Legislative Council Standing Committee on Law and Justice
Statutory review of the *State Insurance and Care Governance Act 2015*
Questions taken on notice by Carmel Donnelly on 7 November 2017

QUESTIONS 1 and 2
Ms DONNELLY: Without getting too technical, I would like to correct one statement. The problem is that we are using tools that are statistical analysis tools like the Statistical Analysis System. I have been a user of SAS throughout my career, which requires an expert to go away, generate code and so on.
The Hon. LYNDA VOLTZ: Yes, that is right. That is what people pay someone to do. That is a resource you bring in.
Ms DONNELLY: But it is time-consuming. We are wanting to move to much more agile ways of doing analytics.
The Hon. LYNDA VOLTZ: I just want to be clear because in my family I have had people who ran businesses in that sector. It is something that people do all the time. While it is time-consuming that is why they are paid to do that job because they have the capacity to do it. Time-consuming or not, it does not take 2½ years.
To do the front ends, there are people who are experts in that area. Why is there a barrier at SIRA that does not exist somewhere else?
Ms DONNELLY: I feel that I have answered the question. I am happy to take it away and give you more technical information….'

'…The Hon. LYNDA VOLTZ: I go back to my original question. Given that your Act requires the board to keep the Minister informed, have you kept the Minister informed of these problems?
Ms DONNELLY: I would like to check whether that has been the content of different ministerial advice. We certainly have had active conversations with the Minister about the priority area of CTP where we have been working on data digital. It is very clear I think that all of our stakeholders understand we have to make progress in lifting our analytic capability.
Mr DAVID SHOEBRIDGE: But things have got worse, not better. The delays are getting longer. I have just checked the publication date for the 2013-14 statistical bulletin and that was published just under two years after the close of that financial year. It was published on 19 May 2016. If the website is right, we are still awaiting the publication of 2014-15 data and it is now almost 2½ years. Things have got worse. How do you explain things getting worse when people have been asking for more timely data?
Ms DONNELLY: I am happy to take that on notice and answer it. My recollection is that it has been a delay in obtaining complete data to be fed in for the analysis. But I am happy to take that on notice and ensure that that is the correct explanation….'

ANSWER:
The Statistical Bulletin for 2014-15 has been published and is available at:
https://www.opengov.nsw.gov.au/publications/16732

The Statistical Bulletin is produced each year using data for claims as at 30 June but the data is extracted at the end of November to enable the analysis to reflect claims development. This approach is based on the need for consistency with Safe Work Australia's (SWA) National Data Set requirement and benchmarking between jurisdictions. SWA's *National Data Set for Compensation-based Statistics* provides further information on Period of Enumeration and Date of Extraction. It is available at:
https://www.safeworkaustralia.gov.au/doc/national-data-set-compensation-based-statistics-3rd-edition

The delay in publishing the Statistical Bulletin for 2014-15 was largely caused by delay in denominator data from the Australian Bureau of Statistics (ABS) that is provided to Safe

Work Australia (SWA) and then passed on to SIRA. The ABS data is required for appropriate relativities in calculation of claims per exposure (the denominator data). The delivery of ABS data used in the Statistical Bulletin in any given year is typically eight to nine months behind.

The 2014-15 ABS data was first received by SIRA on 3 May 2016. Just prior to SIRA completing the 2014-15 Statistical Bulletin, the ABS identified "significant" errors with its data. Corrected data was received from the ABS via Safe Work Australia on 14 June 2017. Following its receipt SIRA updated the 2014-15 Statistical Bulletin and published it on 19 August 2017.

SIRA did advise the Minister in August 2017 that Workers Compensation Statistical Bulletins are always two years behind due to the task of compiling and verifying the data for public release.

SIRA is working to improve reporting of data and is investigating ways to reduce the impact of delays in receiving ABS data by using statistical estimates of denominator data. This would enable SIRA to achieve faster reporting of data by using both numerator and denominator data as at November of the reporting year. It is noted the data would then be indicative, rather than final.

SIRA will also continue to provide data to the SWA National Data set, based on November data each year.

QUESTION 3

Mr DAVID SHOEBRIDGE: A series of submissions say that SIRA does not exercise its role as a regulator to hold insurers to account when they do not comply with the Act. As you would know, there is a series of financial penalties to insurers who do not comply with their obligations under the Act: there is a penalty under section 54 of the 1987 Act if benefits are terminated without due notice, and there is a penalty under section 74A of the 1998 Act if benefits are not paid promptly. How many penalty notices has SIRA issued over the last three years under either section 54 or section 74A?
Ms DONNELLY: SIRA has been in existence for two years.
Mr DAVID SHOEBRIDGE: Then make it two years, and if you have any evidence about WorkCover for the 12 months before that, WorkCover as well for the 12 months before that.
Ms DONNELLY: I am happy to take that on notice.

ANSWER:

SIRA is not able to issue a penalty notice under section 54 of the *Workers Compensation Act 1987* (1987 Act). Section 246 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act) provides for issue of penalty notices and states that only those offences prescribed by the Regulations can proceed by penalty notice. Clause 71 of the Workers Compensation Regulation 2016 (Regulation) refers to the offences listed in Schedule 5 for this purpose.

As s.54 of the 1987 Act is not prescribed in Schedule 5 to the Regulation it cannot proceed by way of penalty notice. Pursuant to s.245 of the 1998 Act proceedings for the offence can be commenced in either the Local Court or District Court. SIRA has not commenced any proceedings under section 54 of the 1987 Act.

As s.74A(3) of the 1998 Act is referred to in Schedule 5 of the Regulation it can proceed by penalty notice. SIRA has not issued penalty notices over the last two years under section 74A(3) of the 1998 Act.

SIRA does not have any record of any relevant penalty notices being issued by WorkCover in the 12 months prior to SIRA being created. There is a limitation period of two years specified in s.247 of the 1998 Act for instituting offence proceedings.

Legislative Council Standing Committee on Law and Justice
Review of the *State Insurance and Care Governance Act 2015*
Additional information provided by SIRA

Evidence of the importance of claimant experience in providing better health and recovery outcomes

There is important evidence indicating that recovery outcomes for people who claim compensation can be worse than for those who do not[1]. Many studies implicate stressful aspects of the claims process itself as independent determinants of poor health outcomes[2].

A recent key study[3] sought to identify specific aspects of the compensation process or claims experience associated with poorer long term recovery. Of claimants included in this study:

- 33.9%reported high levels of stress associated with understanding what they needed to do for their claim
- 30.4% reported high levels of stress associated with claim delays
- 26.9% reported high levels of stress associated with the number of medical assessments, and
- 26.1% reported high levels of stress associated with the amount of compensation they received.

The study confirmed, six years after injury, that claimants who reported high levels of stress had significantly higher levels of disability, anxiety and depression, and lower quality of life. Two complementary strategies were identified with strong potential for improving claimant outcomes:

- interventions to boost the resilience of claimants at risk of stressful claims experiences,
- redesigning claims procedures and processes to reduce stressfulness.

Research also highlights the negative impact of perceptions of injustice or unfairness as a powerful predictor of disability which can trigger social, psychological and physiological changes that compromise an individual's health and recovery outcomes and reduce quality of life[4].

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[1] Harris, I. Mulford, J. Solomon, M. van Gelder, J. Young, J. (2005). Association between compensation status and outcome after surgery: a meta-analysis. *Journal of the American Medical Association* , 293 (13) pp.1644-1652.

Cameron, I. Rebbeck, T. Sindhusake, D. et al. (2008). Legislative change is associated with improved health status in people with whiplash, in Genevieve M. Grant, LLB, PhD; Meaghan L. O'Donnell, PhD; Matthew J. Spittal, PhD *Spine,* Phila Pa 1976. 33(3):pp.250-254.

Genevieve M. Grant, LLB, PhD; Meaghan L. O'Donnell, PhD; Matthew J. Spittal, PhD; Mark Creamer, PhD; David M. Studdert, LLB, ScD, MPH. (2014). Relationship between stressfulness of claiming for injury compensation and long-term recovery: a prospective cohort study. *Journal of the American Medical Association (JAMA) Psychiatry*, 71 (4) pp.446-453.

[2] Robinson JP and Loeser JD. (2012). Effects of workers compensation systems on recovery from disabling injuries, in MA Hasenbring, AC Rusu, DC Turk, eds. *Acute to Chronic Back Pain: Risk Factors, Mechanisms, and Clinical Implications.* New York, NY: Oxford University Press, pp.355-376.

Cameron ID, Harris IA and Murgatroyd DF. (2011). Understanding the effect of compensation on recovery from severe motor vehicle crash injuries: a qualitative study, in *Injury Prevention,* 17 (4) pp.222-227.

[3] Genevieve M. Grant, LLB, PhD; Meaghan L. O'Donnell, PhD; Matthew J. Spittal, PhD; Mark Creamer, PhD; David M. Studdert, LLB, ScD, MPH. (2014). Relationship between stressfulness of claiming for injury compensation and long-term recovery: a prospective cohort study. *Journal of the American Medical Association (JAMA) Psychiatry*, 71 (4) pp.446-453.

[4] Scott Whitney, Sullivan Michael J. L, Tait Raymond and Yakobov Esther (2014). Perceived Injustice and Adverse Recovery Outcomes, in Psychological Injury and Law, 7 (3) pp.197-296.

REPORT ON NSW WORKERS COMPENSATION ARRANGEMENTS IN RELATION TO PRE-INJURY AVERAGE WEEKLY EARNINGS (PIAWE)

Professor Tania Sourdin, University of Newcastle

March 2017

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Report on NSW Workers Compensation arrangements in relation to Pre-Injury Average Weekly Earnings (PIAWE)

BACKGROUND

In 2016, Professor Tania Sourdin, Dean of the University of Newcastle Law School, was retained by the State Insurance Regulatory Authority (SIRA) as an independent expert to assist with consultation and the development of a regulatory framework for pre-injury average weekly earnings (PIAWE).

The current PIAWE calculation method was introduced by the *Workers Compensation Legislation Amendment Act 2012* (NSW). Since the 2012 amendments, 7 sections of the *Workers Compensation Act 1987* (NSW) (ss 44C – 44I), in addition to Schedule 3, define how PIAWE is to be calculated.

For the majority of workers, PIAWE is determined by reference to their earnings over the 52 weeks prior to the date of injury. Sections 44C – 44I contain a number of complex provisions, the effect of which is that any payments in excess of a worker's "ordinary earnings" are disregarded for the purposes of determining the correct PIAWE amount.

There is widespread agreement that the PIAWE calculation method laid down in these sections is overly complex, costly, and creates difficulties for a range of stakeholders, including employers, employees, insurers, lawyers, workers' compensation conciliators, and arbitrators. Specifically, concerns have been raised that the PIAWE calculation method may have unfair consequences that disadvantage workers, and/or may lead to conflicting opinions about the correct PIAWE amount, and thus delays in processing weekly payments. The recent decision of Arbitrator Harris of the Workers Compensation Commission in *Whaley v Upper Hunter Shire Council* demonstrates a number of the complexities which arise when determining how the current PIAWE provisions apply.[1]

Overall, there appears to be little doubt that the current regime for calculating PIAWE is neither fair nor efficient, and may therefore be perceived to be inconsistent with the objectives of NSW's workers' compensation system.[2]

Purpose of Engagement:

Given the issues associated with the current PIAWE calculation method, Professor Sourdin was engaged to:

i) Undertake specific and targeted consultation and engagement with key stakeholders in order to identify and clarify the difficulties and complexities of PIAWE within the NSW workers' compensation system; and

[1] [2016] NSWWCC 280 (6 December 2016).

[2] *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s 3.

ii) Explore and evaluate opportunities to improve and simplify the PIAWE calculation methodology and experience of all stakeholders.

The scope of Professor Sourdin's engagement did not extend to exploring any issues relating to the length of time that PIAWE is payable to injured workers, the percentage rate of PIAWE that a worker is entitled to receive, or the reduction rules that apply after the first 12 months of payments. Rather, consultation with stakeholders focused on the various issues associated with the PIAWE definitions and calculation methodology.

Previous Reviews and Consultation:

A number of reviews have previously considered the application and calculation of PIAWE in NSW. These include the Centre for International Economics' *Statutory Review of the Workers Compensation Legislation Amendment Act 2012*,[3] and the Workers Compensation Independent Review Office's 2015 *Parkes Project*.

> "The PIAWE approach is complex and often difficult to calculate, and yet it is still able to generate 'winners' and 'losers' compared to a more simple averaging calculation…" (Centre for International Economics, 2014)

The Centre for International Economics' review highlighted the need to minimise complexity and reduce the administrative burden currently associated with calculating weekly benefits, stating that "[t]he PIAWE approach is complex and often difficult to calculate, and yet it is still able to generate 'winners' and 'losers' compared to a more simple averaging calculation that was used previously and is still used by those exempt from the amendments".[4]

> "The calculation of Pre Injury Average Weekly earnings should be a simple process" (Parkes Project Advisory Committee, 2015)

Stakeholder submissions to the *Parkes Project* similarly identified numerous problems with the current PIAWE calculation method, which was widely viewed as being overly complex, difficult, and leading to anomalous results for workers. In its Statement of Principles, the *Parkes Project* Advisory Committee concluded that "[t]he calculation of Pre Injury Average Weekly earnings should be a simple process".[5]

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3 Centre for International Economics, *Statutory review of the Workers Compensation Legislation Amendment Act 2012,* Report for Office of Finance and Services (2014).

4 Ibid 16.

5 Workers Compensation Independent Review Office, *Parkes Project Advisory Committee Statement of Principles* (2015) 1.

Developments Post-2015:

A range of benefit reforms to the NSW workers' compensation system were introduced in 2015 and have been progressively implemented. The *Workers Compensation Amendment Act 2015* (NSW) included a provision to vary the method by which PIAWE is calculated. On 24 February 2016, the State Insurance Regulatory Authority (SIRA) published a Discussion Paper and sought stakeholder and public feedback on the development of a regulatory framework for PIAWE. A submission summary was published in May 2016, with stakeholder submissions again identifying numerous problems with the current PIAWE calculation method.

Professor Sourdin's consultation with stakeholders was undertaken in order to further evaluate, refine, and articulate the issues impacting on PIAWE in NSW. Given the potential impact of any reform on the overall cost and efficiency of the NSW workers' compensation scheme, further consultation was necessary in order to ensure that all reform options were properly considered.

Consultation occurred in two phases. Phase One commenced in August 2016 and involved informal initial discussions with select stakeholders to explore background matters and to discuss the preferred consultation approach. In consideration of both the substantial stakeholder consultation that had already occurred, and the preferred consultation approach from the stakeholders' perspectives, Phase Two of the consultation consisted of a stakeholders' forum held in December 2016. A list of all stakeholders consulted can be found in Appendix A.

Stakeholders included agencies, employer and employee representatives and others involved in the current system. Some limited consultation was also conducted outside of these consultations. For example, Professor Sourdin attended some Parliamentary Inquiry hearings relating to NSW Workers Compensation reforms on 4 and 7 November 2016. Also, direct consultations were undertaken with Worksafe Victoria which administers the Victorian scheme which includes similar PIAWE legislative requirements (these are discussed later in this Report).

In addition, a Project Team was set up to support the consultation process and conduct background research. Details about the Project Team are located in Appendix B. The Project Team undertook a number of research tasks that included reviewing PIAWE legislation across Australia and reviewing all past submissions (written and in some instances oral) in various fora relating to PIAWE.

Options for Reform:

Following consultation with stakeholders, consideration of previous reviews into PIAWE, and examination of PIAWE-like arrangements in other Australian jurisdictions, the following four options for reform were identified:

1) Legislative Reform
2) Regulatory Reform
3) Development of an Online System to support calculations
4) Procedural Reform

In the following sections of this report, each option is outlined, together with an analysis of its expected outcomes and overall impact on the NSW workers' compensation system. Consideration is given to the suitability of each of the four options, both in their own right, as well as in combination with one or more of the other options. Recommendations for reform are made where appropriate.

OPTION 1: LEGISLATIVE REFORM

Overview:

The first option is legislative reform to simplify the PIAWE calculation methodology. This is a long-term solution which would require amending the *Workers Compensation Act 1987* (NSW). There are 7 sections which currently deal with PIAWE (ss 44C – 44I). These define and outline a calculation methodology for the following key concepts:

- Pre-injury average weekly earnings;
- Relevant period;
- Ordinary earnings;
- Non-pecuniary benefits;
- Base rate of pay;
- Ordinary hours of work; and
- Current weekly earnings

In addition, Schedule 3 of the Act deals with certain classes of workers, including those employed by two or more employers. Legislative amendment would involve replacing these current sections with a single, simplified definition of PIAWE. This is consistent with the preferred view expressed by stakeholders. In this regard it is noted that a number of stakeholders considered that a PIAWE decision should not be regarded as a work capacity decision and this would also require legislative amendment. In relation to the removal of a 'work capacity' component, it is noted that this should be is an appropriate matter to also review (see p 10 of this Report).

> "To have such a complex web of interrelated provisions to remain in the legislation… is fraught with such difficulty" (Roshana May, Australian Lawyers Alliance)

Rationale:

Seven sections detailing how PIAWE is to be calculated creates unnecessary complexity. The fact the sections refer and/or link to one another was also identified by stakeholders as contributing to the complexity that exists. As stated by Roshana May, President of the NSW Branch of the Australian Lawyers Alliance, "to have such a complex web of interrelated provisions to remain in the legislation…is fraught with such difficulty."

The replacement of the seven sections with a single and concise definition of PIAWE that is easy to understand and apply would likely result in a decreased administrative burden and cost for

employers and insurers. A simpler methodology also has the potential to lead to a reduction in disputes about what benefits should be included when calculating PIAWE, and could reduce delays with the processing of weekly payments.

Simplifying the PIAWE calculation methodology via legislative amendment was strongly and uniformly supported by stakeholders at the PIAWE forum in December 2016. Significantly, no attendees were opposed to legislative reform. Amending the legislation to simplify the definition of PIAWE is also consistent with the view expressed by the *Parkes Project* Advisory Committee that "[t]he calculation of Pre Injury Average Weekly earnings should be a simple process."[6]

Achieving a Fair System:

All stakeholders agreed that simplification was required in order to provide a fair and efficient workers' compensation system. A number of stakeholders considered that without legislative amendment, the aim of achieving a system that is fair for workers cannot be achieved.

> "The goal was to make it simple and fair for workers and transparent for employers – it's not doing either of those things" (Catherine McMonnies, EML)

It was argued that the focus should be on returning to system objectives and ensuring the PIAWE provisions advance the fundamental principles which underpin the no-fault workers' compensation scheme. As noted by Catherine McMonnies from EML, the goal of the 2012 amendments was "to make it simple and fair for workers and transparent for employers – it's not doing either of those things".

> The current provisions are "so far from being aligned with the concept of income replacement" (Roshana May, Australian Lawyers Alliance)

Specifically, it was suggested that the way PIAWE is currently calculated is disadvantageous for workers in a number of significant respects. As stated by Roshana May, the current provisions are "…far from being aligned with the concept of income replacement". Paul Macken representing the Law Society of NSW was also of the view that the current calculation methodology fails to accurately represent the value of a worker's pre-injury earnings, and noted that it is the Law Society's view that a "degree of rationality" needs to be injected into the legislation.

A simplified PIAWE definition could allow for a more accurate calculation of a worker's pre-injury earnings by including overtime and shift allowances beyond the first 52 weeks of incapacity. A number of stakeholders also suggested that in addition to simplifying or replacing ss 44C – 44I of the Act, Schedule 3 should be amended or incorporated into a simpler definition

[6] Ibid.

of PIAWE. Schedule 3 relates to certain classes of workers, and those employed by two or more employers. A number of stakeholders were of the view that Schedule 3 is unnecessarily complex, and delivers unfair results for workers with more than one employer. Currently, Schedule 3 allows earnings from multiple employers to be included in the PIAWE calculation in certain circumstances, but in other instances only allows earnings from one employer to be considered.

> "The calculation method of PIAWE should provide a fair outcome regardless of the class of worker" (Parkes Project Advisory Committee, 2015)

A simplified methodology would involve the calculation of a PIAWE figure for each employer in order to get a total PIAWE amount which more accurately reflects an average of a worker's pre-incapacity earnings. Simplifying the operation of Schedule 3 is also consistent with the *Parkes Project* Advisory Committee Statement of Principles (2015) which provided that "[t]he calculation method of PIAWE should provide a fair outcome regardless of the class of worker."

Minimising Administrative Costs:

In addition to being fairer for workers, all stakeholders agreed that legislative amendment was needed in order to minimise the administrative costs associated with the PIAWE calculation process. A number of stakeholders raised the point that post-2012, the complexity of the PIAWE calculation methodology has meant that many lawyers and case managers who previously calculated PIAWE amounts for employers are no longer able to do so, and have instead been required to engage external assistance. Simplifying the legislation would also reduce the costs associated with calculating PIAWE for workers with multiple employers, with Schedule 3 currently requiring more than one PIAWE calculation to be completed for such workers.

A simplified definition could similarly reduce the administrative burden associated with insurers having to re-determine a worker's PIAWE amount (by disregarding overtime and shift allowances) after the first 52 weeks of incapacity.

> "We are always coming to the same conclusion as a group of stakeholders – money is being wasted on PIAWE disputes" (Sherri Hayward, CFMEU)

There was also a view expressed that the complexity of the current legislation has led to an increase in the number of costly PIAWE disputes. The current provisions have resulted in confusion about the types of benefits that should be included in the PIAWE calculation. This point was emphasised by the New South Wales Bar Association in its submission to the Standing Committee on Law and Justice's Workers' Compensation Inquiry, where it highlighted the oddity of the current provisions which "require the value of non-pecuniary benefits to be initially assessed and included before they are then removed again. The utility of

this is obscure".[7] It was further noted by the NSW Bar Association that "the complexity of the provisions is fairly obviously causing a level of confusion and delay with the practical processing of claims."[8]

As concluded by Sherri Hayward from CFMEU, "we are always coming to the same conclusion as a group of stakeholders – money is being wasted on PIAWE disputes".

Options for Simplification:

Three main options for simplifying the definition of PIAWE were identified during consultation with stakeholders:

i) Substitute the definition Average Weekly Earnings and Current Weekly Wage Rate that applied prior to the introduction of the *Workers Compensation Legislation Amendment Act 2012* (NSW) in respect of PIAWE;
ii) Amend the legislation so that the calculation methodology which currently applies in relation to exempt workers applies to all workers; or
iii) Amend the definition of PIAWE to make it consistent with the definition which applies in the Australian Capital Territory (ACT).

The practical effect of each of these three options is similar, with all resulting in the simplification of the existing legislative provisions. Each option will now be briefly examined.

i) Returning to the previous definition of Average Weekly Earnings and Current Weekly Wage Rate rather than PIAWE:

A number of stakeholders argued that the simplest solution was to return to the definition that applied in NSW prior to the 2012 amendments. The former s 43(1)(a) of the *Workers Compensation Act 1987* (NSW) provided that:

> "Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the worker was being remunerated…"

In relation to workers employed by more than 1 employer, s 43(1)(b) provided that:

> "If the worker has entered into concurrent contracts of service with 2 or more employers…the worker's average weekly earnings shall be computed as if the worker's earnings under all such contracts were earnings in the employment of the employer for whom the worker was working at the time of the injury."

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[7] New South Wales Bar Association, Submission No 6 to the Inquiry of the Legislative Council Standing Committee on Law and Justice, *First Review of the Workers Compensation Scheme,* 26 September 2016, 13.4.

[8] Ibid 13.3.

Stakeholders considered that previous provisions provided a simpler and more concise definition than the newer PIAWE provisions and that the previous provisions were also fairer for workers with more than one employer. In this regard, it is also important to note that the previous decision making in this area was also likely to be more informal as the decisions were not regarded as work capacity decisions (and therefore were less likely to be the subject of scrutiny or review).

The point was made at the December 2016 stakeholders' forum that the former provisions worked reasonably well from 1987 until the legislation was amended in 2012, and a return to the former formulation should not be viewed as "going back", given that claims by exempt workers continue to be managed and administered as though the 2012 amendments did not occur. A return to the previous provisions has also been advocated by the NSW Association, which has argued that the "unfairness and complications" which now exist did not arise under the "well understood provisions" of the former s 43.[9] According to the NSW Bar Association, "the new provisions are inferior and should be replaced with the old provisions".[10]

> PIAWE calculations for exempt workers take 1/10th of the time as PIAWE calculations for non-exempt workers
> (Catherine McMonnies, EML)

ii) Adopting the calculation method that applies for exempt workers:

Alternatively, it was argued by a number of stakeholders that the method of calculation that currently applies in relation to exempt workers should be extended to apply to all workers. The practical effect of this proposal is the same as returning to the pre-2012 definitions, given that the 2012 amendments do not apply to exempt workers.

In addition to ensuring a consistent calculation methodology for all workers, the point was made by Catherine McMonnies that the current calculations for exempt workers take 1/10th of the time as PIAWE calculations for non-exempt workers. Adopting the calculation method that currently applies to exempt workers would therefore result in a decreased administrative burden.

iii) Adopting the ACT's PIAWE definition:

A third alternative put forward by Paul Macken is to adopt the definition of the PIAWE equivalent that applies in the ACT. According to Macken, "the ACT legislation contains a definition which comes closest to simplifying PIAWE in a way that is not overly complex."

Section 21 of the *Workers Compensation Act 1951* (ACT) provides:

9 New South Wales Bar Association, above n 7, 13.6.
10 Ibid.

(1) In working out average pre-incapacity weekly earnings for a worker who is not a contractor—

(a) if the worker was, immediately before the injury, employed by 2 or more employers—the worker's earnings from all employment must be taken into account; and

(b) the actual weekly earnings of the worker may be taken into account over—

(i) a period of 1 year before the injury; or

(ii) if the worker has not been employed for 1 year—the period of employment.

> "The ACT legislation contains a definition which comes closest to simplifying PIAWE in a way that is not overly complex" (Paul Macken, Law Society of NSW)

In contrast to the NSW legislative provisions, s 25 of the ACT legislation also allows for overtime to be included in the PIAWE amount beyond the first 52 weeks of incapacity. As noted on page 3, the focus of this review was on the calculation methodology rather than considering the period of time that payments would be made.

A number of stakeholders expressed the view that the ACT provisions allow for a more accurate calculation of a worker's actual ordinary earnings. It was noted that amending the NSW legislation so that a similar definition of PIAWE applied would help to reduce administrative costs and minimise disputes. The ACT provisions were also seen as being fairer to workers with more than one employer. It was further observed that the definition in place in the ACT is similar to the definition that applied in NSW prior to the 2012 amendments.

> "A person who is injured should not have to wait months to get their correct PIAWE…PIAWE should never be a work capacity decision because it is a person's livelihood" (Sherri Hayward, CFMEU)

Work Capacity Decision:

In addition to simplifying the definition of PIAWE, a number of stakeholders argued that the legislation should be amended so that an insurer's PIAWE determination is no longer classed as a work-capacity decision. To achieve this, section 43(1)(d) of the 1987 Act which currently defines a PIAWE determination to be a work-capacity decision would therefore need to be repealed.

Numerous stakeholders expressed dissatisfaction with the work capacity process which was seen as resulting in long delays for the processing of payments for injured workers. As stated by Sherri Hayward, "a person who is injured should not have to wait months to get their correct PIAWE…PIAWE should never be a work capacity decision because it is a person's livelihood". A

number of stakeholders also highlighted the fact that Victoria has successfully implemented a system in which PIAWE is not classed as a work capacity decision, and it was observed that it was the Victorian legislative scheme upon which NSW's PAIWE provisions were based. The removal of PIAWE from the definition of a work capacity decision has previously been recommended by the Australian Lawyers Alliance in its submission to the Standing Committee on Law and Justice's Workers' Compensation Inquiry.[11]

Limitations:

The 2012 changes, although complex, arguably allow for a more accurate calculation of complex pay and working conditions than can be achieved by a single definition of PIAWE which may be overly simplified. Furthermore, it is also the case that NSW's worker's compensation system has undergone significant changes, meaning further legislative reform could increase confusion for stakeholders.

Despite these challenges, there was unanimous agreement among all stakeholders consulted that the preferred way to fix the problems with PIAWE is via legislative amendment. Any risk that a simplified definition may, in some cases, result in uncertainty could be addressed by additional reform mechanisms. Specifically, a number of stakeholders were of the view that legislative amendment should be accompanied by procedural reform, namely, the implementation of a process whereby employers and employees can reach an agreement on the PIAWE amount. It was also suggested that the development of an online system could assist stakeholders in calculating PIAWE. These options are considered in more detail below.

Alternatively, another option to reduce uncertainty would be to implement a provision similar to s 49(5)(e) of the Northern Territory's *Return to Work Act 2015* (NT). This section provides:

> "if there is doubt about the method to be used for the calculation of the worker's normal weekly earnings – the method of calculation that results in the greatest amount being calculated as the worker's normal weekly earnings must be used."

In regard to the changing landscape of NSW's workers' compensation system, a number of stakeholders highlighted the fact that since 2012, the *Workers Compensation Act 1987* (NSW) has only been amended once. Prior to this, the last major legislative reform was in 2001. By contrast, fifteen regulatory instruments have been implemented since 2012. There was a view that despite this, legislative amendment would provide a more effective long-term solution than further regulatory reform. It is also noted that SIRA may need to consider the recommendations arising from the current Standing Committee on Law and Justice as such recommendations may impact on work capacity decision making, review processes and dispute resolution.

Recommendation 1:

Replace the 7 sections of the *Workers Compensation Act 1987* (NSW) which currently deal with PIAWE (ss 44C – 44I), in addition to Schedule 3, with a single, simplified definition of PIAWE. This could be achieved by either returning to the pre-2012 legislative definition, extending the arrangements that currently exist for exempt workers, or adopting the definition of PIAWE that

[11] Australian Lawyers Alliance, Submission No 74 to the Inquiry of the Legislative Council Standing Committee on Law and Justice, *First Review of the Workers Compensation Scheme,* 10 October 2016, 15.

applies in the ACT. An alternative option would be to draft a new, simplified definition of PIAWE. Legislative reform will also be required to ensure that a PIAWE decision is not regarded as a work capacity decision.

OPTION 2: REGULATORY REFORM

Overview:

A second option for reform is to develop a regulation in accordance with s 58A of the *Workers Compensation Amendment Act 2015* (NSW).

Rationale:

Section 58A enables the creation of a regulation that may:

- Vary the PIAWE calculation method (for a worker or class of workers);
- Prescribe that a benefit or class of benefits are a non-pecuniary benefit; or
- Prescribe as a base rate of pay exclusion, a payment, allowance, commission or other amount, or a class of amount.

The development of a regulation could clarify a number of the uncertainties which currently exist with the PIAWE calculation methodology, whilst still allowing for an accurate reflection of a worker's pre-injury earnings. This would avoid the risk associated with legislative reform, where a single definition of PIAWE may be overly simplistic.

Details:

A PIAWE regulation under s 58A of the 2015 Amendment Act could vary the method by which PIAWE is calculated. Following consultation with stakeholders in the first half of 2016, SIRA considered options for varying the PIAWE calculation methodology:

- Prescribe a single definition of 'relevant period', with leave inclusions/exclusions to be the same for both ordinary earnings and overtime and allowances;
- Clarify or remove certain base rate of pay exclusions;
- Clarify the value of non-pecuniary benefits or class of non-pecuniary benefits to be included in the PIAWE calculation;
- Amend the effect of Schedule 3 for workers with 2 or more employers;
- Allow inclusion of overtime and shift allowance after 52 weeks.

Limitations:

On the whole, stakeholders consulted at the December 2016 forum were opposed to further changes in the form of additional Regulations. Two key problems were identified with the implementation of a Regulation:

i) A regulation would not, by itself, be sufficient to address the problems with the current definition of PIAWE.
ii) A number of issues with PIAWE cannot be addressed by the power under s 58 of the *Workers Compensation Amendment Act 2015* (NSW).

Stakeholders acknowledged that some minor definitional changes would help to clarify the PIAWE calculation methodology, including defining the meaning of 'a week'. It was agreed that following the 2012 amendments, uncertainty has existed in relation to the definition of a week, leading to inconsistent calculations of PIAWE, particularly for the first week of payments. It was noted by the Workers Compensation Independent Review Officer, Kim Garling, that this can be disadvantageous for workers who are injured part-way through a working week.

> Regulatory reform "adds layers upon layers" (Paul Macken, Law Society of NSW)

Nevertheless, there was a view that minor definitional changes would not be sufficient to address the broader problems with PIAWE. It was also acknowledged that the time and cost associated with insurers determining PIAWE would not be significantly reduced, given that many of the complexities with the current provisions would still remain. Stakeholders were also opposed to further regulatory reform on the basis that this would not address the problems associated with PIAWE being classed as a work capacity decision.

A matter raised by a number of stakeholders is that a regulation cannot be made which is inconsistent with the Act. Accordingly, any regulation would therefore fail to achieve the desired result, given that the fundamental issues raised by stakeholders relate to the PIAWE provisions themselves. Whilst s 58 permits modifications of these provisions, wholesale replacements are not allowable. In this regard it is noted that in the past regulatory reform options have not been pursued by SIRA, because of the limited power under s58A in that a Regulation cannot be made if it is inconsistent with the Act unless expressly authorised.

There was also consensus among stakeholders that regulatory reform may actually work against the objective of simplifying the PIAWE calculation methodology. Rather, it was argued that the commencement of s 58A would in fact result in further complexity. As stated by Paul Macken, regulatory reform "adds layers upon layers". Other stakeholders pointed to the piecemeal approach that has been taken in this area and the numerous regulatory instruments that have been implemented since 2012.

Overall, whilst stakeholders appreciated the need to vary the method by which PIAWE is calculated, with the amendment of Schedule 3 seen as particularly desirable, it was agreed that the various issues identified would be better dealt with via legislative amendment aimed at achieving a simplified definition of PIAWE. This would also address stakeholder concerns about the current definition of a week. Stakeholders agreed that a clear definition of a week applied prior to the 2012 amendments, and a return to the former provisions would clarify the uncertainty which currently exists.

Recommendation 2:

Further reform in the context of Regulation should be avoided. In the event that a regulation is introduced in accordance with s 58A of the 2015 Amendment Act, this should not be seen as a long-term solution, but rather, an interim measure aimed at clarifying the uncertainties which exist with the PIAWE calculation methodology until legislative amendment has been achieved.

OPTION 3: DEVELOPMENT OF AN ONLINE SUPPORT SYSTEM

Overview:

A third option for reform is to develop an online supportive system to assist with PIAWE calculations. This could include an app as well as an online calculator using assistive technology and basic algorithms to determine the PIAWE amounts.

Rationale:

The development of an online support system, portal and PIAWE calculator would help to ensure accurate and consistent PIAWE calculations. In particular, the benefits of a PIAWE calculator and app were highlighted by a number of stakeholders who pointed to the large degree of discretion that currently exists when determining PIAWE amounts.

Increased operational clarity would also promote confidence among workers that PIAWE claims are being dealt with fairly, potentially resulting in a decreased number of disputes.

There was also a view by at least one stakeholder that the more accurate calculation which an online system could deliver would be beneficial in light of the problems currently associated with workers receiving back-pay in circumstances where their PIAWE has been incorrectly determined. Whilst it was acknowledged that a worker who makes a complaint may be entitled to back-pay, it was suggested that this might not be the situation for some workers who formally challenge the insurer's work-capacity decision. Furthermore, it was suggested that any recommendations for the payment of backdated entitlements made by the Merit Review Service might not be enforceable. Stakeholders were concerned that back-pay may not be available in circumstances where a worker's PIAWE amount is incorrectly calculated, potentially resulting in a loss to the worker of thousands of dollars.

Details:

There was a common view among stakeholders that the development of an app (software that can run on a computer or mobile device) and an online advisory or determinative system would not, by itself, be sufficient to address a number of the broader issues with PIAWE, and would not necessarily making the system fairer for workers who are disadvantaged by the current calculation methodology, including those with more than 1 employer. This is partly because some of the issues with the current PIAWE system relate to the difficulty in determining what allowances can be included in a PIAWE calculation. This issue is a significant concern as many employees do not simply receive a 'salary.' Allowances vary considerably across sectors and the myriad of examples provided in consultations indicates that it would be difficult to build an online system that could respond intelligently to the myriad of employment arrangements that

exist. Part of the issue with current PIAWE arrangements include that employment payment arrangements are constantly changing and this means that what is 'in' or 'out' for PIAWE circumstances can vary depending on the definitions adopted.

Stakeholders indicated that the implementation of an online system would not address the issues arising from the way in which discretion about the categories within the PIAWE calculation is exercised. There was widespread agreement that the development of an online supportive system would therefore need to be combined with one or more of the other options for reform.

A number of stakeholders considered that an online calculator should be implemented only after a simplified definition of PIAWE is achieved via legislative amendment. Once clearer and more concise definitions were in place, a calculator could then assist with PIAWE calculations. Other stakeholders were of the view that an online portal and supportive tool could only be used as an interim tool until legislative reform is achieved. In the meantime, it was noted that an online calculator would need to be supported by a regulation which addresses some of the uncertainties with the current PIAWE calculation methodology, including clarifying what constitutes a base rate of pay exclusion. In either case, it was agreed that the development of an online system would be beneficial in the event that legislative reform is not achieved.

There was also a view among stakeholders that the development of an online system should be accompanied by other administrative tools, including scheme wide training for case managers and large employers in order to ensure consistency in how PIAWE is determined. The dissemination of education and guidance material was also seen as desirable. Importantly, stakeholders once again noted that there is little utility in moving forward with the development of these options until a clear and concise definition of PIAWE has been implemented. It was also observed that whilst training can help stakeholders to understand how to interpret and apply the PIAWE provisions, the current complexity and confusion which exists is very much a product of the PIAWE definitions, rather than a lack of adequate training. According to Catherine McMonnies, the complex definitions and broad discretion which currently exists also undermines the effectiveness of existing guidance material.

> "By focusing on whether we should have an online portal, we are taking attention away from fixing the actual problem. I would be very cautious about spending time building the system, until we have a simple definition for the system to apply"
> (Sherri Hayward, CFMEU)

Limitations:

A potential issue identified by stakeholders is the fact that an online system may not be able to adequately deal with variations such as allowances (which can vary between workplaces and employees) overtime, as well as specific access and related issues that could raise difficulties for some small businesses.

In addition to the challenges posed by complex working arrangements, another concern raised was that the continuing existence of a "digital divide" means that not all workers or employers will be able to access and/or benefit from an online portal. Although these issues are less relevant than in the past, as some small employees and workers have limited experience with definitions required to use any PIAWE system, it was considered that a very simple low data load online design structure with an online 'concierge' system would be required.

The issue with a PIAWE calculator is that "a dispute about whether the section in the Act is capable of being interpreted (quite reasonably) in two or more different ways renders an objective system pointless" (Kim Garling, Workers Compensation Independent Review Office)

There was also concern among some stakeholders that the development of an online portal would divert attention away from the core issue, namely, the fact that legislative reform is needed to attend to the definitional issues in relation to PIAWE. As noted by Sherri Hayward, "by focusing on whether we should have an online portal, we are taking attention away from fixing the actual problem. I would be very cautious about spending time building the system, until we have a simple definition for the system to apply."

This sentiment was echoed by a number of stakeholders, with Kim Garling noting that the issue with a PIAWE calculator is that "a dispute about whether the section in the Act is capable of being interpreted (quite reasonably) in two or more different ways renders an objective system pointless."[12]

The concerns raised by these stakeholders could be addressed by ensuring an app, online calculator and even an advisory system with a technology based concierge is developed after legislative reform has occurred, and a simplified definition of PIAWE has been implemented.

An online app together with an intelligent system could then provide a more definitive calculation and a useful reference point, promote consistency in applying the PIAWE provisions, and could therefore decrease delays in the practical processing of payments.

There are many examples of supportive advisory online systems that could be used to determine PIAWE and provide advice. Previous research has outlined the growing convergence between online advisory systems and legal processes, in addition to the ability of such systems to assist disputants to negotiate more effectively.[13]

[12] Email from Kim Garling, 3 March 2017.

[13] See Tania Sourdin, 'Justice and Technological Innovation' (2015) 25(2) *Journal of Judicial Administration* 96.

Recommendation 3:

Develop an online support system to assist with the calculation of PIAWE and ensure consistency in PIAWE calculations. Time and money should only be spent developing an online portal after the definition of PIAWE has been simplified.

OPTION 4: PROCEDURAL REFORM

Overview:

A fourth option for reform is to amend the processes which currently exist for calculating PIAWE. Specifically, using the Victorian system as a model, a process could be implemented whereby an employer and employee reach an agreement about the PIAWE amount. If disagreement ensues, the employer can calculate the PIAWE figure and it will be open for the worker to appeal.

> A system of PIAWE negotiation should be implemented as a voluntary pilot program (Kim Garling, Workers Compensation Independent Review Office).

Rationale:

Enabling workers and their employers to agree on the PIAWE amount, rather than it being within the discretion of the decision-maker, could minimise disputes and result in significant cost savings. It could also help to ensure that the system is, and is seen as being, fair to workers. Stakeholders expressed the view that a negotiation process would expedite initial payments to workers, and ultimately promote return to work objectives.

Details:

A proposal was put forward by Kim Garling that a system of PIAWE negotiation be implemented as a voluntary pilot program. Numerous stakeholders supported this suggestion. Given the similarities between the Victorian and NSW PIAWE provisions, the development of a pilot program could be based on the negotiation system that currently operates successfully in Victoria.

Importantly the Victorian system enables support to be provided by WorkCover so that where agents, employers or employees are unsure about definitions and inclusions, advisory support can be provided. It is noted that support could be provided through an online concierge system as noted above.

Limitations:

A number of stakeholders were of the view that this type of procedural reform may not be possible whilst the determination of PIAWE remains a work-capacity decision. Whilst it was noted that s 42 of the *Workers Compensation Act 1987* (NSW) ('application by worker to alter amount of weekly payments') allows such a process to occur, there was some concern expressed about how s 42 interacts with s 44BB of the Act ('review of work capacity decisions').

Whilst some stakeholders suggested that a negotiation process could be voluntarily implemented, and noted that in practice, many PIAWE disputes are already being resolved informally, others were of the view that allowing informal negotiation whilst PIAWE remains a work-capacity decision would be unlawful, given that agreements could be made which are inconsistent with the legislation. It was also observed that the reason a process of PIAWE negotiation has been successful in Victoria is because the Victorian scheme does not define PIAWE as a work-capacity decision. There was therefore some reluctance among stakeholders to implement changes in relation to the NSW system that support the process that currently operates in Victoria.

Overall, it would appear that stakeholder concerns could be addressed by legislative amendment which removes PIAWE from the definition of a work capacity decision. Amending the legislation in this way is discussed in greater detail above. This change would potentially enable employers and employees to be able to informally agree on a PIAWE amount and reduce cost and time.

Finally, there was also a concern raised by some stakeholders that a small percentage of employers may seek to take advantage of a PIAWE negotiation process. It was argued that workers who do not have the capacity to negotiate a fair payment could be disadvantaged and may agree to a less favourable PIAWE amount than they would otherwise have been entitled to. The development of an online calculator, as discussed in Option 3 above, could help to alleviate this concern by providing workers with an estimate of what a fair PIAWE amount might be.

Recommendation 4:

Introduce a pilot program for employers and employees to voluntarily agree on the PIAWE amount. Legislative amendment that makes is clear that a PIAWE determination is not a work capacity decision would also need to occur. The timing of this would need to be considered in the context of recommendations that may arise from the Standing Committee process.

CONCLUSION

Consultation with stakeholders has revealed a clear and unanimously held preference for legislative amendment in order to achieve a simplified PIAWE definition. This is a long-term solution which is necessitated by the numerous and complex problems with the current PIAWE provisions, in addition to the inability of a regulation to address stakeholder concerns.

In order to address the risks associated with legislative reform and the implementation of a simplified PIAWE definition, an online app and system that includes a PIAWE calculator and concierge service should be developed to ensure accurate and consistent application of the legislation.

Finally, legislative amendment and the development of an online system should be accompanied by procedural reform in order to allow workers and their employers to agree on the PIAWE amount. Notably, the Victorian system currently enables negotiations to take place (and supports a negotiated outcome). A simplified PIAWE definition, in addition to an online calculator, would assist in promoting an agreement focussed process.

APPENDIX A: LIST OF THOSE CONSULTED

NAME	ORGANISATION
Alan Becken	NSW Workers Compensation Self-Insurers' Association Inc.
Shane Butcher	Australian Lawyers Alliance
Ben Duncan	Hotel Employers Mutual
Kim Garling	Workers Compensation Independent Review Office
Sherri Hayward	Union Affiliates
Kathryn Horne	Hotel Employers Mutual
David Hyslop	Icare
Jennifer Isaacs	Hospitality Employers Mutual
Paul Macken	Law Society of NSW
Alistair McConnachie	NSW Bar Association
Roshana May	Australian Lawyers Alliance
Catherine McMonnies	EML
Alexandra Novelli	Hospitality Employers Mutual
Sasha Saviane	Hospitality Employers Mutual
Elizabeth Uehling	Icare
Joanne Webber	Icare
Doreen Wilby	Worksafe, Victoria
Leonora Wilson	Law Society of NSW

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SIRA PROJECT TEAM

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Louise Wattus	Managing Lawyer, Legal, Government and Corporate Services, Department of Finance, Services and Innovation
Ryan Williams	Director Merit Reviews, Dispute Services Division, State Insurance Regulatory Authority
Wayne Wormald	Merit Reviewer, Dispute Services Division, State Insurance Regulatory Authority