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Dear Ms Donnelly,

Regulation of pre-injury average weekly earnings (“PIAWE”) – Discussion Paper

The Law Society is pleased to provide a submission in response to this Discussion Paper designed to inform the development of a new regulation. The regulation aims to address the concerns raised about the complexities surrounding the PIAWE calculation methodology, which may lead to delays with processing claims and weekly payments, workers being denied their proper entitlements and disputation. The Discussion Paper notes that the current PIAWE calculation may also lead to unfair or unintended consequences, resulting in a perceived inequity for a number of workers.

The Discussion Paper also notes that the calculation and application of PIAWE has been considered in a number of inquiries including the Parkes Project, established by the Workers Compensation Independent Review Office. The Law Society was represented on the Parkes Project Advisory Committee, and on the Working Group convened to support the Advisory Committee, and endorsed its approach and recommendations.

An outcome of the Parkes Project Advisory Committee was a Statement of Principles relating to 12 key issues, which received unanimous consent from Committee members. The principles 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.
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 Advisory Committee endorsed recommendations with respect to issues which arose during the inquiry in relation to PIAWE, as follows:

1. Simplify the definition and computation method of **pre-injury average weekly earnings**. As a guide, some of the features of 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 Law Society endorses these principles and the recommendations. The submission will now address the specific focus questions:

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 in a position to calculate PIAWE immediately on receipt of a notice of injury. Consideration should be given to a default rate in circumstances where PIAWE isn't readily ascertainable.

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

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

The Law Society 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 of the *Workers Compensation Act 1987* ("1987 Act"), incorporating the exceptions, removing reference to the multiple elements described in sections 44D to 44I, most particularly base rate of pay and base rate of pay exclusions and providing a single definition of 'earnings'.
2. As an alternative, the method should be varied to incorporate the rules prescribed in the 'old' section 43(1) of the 1987 Act.
3. Prescribe a single definition of 'earnings' that ensures that all payments made to a worker as a reward for their employment are included.
4. Ensure that PIAWE is calculated only once at the commencement of a claim: remove 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?

This can be achieved by ensuring that there is 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 average weekly earnings ("AWE"), in a similar way classes of worker were managed in the old section 43(1)(b).

More specifically, there is no logic in treating workers currently identified in Schedule 3 as classes 2, 3, 4, 5, 6 and 8 differently from those described in class 7.

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.

Assuming the method of calculating PIAWE is simplified and supported by a simple definition, there may be no requirement for such 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 Law Society 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.

The Law Society can find no rationale for excluding any base rate of pay exclusion from the calculation of PIAWE 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. 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. If exclusions are to be considered these should be limited to payments which are made specifically as a consequence of specific work activities only (e.g. knife allowance, "dirt money" etc).

Operational and administrative considerations

The Law Society 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 Law Society 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 the administrative burden and ensure workers are treated fairly and equitably
- improve timeliness of the calculation as to the rate of weekly payments
- provide a quick, easy and accessible means of PIAWE dispute resolution
- ensure adjustments to weekly payments apply from the date of commencement of payments and not the date of determination.

Timeliness

The regulation should provide for a simple 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.

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 to gather sufficient information from the employer or worker or both.

The Law Society submits that the following process should be embodied in the regulation or Guidelines:

- (1) On receipt of notification of an injury the insurer sends SIRA the Earnings Information Form (currently called the PIAWE form) to the employer and to the 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 this purpose (in that it does not collect all the information required to calculate PIAWE or current weekly wage rate).
- (2) Employers *must* complete and return the 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 of weekly payments' should apply.
- (7) Where the default rate is paid, the insurer must determine the AWE and notify 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 Law Society 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 *Workplace Injury Management and Workers Compensation Act 1998*) 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 Law Society 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.

Backdating of payments

In the interests 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 to our answers above.

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 to our answers to questions 1 to 7 above.

The Law Society thanks you for the opportunity to contribute to this consultation. Should you require any further information, please contact Leonora Wilson, policy lawyer for the Injury Compensation Committee on 9926 0323 or Leonora.Wilson@lawsociety.com.au.

Yours sincerely,



Gary Ulman
President