



Legislation Review Committee

Correspondence received in response to the Legislation Review Committee
Digest No. 16/57 – 16 July 2020



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The Honourable Victor Dominello MP
Minister for Customer Service

Our reference: COR-04108-2020

Ms Felicity Wilson MP
Legislation Review Committee
Parliament of New South Wales
Macquarie Street, Sydney NSW 2000
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Dear Ms ~~Wilson~~ *Felicity*

Thank you for your correspondence about Digest No. 16/57 of the Legislation Review Committee.

Please see below responses to the issues raised by the Committee in relation to the *Personal Injury Commission Bill 2020*.

Trespasses on personal rights and liberties

Right to a fair hearing and right to an appeal or review

Under clause 52 of the Bill, the Personal Injury Commission (the Commission) may decide to resolve a matter without holding a conference or hearing, if it is satisfied that it has been provided with sufficient information. This may impact on the right of parties to a proceeding to be heard as to the matters in dispute. This is particularly the case given that decisions of the Commission under the Workers Compensation Acts are generally final and binding, and not subject to appeal or review.

The Committee acknowledges that the Bill has broader aims of facilitating the just, quick and cost effective resolution of proceedings, and the Commission must be satisfied that it has sufficient information before it makes a decision. However, given the provisions in question are coupled with limited appeal rights, the Committee refers this matter to Parliament.

Response:

Clause 52(3) of the Personal Injury Commission Bill 2020 (PIC Bill) states:

“If the Commission is satisfied that sufficient information has been supplied to it in connection with proceedings, the Commission may exercise functions under this Act and enabling legislation without holding any conference or formal hearing.”

This clause does not introduce new arrangements for any scheme. It is drafted in the same terms as the current s 354(6) of the *Workplace Injury Management and Workers Compensation Act 1998*, section 104(6) of the *Motor Accidents Compensation Act 1999* and section 7.46(6) of *Motor Accident Injuries Act 2017*.

Section 354(6) of the *Workplace Injury Management and Workers Compensation Act 1998* provides that if the Workers Compensation Commission (WCC) is satisfied that sufficient information has been supplied to it in connection with proceedings, the WCC may exercise functions under that Act without holding any conference or formal hearing. This provision applies to the WCC at both the arbitral and presidential appeal levels.

Similarly, section 104(6) of the *Motor Accidents Compensation Act 1999* and section 7.46(6) of *Motor Accident Injuries Act 2017*, provide:

“If the claims assessor is satisfied that sufficient information has been supplied to him or her in connection with a claim, the assessor may exercise functions under this Act without holding any formal hearing.”

For the purposes of the single Personal Injury Commission, these separate but essentially same provisions have been preserved. They have been consolidated in one provision (Clause 52(3) of the PIC Bill 2020) which applies to proceedings in both Divisions of the Commission and this is consistent with stakeholder consultation feedback that there be minimal disruption to the existing schemes, including the dispute pathways in those schemes.

Further, Practice Direction 1 of the WCC sets out the practice and procedure of the WCC when determining matters on the basis of the documents provided (i.e. ‘on the papers’), in the absence of any conference or formal hearing. This will only occur where the Presidential Member or Arbitrator (before whom the matter is listed) is satisfied sufficient information has been supplied to enable them to determine the matter ‘on the papers’ (in accordance with s 354(6) of the *Workplace Injury Management and Workers Compensation Act 1998*). Practice Direction 1 sets out a list of matters the WCC will consider when exercising this discretion. WCC stakeholders are familiar with this long-standing practice.

These long-standing provisions and practices have also afforded expert decision-makers a degree of flexibility when conducting proceedings, having regard to the circumstances of the cases before them. Indeed, clause 52 of the PIC Bill must be read in the context of the Bill as a whole, in particular clause 43 of the PIC Bill which provides:

- “(1) Proceedings in any matter before the Commission are to be conducted with as little formality and technicality as the proper consideration of the matter permits.*
- (2) The Commission is not bound by the rules of evidence but may inform itself on any matter in the manner the Commission thinks appropriate and as the proper consideration of the matter before the Commission permits.*
- (3) The Commission is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.”*

Further, PIC members and decision-makers must afford procedural fairness to the parties including applying the two broad administrative law principles of the rule against bias, and the hearing rule which requires a party be afforded a fair hearing and the right to be heard, as appropriate for the circumstances of the case. To ensure that disputes may be determined or considered in accordance with the PIC’s objectives, it is important there is some flexibility for members when applying these principles in the PIC, having regard to the particular dispute being determined.

Right to legal representation

Under clause 48(3) of the Bill, the Commission may refuse to permit an insurer to be legally represented if the claimant in a workers compensation matter does not have legal representation. While this may impact on the right to legal representation, it is noted that this will only affect insurers and not individuals. Such a provision may also be designed to support access to justice for individual claimants and enhance the Bill’s overall goal of facilitating the just, quick and cost effective resolution of Commission matters with as little formality as possible. The Committee also notes that under clause

48(5) the Commission must take into account any written submission prepared by a legal practitioner, even if the party is not legally represented at a conference or hearing. In the circumstances, the Committee makes no further comment.

Response:

Clause 48(3) of the PIC Bill is a provision principally addressing the right to a fair hearing. The clause reproduces the longstanding section 356(3) of the *Workplace Injury Management and Workers Compensation Act 1998*. This is consistent with clause 48(3) in the PIC Bill which only applies to disputes in the workers compensation jurisdiction and with stakeholder consultation feedback that there be minimal disruption to the existing schemes, including the dispute pathways in those schemes.

The clause provides a discretion to be exercised by a member to ensure a fair hearing in the workers compensation jurisdiction as the decision-maker must afford a fair hearing to the parties. In the circumstances of a case where a worker is not legally represented, it may be appropriate for the PIC member (like an Arbitrator in the WCC) to exercise the discretion.

Access to workers entitlements

Schedule 1, Part 2, Division 2, clause 4 to the Bill provides that when the Commission is established, certain positions in the WCC automatically become vacant. The schedule provides further that the relevant individuals are not entitled to remuneration or compensation because of the loss of that office. The Committee notes that Divisions 3 and 4 in Part 2 of the Schedule provide for many of these people to be automatically transferred to the Commission. Further, if a person ceases to hold office and Divisions 3 and 4 do not operate to automatically transfer them, they are eligible, if otherwise qualified, to be appointed to hold an office in the Commission.

Notwithstanding these safeguards it is unclear whether cases may eventuate where individuals are not eligible for transfer, or are not transferred, and are not entitled to compensation for loss of their office. The Committee refers these matters to Parliament for consideration.

Response:

The PIC Bill makes provision to abolish the current WCC, remove motor accident dispute resolution functions from SIRA (including the Claims Assessment and Resolution Service (CARS), Medical Assessment Service (MAS) and Dispute Resolution Service (DRS)) and establish the PIC which assumes jurisdiction from the current workers compensation and motor accident dispute resolution services.

To ensure business continuity and retention of expertise from the existing schemes into the PIC, the intention is all current office holders (excluding public servants) as described in Schedule 1 to the Bill will be transferred into the PIC as members, decision makers (medical assessors and merit reviewers) and mediators. Current office holders are those office holders who immediately before the establishment day of the PIC held the relevant office as defined in clause 2 of Schedule 1 to the PIC Bill.

The transitional arrangements in Schedule 1 to the PIC Bill do not provide for the transfer of public servants who currently also hold appointments as arbitrators in the WCC or as motor accident decision-makers in CARS, MAS or DRS because their terms and conditions of employment are subject

to the usual public sector terms and conditions governing their employment (rather than the terms of appointment for statutory and other office holders).

It is anticipated that if, by proclamation, the establishment day is later than 1 December 2020, appointments may need to be extended to ensure that current office holders are captured by the transitional provisions in the PIC Bill to ensure business continuity and retention of expertise in the schemes. If such circumstances do arise, this will be coordinated and dealt with operationally by SIRA and the WCC, through existing appointment processes.

Where a current office holder elects to cease work when the current WCC is abolished, the office holder may simply decline the appointment as a PIC member or decision-maker.

In addition to these transitional arrangements, if additional members and/or decision-makers are required in the new PIC, new appointments for decision makers may be made by the President and new members may be appointed by the responsible Minister, as provided for in the PIC Bill.

Inappropriately delegates legislative powers

Commencement by proclamation

Clause 6 of the Bill establishes the Commission on the establishment day of 1 December 2020, or any later day proclaimed by the Governor. The Governor can also revoke an earlier proclamation regarding the date of establishment. Further, clause 2 of the Bill provides that while the proposed Act generally commences on assent, schedule 5 commences on a day or days to be appointed by proclamation. The Committee generally prefers such significant legislative change to commence on a fixed date or on assent to provide certainty for affected parties.

However, the Committee acknowledges that the establishment of the new Commission is likely to involve a degree of administrative complexity, requiring some flexibility. Further, it acknowledges that schedule 5 to the Bill makes consequential amendments to certain legislation that will not be necessary until the Commission has been established. Given the circumstances, the Committee makes no further comment.

Response:

Clause 6 of the Bill is drafted in the same terms as section 7 of the *Civil and Administrative Tribunal Act 2013* which also created a multi-division tribunal in New South Wales which amalgamated a number of existing tribunals and schemes.

Due to Parliamentary processes and the size and complexity of the reforms for the establishment of a new consolidated PIC, clause 6 of the Bill provides the appropriate flexibility to ensure that when the PIC is established it is fully operational on its establishment day.

Significant matters in regulations and Henry VIII clauses

The Bill allows certain significant matters to be set by the regulations. For example, clause 28(1)(e) of the Bill provides that the regulations can make provisions relating to substituted proceedings, that is, proceedings permitted to be heard in the District Court rather than in the Commission. The Committee prefers significant matters such as these to be dealt with in primary legislation to foster an appropriate

level of parliamentary scrutiny. Further, the Committee notes that clause 28(1)(e) also allows such regulations to modify the provisions of the proposed Act, enabling legislation or other legislation.

This is a Henry VIII clause, allowing the Executive to legislate without reference to Parliament. Again, this may be an inappropriate delegation of legislative power particularly as the clause allows the modification of a broad range of legislation – not just the proposed Act itself. The Committee notes that clause 29 of the Bill contains a similarly broad Henry VIII clause. The Committee refers these matters to Parliament to consider whether any inappropriate delegation of legislative power has occurred.

Response:

The provisions dealing with Federal jurisdiction in the PIC Bill are in part, modelled on those contained in the *Civil and Administrative Tribunal Act 2013*. These provisions are required to ensure there is an appropriate forum for matters involving Federal jurisdiction.

This is a complex part of the Bill which requires co-ordination between the PIC and the New South Wales courts system, as the approach taken has the potential to impact on both. Supporting regulations and consultation are required to ensure that the regulations are effective, fair and appropriate for all stakeholders.

With respect to regulations concerning Federal proceedings, the PIC Bill is consistent with the legislative approach taken in s 34C(4) and (5) of the *Civil and Administrative Tribunal Act 2013*. Clause 28(3) of the PIC Bill states:

- “The Minister is not to recommend the making of a regulation for the purposes of subsection (1)(e) unless the Minister certifies that—*
- (a) if the proposed provisions affect the exercise of jurisdiction or functions by the Commission—the President has agreed to the provisions, and*
 - (b) if the proposed provisions affect the exercise of jurisdiction or functions by the District Court—the Chief Judge of the District Court has agreed to the provisions.*

Accordingly, any regulations made under clause 28(1)(e) of the PIC Bill requires agreement from the Chief Judge of the District Court and the President of the PIC, which cannot occur until the PIC Bill is passed.

Broad power to create Commission rules

Clause 20 of the Bill provides that the Rule Committee of the Commission may make rules which regulate the procedural aspects of Commission proceedings. In some cases these rules may have the potential to affect the substantive rights of those who have dealings with the Commission. However, the Committee notes that the rules must not be inconsistent with the proposed Act or the workers compensation legislation and motor accidents legislation as defined. Further, such rules can be disallowed by either House of Parliament. Owing to these safeguards, the Committee does not consider the provisions to involve an inappropriate delegation of legislative power and makes no further comment.

Response:

It is appropriate, and consistent with the practices of other NSW Courts and Tribunals, for the PIC to set its own practice and procedures. Further there are also several safeguards (in addition to the

safeguards already observed by the Committee) in the PIC Bill to ensure the Rule Committee acts appropriately, such as:

- The Rule Committee is chaired by the President of the PIC, who is an independent judicial officer and a judge of a court of record.
- The Rule Committee will include senior PIC Commission members and experts who are familiar with the detail of workers compensation and motor accidents legislation and dispute resolution procedures. This will help ensure the Rules will facilitate operations that are consistent with the objects of the PIC Bill to resolve the real issues in proceedings justly, quickly, cost effectively and with as little formality as possible.
- The Rule Committee also comprises of members drawn from the bodies that regulate the legal profession and two SIRA officers, ensuring both relevant and broad representation.
- The quorum requirements and majority voting provisions are consistent with the similar provisions in the *Civil and Administrative Tribunal Act 2013* and ensure the Commission Rules have the support of the majority of the Committee.
- Like any rule or guideline, the Rules are ultimately subject to scrutiny and interpretation by the Court. This, together with the safeguards in the PIC Bill, operate to ensure the Rules made by the Rules Committee are within power.

Inufficiently subjects the exercise of legislative power to parliamentary scrutiny

Procedural directions not disallowable

Clause 21 of the Bill provides that the President may issue procedural directions which must be complied with, provided that those directions are publicly available on the Commission's website and consistent with the Act and the workers compensation legislation and motor accidents legislation as defined. However, unlike the Commission rules which also regulate practice and procedure, the procedural directions do not appear to be disallowable by Parliament. The substantive difference between the procedural directions and the Commission rules is unclear. Given that only the Commission rules are disallowable, the Committee refers this matter to Parliament.

Response:

To enable efficient and effective operation, courts and tribunals each have relevant legislative provisions enabling (as relevant) the Chief Justice or President to issue practice notes (as in the Supreme and District Courts), procedural directions (as in the NSW Civil and Administrative Tribunal (NCAT)) and practice directions (as in the WCC) relating to the practice and procedure of the court or tribunal.

Procedural directions differ from Commission Rules in that they provide more information on specific issues and complement the legislation and Rules. These procedural directions generally include guidance to the parties on specific matters that may arise in proceedings. They cannot be inconsistent with the PIC Bill or enabling legislation.

Further, like any current practice direction in the WCC, procedural direction in NCAT or practice notes in the Courts, they will be subject to scrutiny and interpretation by the Court.

If you have any further queries, please contact Cheri Boxoen, Principal Policy Officer of Strategy & Policy in the Office of the Secretary at the Department of Customer Service on (02) 8514 2549.

Yours sincerely



Victor Dominello MP
Minister for Customer Service

Date: 16.7.20