SUBMISSION | NEW SOUTH WALES

BAR ASSOCIATION

Review by the NSW Legislative Council's Standing Committee on Law and Justice of the NSW Workers Compensation Scheme

27 July 2020

Promoting the administration of justice

The NSW justice system is built on the principle that justice is best served when a fiercely independent Bar is available and accessible to everyone: to ensure all people can access independent advice and representation, and fearless specialist advocacy, regardless of popularity, belief, fear or favour.

NSW barristers owe their paramount duty to the administration of justice. Our members also owe duties to the courts, clients, and colleagues.

The Association serves our members and the public by advocating to government, the Courts, the media and community to develop laws and policies that promote the Rule of Law, the public good, the administration of and access to justice.

The New South Wales Bar Association

The Association is a voluntary professional association comprised of more than 2,400 barristers who principally practice in NSW. We also include amongst our members judges, academics, and retired practitioners and judges. Under our Constitution, the Association is committed to the administration of justice, making recommendations on legislation, law reform and the business and procedure of Courts, and ensuring the benefits of the administration of justice are reasonably and equally available to all members of the community.

This Submission is informed by the insight and expertise of the Association's members, including its Common Law Committee. If you would like any further information regarding this submission, please contact the Association's Department of Policy and Public Affairs, Ms Elizabeth Pearson, via epearson@nswbar.asn.au or 02 9232 4055.

Contents

A Executive summary

B Recommendations

C Compensation benefits

D Access to independent legal advice

E Parliamentary scrutiny of substantive amendments to the legislation

F Costs

G Government proposal to create a Personal Injury Commission

Annexure I History of the Workers Compensation Scheme

A. Executive summary

1. The New South Wales Bar Association (**the Association**) thanks the NSW Legislative Council's Standing Committee on Law and Justice for the opportunity to make submissions to its 2020 review (**the Review**) of the NSW Workers Compensation Scheme (**the Scheme**).

2. Regulation of workers compensation has had a long and convoluted history in this state. Compulsory workers compensation insurance for employers was introduced in NSW by the *Workers Compensation Act 1926* (NSW) (***WCA 1926***), which created the first iteration of the Workers Compensation Commission. Since 1987, legislation governing the Scheme has become increasingly and absurdly complex. The *WCA 1926* was replaced with the *Workers Compensation Act 1987* (NSW) (***WCA 1987***), which introduced more complex premium calculations and replaced orthodox private insurance with statutory fund insurance managed by authorised insurers.

3. Subsequent amendments in 2012 were particularly harsh and ushered in a number of significant changes with great haste and very little debate. While this tranche of reform has been wound back to some extent by amendments in 2015 and 2018, the Association considers that significant problems remain with the Scheme.

4. Before 1987 there was one Act with 72 sections. Currently there are two main Acts with hundreds of sections. Numerous provisions are now duplicated and some even contradict other legislative provisions. The situation is made all the more confusing by recent retrospective provisions, complex transitional provisions and Guidelines now issued by the State Insurance Regulatory Authority (**SIRA**), some of which have statutory effect.

5. To assist injured workers to remain at work, and remove pressures and costs from the public health system, the Association considers that the Scheme should be simplified and returned to a system where reasonably necessary medical expenses are payable to all injured workers, as was the case for more than 80 years to 2012.

6. This submission considers five primary matters:

    a. Compensation benefits;

    b. Access to independent legal advice;

    c. Parliamentary scrutiny of substantive amendments to the legislation;

    d. Costs; and

    e. The proposed Personal Injury Commission.

7. To assist the Committee, the Association has also included a comprehensive history of the Scheme and its legislative context at Annexure I.

B. Recommendations

8. The Association makes the following recommendations:

   a. The Scheme should promptly return to a simple system whereby reasonably necessary medical expenses are payable to all injured workers, as occurred from 1929 to 2012. This would assist injured workers to remain at work and remove pressures and costs from the public health system;

   b. Assessments of the degree of permanent impairment should not be used as a basis for determining whether a worker receives weekly payments or medical expenses compensation;

   c. The reassessment of degrees of permanent impairment should be permitted when a worker's condition deteriorates;

   d. The legal costs payable for lawyers acting for employers should be increased. This will improve the quality of their representation and decrease overall costs to the Scheme;

   e. Section 38 of the *Workers Compensation Act 1987* (NSW) should be redrafted so that a potential weekly benefit is not dependent on an insurer's administrative decision;

   f. Premiums should not be increased if claims are made. This will assist injured workers in obtaining alternative employment and assist employers in predicting their insurance costs and making decisions to invest in employment generating activities in NSW;

   g. Consideration, involving a broader public discussion, should be given to what medical expenses are to be paid from workers compensation premiums as opposed to the general taxation revenues of Commonwealth and State Governments;

   h. Consideration should be given to whether injured workers should be entitled to damages beyond economic loss, reflecting the entitlement to damages in other personal injury claims;

   i. The importance of the solicitor-client relationship should be acknowledged and respected. Injured workers must be advised of their right to obtain independent legal advice by the insurer when any dispute arises. Independent legal advice should be seen as essential to the fair and efficient running of the Scheme, both for the injured and insurers. The secondment of solicitors from private law firms by iCare should be undertaken within defined limits to preserve the independence of the legal profession and to avoid perceptions of bias;

   j. Substantive legislative amendments should be made through primary legislation, not regulation, to ensure due parliamentary scrutiny and avoid inconsistencies.

C. Compensation benefits

9. The 2012 amendments to the *WCA 1987* and *Workplace Injury Management and Workers Compensation Act 1998* (NSW) (***WIM***) removed protections for injured workers which had existed in statutory form since 1926.

10. The Scheme must be sustainable but it must also meet its objectives. Changes made in and since 2012 acknowledge that the Scheme has operated too harshly against the interests of injured workers. For example, the 2015 amendments to the legislation restored limited benefits for those who require further surgery, providing for a limited period of weekly payments and treatment expenses in that event.

11. Unfortunately, those changes were piecemeal and have left major issues unresolved, including the absence of a right to be re-assessed in relation to a worker's degree of whole person impairment arising from an injury and her or his entitlement to ongoing weekly benefits and treatment expenses. This approach is depriving people with serious injuries from receiving financial support, medical treatment and access to modified common law damages. That is a failure in a scheme in which the support of the seriously injured is a central objective.

12. There is a serious need to amend the current Scheme to provide a consistent and principled approach to the payment of compensation to injured workers.

Medical treatment

13. Workers now have fewer rights under the Scheme than they did 90 years ago.

14. As early as 1929, section 10(1) of the *WCA 1926* provided that where an injury was received by a worker and medical or hospital treatment *"thereby becomes necessary"* the employer was liable to pay the cost of the treatment. In 1929 there were:

    a. no time limits on this;

    b. no requirement for the worker to also be receiving weekly benefits;

    c. no age limits;

    d. no limits defined by concepts such as percentage degrees of permanent impairment; and

    e. no need to have prior approval from an insurer.

15. As a result of amendments made to the *WCA 1987* and the *WIM* by the *Workers Compensation Legislation Amendment Act 2012* (NSW) (**the 2012 Amendments**), many workers can no longer obtain medical expenses which are reasonably required to treat the effects of their workplace injuries. The reasons for this vary and include where:

    a. Their initial claim with respect to the injury was made more than two years previously (section 59A(1) of the *WCA 1987*);

b. They have not been receiving weekly benefits for two years or five years if they have been assessed with a whole person impairment (**WPI**) between 11% and 20% (section 59A(2) of the *WCA 1987*);

c. They do not have a degree of permanent impairment of 21% or more (section 59A(4) of the *WCA 1987*);

d. They have reached the Commonwealth Government's pension age (sections 52 and 59A(2) of the *WCA 1987*); and

e. The expenses were not approved in advance by an insurer (section 60(2A) of the *WCA 1987*).

16. This is an extraordinary situation - the more so because it has arisen without any obvious financial inability of the WorkCover Scheme to fund medical expenses. The complexity of the regime is also demonstrated by the analysis above.

17. Section 3 of the *WIM* provides that the workers compensation system in NSW has "System Objectives" which include *"(c) to provide …. payment for reasonable treatment and other related expenses"*.

18. The restrictions on medical expenses introduced by the 2012 Amendments are preventing this *"System Objective"* from being attained and should be removed urgently.

19. It is important to note that many medical costs which were previously paid for out of WorkCover funds are now being funded through injured workers being treated at NSW Public Hospitals. As such, the consolidated revenue of the NSW Government is now funding much of the treatment needs of injured workers, which could be paid for out of the large reserves of the Nominal Insurer's funds. Self-evidently this is preventing certain consolidated revenue funds from being used for other state government obligations.

20. Injured workers are now being placed onto public hospital waiting lists instead of being treated as workers compensation patients at private hospitals. As such, the 2012 Amendments are worsening the delays with surgery times at public hospitals, delaying treatment and preventing or deferring a return to work.

21. It is suggested that the Scheme should revert to the situation that existed between 1929 and 2012. The costs associated with reasonably necessary medical expenses resulting from injuries should simply be paid. There should be no artificial limits created by time periods, age or the degree of permanent impairment. Doing this will enable the Scheme to attain one of its most important "system objectives". It will assist in keeping injured workers at work. It will also remove a drain on consolidated revenue as the public health system will not be having to pay for the expenses.

Use of WPI assessments to limit statutory entitlements

22. The new section 39 of the *WCA 1987* provides that virtually all injured workers cannot receive any weekly compensation after 260 weeks. Section 39(2) creates a potential exception for workers who are assessed as having a WPI of "more than 20%" - which means 21% or more. As such the WPI system is now used in the legislation as a basis for determining whether an injured worker is entitled

to receive weekly benefits. This use is not consistent with the purpose for which whole person impairment assessment was introduced into the Scheme. It is not compatible with the role and object of the medical assessment protocols on which it is based. There is no necessary, nor even direct, relationship between an injured worker's whole person impairment and her or his incapacity for work.

23. The method for calculating WPI is established by SIRA-issued *Guidelines for the Assessment of Permanent Impairment*. These currently provide that the assessments are to be made in accordance with American Medical Association *Guides to the Evaluation of Permanent Impairment* (5th Ed) (**AMA5**) (subject to some further minor amendments). Chapter 1 of AMA5 specifically cautions that "*impairment ratings are not intended for use as direct determinants of work disability*".[1] Chapter 1 of AMA5 explains this by giving the example that a heart condition may prevent a manual labourer from pursuing his trade but that a sedentary worker, with the same condition, may not be prevented from resuming work.

24. The authors of AMA5 have then repeated and further explained this caution as follows:[2]

> Impairment ratings should not be used as direct estimates of disability. Impairment percentages estimate the extent of the impairment on whole person function and account for basic activities of daily living. The complexity of work activities requires individual analysis.

25. This warning is being ignored by the current legislative provisions, which use the percentage estimates as a basis for deciding whether a worker can obtain more than 260 weeks of weekly compensation.

26. Following the amendments made to the *WCA 1987* and the *WIM* by the *Workers Compensation Amendment Act 2015* (NSW) (**2015 Amendments**), a worker is now regarded as having "high needs" and hence entitled to more than 260 weeks of benefits if he or she has been *"assessed"* as having a degree of permanent impairment of *"more the 20%"*. As WPI assessments are rounded up or down to the nearest percentage this means the worker has to be assessed at 21% WPI or more to come within this definition.

27. Not many workers are assessed at 21% or more. Given the prevalence of lower back injuries the most commonly seen assessments of 21% or more relate to spinal fusion procedures which are assessed at slightly more than this figure because of automatically applicable provisions in AMA5. As already noted, workers who attain the 21% threshold have a statutory entitlement to reasonable medical expenses to treat the effects of the relevant injury for life.

28. Just as the authors of AMA5 caution that it is not appropriate to use WPI assessments as a way of assessing the payment of benefits for incapacity for work, it is the Association's view that it is not appropriate to use WPI assessments as a way of determining entitlements to medical expenses. AMA5 does not endorse this use.

---

[1] At page 5.
[2] At page 13.

The unfairness of only permitting one WPI assessment

29. Section 322A of the *WIM* limits parties to *"one assessment … of the degree of permanent impairment of an injured worker"*. The type of assessment being referred to is an assessment by an *"approved medical specialist"* (**AMS**) appointed by the Registrar of the Workers Compensation Commission. Section 322A(2) then provides that only this assessment *"can be used in connection with any further or subsequent medical dispute about the degree of permanent impairment"*.

30. Section 326 of the *WIM* provides that the outcome of the AMS assessment is *"conclusively presumed to be correct"* as to the degree of impairment that results from the injury. As such the one permitted AMS opinion is forever determinative of the degree of impairment - as it is conclusive and section 322A(2) prevents a second assessment from being made.

31. There is a drafting inconsistency with section 329 of the *WIM*, which continues to provide that the Registrar of the Workers Compensation Commission may refer matters for assessment *"again"*.

32. However, putting such problematic matters of drafting to one side, the Association considers that the section conflicts with the *WIM*'s section 3 *"System Objectives"* of providing a *"workers Compensation system"* which is *"fair"* and one which provides payment for *"permanent impairment"*.

33. The unfairness is illustrated by the common scenario of a worker subsequently developing a further degree of permanent impairment as a result of the injury, after an assessment has been made by an AMS. For example, a worker with a lumbar spine disc protrusion might have been assessed at 12%. Some years later the disc may completely collapse and produce the need for a lumbar spinal fusion to be performed - which typically increases the WPI resulting from the injury to 24%. The inability of the worker to have a second assessment made by an AMS means that the earlier certificate continues to conclusively determine the degree of impairment. Even if everyone agrees the impairment was now 24%, the legislation continues to provide that it is only 12%. This is an absurdity. It means that an injury which will put manual workers out of work is treated as a relatively minor injury, with very limited support, when the reality requires ongoing support and the availability of a common law remedy. This position is unprincipled and unfair.

34. Under the current regime the above outcome would prevent the worker from having any entitlement to medical expenses five years after he or she ceased to be entitled to weekly compensation. Thus, in this not uncommon scenario, the Scheme operates so that a person who has an accepted 24% whole person impairment is not entitled to any support.

35. It is self-evident that the above result is not *"fair"*. It also prevents appropriate payment for the overall *"permanent impairment"* and medical expenses. As such, section 322A is preventing *"System Objectives"* from being attained. It is also potentially productive of absurdity.

36. It is the Association's view that section 322A should be removed from the legislation.

Section 38

37. Some workers have a potential entitlement to weekly payments after 130 weeks have passed. Such entitlements arise from section 38 of the *WCA 1987* but for weekly benefits to be payable the worker has to be:

"assessed by the insurer as having no current work capacity" (or)

"assessed by the insurer as having current work capacity" (and is working for at least 15 hours per week) and the workers inability to work more *"is assessed by the insurer as being ... likely to continue indefinitely"*

38. The potential entitlement is completely contingent on the insurer making an assessment or assessments - which are favourable to the worker. The drafting of this is misconceived. An important statutory entitlement for a worker should not be contingent on the administrative whims of an insurer. Section 38 should be redrafted to make the benefit payable if the underlying factual matters exist (no or limited work capacity etc) rather than it resting on the insurer's opinion.

Helping workers find alternative lighter work

39. As noted above, an employer's premium can significantly increase if a claim is made. Employers regard workers who have a disability as being at a much higher risk of making a claim for workers compensation. It has become standard practice for job application forms in NSW to contain questions about past workers compensation claims. As such, it is near impossible for an incapacitated worker to obtain a new lighter job if they truthfully disclose their condition.

40. The approach of various administrators to this problem has been to periodically create schemes providing subsidies or protection against premium increases if a worker with a disability is employed. The practical experience of our members is that most workers employed under such schemes have been promptly dismissed once the subsidy or protection comes to an end.

41. A practical way of reducing the prejudice of employers is to completely remove "Experience Adjustments" from premium calculations. If this would result in the pool of premium income for particular industries being too low, the basic percentage tariff for that industry can be increased. Employers dislike the uncertainty created by "Experience Adjustments" and it is understood they would prefer the certainty of known premium costs - which is what they had between 1926 and 1987. Predictability is important to entrepreneurs. Unpredictable insurance costs discourage them from investing in employment generating businesses in NSW.

42. The related issue of encouraging employers to have safer work places is much better achieved by prosecuting those who fail to take reasonable steps to have safe places of work. As workers compensation is a no-fault benefit, many employers are currently being penalised by "Experience Adjustments" for industrial accidents they actually had no control over.

Broader policy considerations

43. The practical reality of the 2012 Amendments has been to significantly limit the medical expenses and income support payments made by NSW employers to employees injured in carrying out their business activities. The result is that the longer term medical expenses and income support payments are now being paid by the taxpayers of the Commonwealth (through Medicare and Centrelink payments) and the taxpayers of NSW (through public hospital payments).

44. Whether this represents good public policy has not been debated publicly. Conservative economic theory generally espouses that the social costs of an activity should be borne by the organisations

which create the costs. Modern western economies generally have workers compensation systems which impose the costs of caring for injured and disabled employees on employers through compulsory insurance premiums.

The entitlement to damages

45. If a worker achieves the relevant threshold of 15% WPI, they may sue their employer for damages as a result of negligence. However, those damages are limited to economic loss. Other claims, such as public liability claims, see injured persons entitled to other heads of damage, including non-economic loss (pain and suffering); medical treatment; and domestic assistance. The oddity can be seen when one considers that substantially higher damages could potentially be obtained if a person tripped and fell on a footpath, yet if they were performing work (an activity with high social utility) they would be entitled to considerably less. The policy behind this situation is unclear.

D. Access to Independent Legal Advice

The solicitor and client relationship

46. The just and efficient operation of the Scheme is dependent upon access to expert independent legal advice. Undermining the solicitor and client relationship, through for example informing the injured that they can navigate the system alone, results in unjust outcomes, as is presently the case in claims under the *Motor Accident Injuries Act 2017* (NSW). This has been demonstrated in the pitifully low claims costs of that scheme to date, compared to actuarial predictions.

47. Any compensation scheme that requires a vulnerable individual, suffering an injury and the stress and uncertainty which comes with it, to act on their own in an adversarial system against an insurance company is unfair.

48. Any instance of an injured person abandoning legitimate rights should be seen as undesirable and avoidable. That is an ever present risk where claimants are self-represented. The Association does not accept that any form of "legal assistance" provided by a regulator is an acceptable alternative to independent legal advice. The regulator has no place permitting or encouraging a system where people are told that they do not need a lawyer.

49. No such restriction is placed on an insurer. The Personal Injuries Commission Bill 2020 (NSW) (**PIC Bill**) provides that an insurer may not be given leave to have legal representation where a worker is self-represented, however, written submissions prepared by a lawyer can be relied upon. That is inherently unfair and it will place an added burden on the Personal Injuries Commission (**PIC**) when dealing with unrepresented claimants. Self-representation in workers compensation claims has always been extremely uncommon. Given the complexities of the legislation, it is essential for the efficient operation of the proposed PIC that legal practitioners continue to be involved in these disputes.

E. Parliamentary scrutiny of substantive amendments to the legislation

50. The Association has consistently raised concerns over the use of Henry VIII clauses in NSW, including most recently in its submission to the Legislative Council Regulation Committee's inquiry into the making of delegated legislation in NSW.[3] These clauses allow key matters to be provided for in subsequent regulations rather than in the substantive drafting of a bill, circumventing the ordinary process of parliamentary scrutiny and debate. The Association considers that wherever possible, Parliament should avoid a regulation-based approach and ensure substantive matters are dealt with in principal legislation.

51. The Scheme and the *Motor Accidents Injuries Act 2017* (NSW) illustrate the vast reach of Henry VIII clauses and their unprincipled use in NSW legislation. The Association has consistently said that it is undesirable that such significant issues be dealt with by regulation, rather than included in a substantive bill so there can be proper consideration and debate by the NSW Parliament. The High Court has noted the use of regulations to deal with substantive issues, although within the legislative power of the NSW Parliament, has attracted criticism "for good reason".[4]

52. The separation of powers doctrine provides important checks and balances on the three arms of government in NSW. The Legislature serves a critical role in publicly scrutinising and testing laws proposed by the Executive. When the Legislature delegates its law-making function to the Executive, including through the use of shell legislation and Henry VIII clauses, the rules created are not subject to the same oversight and are therefore open to the risk of overreach, whether deliberate or unintentional, and undermine public confidence.

53. There may be rare instances where delegated legislation may be advantageous,[5] such as when the law deals with rapidly changing or uncertain situations and requires flexibility and responsiveness that ordinary Parliamentary processes cannot provide. However, the Association considers these powers should only be used as a last resort and regulations replaced at the earliest opportunity with legislation considered and passed by the Parliament.

54. Accordingly, any further change to the Scheme should be achieved through primary legislation, not secondary legislation. If exigencies do arise that require a response by regulation, appropriate safeguards must be in place to ensure that regulation does not impermissibly erode human rights, is still subject to appropriate scrutiny and contains sunset clauses to ensure repeal at the earliest possible opportunity.

---

3 See <https://nswbar.asn.au/uploads/pdf-documents/submissions/0008_New_South_Wales_Bar_Association_Regulation_inquiry.pdf>.

4 *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1, [31] (French CJ, Kiefel and Keane JJ).

5 D Pearce and S Argument, *Delegated Legislation in Australia*, (2017, 5th ed) 6; see also D Hamer, *Can Responsible Government Survive In Australia?*, Department of the Senate (2004) 303.

F. Costs

55. The present situation with legal costs in NSW concerning workers compensation is complex.

56. The legal costs of workers in the Workers Compensation Commission are paid through a legal aid system known as Independent Legal Assistance and Review Service (**ILARS**), which is administered by the Workers Compensation Independent Review Office (**WIRO**), the Independent Review Officer. ILARS fees are based on certain schedules outlining these costs. These have been revised a number of times and were in part originally based on Schedule 6 of the Workers Compensation Regulation 2010, which now resides in the Workers Compensation Regulation 2016. These also pay for some additional disbursements such as counsel's fees, which are normally paid at rate of $1,600 exclusive of GST for counsel to appear at a typical hearing. Additional fees are paid to counsel for longer hearings.

57. The legal costs of employers/scheme agents in the Workers Compensation Commission are paid by a strict application of the Schedule 6 items. They are not paid any disbursements for counsel's fees in most matters in the Workers Compensation Commission. Thus, if the solicitors form the view that counsel is required to properly protect the Scheme's interests, they have to pay the counsel's fees from within their Schedule 6 fixed fee. The convention is that the brief fee is $1,150 exclusive of GST. If there are subsequent hearing days no further scale costs are payable because Schedule 6 does not provide for this eventuality. Any fees payable for counsel for appearing at second and subsequent days are negotiated between the counsel and the solicitor. If a hearing is particularly protracted, the situation arises where the professional fees being paid are unlikely to cover the practitioners' overheads. This bizarre situation exists in contrast with the *Motor Accidents Compensation Act 1999* (NSW) where insurers pay counsel's fees as a disbursement.

58. The legal costs of workers in work injury damages matters are usually paid in accordance with solicitor/client cost agreements made in accordance with the *Legal Profession Uniform Law* (NSW) and its predecessor the *Legal Profession Act 2004* (NSW). Schedule 7 of the Workers Compensation Regulation 2016 can be relevant to whether and to what extent any party/party costs are recovered.

59. The legal costs of employers/scheme agents in work injury damages matters are understood by the Association to be paid by a strict application of the Schedule 7 Workers Compensation Regulation 2016 items. The monetary amounts in Schedules 6 and 7 have only been revised once, back in 2012. The costs of providing legal services have increased significantly over the last eight years.

60. The costs paid with respect to the legal services provided to represent employer/ scheme agents in the Workers Compensation Commission have actually decreased. This is because Schedule 6 is designed to pay some increased amounts for more complex matters. However, for such increases to be payable, the Workers Compensation Commission has to certify "the matter as complex" and specify a percentage increase in the costs. As the Workers Compensation Commission (in most matters since the 2012 Amendments) no longer has any power to make any orders relating to costs, there is no way to certify the increase that Schedule 6 still contemplates. Thus, the increases are illusory.

61. In the past, the solicitors for employers/scheme agents would be paid some additional level of costs for complex matters. Since the 2012 Amendments were made, they have received no additional costs for more complex matters. Therefore, they are essentially now paid less.

62. It is not realistic to expect that employers/scheme agents will continue to obtain appropriate legal representation when the costs of practising as a lawyer are increasing and the fees being paid for the work are decreasing. What is now happening is that the quality of the defences being mounted to claims is deteriorating. This means that certain claims now cost the Scheme more. The Scheme will be more sustainable if competent and experienced lawyers can afford to spend their time doing this work.

63. Schedules 6 and 7, if they are retained, need to be amended to increase the stipulated fees. In addition, to ensure these amounts are sensibly increased to permit further increases in complex and longer running matters, the Workers Compensation Commission should have power returned to it to permit what were known as uplifts for complexity. One possible solution would be to amend the legislation to provide that the Registrar, Commission or Presidential Member can certify such matters for the purposes of Schedule 6 notwithstanding the terms of section 341(2) of the *WIM*.

64. As discussed above, the interests of employers and the scheme are only assisted by the appearance of counsel in Workers Compensation Commission hearings if respondent's solicitors pay part of their permitted schedule 6 fee to the counsel concerned. There has to be a practical limit on how long this practice can continue. If it is desired that employers and the Scheme continue to have the benefit of counsel appearing for them in appropriate matters, the regime of costs should be changed to also permit the payment of counsel's fees as a disbursement.

65. Legal practitioners acting for employers/scheme agents for Work Injury Damages claims pursuant to the old Schedule 7 are still confronted with the anomalous situation where more costs are paid in accordance with the size of the verdict or settlement. The assumption is that the amount of work required broadly corresponds with the size of the verdict or settlement. This completely ignores the reality that additional work on the part of a defendant's legal representatives can reduce the size of the verdict or settlement.

66. Such costs should be paid on a different basis in accordance with the amount of work required to properly represent the employer/scheme agent. This is what presently occurs with matters involving the defence of damages claims by coal miners. There is no reason why it cannot be done for other employers.[6]

67. The ILARS legal aid system provided through WIRO appears to be generally satisfactory with respect to workers bringing proceedings in the Workers Compensation Commission.

[6] For an example of this sort of regime, see Schedule 2 of the Legal Profession Uniform Law Application Regulation 2015.

G. Government proposal to create a Personal Injury Commission

68. The 2018 Standing Committee on Law and Justice *Review of the Workers Compensation Scheme* recommended consolidating "the workers compensation scheme and CTP insurance scheme dispute resolution systems into a single personal injury tribunal, by expanding the jurisdiction of the Workers Compensation Commission, but retaining two streams of expertise". The Standing Committee qualified the recommendation with several significant conditions that the consolidated Commission:

- be independent and judicial;
- have statutorily appointed presiding officers;
- provide a judicial appeal mechanism;
- publish its decisions; and
- allow claimants to have access to legal representation.

69. The PIC Bill was introduced and passed in the NSW Legislative Assembly in June 2020.

70. The PIC Bill is procedural in nature - there is no change to substantive rights. If enacted, the PIC will operate from 1 December 2020. It will have jurisdiction over workers compensation and motor accident claims which will operate in separate streams generally maintaining practice and procedure presently in place but formalising them within the PIC's structure. The Association raises the following considerations in relation to the proposed PIC.

Legal fees

71. Claimants will not be able to access to justice in the PIC unless reasonable, adequate remuneration is provided to permit lawyers to undertake the work.

72. The *Motor Accident Injuries Act 2017* (NSW) is already failing to deliver a fair system for motor accident victims, in part because of the lack of provision for legal fees sufficient to permit lawyers to do the work necessary.

73. Lawyers are paid $1,600 for all work performed in relation to a DRS dispute for statutory benefits. That was a result of actuarial assumptions about the number of claims and the number of disputes, both of which have proved to be grossly inaccurate. Ernst & Young assumed that there would be $330 million incurred by way of legal and related costs under the Motor Accidents Scheme. However, for the past 12 months, costs have only amounted to a total of $20 million, over 75% of which has been incurred in insurance companies' investigation and legal expenses. Thus, about 1.5% of the amount the Motor Accidents Scheme designers assumed would be spent on legal expenses has been spent on claimant legal expenses. The obvious imbalance between legally resourced insurers and unrepresented claimants compounds the impact of a general, entirely understandable lack of public knowledge as to potential rights, both substantive and procedural, and the confusion that arises from the complexity of the Motor Accidents Scheme.

74. Only 23% of claimants have legal representation. The Government with the assistance of insurers have destroyed the solicitor and client relationship, leaving people to inform themselves as to their legal rights in an area of law of unequalled complexity.

(i) There has been no genuine effort to educate injured claimants about their legal rights or even to inform them of the possibility of their claim being handled by a lawyer.

75. The Motor Accident Division of the PIC gives the impression of access to an independent decision maker for the resolution of disputes when in fact the insurance companies will have had multiple opportunities to reject claims through initial decisions and internal review before the PIC has jurisdiction to resolve a dispute. Most people will have given up, often ignorant of their potential rights. Assuming that a claimant happens to think of engaging a lawyer, there is then a serious question as to whether any lawyer can represent her or him without losing money in the process. Anecdotal evidence suggests that where claimants have been represented, the lawyers have spent more than they have been paid in doing so.

76. SIRA is not publishing any guidance as to how an unrepresented person should calculate their entitlement to damages.

77. The following table provides a current summary of cost of claims for the past 12 months compared with assumptions:

	ACTUAL COST FOR PAST 12 MONTHS	2017 ASSUMPTION	ASSUMPTION ADJUSTED FOR REDUCTION IN PREMIUM FROM 551 TO 487
Loss of earnings	$113 million	$490 million	$431 million
Non-economic loss	$11 million	$235 million	$206 million
Treatment and care	$127 million	$280 million	$229 million
Total claim expenses	$20 million	$330 million	$290 million

Independence from the regulator

78. The present Workers Compensation Commission is an independent Tribunal. The creation of a PIC will not substantially alter the current arrangements for resolution of legal disputes and it will formalise current arrangements for medical assessments.

79. The motor accident dispute system is currently administered by the regulator, SIRA. The creation of a Motor Accident Division in the new Personal Injury Commission is intended to provide for dispute resolution which is independent of the regulator.

80. As presently drafted, the PIC Bill provides for the regulator to have the following involvement in the PIC:

a. Under clause 19(3)(c) SIRA has been allocated two positions on the PIC Rules Committee, with the President of the PIC having power to appoint two additional committee members. This leaves at least a theoretical potential for there to be four representatives of the regulator, or representatives primarily concerned with the regulator's interests, on the Rules Committee;

b. Under clause 37(2) the PIC is to have regard to any relevant material prepared by the Authority in relation to training or "information"; and

c. Under clause 47, the Authority has a right to be heard in any proceedings before the PIC and may apply for any order for which any party may apply in those proceedings.

81. As a result, the regulator can be a party to proceedings in the PIC whilst exercising a role with respect to training and supervision and, most importantly, being involved in the running of the PIC through the Rules Committee.

82. The regulator's power to intervene in proceedings has existed for many years. The current provision is section 106 of the *Workplace Injury Management Act 1998* (NSW).

83. The Workers Compensation Commission Rules are presently made by ministerial order (section 364 of the *WIM*) - they are not a statutory rule for the purposes of the *Interpretation Act 1987* (NSW). The current workers compensation legislation does not provide for a Rules Committee. The PIC Rules will be Rules of Court within the meaning of section 21 of the *Interpretation Act 1987* (NSW). This means that the rules will not necessarily be subject to any parliamentary debate before they come into effect.

(ii) The Association is opposed to SIRA's inclusion on the Rules Committee because it creates a perceived, if not actual, conflict of interest given SIRA can be a party to any proceedings in the PIC. The inclusion of SIRA representatives on the Rules Committee will undermine at least the appearance of the independence of the PIC. The appearance of a conflict can be just as damaging an actual conflict in terms of undermining public confidence in the integrity of the system and the administration of justice.

Federal jurisdiction

84. In relation to the rules and the exercise of Federal jurisdiction (Division 3.2), the rules in the first case and regulations in the latter case do not accompany the legislation but will be created at a later date. The Association has consistently objected to this method of drafting and its undesirability in the context of the conferral of potentially contentious jurisdiction is heightened.

Appointment of non-lawyers

85. Clauses 10(3)(b) and 4(b) give the Minister power to appoint principal members, senior members and members to the Commission if the person "has the qualifications, skills or experience the Minister determines as appropriate for the office".

86. The provision has obvious potential to undermine independence and compromise the quality of decision making being sought by the establishment of the PIC.

Other concerns

87. The Association holds additional concerns regarding several aspects of the PIC Bill.

88. Clause 31(2) provides that:

> The President may give directions as to the members who are to constitute the Commission for the purposes of any particular proceedings.

In addition, clause 33(6) provides that:

> The President may remove a decision-maker from office at any time.

89. These provisions could affect the independence of medical Assessors and merit reviewers.

90. Clause 36 provides that decision-makers are, in the exercise of their functions, subject to the general control and direction of the President (36(1)) but the independence of those decision-makers from interference by the Commission (or a member), the Authority or any Public Service employee is preserved under clause 36(3).

91. The Association is concerned about encroachment upon the independence of decision-makers through conferring power on the President to remove them and to exercise general direction and control over the exercise of their functions.

92. Clause 33(6) is a very broad provision providing for the President to remove a decision-maker from office "at any time". That power could be used to remove decision-makers who were seen to fall outside of particular norms and encroaches on their independence in a true sense.

93. The opaque assessment process already involved in medical assessment cannot be permitted to determine substantive rights by narrowing the range of legitimate professional views which may be applied in the medical assessment process.

94. Division 5.4 (Conduct of Proceedings) includes the following:

> 52(1) Proceedings need not be conducted by formal Hearing and may be conducted by way of a conference between the parties, including a conference at which the parties (or some of them) participate by telephone, closed-circuit television or other means.

95. The Association considers that the right of a claimant to be heard in person should be protected in the legislation. Further, clause 52(2) provides that:

> Subject to any procedural directions, the Commission may hold a conference with all relevant parties in attendance and with relevant experts in attendance, or a separate conference in private with any of them.

96. The Association submits that a claimant and the legal representatives for the parties should be present for the whole of any proceedings. Conduct of any part of the proceedings in the absence

of any other party would readily give rise to perceptions of bias, predetermination and impinge upon the transparency of the claim adjudication process.

97. In addition, clause 52(3) provides that:

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

This provision should be subject to the right of the parties to be heard.

98. Otherwise the PIC is an improvement on the current systems for both workers compensation and motor accident claims.

Conclusion

99. The Association would be pleased to assist the Committee with any questions it may have, through oral or further written submissions. Please contact the Association's Director of Policy and Public Affairs, Ms Elizabeth Pearson, at first instance via epearson@nswbar.asn.au if you would like any further information or to discuss this submission.

Annexure I
History of the Workers Compensation Scheme

100. Compulsory workers compensation insurance for employers was introduced in NSW by the *WCA 1926*. This Act replaced an earlier scheme limited to certain dangerous occupations.

101. Initially the insurance industry was reluctant to issue policies, as it was thought the business might be unprofitable. This led the then Lang Labor Government to create the Government Insurance Office of NSW to ensure policies were available. As it transpired the business was attractive and various private insurers became active in the market along with the GIO.

102. The *WCA 1926* also created a body known as the Workers' Compensation Commission of NSW (**the First WCC**). The First WCC issued licenses to suitable insurers, which authorised them to issue standard policies. It was the body that determined disputes about a worker's entitlements. It also performed other functions, such as administering a scheme to pay benefits when employers were uninsured.

103. The premium rates were set by an Insurance Premiums Committee, comprised of the Chairman of the First WCC and four individuals who variously represented insurers, government, employers and workers. The rates were a set percentage of the wages paid to workers in certain categories of employment. Clerical employees had the lowest premium rate. More dangerous pursuits had higher rates. A claim did not increase the premium payable in subsequent years. Insurers were free to charge lower premiums, and at times some did.

104. The Insurance Premiums Committee endeavoured to ensure approximately 30% of the premiums collected were available to insurers to cover overheads and profit. The remaining 70% was devoted to claims. This scheme was relatively successful for a long time. For instance, in 1976-77, the cost of claims was 71.27% of premiums collected.

105. The First WCC was a lean organisation, comprising a small staff and the "members" of the Commission, including the Chairman. By 1983 there were 12 members. The members of the Commission also conducted the Commission's dispute resolution functions in a similar manner to civil proceedings in the District Court. Partly because of this the members were usually senior legal practitioners and included some Queen's Counsel.

106. In the mid 80's, to avoid perceived conflicts, it was thought appropriate to separate the dispute resolution and administrative functions of the First WCC. The dispute resolution role was given to a new Compensation Court of NSW. The members of the Commission became judges of the Court and the Chairman became the Chief Judge. The administrative functions were given to a new statutory organisation, initially called the State Compensation Board of NSW. The name of the State Compensation Board was eventually changed to the WorkCover Authority of NSW (**WorkCover**). This body also acquired certain industrial safety and regulatory roles, which had mostly previously been performed by the Department of Labour and Industry.

107. In the mid 80's two licensed NSW workers compensation insurers became insolvent. Pursuant to statutory provisions that until that time had seen little use, a pool of funds was collected from the other licensed insurers to ensure the affected employers had indemnity.

108. In 1987 the Unsworth Labor Government replaced the *WCA 1926* with the *WCA 1987*. One major change in the *WCA 1987* was to replace orthodox private insurance with statutory fund insurance managed by authorised "insurers" (who are more correctly called "Scheme Agents"). The premiums collected after 30 June 1987 were deposited in various statutory funds. The Scheme Agents were paid fees by WorkCover, for collecting the premiums and managing claims. The main rationale for this system was to remove the risk of an insurer becoming insolvent. The *WCA 1987* also introduced more complex premium calculations which included potentially significant increases in an employer's premium in the event of claims being made. These are called "Experience Adjustments". The underlying system of setting premiums based on job categories continued.

109. Since 1987 the Scheme has followed some strange paths. One illustration of its confused state have been the provisions surrounding overall lump sum ("redemption" or "commutation") settlements. In practical terms these were abolished, reintroduced, then mostly abolished again.

110. Over the same period the legislation has become absurdly complex. Before 1987 there was one Act with 72 sections. Currently there are two main Acts with hundreds of sections. Numerous provisions are now duplicated and some even contradict other legislative provisions. The situation is made even more confusing because of various recent retrospective provisions, complex transitional provisions and "Guidelines" now issued by SIRA - some of which have statutory effect.

111. Over the same time the staff numbers of the administrative organisations grew significantly. For example, in 2001 WorkCover had 856 staff. By 2015 it had 2,470 which reflected a 289% increase over the 14 years to 2015.

112. In the late 90's, a plan to revert to traditional insurance, in lieu of the managed statutory fund system, was mooted and then put on indefinite hold.

113. By 2001, the Carr Labor Government was receiving advice through WorkCover that the scheme had a large projected future deficit and that benefits and costs needed to be reduced. In late 2001 this and other presumed concerns prompted various legislative provisions which amongst other matters:

    a. Changed the manner in which lump sum workers compensation benefits are assessed by implementing the WPI regime. The practical effect of these changes was to reduce the amounts recovered;

    b. Abolished a large proportion of potential common law damages claims by employees against their employers - by imposing a 15% WPI threshold;

c. Replaced the Compensation Court of NSW with a new Tribunal called the Workers Compensation Commission of NSW (the current Commission).

114. The projected scheme deficit initially reduced fairly quickly. In 2002 the estimated deficit was $3.2B. By 2004 it was $1.65B. Given the abolition of many common law claims and the reductions in lump sum compensation, this was possibly not that surprising. By June 2008 a surplus of $625M was being estimated. However as of 30 June 2009 the figure had reverted back to an estimated deficit of $1.48B.

115. By early 2012 a larger projected deficit prompted the O'Farrell Coalition Government to further amend the Workers Compensation Acts. The 2012 Amendments were particularly harsh and made a large number of changes, most of which had not been canvassed in the rushed and limited debate which occurred before the Amendments were made. The harshest of these changes involved:

a. Giving insurers the ability to end the payment of weekly benefits to an injured worker by making a "work capacity decision". This was an administrative decision, which could not be challenged in the Commission. Instead workers were permitted to seek a review of the work capacity decision by WorkCover (now SIRA) in its Merit Review Service. Lawyers were not permitted to be paid for assisting workers present review applications to the Merit Review Service. Hence workers had to attempt to submit the forms, required evidence and written submissions on their own - whatever their literacy or educational background;

b. Providing that most workers could also not receive any more than 130 weeks of weekly benefits (with a smaller number not been permitted to receive more than 260 weeks);

c. Providing that most workers could not even receive medical expenses one year after they ceased to be entitled to weekly benefits. The main exception to this was if a worker was 31% WPI or more and hence defined to be a *"seriously injured worker".* Medical expenses were also only payable if approved in advance by an insurer - with minor exceptions such as the first 48 hours after an injury;

d. Providing that there can only ever be one assessment of the WPI resulting from an injury - thereby preventing the assessment from being reviewed if it deteriorates in the future.

116. Within a very short period of time the scheme had a large projected surplus, which illustrated that the 2012 Amendments were unnecessarily harsh.

117. This led to some changes being made by retrospective regulations and the 2015 amendments, which very slightly changed the harshness of the 2012 Amendments by:

a. Permitting workers to have medical expenses for a period of 2 years after their weekly benefits are stopped or for 5 years if their WPI was assessed at 11% to 20%;

b. Reducing the threshold for lifetime medical cover to 21% WPI;

c. Increasing lump sum compensation for some (rarely attained) high degrees of WPI.

118. The 2015 amendments also implemented the Standing Committee's 2014 recommendation that the functions of WorkCover be divided into three separate organisations. Industrial Safety is now dealt with by "SafeWork NSW", the scheme agents are now overseen by "iCare" and policy and certain other matters are now performed by "SIRA".

119. Further changes advocated by the Standing Committee were then implemented through the *Workers Compensation Legislation Amendment Act 2018* (NSW) which:

a. Removed SIRA's Merit Review Service from having any role in dealing with disputes about "work capacity decisions";

b. Restored the jurisdiction of the WCC to generally deal with any disputes about a worker's entitlements under the *WCA 1987*;

c. Restored the ability of worker's lawyers to be paid realistic fees for assisting workers in all disputes.

120. The combined effect of the 2015 and 2018 amendments have gone some distance to ameliorating the harshness of the 2012 Amendments. However, as this submission illustrates, significant problems remain which require urgent attention.