

INQUIRY INTO 2023 REVIEW OF THE WORKERS COMPENSATION SCHEME

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2023 Review of the Workers Compensation Scheme

Submission to the Standing Committee on Law and
Justice, Legislative Council, Parliament of NSW

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal people of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input in the Standing Committee on Law and Justice’s 2023 Review of the Workers Compensation Scheme (‘Scheme’) at the invitation of the Hon. Greg Donnelly MLC, Chair of the Standing Committee on Law and Justice (‘Standing Committee’).
2. The following submission from the ALA is in addition to our contributions to the Standing Committee’s 2022 Review of the Workers Compensation Scheme, namely:
 - a. The ALA’s written submission;²
 - b. Testimony from Shane Butcher, who attended the Standing Committee’s public hearing on 10 October 2022 on behalf of the ALA NSW Committee;³ and
 - c. Post-hearing additional evidence submitted by the ALA.⁴
3. The ALA notes that SIRA and icare have been asked to provide financial information to the Select Committee. The ALA welcomes this request and looks forward to seeing what evidence is produced. As stated in our 2022 submission, it is difficult to reconcile differences in the data produced by SIRA and icare. The ALA repeats our previous caution to the Standing Committee about placing confidence in the data presented to date.
4. This further submission focuses on the ALA’s primary concerns about the NSW Workers Compensation Scheme. This includes:
 - a. The legislation;
 - b. The current structure of the system; and
 - c. Performance of the regulator.

² Australian Lawyers Alliance, Submission to Standing Committee on Law and Justice, Parliament of New South Wales, *2022 Review of the Workers Compensation Scheme* (8 August 2022) <www.lawyersalliance.com.au/documents/item/2295>.

³ Evidence to Standing Committee on Law and Justice, Parliament of New South Wales, Sydney, 10 October 2022, 7-18 <www.lawyersalliance.com.au/documents/item/2381>.

⁴ Australian Lawyers Alliance, Post-hearing additional evidence to Standing Committee on Law and Justice, Parliament of New South Wales, *2022 Review of the Workers Compensation Scheme* (3 November 2022) <www.lawyersalliance.com.au/documents/item/2340>.

5. This submission will seek to briefly explore those issues before providing an update on some developments that have occurred since the ALA's contributions to the 2022 Review of the Workers Compensation Scheme.

The legislation

6. Workers compensation legislation in NSW is not fit for purpose. It has been described by this Standing Committee in the past as complex and difficult to navigate. Elsewhere, the legislation has been described as "Byzantine in their elaboration and labyrinthine in their detail".⁵
7. Those comments were made in relation to that part of the legislation that applies to the majority of workers in New South Wales, that is, the non-exempt workers. It is often overlooked that there are four benefits regimes covered by the legislation, reference to three of them cannot be found within the current form of the legislation. This leads to confusion and uncertainty. For example, it is not possible for a police officer or worker in a coal mine to look at the legislation and determine their rights and entitlements.
8. The call to conduct an independent and thorough review of the complex legislation has been made on many occasions and, most recently, in the McDougall Review and, prior to that, under the Parkes Project. Recommendation 34 of the McDougall Review provided:⁶

Legislative redrafting

34. The government should give consideration to appointing a suitable agency or body to conduct a review and reconciliation of the *Workers Compensation Act 1987*, *Workplace Injury Management and Workers Compensation Act 1998* and *State Insurance and Care Governance Act 2015* into a single consolidated piece of legislation.

That review should consider, among other things, the appropriate legislative response to the changing nature of work and the growth of the gig economy, and the extent to which, and ways in which, gig workers should have the benefits provided by the workers compensation scheme.

The reviewing body should be instructed to consider the further recommendations made herein this report, and should not otherwise consider, review, or amend workers compensation benefits.

⁵ Robert McDougall QC, *icare and State Insurance and Care Governance Act 2015 Independent Review* (Report, 30 April 2021) 37 <<https://www.nsw.gov.au/sites/default/files/2021-04/Independent-Review-Report.pdf>>.

⁶ Ibid 21.

9. **The ALA repeats our support for Recommendation 34 of the McDougall Review to be progressed.**
10. The recommendation makes reference to “appointing a suitable agency or body” to conduct the review. The ALA submits that the review must be completed outside of the public service, by a group of experts and stakeholders to report to Parliament and to do the drafting. It is well known that Recommendation 34 was not the first time consolidation and reconciliation of the legislation has been called for. It is the ALA’s position that the NSW Parliament must appoint an independent group to conduct the work and present it to the NSW Parliament.
11. The Parkes Inquiry is a blueprint for a successful, independent review reporting to government. It had near unanimous support in the industry and the fact that it was not completed remains a blight on the scheme. The past success of the Parkes Inquiry demonstrates that there is good will in all stakeholders to work together and assist on this issue.
12. The ALA has provided numerous examples over the years as to why the legislation should be reviewed and reconciled. We would be happy to engage on the issue in more depth if requested.

SIRA, icare and the structure of the Scheme

13. The ALA submits that a close examination of the structure of the system should be conducted to ensure that the key entities and agencies responsible for the operation of the Scheme have clearly defined roles, functions and are able to conduct their business free from influence of each other.
14. The 2014 Standing Committee on Law and Justice Review of the exercise of the functions of the WorkCover Authority first examined the conflicts of interest that arose under the old reign of the WorkCover Authority. It clearly set the roadmap for the division of conflicting areas of responsibility. The resulting *State Insurance and Care Governance Act 2015* was the first step, albeit a large step, in achieving a compensation system with clearly designated responsibilities. **The ALA considers that a further review of the operational structure under that Act is required.** This includes SIRA, icare, SafeWork NSW, IRO and the PIC to assign the

roles and functions of regulator, funds manager, work health and safety regulator, ombudsman and independent dispute resolution body.

15. Complaints about roles and responsibilities are nothing new to the Scheme; however, it does not mean it is desirable. The ALA agrees with the McDougall Review that it is far preferable that such dispute not arise at all.
16. One example of where conflicts continue to arise surrounds funding under the Workers Compensation Operational Fund. SIRA is responsible for the Workers Compensation Operational Fund. Section 35(2) of the *Workplace Injury Management and Workers Compensation Act 1998* clearly sets out what is to be paid out of that fund. In practice what appears to be happening is that entities like SafeWork NSW and IRO have to go to SIRA and seek funding for the projects and operations that they wish to undertake. In our view this should be closely looked at to determine if there is better method of distributing funding to the various departments that do not rely upon the good graces of another.
17. The ALA understands that SafeWork NSW has not been funded to the extent of its budget requests, despite the fact that nowhere in section 35(2) does it state SIRA can determine whether an agency sourced by the funds is entitled to receive moneys. This demonstrates the ongoing conflict that arises on a daily basis.

Performance of the regulator

18. The Standing Committee would be well aware of recent criticism of the performance of icare as it occupied substantial parts of the evidence in the 2022 hearings. As far as the ALA is concerned, our criticisms of icare remain.
19. The recent experience of ALA members is that in SIRA, in the motor accidents space, have increased its activities in regulation, become more consultative with the legal profession and generally engaging in a manner that one would expect of a regulator. Unfortunately, the same cannot be said for their conduct in the workers compensation space.
20. We note that SIRA has not published any quarterly regulatory updates in 2023. The most recently published 'SIRA quarterly regulatory update' is for the quarter ending 31 December 2022. In that update the regulator notes that they regulate six licenced CTP insurers and in the relevant quarter they issued two civil penalties, seven letters of compliance and had 21 ongoing remedial plans.

21. The regulator seems to be less active in the workers compensation space. In the same update they note that in the workers compensation space they issued two letters to the nominal insurer, issued two special licence conditions to two self-insurers and six remediation plans. This is despite regulating the nominal insurer (with 4 scheme agents), the treasury managed fund (with 3 TMF claims managers), six specialised insurers, 36 self-insurers and 33 group life insurers.
22. The experience of ALA members is that licenced CTP insurers are now behaving in a way that demonstrates their concern for regulatory review. They are quick to respond and generally accept that failure to do so might result in contact being made by the regulator. This can be contrasted on the other hand by our members' experience in dealing the scheme agents or insurers.
23. The decision of *Fairfield City Council v Comleki*⁷ illustrates the kind of behaviour that injured workers can experience in the NSW workers compensation system. A helpful summary can be found in paragraph 138 of that judgment which provides:

This is the fourth decision of the Commission in this matter which is adverse to the appellant. There have been two first instance decisions of a member and two Presidential decisions on appeal. The grounds advanced in this appeal were unmeritorious and the appeal papers themselves were not produced in accordance with the requirements for appeals in the Commission. The Certificate of Determination issued by the Member dated 6 April 2023 at orders 3 and 4 awarded the respondent weekly compensation for the seven-month period 5 August 2021 to 28 February 2022, an amount totalling (on my calculations) of slightly over \$10,000. A general order for s 60 expenses was also made. The cost of this dispute, both in terms of the legal costs expended and the costs to the Commission in dealing with the matter, is out of proportion with its relatively modest value. This circumstance is not in conformity with the model litigant policy (which applies to public bodies such as the appellant). The type of conduct seen in this matter frustrates the Commission's ability to meet its statutory objects and serves to delay other cases.

24. It is clear that insurers behave this way because they can do so with impunity and because the regulator is not doing their job. Judge Phillips in this decision referred the matter to the Principal Registrar of the Commission "to complete such process as she deems appropriate to enable the parties to be heard on this issue and to consider whether to refer the appellant's conduct to SIRA." This committee should request SIRA to confirm if such a referral occurred and, if so, to confirm what action it has taken since the referral.

⁷ [2023] NSWPICPD 45.

25. A further example of where the regulator has been ineffective is evidenced by the fact that in the workers compensation space, ALA members can barely recall any one instance where liability has been accepted in a work injury damages claim. Insurers routinely deny liability irrespective of the circumstances of the case. They do so because they know they can and that they will not be pulled up on it by the regulator. The result is increased costs in preparing a common law claim in a front end loaded system.
26. Our experience is that the regulator engages in consultation over matters raised in recommendations of reviews and indeed of this Standing Committee but the outcomes take far longer expected and no further action is taken beyond delivery of a report. The regulator refers to themselves as the steward of the system and the ALA considers that to be a declaration of overreach.
27. The failure of the regulator to advance a project to simplify the legislation as recommended many times and the apparent inability to deter poor behaviour by scheme agents and insurers should all be taken as signs that the regulator is struggling to act effectively in the workers compensation space. Because SIRA appears to be acting effectively in the CTP space the ALA submits that it is not an issue with powers but rather with a lack of action.
28. The 2014 Committee Report calls for clear, unambiguous, defined responsibilities of the regulator separate from funds management and claims management. SIRA, by its actions, behaves as regulator, ombudsman, decision maker and funds manager. The ALA calls for a reconsideration of the role of the regulator in the NSW workers compensation scheme.
29. The remainder of this updated submission touches upon updates since the hearing of evidence in the 2022 Review of the Workers Compensation Scheme. Within those updates you will also see examples of where strong action by the regulator could have helped solve ongoing issues that appear to have unnecessarily dragged on. Take for example the simple and well received proposed amendments to PIAWE and death benefit settlements (both of which form part of many 'low hanging fruit' that could be tackled) but of which we are no closer to seeing in reality.

Updates since the 2022 Review of the Workers Compensation Scheme

30. The workers compensation space is continuously evolving and, as such, there are a few matters to update this committee on that have developed since the giving of evidence to the 2022 Review of the Workers Compensation Scheme.

The SIRA Statutory Review of the Personal Injury Commission Act 2020

31. On 14 August 2023 SIRA tabled its report on the outcome of the two-year Statutory Review of the *Personal Injury Commission Act 2020*.

32. The report produces what are described as two recommendations however each recommendation has multiple parts. The first recommendation deals primarily with establishing fit for purpose legislation in relation to the IRO. The ALA has no concerns with that in principle however it also suggests that that the fit for purpose legislative framework should ensure:⁸

ii. effective governance, performance and accountability on the management of the IRO and administration of ILARS in the workers compensation scheme...

33. The body of the report discusses the issue briefly and attempts to explain what SIRA envisages is needed:⁹

A lack of regulatory oversight may limit openness, transparency and accountability for ILARS. Without such oversight, it may be difficult to evaluate the effectiveness and efficiency of the program and ensure that it is providing the best possible outcomes for workers, while ensuring the ongoing affordability and viability of the scheme.

...

A new legislative framework for IRO should include provisions to ensure effective governance, performance and accountability for the management of the IRO and administration of ILARS.

⁸ State Insurance Regulatory Authority, NSW Government, *Statutory Review: Report on the outcome of the two-year Statutory Review of the Personal Injury Commission Act 2020* (31 August 2023) 5.

⁹ Ibid 15.

34. These comments highlight many of the points made in this updated submission. To the extent that it is suggested that any increased accountability of IRO should be to SIRA then it should be strongly resisted. The IRO, when working independently and effectively, serves a very important function in the workers compensation scheme. See for example, the 2018 review of the Workers Compensation Scheme where the value of independent IRO was examined. The same can be said of the independence of SafeWork NSW and the PIC. What is needed is a strengthening of the independence and not an increase in oversight by SIRA.
35. The commentary in the review only serves to further demonstrate why a review of the structure of the system is needed. **The roles and functions of SIRA, icare, SafeWork NSW, IRO and the PIC need to be clearly defined, conflicts removed and independence enhanced.**

Death benefits – funds management

36. In the time that has passed since our previous submission, section 25(1A) of the *Workers Compensation Act 1987* has commenced (16 December 2022). The ALA understands that there has been a little over 10 matters resolved in NSW where the new provisions have provided valuable compensation for the dependents of deceased workers in NSW.
37. Whilst the formula used to calculate the relevant compensation amount appears complicated in practice there has been little difficulty in applying the formula. The ALA submits that there are too few claims and too little time that has passed to be able to evaluate whether the formula itself results in fair compensation for the costs of funds management. This issue should continue to be monitored.
38. The ALA does have concerns in regard to two other aspects of the operation of 25(1A). First, the ALA has a general concern regarding the current performance of NSWTAG in the NSW workers compensation space. We accept that a review of NSWTAG would be outside the scope of this review and as such we do not propose to go into detail into all the concerns. However, we urge this committee to be cognisant of the findings and recommendations of New South Wales Auditor-General's report entitled *Managing the affairs of people under financial management and/or guardianship orders* and dated 18 May 2023. That reports set out several findings in relation to the current operation of NSWTAG including findings that:

- NSW Trustee and Guardian does not have sufficient oversight to ensure that its services are consistent with legislative principles which aim to promote positive client outcomes;
- It does not track the actual costs of service delivery, the quality of services or client experiences and key findings from previous reviews remain unresolved; and
- There is a risk that some fee-paying clients are unknowingly subsidising others.

39. The second concern relates to the fact that the compensation is only available if the “lump sum death benefit is paid to the NSW Trustee”. Whilst it is true that the large majority of funds are managed by NSW=TAG the current wording of the provision effectively removes the possibility of private funds management by ensuring that no amount is paid unless managed by NSWTAG. An amendment to section 25(1A) to remove the requirement for the money be paid to NSWTAG before the entitlement arises would create competition for NSWTAG and give options to vulnerable people of NSW should the performance of NSWTAG continue to deteriorate.

Death benefits – dispute resolution

40. The ALA notes that the *State Insurance and Care Legislation Amendment Bill 2022 (NSW)* lapsed on prorogation. The amendments that enabled parties to a compromise and settle a dispute in regard to a death benefit claim therefore did not pass. The proposed amendment was a valuable amendment welcomed by everyone involved in dispute resolution. It was a shame that was included in a bill that contained more controversial topics preventing its passing earlier. The ALA urges the NSW Government to pass that part of the legislation as soon as possible.
41. As stated in our primary submission, the proposed transitional provisions would have the amendment apply to any death that occurred after commencement. The ALA repeats its earlier submission that the provisions should apply from 5 August 2015.

PIAWE

42. In March 2023 SIRA released the PIAWE post-implementation review report. I was a long review process that included four meetings with the reference group from March 2022 to November 2022. The report makes two of the recommendations worth noting.

43. First, final recommendation 1 provides:¹⁰

Provide advice to government on removing PIAWE from the definition of a work capacity decision ensuring the worker maintains access to the resolution of disputes via the Personal Injury Commission and access to a fair notice period in the event of an adjustment of PIAWE resulting in a reduction or cessation of weekly payments.

44. The ALA has long advocated for this change and the removal of PIAWE from the definition of a work capacity decision. This has been supported in a number of reviews since 2014 and can be achieved by amending section 43(1) of the 1987 Act to remove (d).

45. The ALA endorses this recommendation and encourages this committee to also make a recommendation that PIAWE be removed as a work capacity decision.

46. Secondly, final recommendation 3 provides:¹¹

Further investigate the difficulties in reaching a PIAWE agreement, and where appropriate, commence work to simplify and streamline the process and amend the PIAWE Agreement form. This may also include improving guidance provided to insurers, workers and employers about the PIAWE agreement process.

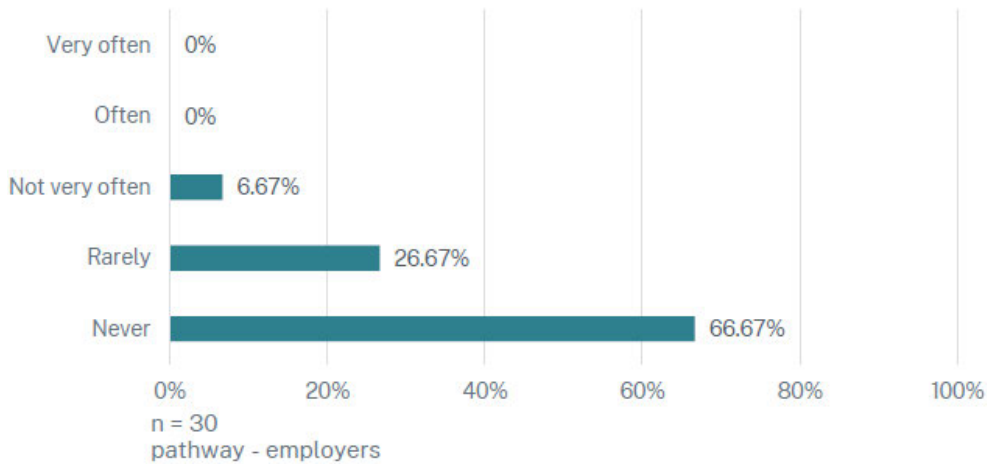
47. The review found that there is little uptake in PIAWE agreements, that they have limited utility in many situations and raised concerns about fairness and potential power imbalances. The following graph, reproduced from the report, illustrates the low levels of uptake:¹²

¹⁰ State Insurance Regulatory Authority, NSW Government, *PIAWE post-implementation review report* (March 2023) 20.

¹¹ *Ibid* 21.

¹² *Ibid* 35.

17. How often have you used an agreement to determine a worker's PIAWE?



48. This is from a sample size of only 30 people who completed the question. One would assume that those completing the survey are likely to have a much closer dealing with PIAWE calculations than most and therefore are probably more likely to understand its workings. It would also suggest that the percentage of people using agreements across the whole industry is probably even lower than this graph shows.

49. The ALA submits that consideration should be given to remove the provision for agreements in their entirety.

Conclusion

50. The ALA welcomes the opportunity to have input into the 2023 Review of the Workers Compensation Scheme.

51. The referral of the 2022 Review of the Workers Compensation Scheme to this Standing Committee and the election of a new NSW Government serves as a timely point to give pause and consideration as to the type of workers compensation system we want for the people of NSW. The complex legal framework and structure of those operating within it need to be urgently reviewed so that we can have a robust system that is fit for purpose, where the roles are clearly defined and stakeholders held accountable for their performance.

52. As can be seen, with the items that we have updated the Standing Committee on, the workers compensation system has not remained static and with every change made the complexity increases. The time to start an independent review is now.

53. The ALA is available to provide further assistance to the Standing Committee on the issues raised in this submission.

Joshua Dale

President, NSW Branch Committee

Australian Lawyers Alliance