provide a copy of the request for advice and the advice to the Nominal Insurer.

The Scheme Agent is not required to provide an opportunity for prior consultation if advice is needed urgently (eg. in the case of an urgent request or a request arising without notice in litigation). However, the matter is to be reported to the Nominal Insurer.

Consultation and disclosure are not required for advice on a routine matter that does no more than advise on the application of the law to particular facts by relying on the settled interpretation of the legislation.

## **1.4 CLAIMS AND LITIGATION BY OR AGAINST THE NOMINAL INSURER OR OTHER SCHEME AGENTS**

The Scheme Agent is to inform the Nominal Insurer of any claim or litigation proposed to be brought against, or involving, the Nominal Insurer or Other Scheme Agent.

The Scheme Agent is to comply with any instructions issued by the Nominal Insurer on the handling of Claims and the conduct of litigation. In particular, the Scheme Agent is to comply with an instruction to provide information about a particular Claim or litigation, or to provide copies of, or access to, material relating to the Claim or litigation.

Claims are to be handled and litigation is to be conducted by the Scheme Agent in accordance with the Nominal Insurer's Model Litigant Policy, Operational Instruction 4.5 and with legal principle and practice, taking into account the legal rights of the parties and the financial risk to the Nominal Insurer of pursuing its rights.

Monetary claims against the Nominal Insurer or the Scheme Agent (other than claims that are to be determined under a legislative or contractual mechanism) are to be handled in accordance with that legislation, contract or the Deed.

The Scheme Agent may settle litigation on condition that the terms of settlement not be disclosed where this is necessary to protect the Nominal Insurer's interests. Before imposing or agreeing to such a condition, the Scheme Agent is to satisfy itself, including by raising the matter with a party requesting the condition, that the condition is necessary. The Scheme Agent should also seek to incorporate an exception to enable disclosure of the settlement (in whole or in part) to the Parliament or to a Parliamentary Committee. Where practicable, the Nominal Insurer is to be consulted before the Scheme Agent agrees to a settlement inhibiting voluntary disclosure to the Parliament or to a Parliamentary Committee.

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## Public interest immunity

If a request or demand to provide documents or information in the conduct of litigation could give rise to a claim of immunity on a public interest ground for which the Scheme Agent has administrative responsibility, the Scheme Agent is to refer the question of whether to make the claim to the Nominal Insurer.

If a claim for public interest immunity is being resisted by another party in litigation, the Scheme Agent is to refer the claim to the Nominal Insurer. If a disagreement arises as to the handling of the claim, the matter is to be determined by the Nominal Insurer.

## 1.5 BANKRUPTCY AND WINDING UP PROCEEDINGS

The Scheme Agent must conduct bankruptcy or winding up proceedings for insolvency consistently with the requirements of the Deed, this operational instruction and the Premium and Debt Collection manual.

A bankruptcy proceeding in respect of an individual concerning a claim debt recovery is considered a significant legal matter (see 1.3) and must be notified to the Nominal Insurer.

## 1.6 CLAIMS INVOLVING MULTIPLE SCHEME AGENTS (SHARED CLAIMS)

Where a claim against the Nominal Insurer involves more than one scheme agent due to one or more Employers being joined in litigation the management of the litigation will be undertaken on behalf of the Nominal Insurer (and all involved scheme agents) by a lead agent.

The lead agent will direct its appointed legal representative in the management of the litigation.

The lead agent is to be the scheme agent managing the claim for the current Employer or on risk at the last Injury date claimed, unless otherwise agreed by all scheme agents involved. For specific Injury Claims the lead agent will be the scheme agent on risk at the date of that Injury or in the case of a nature and conditions Claim the scheme agent on risk for the last day claimed eg. if a Worker claims injuries for the period 1/1/95 to 31/12/05, the lead agent will be the scheme agent on risk 31/12/05. Note. scheme agents may agree separately which scheme agent will manage the matter, an example would be where an earlier scheme agent in time carries the majority of the risk and requests to be lead agent. Failing such agreement the scheme agent last on risk as defined above will manage the matter on behalf of the Nominal Insurer and all scheme agents.

In matters involving other insurers eg. self insured and specialised insurers, and a number of Other Scheme Agents, the Nominal Insurer will be represented by a lead agent in keeping with the definition above.

The onus is on all scheme agents involved to achieve agreement on contribution from all joined Employers. Where scheme agents cannot agree on the apportionment, the legal representative appointed by the lead agent will in their initial advice advise on the percentage split to be applied to the relevant policies. The legal representative's advice should be the apportionment of the claim taken up by all involved scheme agents. Apportionment is to be determined in accordance with the applicable legislation.

There is no restriction on the apportionment being varied should further information become available, the legal representative will advise on any changes to their initial advice.

It is the responsibility of the lead agent to instruct a legal representative who has no apparent conflict of interest with the Employers involved in the matter.

In matters requiring the appointment of a lead agent, the legal representative must be made aware they are instructed to act on behalf of all scheme agents involved with the Claim and copies of all

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their correspondence will be sent to the lead agent who will refer it on to all involved scheme agents (it is the responsibility of the lead agent to notify relevant contacts). All contact by involved scheme agents with the appointed legal representative is to be made through the lead agent, this does not rule out any requested conferences with the parties involved.

In the event the apportionment determined by the lead agent's legal advice is not agreed, a scheme agent may request the lead agent to seek a review on the apportionment by a senior workers compensation legal practitioner (to be agreed between the scheme agents or failing agreement as nominated by the Nominal Insurer Principal) from the panel formed for this purpose. This advice will be paid under item F of Table 3 of Schedule 6 of the Workers Compensation Regulation 2003 (this legal cost is to be taken up by the scheme agent requesting the review and paid against their Claim, this may not be the lead agent).

This advice received on the apportionment of the claim between employers is final. The panel of nominees will be maintained and available from the Nominal Insurer. The panel of nominees will be comprised of two senior legal practitioners nominated by each scheme agent from their legal panel.

The Nominal Insurer expects the Scheme Agent to adhere to the intent of this operational instruction through conduct that seeks to:

- reduce the impact on an Employer of a claim which involves more than one Employer, and/or more than one scheme agent;
- reduce the overall costs of the claim;
- reduce the need for determination by the Workers Compensation Commission and the use of legal resources;
- eliminate unnecessary delay in the resolution of claims or disputes, and
- ensure soundly based decisions are made giving consideration to all available information in a manner free of preference or bias and with the outcome for stakeholders considered

There are very limited circumstances in which the lead agent provisions may not apply to shared Claims. These are for example:

- significant factual dispute as to which Employer employed the Worker
- factual dispute as to whether an injury is in the course of employment where a Worker sustains more than one injury with a number of Employers.

If the Scheme Agent is of the view that the factual circumstances of a matter represent such a conflict of interest between Employers that the lead agent provision should not apply, they may be excluded from the provision by forwarding a statement endorsed by two or more of the scheme agents involved in the proceedings to that effect to the Nominal Insurer. The Nominal Insurer may advise within five working days, if it is deemed appropriate in the circumstances that the lead agent provision is to apply in any event. (Note: This does not limit the provisions under item 1.1 above under which the Nominal Insurer may require the Scheme Agent to remit conduct of the litigation to the Nominal Insurer or the Nominal Insurer's delegate.)

**1.7 COMPLIANCE WITH ORDERS**

A Workers Compensation Commission (or Court) order/direction remains in place until the matter is concluded. The Scheme Agent should ensure compliance with these orders (including benefit payments) until the matter is concluded (for example, until any appeal is resolved).

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## 1.8 NOTIFICATIONS AND REPORTS

Notifications and reports mentioned in this policy are to be made in writing to the Scheme Agent's mailbox at WorkCover and include a summary of the issue(s) and an outline of the Scheme Agent's proposed management strategy.

### References

Deed, clause 25.10; Schedule 1, clause 5.5.1; Schedule 2, clause 2.2.14

Premium and Debt Collection Manual

Operational instruction 4.5

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