Dear Mr Lean

REGULATION OF PRE-INJURY AVERAGE WEEKLY EARNINGS (PIAWE) – DISCUSSION PAPER

The Australian Lawyers Alliance (‘ALA’) welcomes the opportunity afforded by the State Insurance Regulatory Authority (‘SIRA’) to provide feedback and a submission to the consultation process on ‘Regulation of pre-injury average weekly earnings’.

The ALA acknowledges the Discussion Paper issued by SIRA on PIAWE dated February 2016. The ALA further acknowledges we have been afforded the opportunity to directly discuss with SIRA the ALA’s position on the PIAWE Regulation. In this response we will follow the format of the discussion paper.

The ALA has had the opportunity to read the final draft of the submission provided to the Review by the Construction Forestry Mining and Energy Union (CFMEU) and supports same.

PREAMBLE

ALA involvement in consultation and review processes

The ALA has had a long and detailed involvement in workers compensation scheme and system reform and has been involved in every review of the NSW workers compensation scheme since major changes were introduced with the Workers Compensation Legislation Amendment Act in 2012.

The ALA has provided written and oral submissions to the Joint Select Committee Inquiry into the NSW Workers Compensation Scheme in 2012, the Minister’s review of the 2012 reforms conducted by the Centre for International Economics (CIE) in 2014 and the Standing Committee on Law and Justice Inquiry into the functions of the WorkCover Authority in 2014.
The Parkes Project

The ALA notes reference in the Discussion Paper to the Parkes Project established by the WIRO1. Commencing in December 2014 the ALA was invited to participate in the Advisory Committee of the Parkes Project2. In addition, there were five members of the ALA on the Working Group convened to support the work of the Advisory Committee. They were selected because of their experience and involvement in workers compensation matters and the scheme and their knowledge and expertise in the scheme and system.

The author of this submission was the Director of the Parkes Project, convenor of the Working Group and author of the Parkes Project Discussion Papers.

During the course of the Parkes Project a discussion paper on Weekly Payments was prepared by the Director, settled by the working group and circulated to the Advisory Committee. Various submissions to the Parkes Project informed the Weekly Payments Discussion paper and addressed PIAWE and its complexities.

The ALA on the Parkes Project Weekly Payments discussion paper (amended 24 July 2016)3. The discussion paper is attached to this submission and will be referred to throughout this submission.

The ALA also seeks to rely on the submission of the CFMEU, Construction and General Division dated 24 February 20154 which enunciates the difficulties with calculation of PIAWE and its various components.

The Parkes Project Advisory Committee reached unanimous consensus in relation to a Statement of Principles the Principles in relation to 12 key issues identified by the Committee for examination by the inquiry. One of the key issues was ‘weekly payments’. The principles unanimously adopted in relation to weekly payments were:

1. The calculation of Pre Injury Average Weekly earnings should be a simple and fair process
2. The calculation method of PIAWE should provide a fair outcome regardless of the class of worker (for example, to ensure workers are not penalised for working more than one job, part time hours, or are aged)
3. ‘PIAWE’ should reflect the current value of ‘pre-injury average weekly earnings’ (Indexation) as should the Maximum cap on weekly payments.

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1 Page 3, regulation of pre-injury average weekly earnings – Discussion paper February 2016, SIRA
2 An inquiry into the operation of the workers compensation legislation announced by the WorkCover Independent Review Officer under section 27(c) of the Workplace Injury Management and Workers Compensation Act 1998. The Advisory Committee was composed of representatives from all scheme stakeholder groups and organisations including scheme agents, SiCorp and TMF, self and specialised insurers, the ICA, legal professional organisations, employer organisations, brokers, Business Chamber of NSW, Unions and the medical profession.
3 Attachment 1 by permission of the IRO, Mr Kim Garling.
4. Where there has been an inadequate payment of weekly payments, adjustments should be easily arrived at and paid from the date of the claim/notification.

5. An injured worker should not be penalised because of their continued lack of any capacity (total incapacity) for work.

6. The suitable employment test has resulted in unfairness in the measure of benefits/earnings for certain categories of injured workers.

The Parkes Project Working Group considered a raft of recommendations addressing these. The recommendations specifically relating to PIAWE were:

1. Simplify the definition and computation method of pre-injury average weekly earnings. As a guide, some of the features the former section 43 (Computation of Average Weekly Earnings) be retained including providing for the employer to provide to the worker such details of the earnings of the worker as will enable the worker to determine his or her pre-injury average weekly earnings.

2. Provide for a “default” (or “interim”) rate of weekly payments where calculation of PIAWE cannot be accurately completed to enable weekly payments to commence within 7 days of injury.

3. Amend Section 82A to ensure indexation of PIAWE in all circumstances.

4. Clarify the meaning of a “week” in the context of calculating PIAWE.

5. Provide for adjustment and backdating of adjustments of PIAWE to encourage early and prompt payments and avoid unnecessary time consuming disputation. Considerations:
   - Exclude PIAWE calculated in the provisional liability period from the definition of ‘Work Capacity Decision’ and/or
   - Mandate the provision of the employer’s completed PIAWE form and exchange of information required to calculate PIAWE between the parties as part of the ‘revision’ process and/or
   - Permit backdating of adjustments to PIAWE to the date of injury with force and effect from that date.

6. Amend Schedule 3 in relation to ‘Workers employed by 2 or more employers’ (Items 2, 3, 4, 5, 6, and 8) so as not to penalise such workers in the calculation of PIAWE and therefore weekly payments.

The ALA lends its full support to those recommendations which will be discussed further in this submission.

**Lawyer involvement in PIAWE disputes to date**

The ALA readily accepts that the great majority of its members involved in workers compensation matters (for non-exempt workers) are unlikely to have any detailed understanding of AWE or PIAWE because of the prevention of legal professionals receiving payment for work done in respect of work capacity decisions reviews. The ALA in considering this submission has consulted
with lawyers who have engaged in PIAWE disputes and Work Capacity Decision Reviews and who have an appreciation of the complexities and difficulties involved. The ALA has also relied on the knowledge and expertise of those members who were involved in the Parkes Project.

**CONTEXT AND BACKGROUND**

**The NSW workers compensation system**

The objectives of the workers compensation system are enshrined in section 3 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act).

The Discussion Paper provides a summary of the objectives in so far as they relate to provision of weekly payments compensation as:

“Provide income and treatment payments to injured workers and their families” and “deliver an efficient and effective system…”

Section 3 of the 1998 Act of the actually states:

“The purpose of this Act is to establish a workplace injury management and workers compensation system with the following objectives:

(a) to assist in securing the health, safety and welfare of workers and in particular preventing work-related injury,

(b) to provide:
   • prompt treatment of injuries, and
   • effective and proactive management of injuries, and
   • necessary medical and vocational rehabilitation following injuries,
   in order to assist injured workers and to promote their return to work as soon as possible,

(c) to provide injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses,

(d) to be fair, affordable, and financially viable,

(e) to ensure contributions by employers are commensurate with the risks faced, taking into account strategies and performance in injury prevention, injury management, and return to work,

(f) to deliver the above objectives efficiently and effectively.”

The objectives are to provide **income support during incapacity and to do so efficiently and effectively**.

The ALA believes that the current computation method to determine AWE and hence PIAWE is contrary to the spirit and intent of the fundamental objectives of the system.
WEEKLY PAYMENTS

Entitlement to weekly payments (income support)

The Discussion Paper states that “Entitlement to weekly payments is now based on a worker’s PIAWE and is payable under sections 36, 37, and 38 of the Workers Compensation Act 1987”. This statement is not correct.

Section 33 of the Workers Compensation Act 1987 (The 1987 Act) provides the basis for entitlement:

“If total or partial incapacity for work results from an injury, the compensation payable by the employer under this Act to the injured worker shall include a weekly payment during the incapacity.”

Put simply, entitlement to weekly payments is based on ‘incapacity’. The 2012 reform legislation introduced ‘work capacity’ (as opposed to incapacity) as the criteria on which entitlement to weekly payments is to be based.

Rate (amount or quantum) of weekly payments

Once a worker establishes his or her entitlement to income support by way of weekly payments of compensation, the rate or amount of weekly payments is determined by reference to sections 36, 37 or 38 (of the 1987 Act).

Those sections contain the formulae for calculating the rate or amount of weekly payments depending on the ‘stage’ at which payment is being made.

The formulae for calculating the rate of weekly payments

The formulae contained in sections 36 to 38 appear on their face relatively ‘straightforward’. For example, section 36 provides:

(1) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the first entitlement period is to be at the rate of:

(a) \( (AWE \times 95\%) - D \), or

(b) \( \text{MAX} - D \),

whichever is the lesser.

(2) The weekly payment of compensation to which an injured worker who has current work capacity is entitled during the first entitlement period is to be at the rate of:

(a) \( (AWE \times 95\%) - (E + D) \), or

(b) \( \text{MAX} - (E + D) \),

whichever is the lesser.

5 Page 3 Regulation of pre-injury weekly earnings (PIAWE) – Discussion Paper, ‘Weekly payments and the 2012 legislative reform’
Section 35 contains the ‘factors’ to determine the rate of weekly payments.

Section 35 sets out 4 factors:

- **AWE** – defined as “Pre-injury average weekly earnings” (also referred to as PIAWE)
- **D** – defined as the “deductible amount”
- **E** – the worker’s “earnings after injury”
- **MAX** – the maximum weekly compensation amount (set by the Government and adjusted from time to time)

It is poignant to note that AWE or PIAWE is never paid to a worker. That is, a worker under the 2012 reforms never receives as a weekly payment 100% of their average weekly earnings lost as a consequence of injury.

The formulae provide for, at most, 95% or 80% of AWE at any time.

That reduced percentage of AWE is further eroded by the two other components to the formulae: D and E.

Furthermore, weekly payments are capped to a maximum and that maximum is also reduced by the factor ‘D’.

**The factors of the weekly payment formulae**

The critical factor and starting point to calculating the rate of weekly payments is AWE. AWE (as shown above) means PIAWE.

**The definition of PIAWE**

PIAWE is defined in section 44C of the 1987 Act.

Section 44C provides not one but four definitions of PIAWE, each depending on the employment circumstances of the worker at the time of injury.

The five definitions concern:

1. Workers who were in employment (with the same employer with whom they sustained injury) for at least 4 weeks before the injury
2. Workers who were in continuous employment with the same employer for less than 4 weeks before the injury
3. Workers who were neither in full time employment immediately before the injury and were seeking full time employment and had ‘predominantly been a full time workers during the 78 weeks immediately before the injury

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6 “D (or a deductible amount) means the sum of the value of each non-pecuniary benefit (if any) that is provided by the employer to a worker in respect of that week (whether or not received by the worker during the relevant period), being a non-pecuniary benefit provided by the employer for the benefit of the worker or a member of the family of the worker.”

7 Section 35(1) 1987 Act: “E means the amount to be taken into account as the worker’s earnings after the injury, calculated as whichever of the following is the greater amount: (a) the amount the worker is able to earn in suitable employment, (b) the workers current weekly earnings.

8 Section 35(1) 1987 Act: ‘MAX’ means the maximum weekly compensation amount.
4. Workers in a class defined in Column 2 of Schedule 3 of the 1987 Act (9 classes of worker including Class 1 apprentices, workers under the age of 21 and those who are undertaking training to become qualified)

There is potentially a fifth definition being those workers whose PIAWE is less than the minimum weekly payment and whose PIAWE is deemed to be the minimum amount.\(^9\) There are also those transitioned workers whose PIAWE is a deemed as the transitional amount.\(^10\)

The most basic of definitions is in 44C(1):

“pre-injury average weekly earnings, in respect of a relevant period in relation to a worker, means the sum of:

(a) the average of the worker’s ordinary earnings during the relevant period (excluding any week during which the worker did not actually work and was not on paid leave) expressed as a weekly sum, and

(b) any overtime and shift allowance payment that is permitted to be included under this section (but only for the purposes of the calculation of weekly payments payable in the first 52 weeks for which weekly payments are payable).”

Overtime and shift allowances is defined in subsection 5.

The phrases ‘relevant period’\(^11\) and ‘ordinary earnings’\(^12\) introduce a cascading set of ‘co factors’ and definitions which supplement the definition of PIAWE.

These co-factors are set out in sections 44D to 44I of the 1987 Act and are:

- ‘week’
- Actual earnings
- Current weekly earnings
- Piece rates commissions
- Employer superannuation contribution
- Non-pecuniary benefits (including ‘fringe benefits’)
- Base rate of pay
- Base rate of pay exclusions (including ‘incentive based payments or bonuses’, ‘loadings’, ‘monetary allowances’, ‘piece rates or commissions’, ‘overtime or shift allowances’ and ‘actual rate of pay’, ‘fair work instrument’)
- Ordinary hours of work.

The ALA adopts and endorses the Parkes Project Weekly Payments discussion paper (attached). At paragraph 1.1.5 on pages 3 to 5 of the paper, a discussion of the factors commences.

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\(^9\) Section 44C(7)
\(^10\) Schedule 6, Part 19H, Division 2, Clause 9(3) of the 1987 Act.
\(^11\) Defined in Section 44D
\(^12\) Defined in Section 44E
The definitions and ‘co-factors’ all contribute to remove any hint of simplicity in the formula for calculating AWE. The absence of definitions, particularly in relation to a ‘week’ in the definition of relevant period, are problematic and in this regard, of itself is a contributor to increased disputation.

**When the PIAWE determination is made**

AWE (and hence PIAWE) must be calculated at least once and possibly twice through the life of a claim. PIAWE is first calculated when a worker is certified as having reduced work capacity following injury and is entitled to receive weekly payments.

After a worker has received 52 weeks of weekly payments PIAWE must be *recalculated* to remove overtime and shift allowances as mandated by section 44C subsections (1)(b), (2)(b), (3(e) and (5)(b).

The fact that in order to affect the 52 week ‘step down’ PIAWE has to be recalculated is of itself a cause for concern as a generator of increased disputation, complexity and unfairness.

It would be argued that the 52 week recalculation provides an incentive for workers to return to work by reducing their weekly payments to base pay (ordinary rate of pay). Whilst there is a second calculation of PIAWE in the legislation the complexities and concerns with the PIAWE calculation method are always going to be magnified.

**Disputes over PIAWE calculation: PIAWE as a Work Capacity Decision**

The decision about a worker’s PIAWE is a work capacity decision and as such is subject to the work capacity dispute review process for resolution of a dispute which may arise as to calculation.

The work capacity decision review process is convoluted, cumbersome and time consuming, and, we submit, an inappropriate process by which to quickly and fairly resolve a dispute confined to a worker’s pre-injury average weekly earnings.

Anecdotally we are aware that internal reviews take up to 30 days. If the worker is dissatisfied with the result and seeks Merit Review, not only are they required to navigate the process without the assistance of a lawyer, but the delay in a determination may be in excess of 30 days. The end result of the whole of the review process is that the insurer may well have to make a new work capacity decision (PIAWE calculation) which operates from its date.

As a consequence of the review process workers are unfairly and inappropriately deprived of ‘back pay’ of weekly payments to which they are legitimately entitled as income support.

Section 42 of the 1987 Act provides a seemingly earlier opportunity for review of a PIAWE miscalculation in an ‘application by worker to alter amount of weekly payments’. Section 42 provides an avenue for review of the amount of weekly payment to which an insurer must respond within 28 days. This is a slightly less protracted period than a work capacity decision review however, if successful, should result in back pay being paid to the worker.

This process on one reading of the section appears to contemplate that the worker is satisfied with the weekly payment but that there are changed circumstances which should be reviewed by

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13 Section 43(1)(d)
14 Now Section 44BB of the 1987 Act
the insurer. It is more than likely that the resultant decision following a section 42 application is a work capacity decision and therefore subject to the section 44BB review process.

The ALA submits that disputes over PIAWE should be managed outside the section 42 and 44BB processes and as quickly as possible and with minimal burden imposed on the worker. It is the ALA’s position that PIAWE disputes are contributed by three factors:

- The complexity of the PIAWE equation
- Insurers not extracting appropriate and accurate information to satisfy the PIAWE enquiry form the Employer
- Employer failure to provide appropriate and accurate information in a timely fashion about a worker who has reported an injury

**KEY AREAS OF CONCERN**

The Discussion Paper identifies the key areas of concern as:

- complexities surrounding the PIAWE calculation methodology, which may lead to conflicting opinions and possible delays with processing claims and weekly payments
- the PIAWE calculation may lead to unfair or unintended consequences, resulting in a perceived inequity for a number of workers.

The ALA considers that in addition, the AWE calculation methodology (including PIAWE) is of concern because it does not fundamentally deliver on the Government’s intentions.

Whilst not wanting to examine the political context in which the 2012 reforms were introduced it is important to note the Government’s concern expressed in its *pre-reform* Options Paper\(^\text{15}\) that there needed to be ‘simplification of the definition of pre-injury earnings and adjustment of pre-injury earnings’. It was said:

“*Changes to weekly benefits would remove the difficult and confusing provisions that currently exist to determine the amount of weekly benefits that an injured worker would receive and thereby reduce disputation over weekly benefits. A new simplified measure more closely aligned to workers’ actual pre-injury earnings would be welcomed.*”

With respect, the ALA submits that this statement confused the ‘rate’ of weekly compensation payments with the ‘computation methodology’.

The ALA submits that whilst there is a closer alignment of the rate of a worker’s weekly payment to workers’ actual pre-injury earnings, the new ‘measure’ is far more complex than the ‘old’ computation method *for AWE*. AWE was a well-defined concept\(^\text{16}\), capable of being calculated quickly and simply. The ALA further submits that the outcomes were more closely aligned to pre-injury average weekly earnings than the reformed provisions now provide.

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\(^{15}\) NSW Workers Compensation Scheme Issues Paper April 2012

\(^{16}\) Section 43, 1987 Act (pre 2012 amending legislation)
Minister Baird’s declaration (in his Second Reading Speech\textsuperscript{17}) that the new method for calculating weekly payments “will reduce disputation in the system as this aspect of the current legislation has led in many cases to prolonged disputes”\textsuperscript{18} was premature. Not only are there more disputes but they are lengthier and the worker is always disadvantaged by the delay in receiving the final outcome.

In the Statutory Review of the Workers Compensation Legislation Amendment Act 2012 conducted by the Centre for International Economics (CIE) on behalf of the Minister, the CIE advised the Government to act to minimise regulatory burden. Stakeholders had shared views that led to the following opinion being expressed:

“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 that was used previously and is still used by those exempt from the amendments.”\textsuperscript{19}

The ALA submits that the key areas of concern are those identified by the Parkes Project expressed though the unanimous statement of principles and the key recommendations. Bearing in mind the objectives of the System, we support a calculation method for weekly payments that:

- Best reflects the worker’s pre-injury average weekly earnings
- Is simple, easy and quick to calculate
- Is easy for workers to understand
- Is capable of adjustment
- Provides consistent outcomes for the majority of workers in NSW

**SCOPE OF REFORM**

Section 58A of the 1987 Act introduced in 2015 provides:

“The regulations may make provision for or with respect to the following;

(a) varying the method by which pre-injury average weekly earnings are to be calculated under this Subdivision in respect of a worker or class of workers,

(b) prescribing a benefit, or class of benefit, as a non-pecuniary benefit for the purposes of this Division,

(c) prescribing a payment, allowance, commission of other amount, or class of amount, as a base rate of pay exclusion for the purposes of this Division.”

SIRA identifies in the Discussion Paper identifies that regulation will be designed to:

- provide fair, equitable and appropriate access to weekly payments of compensation
- promote a consistent, transparent and robust method for the calculation of PIAWE

\textsuperscript{17} Second Reading Speech 19 June 2012, Minister Baird Treasurer
\textsuperscript{18} Second Reading Speech, Op Cit
\textsuperscript{19} The CIE Statutory Review of the Workers Compensation Legislation Amendment act 2012, Final Report 30 June 2014, page 16
• avoid unnecessary complexities and disputes regarding the calculation of PIAWE
• impose minimal regulatory and administrative costs
• maintain the scheme’s financial sustainability
• provide return to work incentives.

The ALA submits that these design features are achievable but we question how the regulation can and should provide ‘return to work incentives’. Return to work incentives are built into the scheme through the legislation. The legislation provides for a series of measures by way of weekly payment ‘step downs’, capacity testing, and disincentives to encourage early to work. With respect, the PIAWE calculation is unlikely to affect return to work outcomes. The ALA considers that focus would be better placed on the definition of suitable employment, return to work assistance, rehabilitation and vocational retraining to achieve that goal.

KEY CONSIDERATIONS AND REGULATORY CONTROLS

Varying the Calculation

FOCUS QUESTION 1: Should the regulation provide a simplified methodology for the calculation of pre-injury average weekly earnings (PIAWE)?

Yes. Insurers have to be capable of determining PIAWE immediately on receipt of a notice of injury (or claim for weekly payments) and must be capable of delivering certainty to injured workers who are entitled to income support. Where insurers are incapable of calculating PIAWE within the defined timeframes, a default rate should apply.

FOCUS QUESTION 2: How should the regulation vary the method for the calculation of PIAWE?

The ALA adopts and supports the Statement of Principles and Recommendations of the Advisory Committee to the Parkes Project.

The ALA submits that the changes to PIAWE should be made by way of legislative change rather than regulation and should:

1. Provide a single definition in section 44C, incorporating the exceptions, stripping out reference to the multiple elements described in sections 44D to 44I, most particularly base rate of pay and base rate of pay exclusions.

As an example, a modified section 44C could read:

44C Definition—pre-injury average weekly earnings

(1) In this Division, pre-injury average weekly earnings means the average of the worker’s pre-injury earnings during the relevant period (excluding any week during which the worker did not actually work and was not on paid leave) expressed as a weekly sum.
(2) If a worker has been continuously employed by the same employer for less than 4 weeks before the injury, *pre-injury average weekly earnings*, in relation to that worker, may be calculated having regard to the average of the worker’s weekly earnings that the worker could reasonably have been expected to have earned in that employment, but for the injury, during the period of 52 weeks after the injury expressed as a weekly sum.

(3) If a worker:

(a) was not a full time worker immediately before the injury, and

(b) at the time of the injury was seeking full time employment, and

(c) had been predominantly a full time worker during the period of 78 weeks immediately before the injury,

*pre-injury average weekly earnings*, in relation to that worker, means the average of the worker’s average weekly earnings while employed during the period of 78 weeks immediately before the injury (excluding any week during which the worker did not actually work and was not on paid leave) (*the qualifying period*), whether or not the employer is the same employer as at the time of the injury expressed as a weekly sum.

(4) If the amount of a worker’s pre-injury average weekly earnings is less than any minimum amount prescribed by the regulations as applicable to the worker, the amount of the worker’s pre-injury average weekly earnings is deemed to be that minimum amount. Different minimum amounts may be prescribed for different classes of workers, including part-time and full-time workers.

(5) For avoidance of doubt, ‘earnings’ includes …

2. Alternatively, regulate to ensure that the PIAWE calculation reflects the ‘old’ section 43(1) rules to be observed in determining pre-injury average weekly earnings:

“(a) *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, except that if, because of the shortness of the time during which the worker has been in the employment of the employer or the terms of the employment, it is impracticable at the date of the injury to compute the rate of remuneration, regard may be had to the average weekly amount which, during the 12 months previous to the injury, was being earned:

(i) by a person in the same grade, employed at the same work, by the same employer, or

(ii) if there is no person so employed, by a person in the same grade employed in the same class of employment, and in the same district.

(b) *If the worker has entered into concurrent contracts of service with 2 or more employers under which he or she worked at one time for one such employer, and at another time for another such employer, 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.

(c) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the worker was employed at the time of the injury, uninterrupted by absence from work due to illness, strikes, lockouts, bad weather or any other unavoidable cause.

(d) If the employer has been accustomed to pay to the worker a sum to cover any special expenses incurred by the worker because of the nature of the employment, the sum so paid shall not be reckoned as part of the earnings.

(e) The average weekly earnings of a casual worker, that is to say a worker whose contracts of service are mainly contracts for separate periods each of which is of not more than 5 working days in the same industry, shall be computed as if the worker's earnings under all his or her contracts of service, for a period of 12 months preceding the injury or any shorter period during which the worker may have been engaged in the industry, were earnings in the employment of the employer for whom the worker was working at the time of the injury.

(f) If a worker is a worker to whom paragraph (e) applies or has been absent from work by reason of illness, strikes, lockouts, bad weather, intermittency of employment, slackness of trade or any other reasonable cause, the average weekly earnings of the worker shall, notwithstanding the foregoing provisions of this section:

(i) in the case of a worker who is 21 years of age or over, be deemed to be not less than the full wage for a full normal working week of that worker or the basic wage, whichever is the greater, and

(ii) in the case of any other worker, be deemed to be not less than the full wage for a full normal working week of that worker.”

3. Provide a single definition of earnings that ensures that there is fair consideration of inclusion in earnings of all payments made to a worker as a reward for their employment.

4. Ensure that PIAWE shall be calculated only once at the commencement of a claim: strip out the 52 weeks 'step down' which requires the second recalculation of PIAWE.

5. Remove Schedule 3 and accommodate the classes of worker in the regulation or definition: as an example see 'old' section 43(1)(b) above.

**FOCUS QUESTION 3: How could the regulation ensure that the method for the calculation of PIAWE is fair and equitable for a worker or class of workers?**

The current class identification is flawed in that it delivers inconsistent and inequitable outcomes for workers employed by 2 or more employers (see Schedule 3, 1987 Act classes 2, 3, 4, 5, 6 and 8 compared with class 7). There should be one rule to manage workers who are employed by one or more employers. Schedule 3 should be removed and the classes of worker accommodated in the simple definition ascribed to AWE, in a similar way classes of worker were managed in the old section 43(1)(b).
Certainly, workers who work with two or more employers in any capacity should not be disadvantaged in terms of income support payments because they sustain an injury with one employer and as a consequence are incapacitated for employment with the other (see Schedule 3, 1987 Act Classes 2, 3, 4, 5, 6 and 8). Classes 2, 3, 4, 5, 6 and 8 should be replaced by one exception best described currently in class 7: [Worker employed by 2 or more employers who sustains an injury that results in an incapacity to work for one or more of those employers but not for all those employers]).

**Non-Pecuniary Benefits**

**FOCUS QUESTION 4:** What benefit or class of benefits (if any) should be classed as a non-pecuniary benefit? Please provide relevant details.

The ALA submits that the calculation of pre-injury average weekly earnings should include those amounts currently classified as a non-pecuniary benefit in section 44E.

Were the definition of PIAWE to be simplified there would in our submission no requirement for such fine distinctions save that the definition of non-pecuniary benefits could be retained for the avoidance of any doubt.

This would remove from the calculation the intense scrutiny and dissection of a worker’s weekly wage.

**Base rate of pay exclusion**

**FOCUS QUESTION 5:** What payment, allowance, commission or other amounts, or class of amount (if any) should be classed as a base rate of pay exclusion? Please provide relevant details.

The ALA advocates for the simplification of the PIAWE calculation method including removal of ordinary earnings and base rate of pay exclusions. There should be no base rate of pay exclusions.

Of the present base rate of pay exclusions “(a) incentive based payments or bonuses, (b) loadings, (c) monetary allowances, (d) piece rates or commissions, (e) overtime or shift allowances, (f) any separately identifiable amount not referred to in paragraphs (a) to (e)”, piece rates or commissions and overtime and shift allowances are added back into the calculation of PIAWE and only in the first 52 weeks of weekly payment.

The ALA can find no rationale for excluding any base rate of pay exclusion from the calculation of pre-injury average weekly earnings or current weekly wage rate in circumstances where the stated objective is to determine weekly payments as close to actual pre injury earnings as possible. Furthermore, if non-pecuniary benefits are factored into the equation for ‘ordinary earnings’ it makes no sense for ‘base rate of pay exclusions’ to be excluded from that equation.

**Operational and administrative considerations**

The ALA agrees with the summary of the operational and administrative considerations of any new regulation contained in the discussion paper.
**FOCUS QUESTION 6: What are the important operational and administrative matters that should be considered when designing any new PIAWE regulation?**

The ALA submits that the most important operational and administrative concerns are:

- to simplify the definition of PIAWE and the calculation method of the rate of weekly payments (including PIAWE) (reduce administrative burden and ensure workers are treated fairly and equitably),
- improve timeliness of the decision as to the rate of weekly payments, and
- provide a quick, easy and accessible means of PIAWE dispute resolution
- Ensuring adjustments to weekly payments apply form the date of commencement of payments and not date of determination.

Achieving simplification has been dealt with in answer to questions above.

**Timeliness**

The regulation must provide for simple and expedient process by which insurers can access employer information about a worker’s pre-injury earnings expediently and immediately following notification of an injury. The importance of timeliness of receipt of the information is emphasised in the Guideline for Claiming Compensation benefits and the process outlined in relation to Provisional Liability. This is discussed at length in the Parkes Project Weekly Payments discussion paper.

An insurer is required to commence weekly payments within 7 days of notification of an injury. A claim form is not required to commence weekly payments under ‘provisional liability’. Therefore, the process must assist the insurer in gathering sufficient information from the employer or worker or both.

The ALA submits that the following process should be enshrined in the Regulation or Guidelines:

1. On receipt of notification of an injury insurer sends SIRA Earnings Information Form (currently called PIAWE form) to employer and to worker. This form should be devised to ensure that there is sufficient explanation to a worker and employer of the purpose of the form, the nature and extent of the information required and the reason for its completion. It is noted that the PIAWE form is not fit for purpose (in that it does not collect all the information required to calculate PIAWE or current weekly wage rate) and gives inadequate attention to the worker application under section 42.

2. Employer *must* complete and return form within 48 hours or 2 business days.

3. Employers who do not return the form or who do not provide the necessary information (based on a new simpler PIAWE calculation method) must suffer a penalty for non-provision of information

4. The insurer *must* provide the employer’s completed ‘earnings information form’ to the worker with the first notification of the commencement of weekly payments.

5. A worker can provide the information required of the employer if they so choose, supported by documentation.
6. Where the insurer has insufficient information to determine PIAWE and correctly calculate the rate of weekly payments, a ‘default rate or weekly payments’ should apply.

7. Where the default rate is paid, the insurer must determine the AWE and notify of the rate of weekly payments as soon as possible on receipt of the information. Any adjustment is to be backdated if the default rate is less than the determined rate. If the default rate is greater than the determined rate, there is to be adjustment to the determined rate from the date of determination and not before.

8. If the insurer is incapable of calculating PIAWE due to absence of information within 21 days of weekly payments commencing, the insurer must refer the determination of AWE to an appropriately qualified independent person for determination.

The ALA submits that the person tasked with resolving PIAWE disputes should be accommodated in the Workers Compensation Commission. They should have powers to obtain documents, information and evidence (similar to the inspectors’ powers under section 238AA of the 1998 Act) and refer employers for imposition of a penalty for failure to provide information or provision of false or misleading information by icare or SIRA.

Dispute resolution

The ALA submits AWE or PIAWE must be removed from the definition of ‘work capacity decision’ in section 43. This would require legislative change. Any regulation should provide for decisions on PIAWE to be excluded from the work capacity decision review process defined in section 44BB.

The process by which disputes over PIAWE should be resolved must be simple, capable of navigation by a worker, employer and insurer without the need for legal representation (only to be afforded in exceptional circumstances).

The process identified in section 42 does not guarantee a timely outcome and is unlikely to lead to resolution while it is considered as an internal insurer review.

Disputes over PIAWE should be resolved ‘on the papers’ by the person outlined in 8 above or by face to face deliberation with ex tempore determinations.

Backdating of payments

In the pursuit of fairness and equity, where the rate of weekly payments has been based on an inaccurate calculation of PIAWE or the default rate (see above), adjustments should be backdated to the date of commencement of payments.

Innovation

**FOCUS QUESTION 7: Do you have any innovative ideas that might be incorporated into the PIAWE regulation or that might otherwise enhance the regulation?**

We refer you to our answers above.

The ALA considers that the provision of information in a form that can be easily accessed and analyzed for purpose is essential to expediency, efficiency and timeliness of determinations. The
provision of forms which can be digitised so that information can be provided and collated electronically would assist in cutting red tape and any administrative burden.

Even where it is not possible to transmit earnings information in a digital form, the information should be recorded, retained or uploaded in a format that provides for easy recall, one stop analysis, data retention, analysis and statistical collation.

**FOCUS QUESTION 8: Are there any other matters which you consider relevant to the proposed new PIAWE regulation that have not been addressed in this discussion paper?**

We refer you to our answers to questions 1 to 7 above.

In summary, the ALA proposes:

- Simplification of the PIAWE definition
- Removing PIAWE from the definition of work capacity decision
- Regulating a process by which insurers can be possessed of the necessary information to determine the rate of weekly payments quickly and accurately
- Providing an opportunity for workers to participate in the PIAWE calculation process
- Rewriting the current ‘Calculating pre-injury average weekly earnings form – 3033’
- Provide a process for penalising employers who do not provide the information required to determine PIAWE in a timely manner
- Create a simple dispute resolution mechanism (with reduced administrative burden) for disputes about calculation of PIAWE (including where an employer does not provide information in a timely manner)
- Remove the 52 week step down within the definition of PIAWE to prevent a second calculation and avoid further potential for disputation
- Provide for a default rate of AWE to ensure prompt and timely weekly payments
- Ensure that any adjustment of PIAWE is made from the date of injury where determined AWE is greater than the default rate.

The ALA is willing to address any matters raised in this submission with SIRA or provide further explanation if so required.

Yours sincerely

Roshana May
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Australian Lawyers Alliance