



Regulation of pre-injury average weekly earnings (PIAWE) – Discussion paper

February 2016

Disclaimer

This publication may contain information about the regulation of workers compensation in NSW. It may include some of your obligations under some of the legislation that the State Insurance Regulatory Authority administers. To ensure you comply with your legal obligations you must refer to the appropriate legislation.

Information on the latest laws can be checked by visiting the NSW legislation website legislation.nsw.gov.au

This publication does not represent a comprehensive statement of the law as it applies to particular problems or to individuals or as a substitute for legal advice. You should seek independent legal advice if you need assistance on the application of the law to your situation.

This material may be displayed, printed and reproduced without amendment for personal, in-house or non-commercial use.

©State Insurance Regulatory Authority

Contents

Introduction	2
Context and background	3
The NSW workers compensation system	3
State Insurance Regulatory Authority (SIRA)	3
Weekly payments and the 2012 legislative reform	3
Scope of reform	4
Consultation	4
Key dates	5
How to make a submission	5
Key considerations and focus questions	5
Regulatory controls	5
Varying the calculation	5
Non-pecuniary benefits	6
Base rate of pay exclusion	6
Operational and administrative considerations	6
Innovation	7
Next steps	7

Introduction

In August 2015 a range of benefit reforms were introduced to the NSW workers compensation system by the passing of the *Workers Compensation Amendment Act 2015*. The core goal of the reforms was to create a fairer, sustainable and more customer-centric workers compensation system.

The [\\$1 billion reform package](#) included three main elements: a simplified system and customer experience, enhanced benefits for injured workers and premium discounts for businesses.

The 2015 benefit reforms include a provision to vary the method by which pre-injury average weekly earnings (PIAWE) are calculated. Further, the regulation may prescribe what constitutes a non-pecuniary benefit and a base rate of pay exclusion.

The State Insurance Regulatory Authority (SIRA) is seeking feedback from stakeholders on how the new regulation should operate. This paper highlights some key considerations and presents target questions for discussion.

We encourage you to have your say and let us know how we can build a fairer, sustainable and customer focused workers compensation system.



Anthony Lean
Chief Executive – State Insurance Regulatory Authority
February 2016

Context and background

The NSW workers compensation system

The objectives of the workers compensation system are set out in section 3 of the *Workplace Injury Management and Workers Compensation Act 1998*. They are to:

- secure workers' health, safety and welfare while preventing work-related injury
- provide prompt treatment and rehabilitation to assist injured workers to return to work
- provide income and treatment payments to injured workers and their families
- provide a fair, affordable and financially viable system
- deliver an efficient and effective system.

State Insurance Regulatory Authority (SIRA)

The 2015 benefit reforms included significant changes to governance arrangements. In particular the reform dissolved the former WorkCover entity and created in its place three new entities:

- Insurance and Care NSW (icare) – insurance and care service provider
- State Insurance Regulatory Authority (SIRA) – independent insurance regulator
- SafeWork NSW – independent workplace safety regulator.

These new entities commenced on 1 September 2015.

SIRA is responsible for the regulatory functions in relation to workers compensation insurance, motor accidents compulsory third party (CTP) insurance and home building compensation. The Workers Compensation Regulation division within SIRA is responsible for workers compensation matters, including the development of policy to guide the creation of the new pre-injury average weekly earnings (PIAWE) regulation.

Weekly payments and the 2012 legislative reform

The 2012 workers compensation legislative reform introduced amendments to the calculation of weekly payments for all workers, with the exception of exempt categories (coal miners, police, fire fighters, paramedics, rescue workers and bush fire, emergency and rescue service volunteers). Entitlement to weekly compensation is now based on a worker's PIAWE and is payable under [sections 36, 37 and 38 of the *Workers Compensation Act 1987*](#) (the 1987 Act).

There are seven sections that define PIAWE and its related terms (sections 44C to 44I of the [Workers Compensation Act 1987](#)) in addition to [schedule 3](#). Generally, PIAWE is an average of ordinary earnings expressed as a weekly amount, plus any permitted overtime and shift allowance payable during the first 52 weeks. Any week where the worker did not actually work and was not on paid leave is excluded from the calculation. An overtime and shift allowance payment is permitted to be included in the calculation of PIAWE for the first 52 weeks for which payments are payable.

Following the 2012 reform, the calculation and application of PIAWE in the NSW workers compensation system has been considered in a number of inquiries and reviews. These have included the [Statutory Review of the Workers Compensation Legislation Amendment Act 2012](#), undertaken by the Centre for International Economics in June 2014; and the [Parkes Project](#) established by the Workers Compensation Independent Review Officer.

Key areas of concern that have been raised include:

- 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.

Overall, stakeholders supported the need for a simplified approach.

Scope of reform

In order to create a fairer, more sustainable and customer focused workers compensation system, the government's 2015 benefit reforms included a new provision that may:

- vary the method used to calculate PIAWE
- prescribe a benefit or class of benefits as a non-pecuniary benefit
- prescribe a payment, allowance, commission or other amount, or class of amount, as a base rate of pay exclusion.

Specifically, section 58A of the 2015 Amendment Act (which has not yet commenced) states:

Section 58A Regulations

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.*

As the regulator of workers compensation in NSW, SIRA is consulting with stakeholders to seek their views prior to developing a regulation. The 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
- 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 above criteria will underpin SIRA's design for regulating PIAWE, and should be used to guide and test regulatory options.

Consultation

Consultation on the new PIAWE regulation commences with the publication of this discussion paper and a call for public submissions (links are available on the SIRA website, former WorkCover website, Insurance Reforms website and NSW Government 'Have Your Say' website). SIRA will also directly contact selected stakeholders to invite their review and submission; however, all interested parties are welcome to review the discussion paper and make submissions.

Using the feedback generated by the discussion paper, SIRA will undertake a detailed analysis of stakeholder recommendations. This process may include further stakeholder forums and/or discussion.

In April 2016 SIRA will publish a summary of the feedback received through the submission process. The publication of the summary paper will mark the end of the dedicated consultation process; however, SIRA will continue to engage with stakeholders as part of any future development, implementation and evaluation activities.

Key dates

Consultation activity	Dates
Discussion paper published on the SIRA/WorkCover website and the NSW Government 'Have Your Say' websites	24 February 2016
Submissions received by SIRA	24 February 2016 – 5 April 2016
SIRA reviews submissions and prepares summary of feedback	6 April 2016 – 26 April 2016
Submissions summary paper published	27 April 2016

How to make a submission

SIRA welcomes comments and feedback from all stakeholders. The preferred format for providing a response to this discussion paper is via a written submission.

Written submissions can be made using the online form on our website or emailed to SIRA at 2015benefitsreform@sira.nsw.gov.au.

Written submissions may be published on the SIRA/WorkCover website. If you do not want your submission or any part of it published, you must clearly indicate this at the time of submission.

Key considerations and focus questions

The issues and questions set out in this section are intended to prompt and focus discussion – they are not intended to be exhaustive or otherwise restrict commentary on broader or related matters.

Regulatory controls

The 2015 Amendment Act provides for three main regulatory controls:

- varying the calculation of PIAWE
- prescribing a benefit or class of benefits as a non-pecuniary benefit
- prescribing a payment, allowance, commission or other amount, or class of amount, as a base rate of pay exclusion.

Varying the calculation

The regulation may vary the method for calculating PIAWE for a worker or class of workers. For example, this may involve a varied methodology in determining the relevant period or the calculation of ordinary earnings and/or overtime and shift allowances.

Further, the variation may be extended to all workers, or to a particular class of workers such as part time, seasonal, or workers who work for two or more employers.

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

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

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?

Non-pecuniary benefits

The monetary value of non-pecuniary benefits is a component of a worker's ordinary earnings. The legislation currently provides that the following are non-pecuniary benefits:

- residential accommodation
- use of a motor vehicle
- health insurance
- education fees.

Further, any amount that the employer is required to apply or deal with under the worker's terms of employment in accordance with the worker's instructions is also a non-pecuniary benefit. However, this does not include any amount that is considered to be a base rate of pay exclusion.

The sum of the value of each non-pecuniary benefit, if any, is also a 'deductible amount' which is a factor used to determine the rate of weekly payments in accordance with sections 36, 37 and 38 of the 1987 Act.

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

Base rate of pay exclusion

Base rate of pay is the rate of pay payable to a worker for their ordinary hours of work but does not include 'base rate of pay exclusions' The legislation currently provides that the following are base rate of pay exclusions:

- incentive based payments or bonuses
- loadings
- monetary allowances
- piece rates or commissions
- overtime or shift allowances, or
- any other separately identifiable amount.

Any amount that is excluded from base rate of pay as a base rate of pay exclusion is not a non-pecuniary benefit.

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.

Operational and administrative considerations

There are a range of operational and administrative matters that will need to be considered with the development of any new PIAWE regulations, including the need to:

- minimise the potential for delays in the calculation of PIAWE
- minimise the potential for disputes regarding the calculation of PIAWE
- avoid any unnecessary complexity or administrative burden
- ensure that workers or classes of workers are not adversely impacted.

FOCUS QUESTION 6: What are the important operational and administrative matters that should be considered when designing any new PIAWE regulation?

Innovation

In keeping with the government's focus on innovation as a means of delivering improved outcomes, stakeholders are encouraged to propose ideas that might complement any regulatory reforms. For example, education and awareness initiatives that might improve the consistency and transparency of PIAWE calculations, thereby reducing potential miscalculation. Additionally, further consultation may be required with relevant industry experts to reach a general understanding of what allowances are to be included or excluded.

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

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?

Next steps

SIRA will review all submissions and prepare a summary of the feedback received. The feedback summary will be published on the SIRA/WorkCover website.

The information provided through this consultation process will be used to develop detailed regulatory options for consideration by government.

Any questions or enquiries in relation to this discussion paper should be emailed to 2015benefitsreform@sira.nsw.gov.au

