

SIRA

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# PIAWE post-implementation review report

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# 1. Executive summary

The State Insurance Regulatory Authority has undertaken a post-implementation review (PIR) of the pre-injury average weekly earnings (PIAWE) amendments that commenced in October 2019.

The purpose of the post-implementation review was to examine the impact of the reforms to determine whether the amendments met the intended objectives of simplicity, transparency, fairness and equity.

The review conducted throughout 2022 used a mixed-methods approach involving a combination of quantitative and qualitative data sources, including expert input and guidance from the PIAWE Reference Group (consisting of industry experts in PIAWE matters).

The findings of the review indicated that the PIAWE amendments have delivered a net benefit to workers, employers and insurers in delivering a simpler, fairer and more transparent approach to determining a worker's pre-injury average weekly earnings compared to the previous 2012 PIAWE provisions.

Despite an overall improvement from the previous methodology, enduring PIAWE challenges still exist for workers, employers and insurers. They include:

- delays in calculating PIAWE mainly due to difficulties in gathering sufficient information
- low uptake of PIAWE agreements
- the application of a simple and fair PIAWE for workers with uncommon work arrangements such as short-term workers, workers with irregular work patterns in the relevant earning period, and workers compensation payments during a worker's relevant earning period.

## 1.1. Summary of recommendations

Review finding: PIAWE Reference Group submissions supported the removal of PIAWE from the definition of a work capacity decision to allow for greater flexibility to change PIAWE when new information is received. A further concern was made about the notice periods associated with work capacity decisions. An alternate viewpoint outlined that PIAWE is a critical determinant of the entitlement to weekly payments and the existing dispute process is robust and well-established.

**Recommendation 1.** Provide advice to government on removing PIAWE from the definition of a work capacity decision ensuring the rights to review a PIAWE decision are maintained.

Review finding: Several decisions at the Personal Injury Commission show that the current PIAWE provisions do not provide for a fair and consistent calculation methodology for workers who received workers compensation payments during the 52 weeks prior to their subsequent injury.

**Recommendation 2.** Consider a fair and consistent subsequent injury PIAWE solution for workers who received workers compensation payments during the relevant earning period.

Review finding: The icare data, survey, interviews and file reviews demonstrated that there is a relatively low uptake of PIAWE agreements. Submissions to the PIAWE Reference Group elaborated that timeframes are difficult to adhere to, and there was a disinterest on behalf of some employers. There was also some misunderstanding of the requirements.

**Recommendation 3.** Investigate the difficulties in reaching a PIAWE agreement, and where appropriate, commence work to simplify and streamline the process including updating associated forms and guidance.

Review finding: Various review activity findings, including from the survey, interviews and written submissions, identified the need for clarification or additional information in the SIRA online guidance.

**Recommendation 4.** SIRA to review and consider changes to SIRA guidance and information based on PIR activity findings.

Review finding: The interviews and survey findings illustrated the importance of insurer communication with workers and employers.

**Recommendation 5.** Insurers to review the PIR findings and consider improvements to processes and procedures.

## 2. Introduction

The State Insurance Regulatory Authority (SIRA) is responsible for regulating and administering workers compensation, motor accidents compulsory third party insurance and home building compensation insurance in New South Wales.

Where a worker is entitled to receive weekly compensation payments due to incapacity as a result of their work-related injury, these payments are calculated by the insurer using the worker's PIAWE. Weekly payments represented around \$1.95 billion, or around 43 per cent of all workers compensation payments in 2021-2022.

Changes to the way PIAWE is calculated in the NSW workers compensation scheme commenced in October 2019. SIRA has undertaken a post-implementation review of the reforms to assess whether the new methodology is operating effectively and efficiently, whether the reforms have achieved their objectives, and to identify and address any unintended consequences or areas for improvement.

### 2.1. Background to the 2019 amendments

The legislative amendments were passed on 26 October 2018 and provided a simple and clear method of determining PIAWE across diverse working arrangements.

SIRA consulted extensively with stakeholders in the drafting of supporting Regulations. The PIAWE Reference Group was established to drive, inform and consult on the policy detail that would underpin the new PIAWE provisions. The PIAWE Reference Group consisted of key subject matter experts and representatives from important stakeholder groups (see Appendix A for a list of member organisations).

Supporting regulations and guidelines commenced on 21 October 2019 with unanimous support from the PIAWE Reference Group, following significant consultation on the practical application of the legislation via the regulation and guidelines.

The key objectives of the simplified framework were that:

- PIAWE is simpler for insurers to calculate so weekly payments are made to injured workers promptly (**Simple**)
- Workers and employers are better able to understand how PIAWE and weekly payments are calculated and paid (**Transparent**)
- The process for calculating PIAWE produces consistent and equitable income support for injured workers and can apply to a range of working arrangements (**Fair and equitable**)

It was also anticipated that achieving the above key objectives would help reduce disputes about the calculation of PIAWE.

Following commencement of the reforms in October 2019, PIAWE is now defined as the weekly average of the gross pre-injury earnings received by the worker for work in any employment in which the worker was engaged at the time of the injury<sup>1</sup>. 'Gross pre-injury earnings' are calculated over the relevant earning period, which is generally the 52-weeks prior to the date of injury, unless adjusted for specified changes in a worker's earning circumstances.

$$\frac{\text{Gross earnings}}{\text{Relevant earning period (weeks)}} = \text{PIAWE}$$

Figure 1: PIAWE is the gross earnings divided by the relevant earning period in weeks.

<sup>1</sup> Clause 2, Schedule 3 to the *Workers Compensation Act 1987* (1987 Act).

The reforms also introduced PIAWE agreements, where a worker and employer may agree to the PIAWE amount to be used, instead of the insurer making the calculation.

PIAWE is now primarily governed by [Schedule 3](#) to the *Workers Compensation Act 1987* (1987 Act) and [Part 4](#) of the *Workers Compensation Regulation 2016* (2016 Regulation).

Information and guidance on the framework is provided in SIRA's online [Claims Management Guide \(CMG\)](#), including the [PIAWE Reference Guide](#) which provides a simple breakdown of the calculation steps and components of PIAWE.

## 2.2. Purpose of the review

The purpose of the post-implementation review was to:

- Better understand how the current methodology for PIAWE is being applied in practice
- Evaluate whether the reform's desired objectives have been met, namely: simple, transparent, and fair and equitable (see the key objectives in section 2.1 above for definitions)
- Consider when and how PIAWE agreements are being used, and whether there are any barriers to using this approach to determine a worker's PIAWE
- Identify any new or enduring challenges with determining a worker's PIAWE which may inform future improvements to processes, guidance, or recommendations for changes to legislation.

The post-implementation review considered the PIAWE framework in place since the commencement of the reforms on 21 October 2019 (the current PIAWE framework).

It was not proposed that SIRA would use any of the information obtained from the review to undertake any enforcement activities. However, as would usually be expected, any identified non-compliance through the review activities would be addressed at the time.

## 2.3. Methodology of the review

The post-implementation review activities were conducted between March and November 2022. The PIAWE Reference Group was reconvened to guide and support the review.

The review involved engagement with workers, employers, insurers and those involved in reviewing PIAWE decisions who have engaged with PIAWE since the reforms commenced. A mixed-methods approach was used to conduct the review, involving a combination of quantitative and qualitative data sources to analyse the impact of the reforms (refer to detail in Table 1).

Information source	Detail
Disputes	<ul style="list-style-type: none"><li>• Analysis of 19 PIAWE matters in the Personal Injury Commission (PIC) (Workers Compensation Commission prior to 1 March 2021), and one appeal matter.</li></ul>
Survey	<ul style="list-style-type: none"><li>• Online public survey to measure the perceptions and experiences of major stakeholder groups.</li><li>• Trial survey was shared for testing with 16 participants over two weeks closing 25 March 2022. Feedback was considered and integrated prior to public release.</li><li>• Online public survey was open from 11 April to 6 May 2022.</li><li>• The survey comprised 156 respondents:<ul style="list-style-type: none"><li>— 24 workers</li><li>— 30 employers</li><li>— 71 insurers</li><li>— 31 reviewers</li></ul></li><li>• Various methods of distribution were used including insurer correspondence, the issue of two SIRA news bulletins, social media channels and assistance from icare and members of the PIAWE</li></ul>

Information source	Detail
	Reference Group to distribute the link to their staff and stakeholders, including the special issue of an IRO (Independent Review Office) Alert to publicise the PIAWE survey.
Interviews	<ul style="list-style-type: none"> <li>• SIRA conducted one-to-one phone interviews with 100 workers.</li> <li>• Interviewees were randomly chosen from relevant claims data of workers who were injured after 1 January 2022 and had at least one weekly payment.</li> <li>• Insurer breakdown: <ul style="list-style-type: none"> <li>— Nominal Insurer managed by icare – 58</li> <li>— Government self-insurers (TMF) – 17</li> <li>— Self-insurers – 25</li> </ul> </li> <li>• The phone interviews were carried out by the SIRA Workers Compensation Assist team from 29 August 2022 to 5 October 2022.</li> </ul>
File reviews	<ul style="list-style-type: none"> <li>• SIRA conducted insurer file reviews on 26 claims, focusing on the PIAWE calculations and related correspondence. Reviews were carried out over four days between June and August 2022.</li> <li>• Three insurers participated: <ul style="list-style-type: none"> <li>— Specialised insurer – Hotel Employers Mutual – 10 files</li> <li>— Government self-insurer – Transport for NSW – 6 files</li> <li>— Self-insurer – 10 files</li> </ul> </li> </ul>
Independent Review Office (IRO) complaints data	<ul style="list-style-type: none"> <li>• Analysis of the number of worker complaints and enquiries about PIAWE to the IRO from 21 October 2019 to 31 March 2022</li> </ul>
SIRA complaints and enquiries data	<ul style="list-style-type: none"> <li>• Analysis of complaints and enquiries about PIAWE to SIRA for the period 21 October 2019 to 11 March 2022</li> </ul>
Utilisation of SIRA online resources	<ul style="list-style-type: none"> <li>• Analysis of website traffic on SIRA's CMG website focusing on: <ul style="list-style-type: none"> <li>— <u>Claims Journey – Pre-injury average weekly earnings</u></li> <li>— <u>Guidance Note – GN 5.1A Calculating PIAWE</u></li> </ul> </li> </ul>
icare claims data	<ul style="list-style-type: none"> <li>• Analysis of claims data provided by icare, including data for Nominal Insurer and Treasury Managed Fund claims</li> </ul>
PIAWE Reference Group (PRG) meetings and written submissions	<ul style="list-style-type: none"> <li>• See Appendix A for a list of PIAWE PRG member organisations.</li> <li>• SIRA held four meetings with the PRG between March 2022 and November 2022. SIRA also met with PRG members separately upon request.</li> <li>• SIRA received three written submissions and one email request from PRG members.</li> </ul>

Table 1: Summary of information sources for the post-implementation review.

### 3. Findings and analysis

This section outlines the data and findings of the post-implementation review activities.

#### 3.1. Disputes

As of 1 December 2022, 19 matters (with one appeal matter) were decided in the Personal Injury Commission (and the Workers Compensation Commission, prior to 1 March 2021) relating to the current PIAWE provisions. Refer to Table 4 in Appendix B for a full list of the decisions considered and the key PIAWE provisions contemplated.

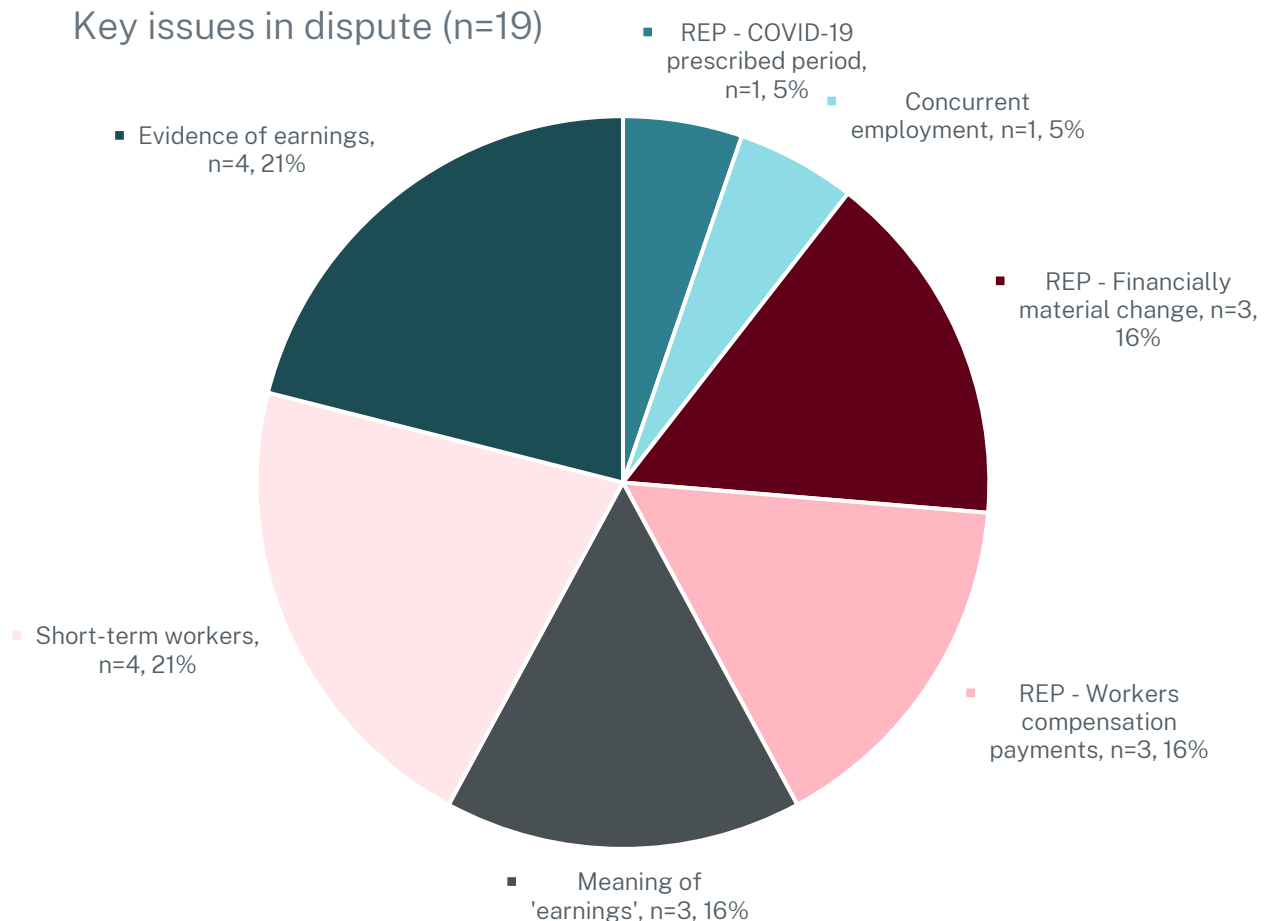


Figure 2: Key PIAWE issues in dispute in the Personal Injury Commission. Where multiple PIAWE issues were considered in a single matter, the main or overarching issue was included in the graph. (Note 'REP' refers to the relevant earning period).

Although PIAWE disputes represent a very small proportion of all Commission decisions, these decisions provide useful case scenarios and insight into interpretation and application of the current PIAWE methodology by the Commission. Key findings are summarised in Appendix B.



### 3.2. Survey

A public survey was designed to measure the perceptions and experiences of major stakeholders in the NSW workers compensation scheme. The survey had four pathways (over the same topics) for different stakeholder groups - workers, employers, insurers and people who review PIAWE calculations ('reviewers').

A total of 156 responses were recorded across the four stakeholder groups (see Figure 3). However, due to low numbers of responses compared to overall numbers in the scheme, the survey does not provide an accurate representation of the overall views but does provide a useful snapshot of the current landscape. Most employers who responded were large employers<sup>2</sup>.

The worker responses should be read together with the results from the one-on-one interviews (see section 3.3). The survey also covered questions about the utilisation of SIRA online resources (primarily the Claims Management Guide), which is discussed in section 3.7.

For further discussion and analysis of survey questions and responses, please refer to Appendix C.

### 3.3. Interviews

One-on-one phone interviews were conducted with workers to gain an understanding of their experience with PIAWE, including their understanding and access to information about PIAWE. The interview questions were modelled on the survey (see section 3.2). The interviews allowed workers to provide verbal feedback to elaborate on the reason for their answers.

SIRA's Workers Compensation Assist Team interviewed 100 workers. Although they were randomly selected, the results are not representative of the entire scheme due to the small number of workers interviewed. However, unlike the online survey participants, the workers who participated in the one-to-one interviews are less likely to have any pre-conceived view about PIAWE.

For a detailed analysis of the interview responses, please refer to Appendix D.

### 3.4. File reviews

The primary purpose of the insurer file reviews was to understand how the new PIAWE methodology is being operationalised. The file reviews highlighted issues and experiences of insurers, employers and workers in implementing the PIAWE reforms.

The reviews comprehensively examined implementation of the PIAWE methodology: please see Appendix E.

One specialised insurer and two self-insurers agreed to participate in the file reviews. A request was made by SIRA to icare to participate in the file reviews in April 2022, but icare requested a postponement until June 2022, at which point icare felt unable to participate at all due to other unrelated commitments. It is important to note that icare manages the Nominal Insurer and Treasury Managed Fund (TMF), which together comprise almost 85% of all active claims<sup>3</sup> in 2021-2022. Therefore, it was not possible to understand the full range of issues faced by NSW workers compensation insurers in obtaining relevant information in a timely manner and applying the PIAWE

Number of Survey Responses (n=156)

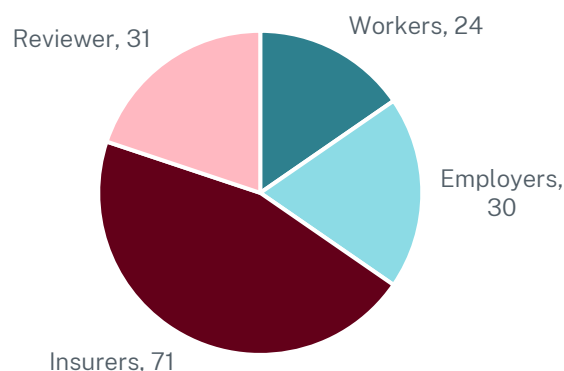


Figure 3: Number of survey responses (total 156). There were 71 responses from insurers, 31 reviewers, 30 employers and 24 workers.

<sup>2</sup> Of the 30 employer responses, 25 were large employers (200 or more employees), 4 were medium sized employers (20-199 employees), and 1 was a small employer (1-19 employees).

<sup>3</sup> An active claim is a claim that has had payments in the last three months of the reporting period.

methodology to a wide range of employment circumstances. Because of relatively low number of files reviewed (26 total), these reviews were a snapshot, rather than a representation of all issues arising from the operationalisation of the PIAWE reforms.

Note that the files were selected by the insurer for review by SIRA. All the self-insurer files were straightforward PIAWE calculations, which did not contain any adjustments to the relevant earning period, or other major considerations. In contrast, the specialised insurer chose a range of experiences with PIAWE to enable the reviewers to understand some of the challenges faced by insurers when determining PIAWE.

#### **3.4.1. General findings**

- Time taken to first determine PIAWE following the notification of injury ranged from 0 to 72 days, with a median of 5.5 days.
- Method of first PIAWE determination: An interim PIAWE was determined much more frequently for the specialised insurer (in 8 of 10 files). First and 'final' PIAWE determinations were more common for self-insurers (in 15 of 16 files). One of the self-insurers reported that they generally do not perform interim calculations, and simply review PIAWE if the worker presents new information.
- Case managers were generally quick to request PIAWE information from employers (within the first 3 days after notification in 15 of 26 files).
- All files showed that a letter was issued to the worker, which informed the worker of their PIAWE and their rights to review. However, no work capacity decision codes were recorded in any of the files.
- In the files reviewed, it appeared that PIAWE was generally calculated in accordance with the legislation, although a thorough check of each calculation was not performed by the reviewers.

#### **3.4.2. Recalculations**

For files with an interim PIAWE, the worker's PIAWE was subsequently recalculated with a 'final' determination.

In the files received, it generally took the specialised insurer between 3 and 56 days to reach the final calculation following issue of the interim PIAWE, with a median of 13.5 days. This meant that the worker was given a 'final' PIAWE between 14-58 days after date of notification, with a median of 24 days. Delays in calculating were due to difficulties for the insurer in obtaining sufficient PIAWE information to make the final determination.

In all of these cases, the insurer requested and received additional PIAWE information before being able to determine the final PIAWE. Additional information received included: complete payslips, further information about the injury, leave, work arrangements and closure of the workplace due to lockdowns.

The final recalculations resulted in a relatively even mix of a higher, the same, or lower PIAWE.

#### **3.4.3. Agreements**

One file had a PIAWE agreement between the worker and employer. The SIRA PIAWE Agreement form was used, which was approved within legislated timeframes, and appeared to be a smooth process.

In most of the files, it appeared that the case managers did not mention the option of an agreement to the worker and employer. One of the self-insurers reported they generally do not use agreements, due to their optimised workflow in access to the worker's PIAWE information, which negates the benefits of reaching an agreement.

#### **3.4.4. Overall comments**

Some of the files displayed a difficulty in obtaining sufficient PIAWE information from the employer and/or worker. For example, one file showed that the employer provided only the worker's payment summary, and did not provide any further details, despite appropriate actions and following up multiple times from the case manager.

In contrast, for the two self-insurers, case managers have direct access to payroll information, payment histories and employee profiles. This streamlines the process of obtaining relevant information to make the PIAWE calculation.

### 3.5. Independent Review Office complaints data

The Independent Review Office (IRO) manages complaints from workers relating to workers compensation matters.

SIRA analysed the number of PIAWE-related complaints to the IRO for workers who had received a minimum of one week of weekly payments between 1/4/2017 and 30/03/22 (five years).

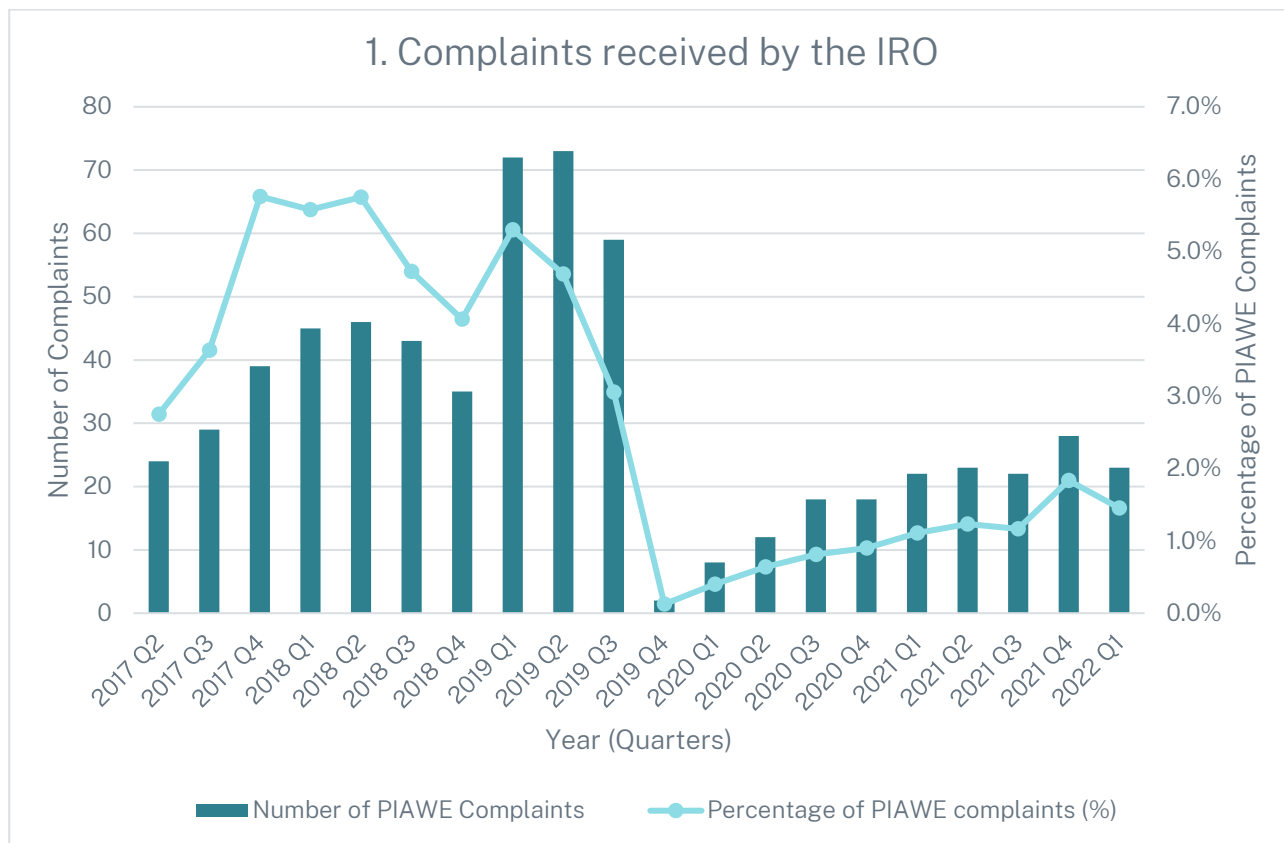


Chart 1: PIAWE-related complaints received by the Independent Review Office, shown by quarter. The line represents the percentage of PIAWE complaints of total complaints received by the IRO, and the bars represents the total number of PIAWE complaints.

The data shows a sharp decrease in both the number and proportion of PIAWE complaints to total complaints received by the IRO from 2019 Quarter 4, that is, around the time that the current PIAWE methodology commenced.

### 3.6. SIRA complaints and enquiries data

SIRA receives enquiries and complaints from employers, insurers and other stakeholders relating to workers compensation matters.

SIRA analysed enquiries and complaints between 21 October 2019 and 1 March 2022.

There were 3,508 total enquiries and complaints for the period. Of these:

- 1,126 were from workers
- 741 were from employers
- 1,641 were from third parties

There were a total of 133 enquiries and complaints relating to the amended PIAWE provisions, a summary can be found in Table 2.

Customer	Enquiry about PIAWE	Complaint about PIAWE	Total PIAWE enquiries and complaints as a percentage of all
Worker	38	23	1.74%
Employer	48	9	1.62%
Third Party	15	0	0.43%
<b>Total</b>	<b>101</b>	<b>32</b>	<b>3.79%</b>

Table 2: Summary of numbers of PIAWE enquiries and complaints received by SIRA.

Third parties included family, friends, brokers, solicitors, insurers, union representatives and an accountant.

Among enquiries and complaints relating to PIAWE from employers, common themes included:

- General enquiries about how PIAWE was calculated and how to fill in the PIAWE form
- How PIAWE is calculated for workers with more than one job, and for short-term workers
- What is included in earnings, including leave loadings and other loadings, workers compensation payments, allowances and commissions
- What constitutes a financially material change in earnings, such as a pay rise from 10 weeks ago, or incremental wage rises
- How to account for COVID impacts, such as periods of non-continuous employment, irregular income and work patterns, JobKeeper payments and COVID disaster payments.

40 of the enquiries and complaints from workers were directed to the Independent Review Office. As a result, there will be duplication in the figures in the above table (for workers) with those numbers represented in the IRO complaints data.

The SIRA complaints and enquiries data covered the period immediately after the commencement of the PIAWE amendments. The volume of complaints about PIAWE decreased over time, however there was a consistency in the volume of enquiries over the period.

### 3.7. Utilisation of SIRA online resources

SIRA analysed web traffic of PIAWE content on SIRA's Claims Management Guide, using Google Analytics. Data dating from 1 October 2019 to 15 March 2022 was received focusing on site traffic from the following two website pages:

- [Claims Journey – Pre-injury average weekly earnings](#)
- [Guidance Note – GN 5.1A Calculating PIAWE](#)

The Claims Journey page is directed at workers and outlines PIAWE and how PIAWE is calculated, and the Guidance Note page is aimed at insurers and provides detailed guidance on calculating PIAWE.

Chart 2 shows that the Guidance Note consistently saw more visits and time spent on the page when compared to the Claims Journey information. This may be due to insurers and other readers requiring more information on how PIAWE is calculated, following the 2019 reforms. The greater detail in the Guidance Note may also explain the increased traffic.

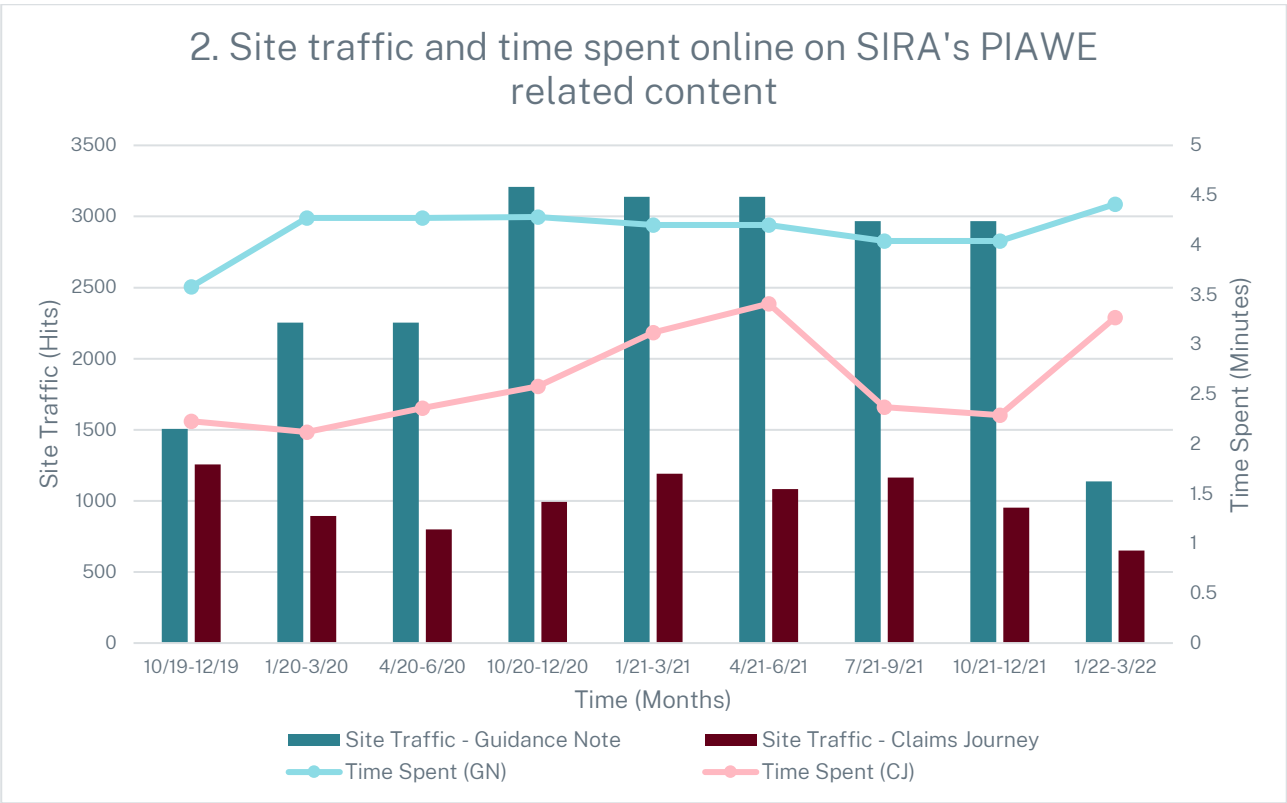


Chart 2: Site traffic and time spent online for PIAWE related content. The lines represent average time spent on the page (minutes), and the bars represent site traffic (number of hits).

The PIAWE survey also covered questions on the utilisation of SIRA resources to workers, employers, insurers and reviewers. Workers and employers were asked whether they had ever referred to the PIAWE-related content on the Claims Management Guide or on the SIRA website (Chart 3). At least half of the total number of respondents said they had not referred to the online content but those who did found the information helpful.

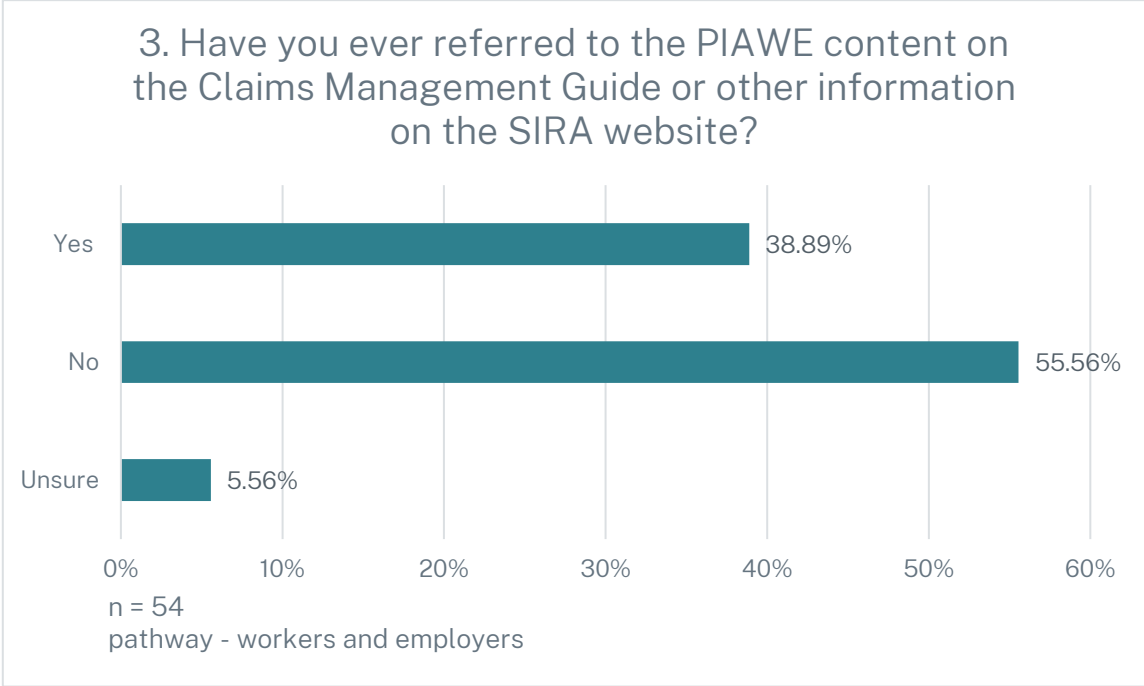


Chart 3: Access to PIAWE related content by workers and employers.

In the worker interviews, 73 workers (of 100) did not know what the Claims Management Guide was. Only 10 said 'yes', they knew, the rest either responded 'possibly' or 'can't remember'.

In contrast, two-thirds of insurers and reviewers responding to the survey had used the online content in assisting them with PIAWE calculations (Chart 4).

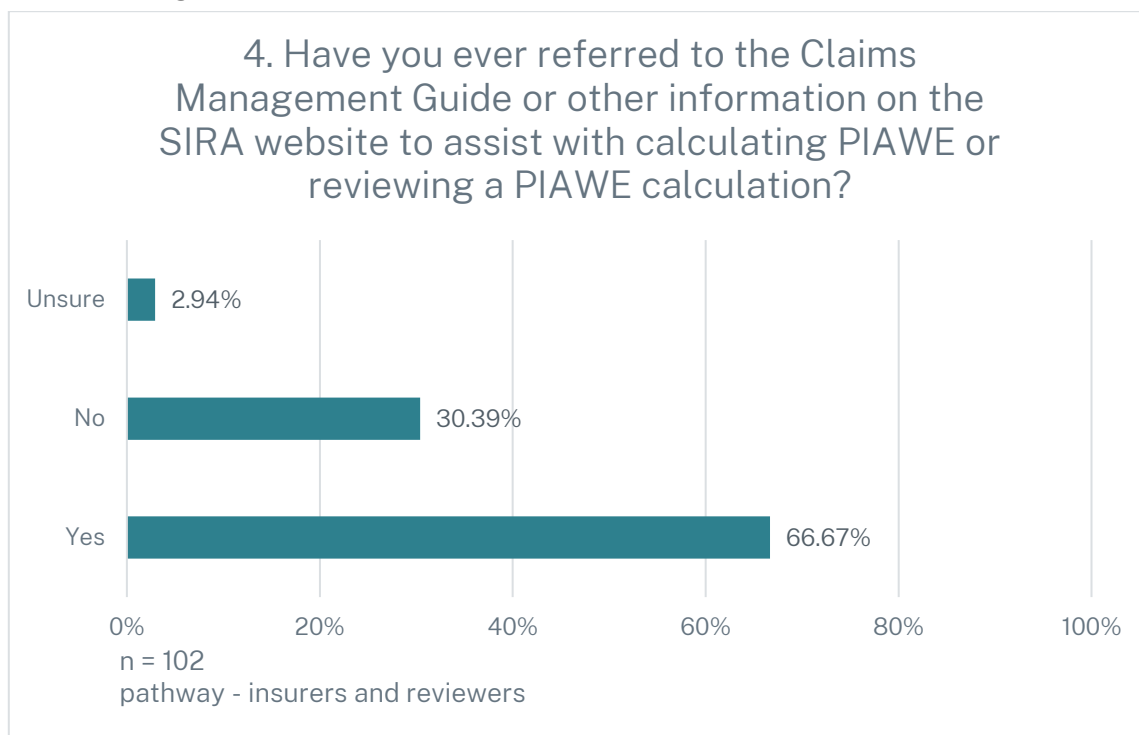


Chart 4: Insurer utilisation of the Claims Management Guide.

The low numbers for workers and employers may be due to the complexity of the information, or general lack of awareness of the resource, a finding supported by the free-text comments.

In response to an optional survey question on other information SIRA could include that would be helpful in calculating or reviewing PIAWE, insurers and reviewers primarily responded that the information is sufficient and clear. Some respondents found there was too much information available. However, other responses suggested:

- A simplified PIAWE template or calculator
- Clarification or examples of what is included as 'earnings', such as allowances and voluntary contributions to salary sacrificed amounts
- More examples of scenarios and calculations, particularly for casual employment and injured workers who are already receiving workers compensation.

### 3.8. icare claims data

icare provided data regarding PIAWE calculations and recalculations, numbers of workers who received the minimum PIAWE and maximum weekly compensation amounts and numbers of PIAWE related disputes.

icare assisted by providing their own data, as overall scheme data provided limited assistance for analysis purposes. The data compared two time periods:

1. Cohort 1 - for all workers with a least one week of weekly payments for the period 1/10/18 – 30/9/19 (12 months – prior to the PIAWE amendments) and
2. Cohort 2 - for all workers with a least one week of weekly payments for the period 1/4/21 – 31/3/22 (a 12-month period after the PIAWE amendments).

icare provided both Nominal Insurer and Treasury Managed Fund (TMF) data. QBE, Allianz and EML supplied TMF data.<sup>4</sup>

Note that cohort 1 covered a period before the COVID pandemic, and cohort 2 included the period during the COVID pandemic.

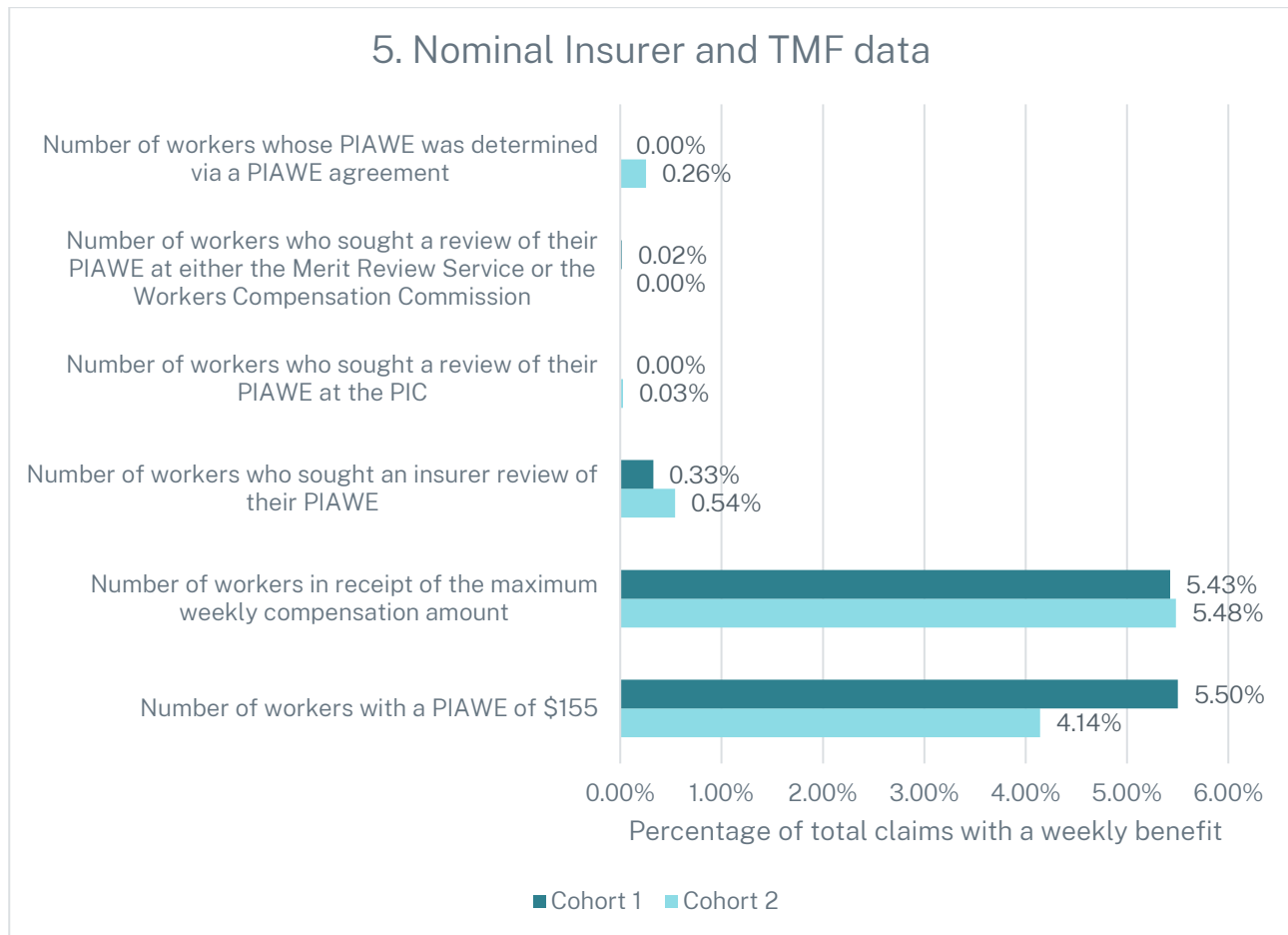


Chart 5: Comparison of icare claims data for Cohort 1 (prior to the PIAWE amendments) and Cohort 2 (after the PIAWE amendments). Percentages are calculated as a proportion of claims with at least one week of weekly payments during the period. The data, with numbers of claims, can also be viewed in Table 6 in Appendix G.

### 3.9. PIAWE Reference Group submissions

Three formal submissions were received from the PIAWE Reference Group. Consideration was also given to informal feedback from PIAWE Reference Group members during meetings and in response to submissions. The suggestions are summarised in Table 3 below. For a high-level analysis of the PIAWE Reference Group recommendations, please see Appendix H.

Suggested improvement	Reasons provided in the submissions
Remove the date of injury restriction to enable the new provisions to apply to all workers	<ul style="list-style-type: none"> <li>Allowing all injured workers to access the new PIAWE provisions, regardless of date of injury, will streamline and simplify the process for all stakeholders, and make it fairer overall for workers</li> </ul>
Remove PIAWE from the definition of a work capacity decision	<ul style="list-style-type: none"> <li>Keeping PIAWE as a work capacity decision under section 43 of the 1987 Act creates confusion</li> </ul>

<sup>4</sup> It is noted that the QBE data included numbers for minimum PIAWE, maximum weekly compensation amount and total relevant claims, and is included in the graph, however QBE data for other criteria was not obtained.



Suggested improvement	Reasons provided in the submissions
	<ul style="list-style-type: none"> <li>PIAWE relates to a period prior to the date of injury</li> <li>PIAWE does not relate to a worker's capacity for work following the injury</li> <li>An alternative view was put forward that PIAWE is related to work capacity, as PIAWE is the basis for the weekly payment amount, which is paid in accordance with a worker's capacity for work</li> </ul>
Simplify and streamline the process for reaching a PIAWE agreement, including extension of timeframes, and allowing for more flexibility in the process	<ul style="list-style-type: none"> <li>Currently low uptake rate of agreements</li> <li>Employers and workers have noted that the provision of supporting information is more difficult than providing a pay history</li> <li>Requiring a signature from both parties presents logistical challenges. Allowing for alternative mechanisms such as electronic signatures, email or verbal approvals (combined with clear insurer documentation and file notes) may increase uptake</li> </ul>
Adjustment to the relevant earning period provisions, including: <ul style="list-style-type: none"> <li>Reducing the period, for example to four weeks</li> <li>Exclude any weeks with unpaid leave and/or include weeks a worker is still working but remains in continuous employment</li> </ul>	<ul style="list-style-type: none"> <li>Most employers either do not have the historical pay and leave information available or find it very difficult to extract the information required</li> <li>Excluding unpaid leave periods of seven or more days can have variable impacts for different workers due to the number of consecutive days of no earnings</li> </ul>
Use of taxable income as an alternative to gathering the required information from the employer	<ul style="list-style-type: none"> <li>Difficult to obtain all information from the employer</li> <li>Confusion about what evidence of earnings is to be preferred over another and the desire to obtain "perfect information"</li> <li>Using alternative mechanisms such as taxable income would be less administratively burdensome for an insurer, particularly if data-sharing systems are in place. It would negate the need to determine adjustments, assessments or exclusions</li> </ul>

Table 3: PIAWE Reference Group submissions summary.

It was clear from some of the submissions that even though legislative change in 2018 and 2019 has made the determination of PIAWE simpler, insurers and employers are still faced with some challenges and complexities in the determination of PIAWE for workers in NSW.



## 4. Discussion of findings and recommendations

This section discusses the findings of the post-implementation review activities from section 3 and evaluates whether the reform's projected objectives have been met, considers barriers to PIAWE agreements, and identifies new or enduring challenges with PIAWE determinations. The section also contains recommendations in response to the findings and discussion.

Overall, the findings indicate that the PIAWE amendments have delivered a net benefit to workers, employers and insurers in delivering a simpler, fairer and more transparent approach to determining a worker's pre-injury average weekly earnings. However, despite this improvement on the previous methodology, the findings revealed some challenges to be addressed.

Before arriving at the final recommendations, the suggested recommendations were discussed with the PRG in response to the review findings. Appendix H details the suggestions considered and how they were revised during the PRG meeting on 29 November 2022. Appendix I summarises the votes of support by PRG members to each of the suggested recommendations.

### 4.1. Simple

**Objective: PIAWE is simpler for insurers to calculate so weekly payments are made to injured workers promptly.**

The findings of the survey, file reviews and the low number of disputes at the Commission clearly indicate that the amendments have broadly met the objective of being simple, particularly in comparison to the previous methodology.

However, survey responses indicated that most workers and employers felt there were delays in determining PIAWE. This could suggest that the process was not simple leading to calculations being made less quickly. There may also be other factors leading to delays, such as difficulties in obtaining PIAWE information. This was evident in the file reviews.

It was clear from the analysis of the disputes, SIRA enquiries and the PIAWE Reference Group submissions that some aspects of PIAWE remain complex to operationalise, particularly: calculating PIAWE for short-term workers, determining the relevant earning period for workers with a complex work history, determining earnings for workers with workers compensation payments during the relevant earning period, and the meaning and evidence of earnings. However, this must be balanced against ensuring that the complex employment arrangements which exist today and into the future can continue to enable a fair representation of the pre-injury earnings for all workers. Selected issues are discussed in further detail below in section 4.4.

Suggestions made by PIAWE Reference Group members primarily dealt with efforts to further simplify the determination of PIAWE, by removing PIAWE as a work capacity decision, shortening the relevant earning period, simplifying the PIAWE agreement process, and enabling the new PIAWE provisions to apply to all workers regardless of date of injury.

### 4.2. Fair and equitable

**Objective: The process for calculating PIAWE produces consistent and equitable income support for injured workers and can apply to a range of working arrangements.**

Analysis of disputes heard at the Personal Injury Commission revealed that the amended PIAWE provisions can be applied flexibly to ensure a fair outcome for the worker, however sometimes this was achieved at the expense of simplicity. For example, although the PIAWE provisions accommodate for various circumstances such as short-term workers and workers who do not have clear wage or employment evidence, the Commission was required to carefully consider the various and sometimes scant evidence before them to determine PIAWE. In situations where a worker was paid compensation payments during the relevant earning period, the existing provisions were difficult for the Commission to apply consistently to ensure a fair outcome for the worker.

The survey responses showed that workers generally did not think their PIAWE was a fair representation of their pre-injury earnings, whereas the employer, insurer and reviewer responses

reflected the opposite. In contrast, worker responses in the interviews indicated that a majority thought their PIAWE calculation was fair. It must be noted that some workers referred to statutory dropdowns in weekly compensation payments when referring to PIAWE, indicating conflation of the two. Some workers also referred to their ability to cover living expenses whilst on workers compensation payments. This may have contributed to their perception of fairness.

A sharp reduction in PIAWE-related complaints to the Independent Review Office following the commencement of the new PIAWE methodology is an indication that more workers feel that their PIAWE is fair compared to calculations made under the old arrangements. Relatively low numbers of complaints and enquiries by employers to SIRA compared to the total number of complaints and enquires received is also an indication of overall fairness.

icare data revealed that there was a decrease in the proportion of workers with a minimum PIAWE in the cohort of workers after the amendments commenced. This suggests that including amounts previously excluded from PIAWE (for example, some allowances or some income from secondary employment) will result in an increase in PIAWE. However, it is expected that average earnings for all workers will also have increased due to other factors.

The PIAWE Reference Group submissions suggested recommendations to achieve greater equity. One suggestion was that the new methodology should apply to all workers, regardless of date of injury. The Reference Group also suggested alternative approaches to determining the relevant earning period to minimise delays in determining PIAWE, so workers are paid in a timely manner and to ensure greater equity for workers.

### 4.3. Transparent

**Objective: Workers and employers are better able to understand how PIAWE and weekly payments are calculated and paid.**

The correspondence between case managers and workers contained in the file reviews showed that the workers were generally not confused about their PIAWE calculation when it was explained. The worker interviews also clearly showed that most found their PIAWE easy to understand. However, since some workers appeared to conflate 'PIAWE' with weekly payments, this may suggest that clearer information should be made available to workers. The interview responses also suggested that the worker experience with the PIAWE determination process is highly dependent on the insurer, case manager and employer.

The low numbers of disputes, and complaints and enquiries to both IRO and SIRA are an indication that the determination of PIAWE was relatively clear to workers and employers.

Overall, there is scope to address clarity of communications for workers and employers about how PIAWE was determined, and to better inform the parties of expected timeframes.

### 4.4. New or enduring challenges

The post-implementation review activities revealed that some aspects of PIAWE were more likely to challenge the original objectives of the PIAWE amendments. All findings were discussed with the PIAWE Reference group members and persisting challenges were tabled at the final PRG meeting. They are outlined below.

#### 4.4.1. Determining PIAWE for workers based on date of injury

***Suggested recommendation:*** Extend the 2019 PIAWE amendments to all workers regardless of date of injury for new claims lodged (after date of commencement of new legislation)

Three approaches apply to determining PIAWE, for different cohorts based on the date of injury:

- 1) Workers injured on or after 21 October 2019 (current methodology)

- 2) Workers injured on or after 26 October 2018 and before 21 October 2019<sup>5</sup>
- 3) Workers injured before 26 October 2018

It was posited that having three approaches dependent on date of injury has caused confusion amongst stakeholders, and this confusion can delay the appropriate payment to the worker. The different approaches also result in a different calculation for two identical workers with different dates of injury, which is inequitable.

**PRG discussion:** It was clarified this option has no relevance to exempt workers and it was reiterated the previous methodology was complicated, created an additional step for case managers (to first consider date of injury) before calculating PIAWE, and there should be one method, not three. The group agreed the current method should apply to all new claims from current date (date of commencement of any future extending legislation), and past claims would not be recalculated regardless of their date of injury.

Other considerations raised included the perception of allowing a more beneficial methodology for “tardy” claims (noting that claims made some time after date of injury will always occur through no fault of the worker, employer or insurer) compared to claims made on time, and that SIRA should first examine the number of claims likely to be impacted if a change were to be made.

**PRG decision:** The PIAWE Reference Group voted to recommend this change with the condition that retrospectivity should not apply.

**Follow up post-PRG meeting:** SIRA met with the PRG representative responsible for this suggestion. Further considerations were raised:

- Inequity may continue under any new amendments, as old PIAWE provisions would continue to apply to existing pre-October 2019 claims and many recurring claims
- Date of injury was the preferred approach in 2019 given the greater certainty over date of claim and notification; not all insurers systematically record date of claim, and for some insurers, a claim form is no longer provided.
- Date of injury may still need to be established in disputes. Without retrospectivity, confusion is thus likely to continue for workers with a PIAWE in dispute.
- The number of workers likely to benefit is low – if new legislation were to commence by October 2023, approximately between 8-15 workers are expected to benefit in the first year, with numbers continuing to decrease the longer it takes for legislative amendment to occur: see Table 8 in Appendix J.

It was agreed not to proceed.

**Outcome:** No action to amend legislation to extend the 2019 PIAWE amendments to all workers regardless of date of injury for new claims lodged after a future date.

#### 4.4.2. PIAWE as a work capacity decision

**Suggested recommendation:** Remove PIAWE from the definition of a work capacity decision

Calculation (or recalculation) of PIAWE is a work capacity decision as defined in section 43(1)(d) of the 1987 Act. If a recalculation results in a decrease or cessation of weekly payments, the required period of notice as prescribed in section 80 of *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) is three months if the worker had been in receipt of weekly payments for a continuous period of at least 12 weeks.

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<sup>5</sup> The PIAWE methodology for workers in this cohort will use the same methodology as cohort 3 (injured before 26 October 2018), without being subject to the removal of shift and overtime amounts after 52 weeks.

In the situation described above, a PIAWE later adjusted downwards based on additional evidence provided by the parties would result in a worker receiving the increased weekly payment for at least three months after the insurer decision. This can have the effect of a conservative initial PIAWE calculation if there is insufficient information to avoid a future overpayment.

PRG submissions unanimously supported a change to ensure PIAWE should no longer be considered a work capacity decision to allow for greater flexibility to change PIAWE as new information is received. The viewpoint was raised that PIAWE isn't related to work capacity as it considers earnings pre-injury, where work capacity relates to capacity post injury.

An alternate viewpoint was provided indicating that PIAWE is related to work capacity as it estimates the value for which a worker was selling their labour prior to receiving the injury and it is the principal determinant of their entitlement to compensation because of economic loss caused by incapacity for work as a result of the injury. In addition, a work capacity decision is made to determine the amount of the weekly compensation benefit that the insurer is liable to pay to the worker once the insurer has decided current work capacity has been established. This determination emanates from the PIAWE. And finally, there is an established avenue for determining disputes about work capacity decisions and removing PIAWE from being a work capacity decision would create ambiguity and discretion without a proper process for review.

**PRG discussion:** There was no further discussion about this suggestion in the meeting, except to express further support.

**PRG decision:** The majority of the PIAWE Reference Group expressed support for PIAWE not to be considered a work capacity decision.

**Final recommendation 1:** Provide advice to government on removing PIAWE from the definition of a work capacity decision ensuring the worker maintains access to the resolution of disputes via the Personal Injury Commission and access to a fair notice period in the event of an adjustment of PIAWE resulting in a reduction or cessation of weekly payments.

#### 4.4.3. Workers compensation payments in the relevant earning period

**Suggested recommendation:** *Adjust PIAWE provisions to enable a fair calculation of PIAWE for workers who have had workers compensation payments during their relevant earning period*

Workers compensation payments are excluded from the definition of earnings in clause 6, Schedule 3 to the 1987 Act. The matters heard at the Personal Injury Commission showed that workers compensation payments during the 52 weeks prior to a worker's injury present challenges to the calculation of earnings and for the adjustment of the relevant earning period, particularly where a worker has no capacity at the date of the subsequent injury.

**PRG discussion:** A suggestion was offered to adopt the principles underpinning the short-term worker provisions – clearly articulating the principles. It was acknowledged the short-term worker provisions were also subject to dispute, but this would avoid the provisions being too prescriptive. PIAWE agreements were raised as an operational solution to this issue.

**PRG decision:** The majority of the PIAWE Reference Group voted to address the issue to ensure a fair outcome for workers and employers which is as simple as possible for an insurer to implement. Some PRG members considered that legislative or regulation change is not necessary or should be considered only after options within existing frameworks are first explored.

**Final recommendation 2:** Commence further policy analysis to consider a fair and consistent subsequent injury PIAWE solution for workers who received workers compensation payments during the relevant earning period.

#### 4.4.4. PIAWE agreements

**Suggested recommendation:** *Simplify the process for reaching a PIAWE agreement, including simplifying the PIAWE Agreement form*

PIAWE agreements were designed to be less administratively burdensome by alleviating the requirement for insurers to gather pay, leave and employment-related information to calculate

PIAWE. In approving, insurers are required to decide whether the agreed amount between a worker and their employer reasonably reflects the worker's pre-injury earnings, and that the agreement is otherwise fair and reasonable. An insurer is to decide what supporting information they require to meet this criterion.

Overall, there has been little uptake of PIAWE agreements across the scheme. The PIAWE survey and worker interviews revealed that most workers and employers were unaware of the option to reach PIAWE by agreement. icare claims data indicated very few PIAWE agreements were reached (363 in the 12 months prior to April 2022). The file reviews indicated PIAWE agreements had limited utility for workers of self-insured employers, due to insurers having more streamlined access to earnings, leave and employment-related information.

Some of the suggested improvements to the PIAWE agreement process raised in the submissions are already available to workers and employers, for instance a worker or employer can apply by email to the insurer, and they can withdraw from the agreement at any time. In addition, the rate on the agreement application form can be used as an interim rate (an 'interim payment decision') until the insurer is able to approve or refuses to approve the PIAWE agreement. This confusion may indicate a need for greater awareness and guidance on the process of reaching a PIAWE agreement.

**PRG discussion:** Feedback from the PIAWE Reference Group indicated that timeframes were difficult to adhere to and there was a general lack of interest from employers to apply for agreements. Concern for the fairness and potential power-imbalance to a worker when settling on an agreement amount was also discussed and was seen as a barrier to the uptake of agreements.

**PRG decision:** The PIAWE Reference Group voted in support of this suggested recommendation and to commence further analysis into the agreement process.

**Final recommendation 3:** Further investigate the difficulties in reaching a PIAWE agreement, and where appropriate, commence work to simplify and streamline the process and amend the PIAWE Agreement form. This may also include improving guidance provided to insurers, workers and employers about the PIAWE agreement process.

#### 4.4.5. Difficulty in collecting PIAWE information

Insurers have described (particularly in the survey, file reviews and submissions) the administrative burden in obtaining the information required to determine PIAWE in a timely manner. This can result in a PIAWE amount which is based on insufficient evidence, and weekly payments calculated based on a PIAWE which does not accurately reflect the pre-injury earnings of the worker. Obtaining sufficient information can require active and regular follow-up from insurers to gather the missing information. Until the insurer receives sufficient evidence, an interim PIAWE can be either too high, resulting in an overpayment to the worker unable to be recovered, or too low, resulting in hardship for the worker. The recommendation to reduce the relevant earning period to just four weeks attempts to assist with this concern.

**Suggested recommendation:** *Adjustment to the relevant earning period provisions – shorter relevant earning period*

**PRG discussion:** It was suggested that smaller employers often have difficulty in obtaining the full 52-weeks of pay and leave information. Introducing a four-week relevant earning period would reduce the number of interim PIAWE decisions and the administrative burden on employers communicating with insurers regarding any missing information. It was further suggested that most jurisdictions have a 52-week earning period to determine an average of earnings.

**PRG decision:** The group voted against this recommendation based on the understanding this recommendation was to replace the 52-week relevant earning period with a four-week relevant earning period. The group was keen to retain the effect of "evening out" sporadic earnings, which a 52-week relevant earning period allows for.

**Follow up post-PRG meeting:** A follow up meeting was held with the PRG representative responsible for this suggestion and the intention behind this suggestion was clarified.



The intended suggestion was to add flexibility by introducing a four-week relevant earning period, and where this approach might not be fair to the worker, the period should be extended up to a period of 52 weeks, depending on the assessment made by the insurer.

However, insurer discretion could create present a greater risk to the worker, with the additional possibility of increased disputes (as can be seen with the short-term worker provisions, where two options are a possibility). An operational solution is preferred.

Retaining a 52-week relevant earning period is consistent with most other jurisdictions in Australia.

**Outcome:** No action to amend the relevant earning period.

**Suggested recommendation:** *Adjustment to the relevant earning period provisions to amend arrangements for unpaid leave outlined in Clause 8E of the 2016 Regulation.*

**PRG discussion:** Members of the PRG who recalled the policy considerations made at the time of developing the amending Regulations commented that the existing provisions were given significant consideration and the group were aware that some workers might be better off than others depending on their individual circumstances. An example was provided where two workers with similar annual earnings who take the same number of unpaid leave days may have their unpaid leave days excluded or not, based on the consecutive seven-day requirement, thus resulting in a different PIAWE outcome. In addition, it was considered important to differentiate between casual workers who have periods where they do not work, and workers who take a fixed period of unpaid leave. Ultimately it was decided that the provision could not capture every situation, that there would be risks, and that it was important to minimise the burden for workers and employers relating to providing appropriate evidence. It was also discussed that the taking of unpaid leave does not affect a large group of workers.

**PRG decision:** 5 of 9 of the PRG voted to further consider the unpaid leave provisions with the caveat of the possibility that no better option could be possible.

**Post-PRG meeting:** No evidence was found to suggest that systemic issues exist with the current provisions, no viable alternative was suggested and there was not unanimous support for change.

**Outcome:** SIRA will monitor future issues raised relating to the unpaid leave provisions outlined in clause 8E of the Workers Compensation Regulation 2016. No further action at this stage.

**Suggested recommendation:** *Consider alternative options for gathering evidence, for example, use of taxable income.*

**PRG discussion:** Taxable income as it applies in the Commonwealth income tax legislation does not meet the definition of PIAWE or 'earnings' in clauses 2 and 6 to Schedule 3 to the 1987 Act. The PRG confirmed that using taxable income as an alternative method of determining PIAWE should not be a recommendation, as it includes income other than earnings for PIAWE calculation purposes and is reduced by allowable deductions. Further, taxable income is generally calculated on a financial year basis, rather than the 52-week period prior to the injury.

The intent of the taxable income submission changed from the use of taxable income as evidence to using payment summaries as evidence. However, payment summaries may already be used with the consent of the worker as a source of evidence of income within the current provisions, without the need for further action.

**PRG decision:** This recommendation in its original form was withdrawn during the meeting.

**Outcome:** This recommendation was withdrawn.

#### 4.5. Additional recommendations

Other matters arising from the review (in particular the survey, one to one interviews, file reviews and complaints data) related to operational matters to improve the process for SIRA and insurers to consider.

***Suggested recommendation:*** Consider changes to SIRA guidance.

The PIR activity findings have identified the potential need for clarification or simplification of certain content (for example around PIAWE agreements or information targeted at workers) or providing further information where gaps have been identified. Any additions or changes to guidance should be balanced with ensuring stakeholders do not find the information excessive to avoid further confusion.

**PRG decision:** Voting was not required.

**Final recommendation 4:** SIRA to review and consider changes to SIRA guidance and information based on PIR activity findings.

***Suggested recommendation:*** Insurers may consider reviewing processes and procedures.

Insurers may review PIR findings and consider improvements to processes and procedures, e.g., correspondence to workers and employers and related communications to ensure clarity and to manage expectations regarding timeframes.

**PRG decision:** Voting was not required.

**Final recommendation 5:** Insurers to review the PIR findings and consider improvements to processes and procedures.

## Appendix A - PIAWE Reference Group member organisations

- AI Group
- Australian Federation of Employers & Industries
- Australian Lawyers Alliance
- Construction, Forestry, Mining and Energy Union
- Hotel Employers Mutual
- icare
- Independent Review Office
- NSW Bar Association
- NSW Business Council
- NSW Law Society
- NSW Self Insurers Association
- Other legal representatives
- Personal Injury Commission
- Unions NSW



## Appendix B - PIAWE disputes analysis

Table 4: List of PIAWE disputes in the Personal Injury Commission (and Workers Compensation Commission prior to 1 March 2021). Where multiple PIAWE issues were considered, the 'main' issue is bolded.

Matter	Date of decision	Key PIAWE topic/issues
<i>Georgina Kategiannis v Decjuba Pty Ltd</i> [2020] NSWCC 101	31 Mar 2020	Short-term workers
<i>Faisal Sarheed v C1 Formwork Group Pty Ltd</i> [2020] NSWCC 326	15 Sep 2020	Evidence of earnings
<i>Sarcia v Workers Compensation Nominal Insurer (icare)</i> [2021] NSWPIC 1	2 March 2021	Evidence of earnings
<i>Benten v William Campbell Foundation</i> [2021] NSWPIC 15	11 Mar 2021	<b>Concurrent employment</b> Meaning of 'employment'
<i>Cain v Tamworth Aboriginal Medical Service</i> [2021] NSWPIC 193	18 Jun 2021	Relevant earning period – financially material change
<i>Eftimovski v Toll Global Express Courier</i> [2021] NSWPIC 288	12 Aug 2021	Meaning of 'earnings'
<i>Toll Transport Pty Ltd v Eftimovski</i> [2022] NSWPCPD 14 (appeal matter for the above)	11 Apr 2022	
<i>Almanaa v FBS Formwork Group Pty Ltd</i> [2021] NSWPIC 455	15 Nov 2021	<b>Short-term worker</b> Evidence of earnings
<i>Tibbetts v Sighthouse Pty Ltd ATF the Trustee for Lord &amp; Rhodes</i> [2021] NSWPIC 478	23 Nov 2021	Relevant earning period – COVID-related changes (cl 8EA)
<i>Sidhu v Secretary Department of Communities and Justice</i> [2021] NSWPIC 522	13 Dec 2021	<b>Relevant earning period – workers compensation payments</b> Relevant earning period – financially material change
<i>Wake v State Emergency Services</i> [2022] NSWPIC 50	8 Feb 2022	Relevant earning period – financially material change
<i>Transport Contract Services (NSW) Pty Ltd v Employers Mutual NSW Limited &amp; others</i> [2022] NSWPIC 81	25 Feb 2022	Meaning of 'earnings'
<i>Stewart v Secretary, Department of Communities and Justice</i> [2022] NSWPIC 333	28 Jun 2022	<b>Relevant earning period – workers compensation payments</b> Relevant earning period – financially material change Relevant earning period – Alignment with pay period
<i>Sehion v Maximum Energy</i> [2022] NSWPIC 405	22 Jul 2022	Short-term workers
<i>Wang v Zhong Y Shen trading as SH and CJ Quality Meat and Poultry</i> [2022] NSWPIC 441	5 Aug 2022	<b>Evidence of earnings</b> Relevant earning period – COVID-related changes (s 8EA)

Matter	Date of decision	Key PIAWE topic/issues
<i>Turner v HammondCare</i> [2022] NSWPIIC 442	5 Aug 2022	<b>Meaning of ‘earnings’</b> Evidence of earnings
<i>Chee v Sunny Building Construction Pty Ltd</i> [2022] NSWPIIC 457	19 Aug 2022	Evidence of earnings
<i>Hull v RSL Care RDNS Limited</i> [2022] NSWPIIC 483	25 Aug 2022	Short-term workers
<i>Nitchell v Secretary (Department of Communities and Justice)</i> [2022] NSWPIIC 625	14 Oct 2022	<b>Relevant earning period – workers compensation payments</b> Relevant earning period – financially material change Meaning of ‘earnings’
<i>Firth v HammondCare</i> [2022] NSWPIIC 630	14 Nov 2022	Relevant earning period – financially material change

### Evidence of earnings

For four of the matters analysed, the main PIAWE issue related to the determination of the earnings of the worker where the evidence was not clear or was in dispute. In these matters, the Commission Members considered all evidence of earnings presented before them and weighed which pieces of evidence were more relevant, accurate, and had probative value for inclusion in the PIAWE calculation.

Examples of evidence considered:

- Oral and written statements from the worker and employer
- SMS message conversations between the worker and employer
- Timesheets
- Evidence of cash deposits at the bank and bank records
- Payment service platform receipts
- Payslips
- Tax return statements

The Commission found no clear and consistent ‘hierarchy’ of evidence across the cases, instead the evidence was considered and weighed in the circumstances of each matter.

### Short-term workers

The main issue in the cases involving the short-term worker provisions<sup>6</sup> concerned which approach to determining PIAWE should be used. That is, whether to use the earnings and period worked with the current employer, or whether to use the weekly average of the earnings that the worker could reasonably have been expected to have earned in the employment, but for the injury, during the period of 52 weeks after the injury.

- In *Georgina Kategiannis v Decjuba Pty Ltd* [2020] NSWCC 101, the employer produced evidence of earnings for a worker ‘performing similar work as the worker’ for the purposes of clause 8F(2) of the 2016 Regulation. However, the Commission rejected this evidence as they were not convinced of the similarity to the injured workers’ circumstances.
- In *Almanaa v FBS Formwork Group Pty Ltd* [2021] NSWPIIC 455, the Commission stated that the ‘earnings that the worker could reasonably have been expected to have earned in the

<sup>6</sup> See Schedule 3, clause 4 of the 1987 Act, and clause 8F of the 2016 Regulation.

employment’ is an objective test, and the worker’s subjective belief or expectation that he would perform overtime did not satisfy the objective test in this case.

- In *Hull v RSL Care RDNS Limited* [2022] NSWPIC 483, the Commission considered that the rostered hours worked after the injury until total incapacity was ‘not a relevant consideration’.

### Meaning of ‘earnings’

‘Earnings’ for the purposes of calculating PIAWE is defined in clause 6, Schedule 3 to the 1987 Act.

- In *Eftimovski v Toll Global Express Courier* [2021] NSWPIC 288<sup>7</sup>, the worker was paid through a partnership with their spouse. The Commission did not accept that distributions from the partnership equated to ‘earnings received by the worker for work in employment’ in this case. The Commission also saw no basis for deducting business expenses from the worker’s earnings identified in the tax return.
- In *Transport Contract Services (NSW) Pty Ltd v Employers Mutual NSW Limited & others* [2022] NSWPIC 81, the Commission found that the definition of ‘earnings’ for PIAWE calculation purposes does not need to be read contextually with section 174 of the 1987 Act (which defines ‘wages’ for the purposes of the calculation of premium), as they relate to different subject matters. The Commission also found that the definition of ‘earnings’ does not expressly exclude business expenses.

### Relevant earning period

The relevant earning period component of the PIAWE calculation, typically 52 weeks, can be adjusted in accordance with Division 2, Part 4 of the 2016 Regulation. This includes adjustments for workers not continuously employed, for financially material changes to earnings, to align with the worker’s pay period, for unpaid leave, and for prescribed periods relating to COVID-19.

- Three decisions related to a worker who was in receipt of workers compensation payments for a previous injury during the 52-week period before the subsequent injury. The three decisions took differing approaches.
  - In *Sidhu v Secretary Department of Communities and Justice* [2021] NSWPIC 522, the Commission applied clause 8C (financially material change to earnings) of the 2016 Regulation. Member Beilby stated that a ‘financially material change’ includes a change in the amount the worker is paid, and/or a change in the method and type of payment. This excluded the first nine weeks in the relevant earning period (when the worker was in receipt of workers compensation payments) before the change occurred (when the worker returned to work at full capacity).
  - The Commission also found in this case that cl 8E (unpaid leave) is not relevant here, because to call the period of being paid workers compensation benefits as unpaid leave is ‘going beyond the “ordinary and grammatical sense of the statutory words”’.
  - The Commission in *Stewart v Secretary, Department of Communities and Justice* [2022] NSWPIC 333 took a different approach. In this matter, the worker was off work and in receipt of workers compensation payments at the date of the subsequent injury (a psychological injury claim). Member Burge applied clause 8D (alignment with pay period) with a beneficial interpretation, to align the relevant earning period to ‘the regular interval... the applicant was entitled to receive earnings from his employment’. This removed the period that the worker was receiving workers compensation payments for the first injury.
  - The Commission rejected the insurer’s calculation which included the entire 52 weeks as the relevant earning period while removing the workers compensation payments from earnings.
  - The Commission refused to apply clause 8C (financially material change), because to do so would exclude the period before the change in earnings (the ‘change’ being the

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<sup>7</sup> This decision was upheld in the Presidential decision *Toll Transport Pty Ltd v Eftimovski* [2022] NSWPCPD 14.

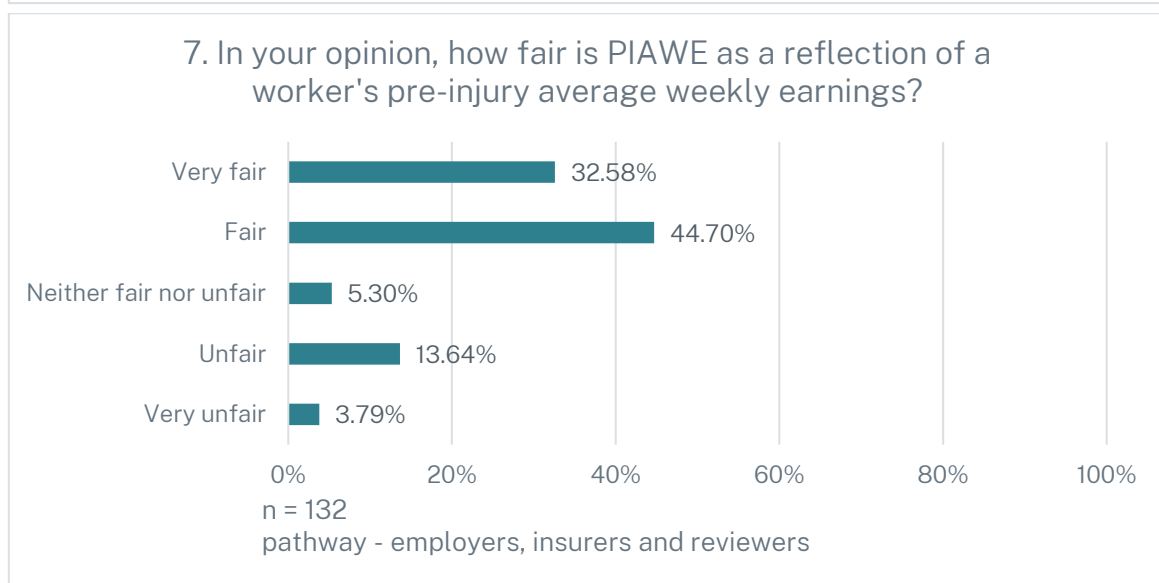
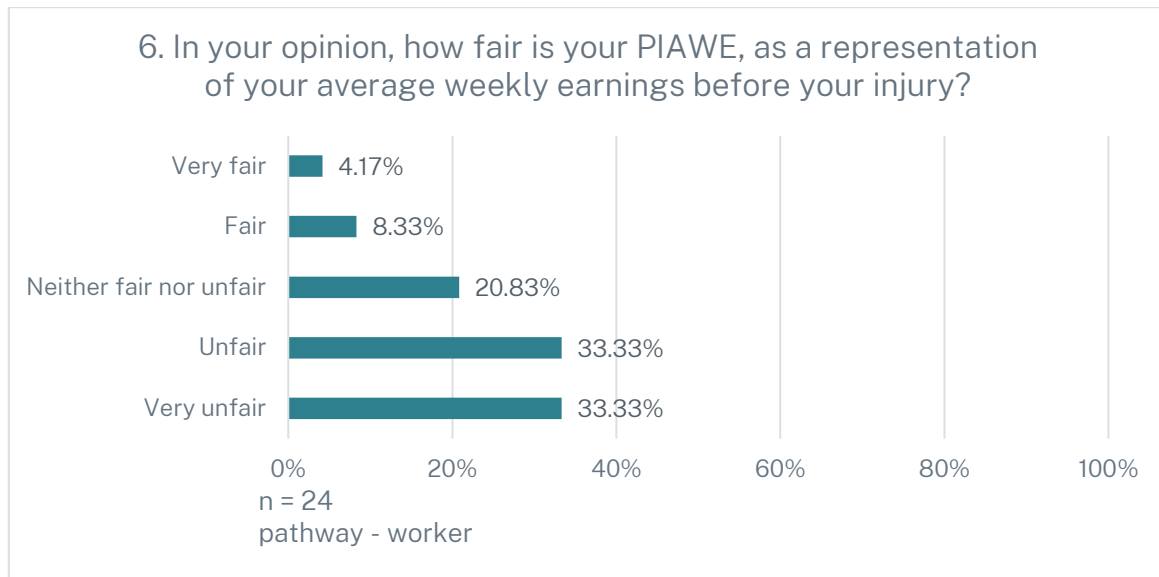
worker commencing workers compensation payments), meaning PIAWE would be zero, which is 'plainly... an absurdity'.

- In *Nitchell v Secretary (Department of Communities and Justice)* [2022] NSWPIC 625, Member Wynyard took an alternate approach to the above decisions. He distinguished this case on the facts and did not apply clause 8C of the 2016 Regulation as it was not related to these circumstances. He also rejected the insurer's calculation of using the entire 52 weeks. He found an anomaly in the legislation, as clause 6(2)(c) of Schedule 3 to the 1987 Act excludes workers compensation payments from the first injury and reduced earnings whilst on suitable duties from the definition of PIAWE, but the statute is silent as to further adjustments in this situation. Member Wynyard therefore read the words "immediately before the date of injury" in clause 2(2) of Schedule 3 as meaning "immediately before the date of injury, or as adjusted where a worker receives income as defined by Clause 6((2)(c) hereof". This had the effect of deducting the 14 weeks where the worker was in receipt of workers compensation payments.
- In *Wake v State Emergency Services* [2022] NSWPIC 50, the worker took long service leave on half pay (eventually returning to full-time work) during the 52 weeks before the date of injury. The Commission adjusted the relevant earning period under clause 8C (financially material change), by excluding the period of long service leave at half pay. It is noted that the Commission did not exclude the entire period before the worker returned to full-time work, as they considered that would be inconsistent with the context of clause 2(3)(a), Schedule 3 to the 1987 Act, and not preferred.
- In *Cain v Tamworth Aboriginal Medical Service* [2021] NSWPIC 193, the Commission found that a change from \$24 to \$26 an hour was a change of an ongoing nature to the employment arrangement resulting in a financially material change. 'Employment arrangements' in clause 8C is broad and includes the agreement, terms and conditions of employment, wages, hourly rates of pay and matters such as a change from part time to full time and promotion.
- Similarly, in *Firth v HammondCare* [2022] NSWPIC 630, the Member found an automatic re-classification of the worker's role and an increase in the hourly rate from \$21.11 to \$22.85 was a financially material change, despite the worker's earnings decreasing overall after the material change due to leave being taken during the later period. The Commission considered that cl 8C is to be applied regardless of whether the material change results in a decrease or increase to earnings.

## Appendix C - Survey Analysis

### Perceived fairness

The below two survey questions targeted the perceived fairness of the PIAWE methodology. Chart 6 depicts the perceptions of workers, while Chart 7 covers insurers, employers, and reviewers. A comparison of the results between the two shows a large difference in perception. Two-thirds of the responses by workers indicated their PIAWE amount was unfair or very unfair, while three-quarters of all other respondents thought it was somewhat fair or very fair.



## Ease of calculating PIawe

Chart 8 reflects mixed views about the general ease of calculating PIawe, with a relatively balanced spread of responses.

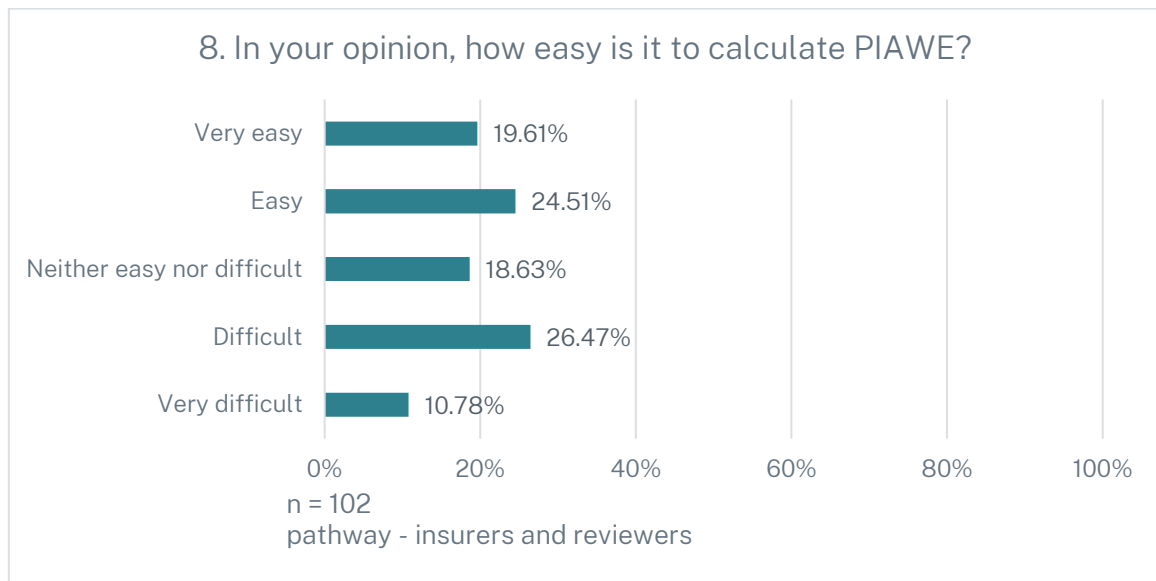
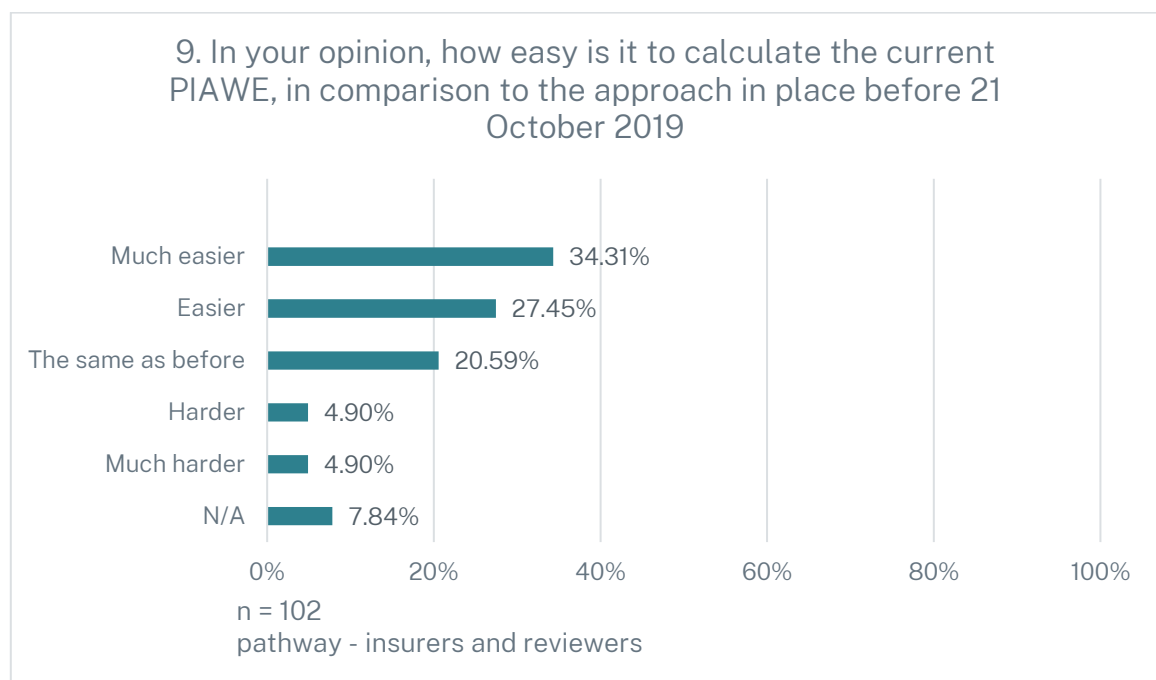


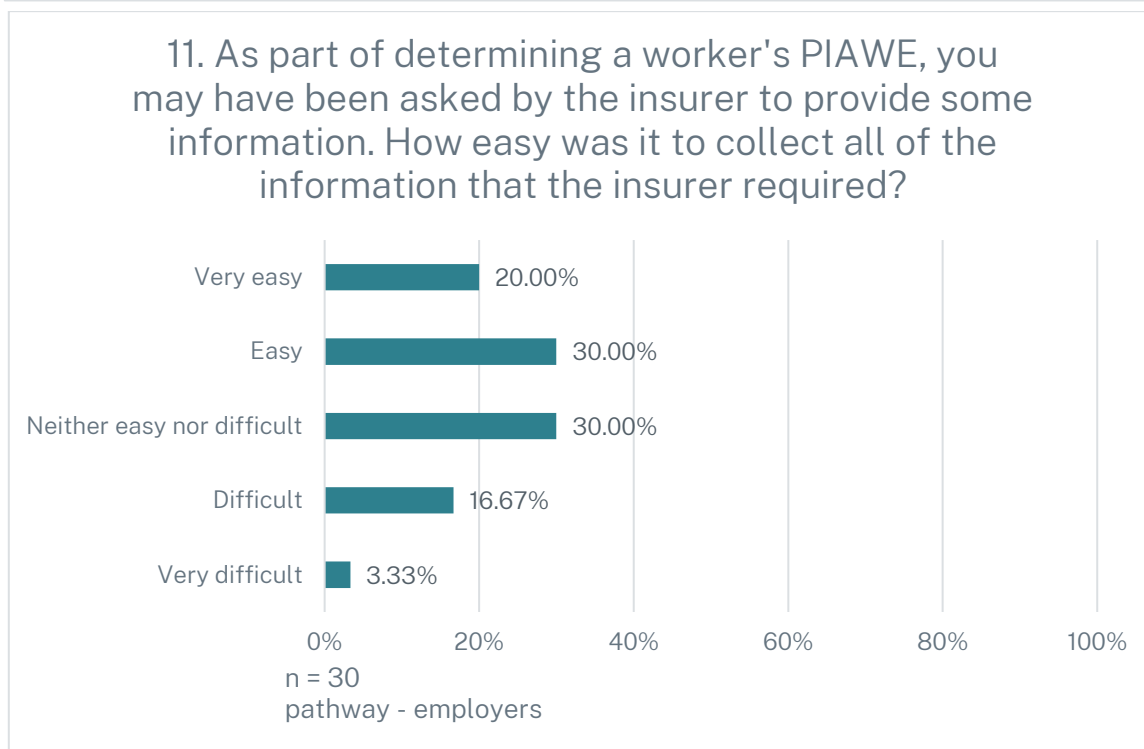
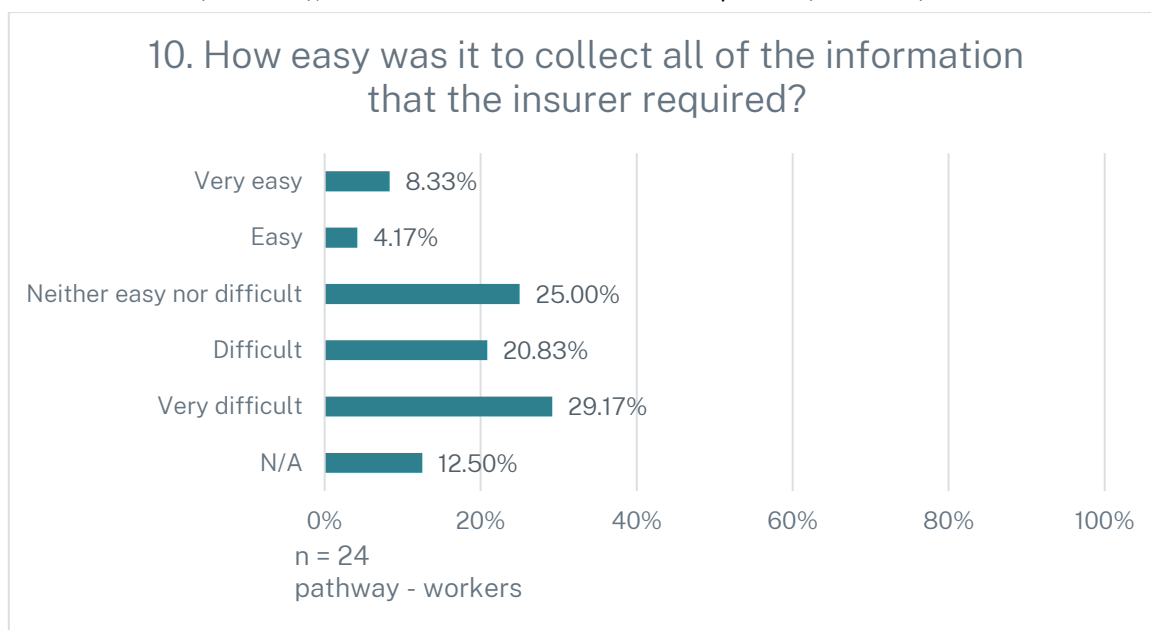
Chart 9 indicates that PIawe is at least comparatively easier to calculate now, with over 60 per cent of respondents believing the current framework is either easier or much easier when calculating PIawe compared to pre-October 2019. Around 10 per cent of respondents found it harder to calculate than before October 2019.



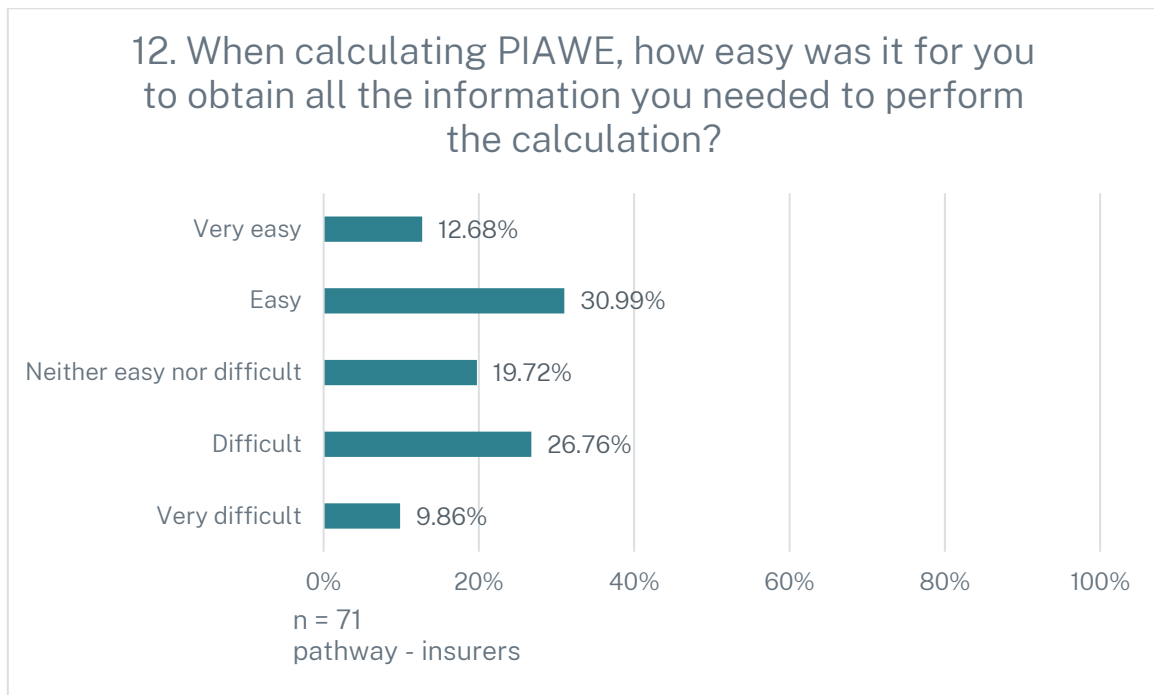
## Ease of collecting PIAWE information

Respondents were asked about the ease of collecting earnings and employment related information (see Charts 10-12 below).

In general, workers found collecting information more difficult (Chart 10) in contrast to employers who found it easier (Chart 11), while insurers had a mixed response (Chart 12).



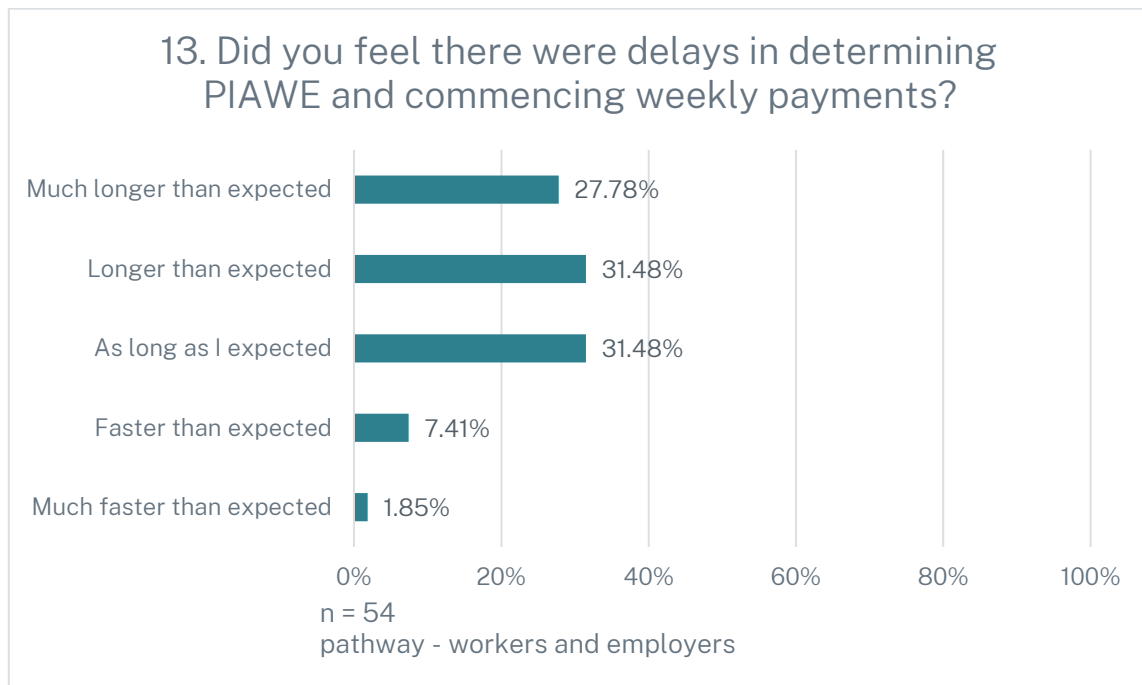
It is important to note that most employers who responded were large employers and their most common free-text responses to what they found most difficult was the amount of information to be collected, and that the process is time consuming.



Insurers indicated that collecting 52 weeks of information is difficult to obtain and is heavily dependent on the employer's payroll systems and people. Some respondents were self-insurers who stated they have ready access to the information and did not find it difficult.

#### Perceived timeliness

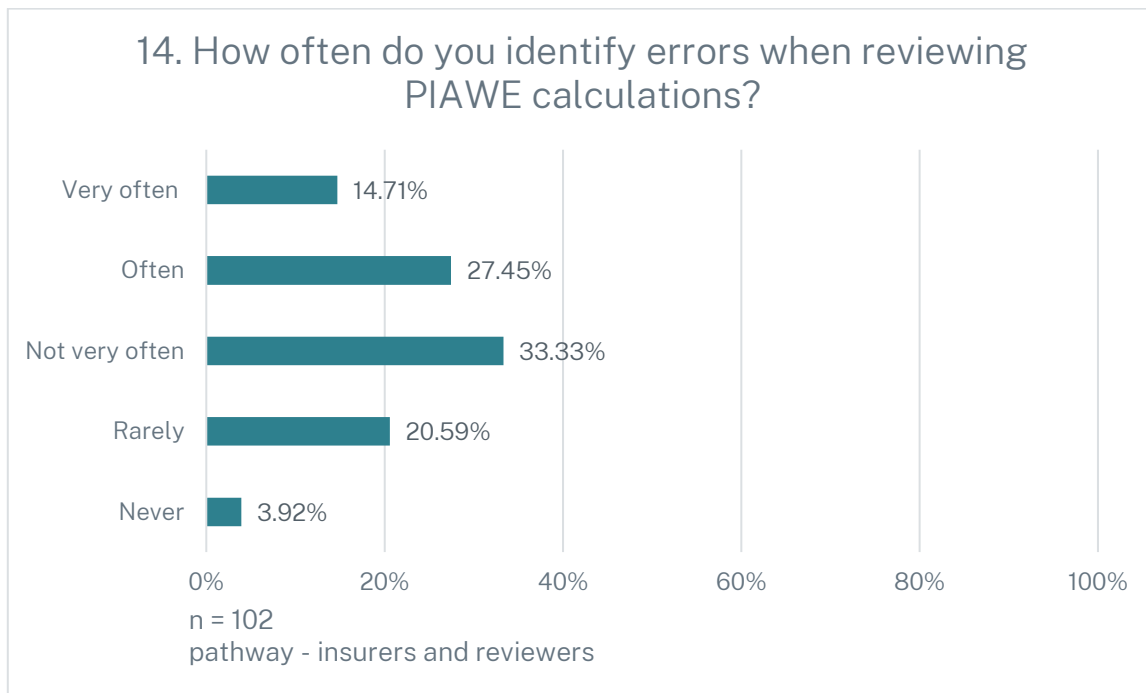
Most workers and employers also felt there were delays between determining PIAWE and weekly payments commencing; 60 per cent of workers and employers answered that the time taken for PIAWE to be determined was either 'longer' or 'much longer' than expected (see Chart 13).





## Errors

Insurers and reviewers were then asked how often errors were identified when reviewing PIAWE calculations. Chart 14 reflects the mix of responses.

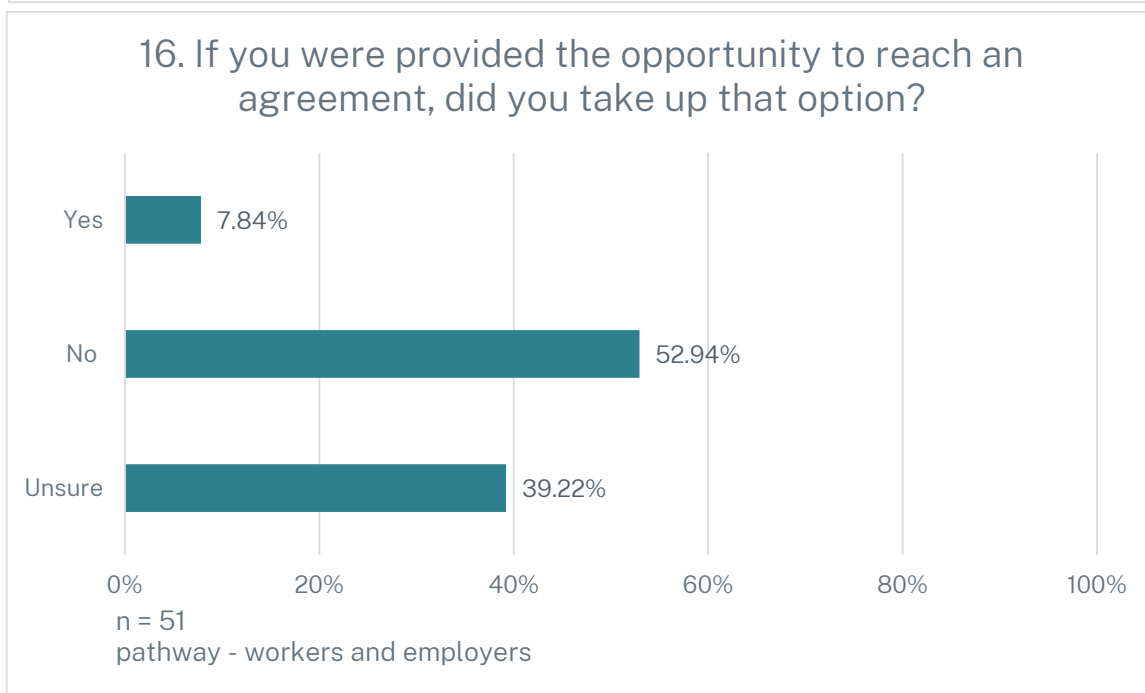
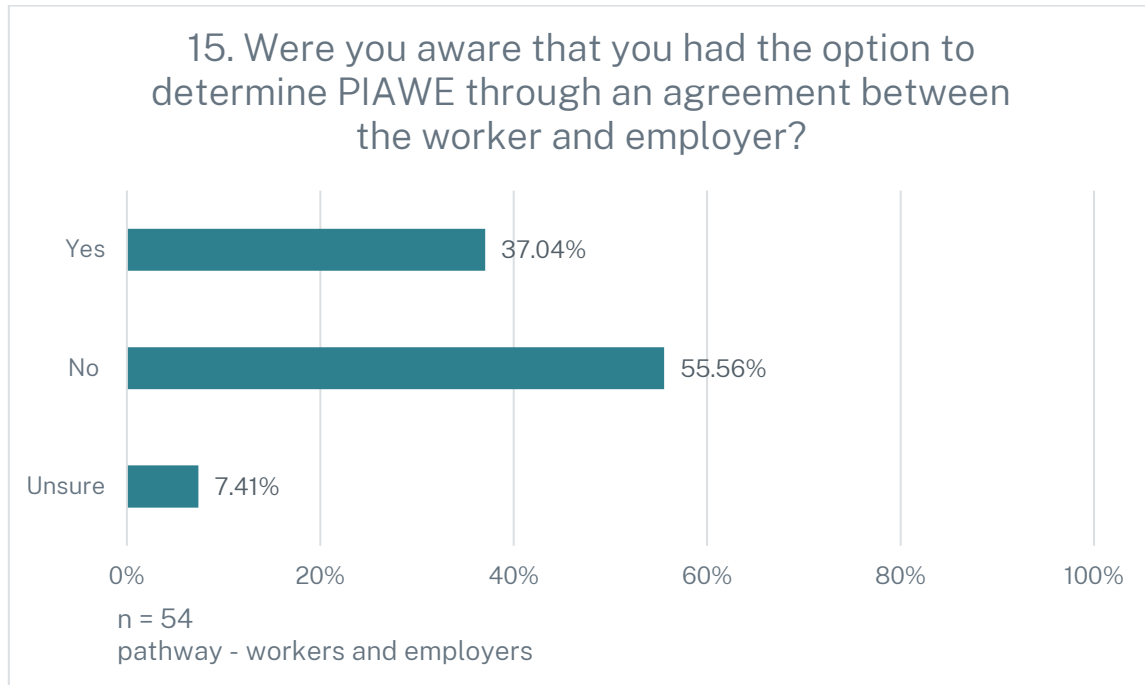


From the optional free-text responses, the most common error types were:

1. Incorrect adjustment of the relevant earning period,
2. Incorrectly including bonuses, superannuation, allowances, etc. as earnings, and
3. Incomplete or incorrect earnings information provided.

## PIAWE agreements

Charts 15-17 illustrate whether workers and employers were aware of the option to reach a PIAWE agreement, and the utilisation of agreements. Most worker and employer respondents were not aware of the option, and only 8 per cent of the sample chose to determine PIAWE through an agreement. From the optional free-text responses, the low numbers are likely due to the further administrative burden for workers and employers, or employers not considering agreements as an option they need to utilise.



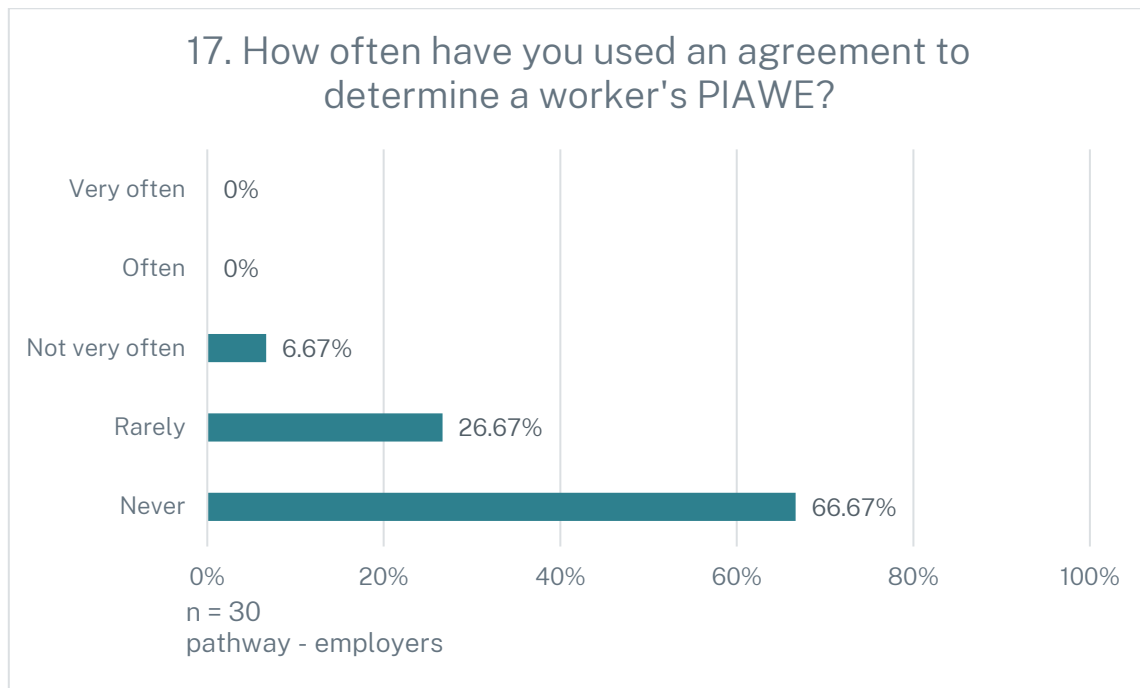
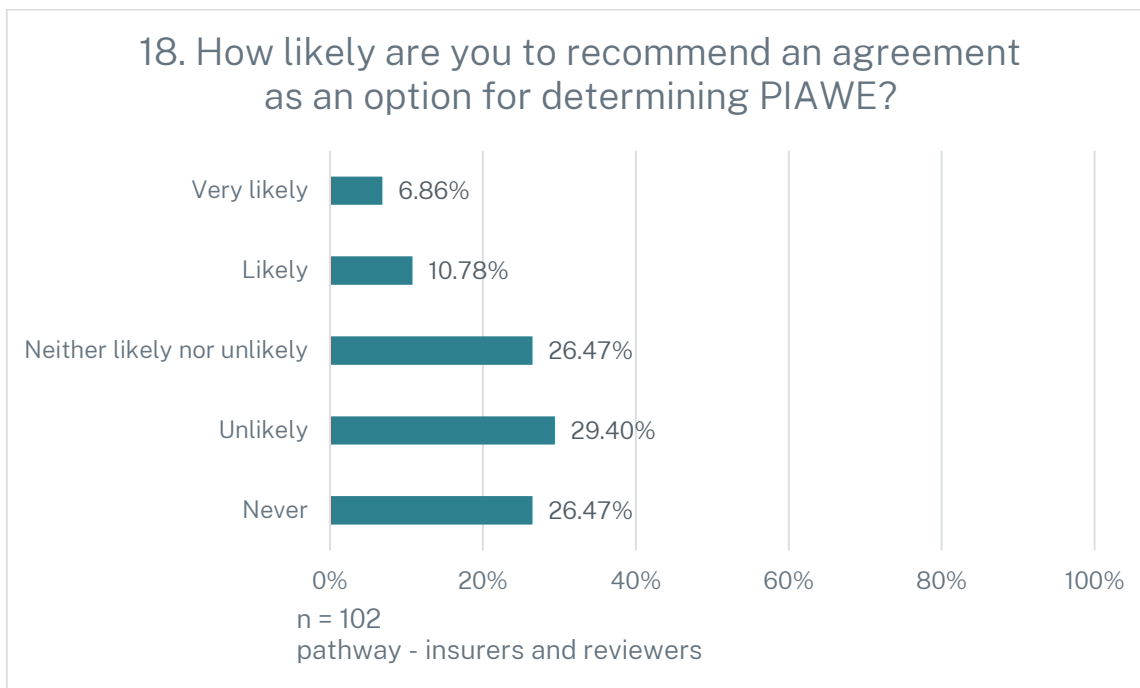


Chart 18 shows how likely insurers and reviewers were to recommend an agreement as an option. The responses were mixed.



## Final questions

The survey concluded with general free-text questions about PIAWE. There was variation in the responses, however some common responses are included below.<sup>8</sup>

Q. Is there something you like, or think is working well with the way PIAWE is determined?

- It is generally fair (to use 52 weeks) and works well
- Calculations are generally simpler, easier, and quicker compared to pre-October 2019.

Q. Is there something you do not like, or think is not working well with the way PIAWE is determined?

- Short timeframe to reach PIAWE agreements is prohibitive to further use – recommend allowing a longer duration to enter an agreement and simplify the process of reaching an agreement
- Difficulty in obtaining information for 52 weeks within the timeframe – reducing the relevant period to 4 weeks would reduce the administrative burden
- Inclusion of allowances such as shift and overtime can inflate PIAWE and lead to disincentives to return to work.

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<sup>8</sup> Note that isolated responses and responses that were not within the scope of this review have not been included for summary in this section, however all responses will be considered when reviewing PIAWE resources and tools.

## Appendix D – Interview responses

### Perceived fairness

Workers were asked how fair they thought their PIAWE was as a reflection of their pre-injury weekly earnings (see Chart 19). More than half of the workers found it fair or very fair, while less than a quarter found it unfair or very unfair. Where responses are marked as 'Other' the workers' responses were 'not sure'.

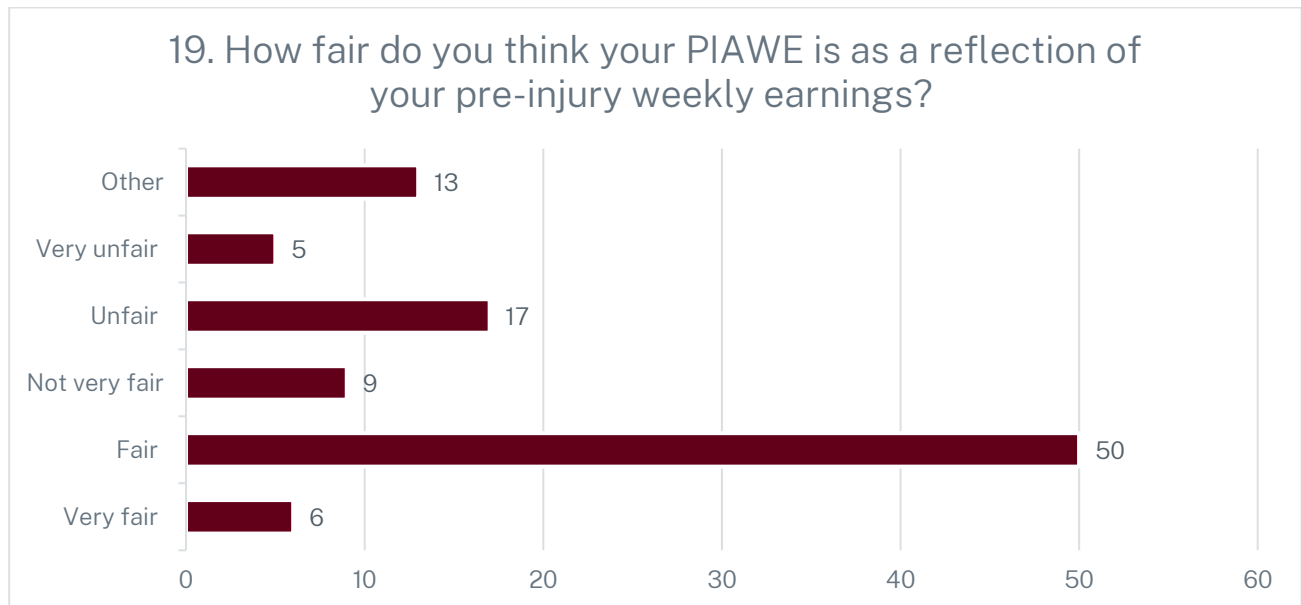


Chart 19: Perceived fairness

When asked about their reasoning, workers who responded with 'unfair' said it was because it is less than their actual earnings or it is not enough to cover their expenses. Those who responded 'fair' stated they did not notice a difference in the amounts, or they understood how it was calculated.

### Provision of information on PIAWE

A quarter of respondents said they were not provided information about PIAWE and how it was calculated (see Chart 20). Thirteen responses were categorised as 'Other' because they either did not remember or they did not provide a direct answer to the question.

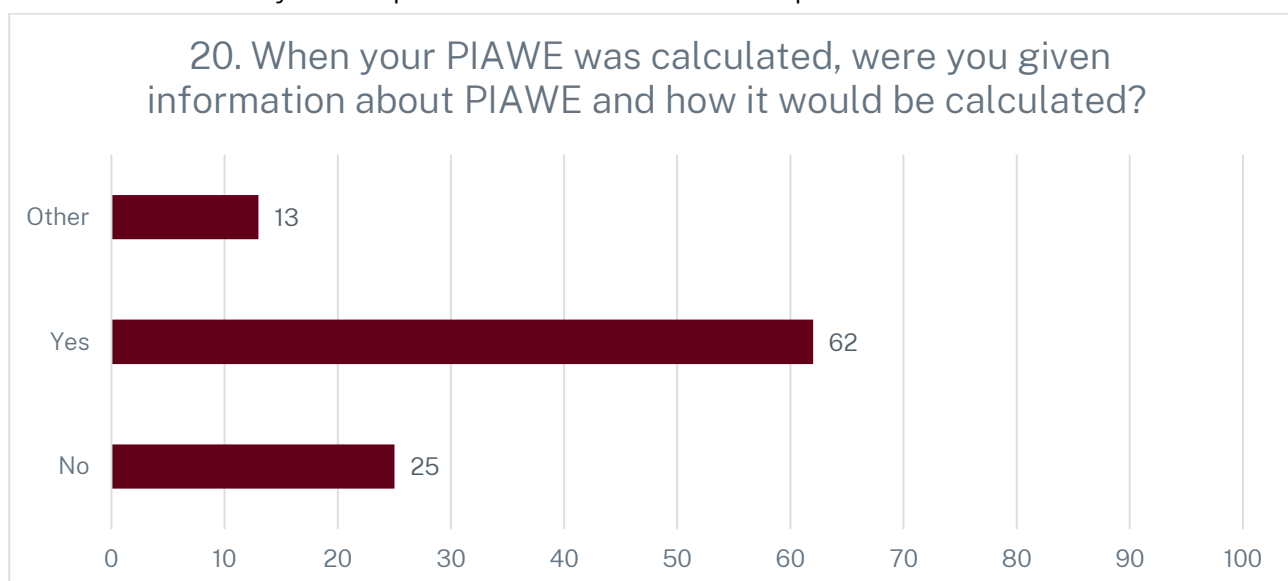


Chart 20: Provision of information

Among those who were provided with PIAWE information, most of them said they were provided with enough information (51 responded 'Yes' out of 62).

### Ease of understanding PIAWE

As seen in Chart 21, close to 60 per cent of the respondents found that PIAWE is easy or very easy to understand, 18 per cent found it difficult or very difficult to understand.

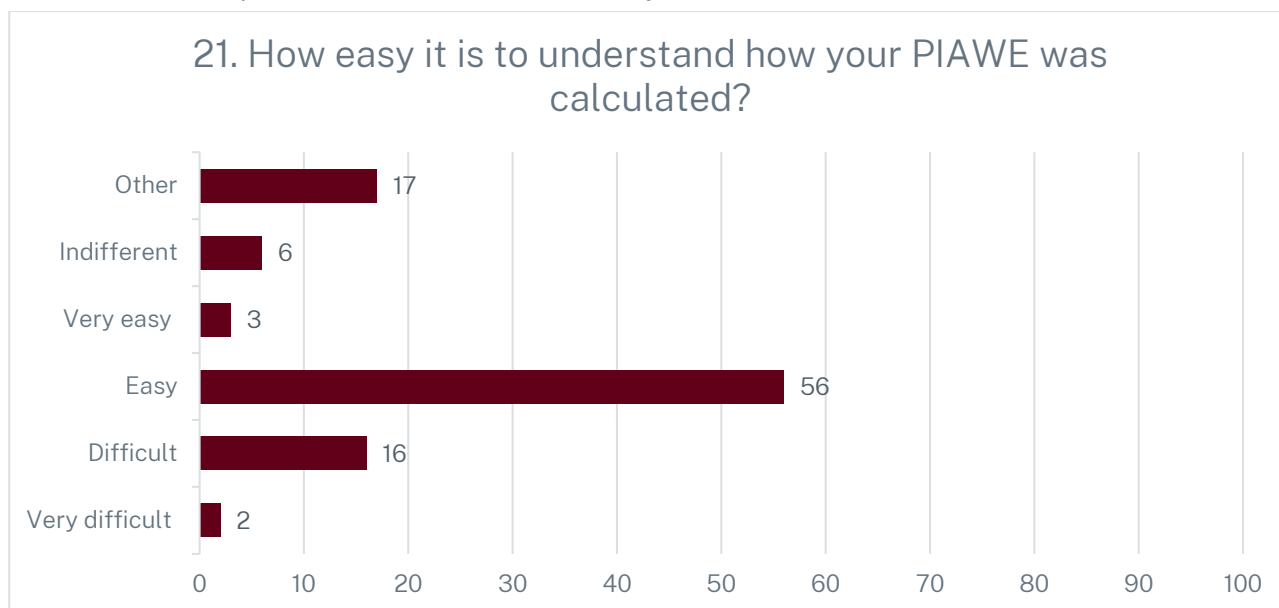


Chart 21: Ease of understanding

Some respondents (6 per cent) indicated an indifference to understanding PIAWE. The responses categorised as 'Other' did not comment on the ease of understanding PIAWE. These responses ranged from a description of what information was provided and who provided it, to the worker not having heard of PIAWE before.

### Subsequent changes to PIAWE

When asked about changes to or reviews of PIAWE (Chart 22), 41 workers responded there was a change in their PIAWE. When asked about whether they knew why it was changed, they referred to a drop after a period of time, or a drop from 95 per cent to 80 per cent. This indicates a conflation between PIAWE and weekly payment entitlements.

'Other' responses for changes to PIAWE were 'I don't remember' or 'I don't know'. One worker reported the insurer acknowledged the need to recalculate the PIAWE amount.

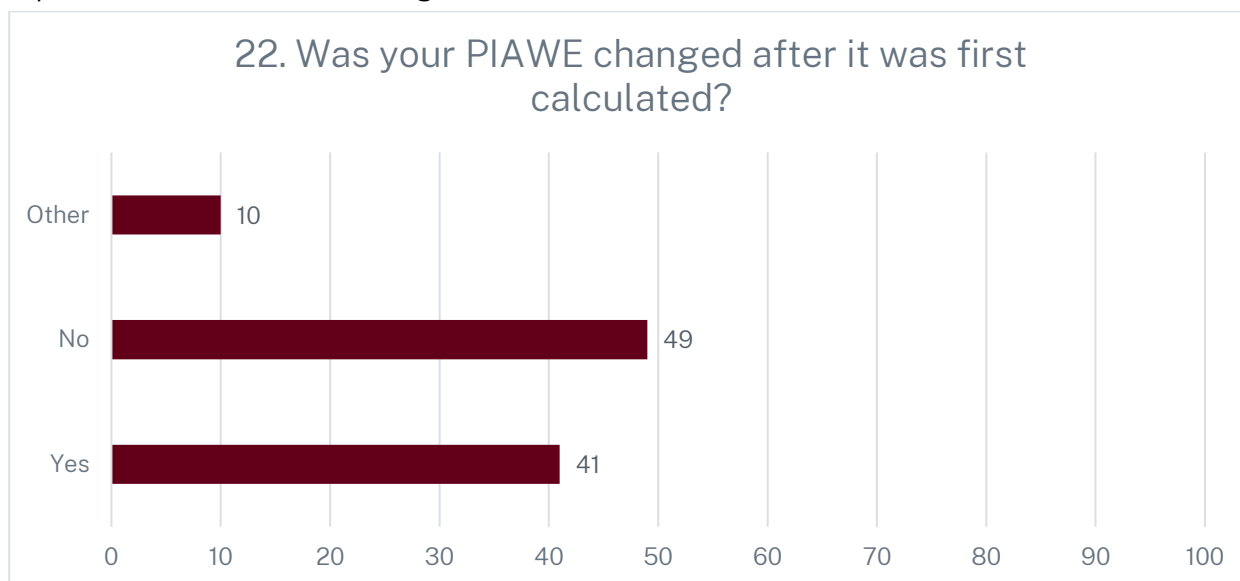


Chart 22: Changes to PIAWE

Almost a quarter of workers either told their insurer that their PIAWE was incorrect or asked for a review. 60 per cent of the interviewed workers did not raise it with their insurer.

In a separate question, only three workers responded that they were aware of the review process.

### PIAWE agreements

Chart 23 shows that three-quarters of the workers did not know what a PIAWE agreement was.

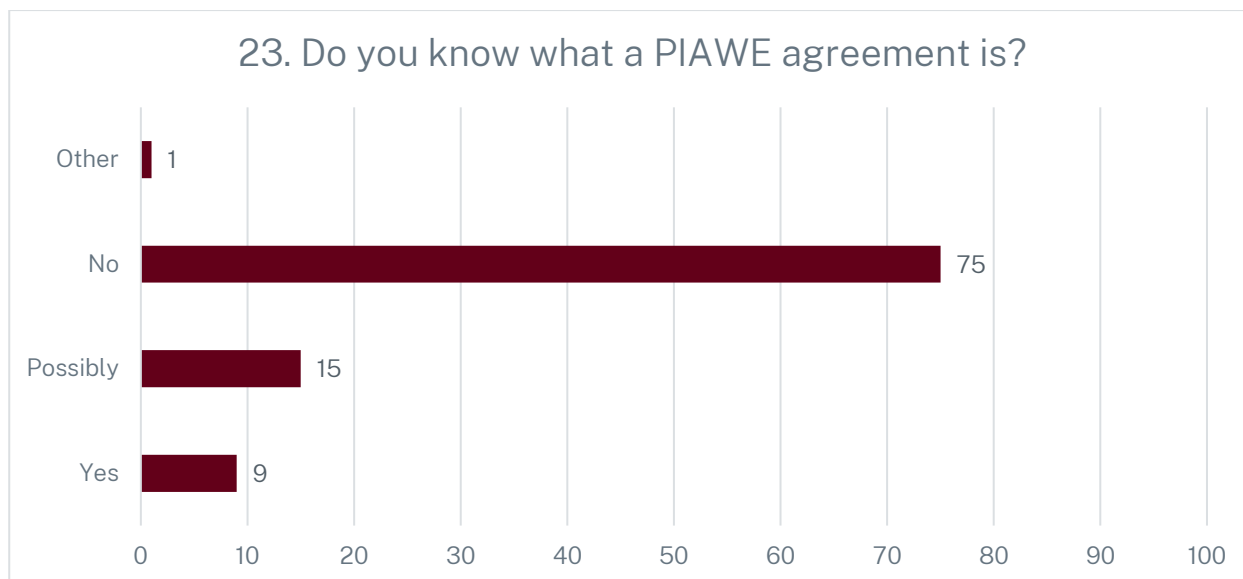


Chart 23: Awareness of PIAWE Agreements

### Overall perception of PIAWE

The responses in this section were highly dependent on the workers' personal experience in the scheme, their interaction with the case manager or insurer, and/or their interaction with the employer.

When asked about what is not working well with how PIAWE is determined, worker responses included:

- insufficient communication between employers and injured workers
- lack of proper explanation of why the amount is less
- information on PIAWE is not easy to understand
- not enough information is provided about PIAWE
- there was no transparency, support, or explanation
- PIAWE is not looked at personally and properly by the insurer
- it is not determined on a case-by-case basis/not a tailored approach
- commissions described as a bonus is not included in the calculation
- the PIAWE reduces after some time
- the amount should not be 95 per cent of pre-injury earnings, it should be the full amount instead
- it did not consider the worker's change in circumstances over a 2-year period (change from part time to full time)
- it does not consider the COVID-19 situation.

When asked about what is working well, responses included:

- good communication
- the process is easy to understand once explained
- the calculation is easy to understand
- case manager provided sufficient information about the process
- worker has been kept up to date by email
- categories are simplified compared to the old PIAWE legislation

- worker has not been without income at any point, there was a seamless transition
- the process and calculation of PIAWE was quick
- it is fair
- it is consistent
- considered all earnings, not just that from the work where the worker was injured
- great that it considered the earnings from working overtime
- happy with the amount they receive
- the PIAWE amount matches the worker's earnings.



## Appendix E - File reviews – areas covered

The file reviews examined:

- Information gathered to calculate PIAWE
- Time taken to receive sufficient information to calculate PIAWE
- Correspondence sent to workers and employers
- Interim PIAWE and interim payment decisions
- Use of forms
- Action taken by the parties after interim PIAWE calculation / interim payment decision
- Timeframes
- Consideration of concerns raised by all parties during the process
- Consideration and implementation of provisions around COVID-related impacts (including JobKeeper payments), concurrent employment, PIAWE agreements, short-term workers, apprentices, trainees and young people, and non-monetary benefits (if applicable)
- Recalculation of PIAWE and disputes about PIAWE (if applicable).

## Appendix F - Independent Review Office – PIAWE complaints data

Table 5: Total number of PIAWE related complaints received by the Independent Review Office.

Period	Total No. of Complaints	No. of PIAWE Complaints	% of PIAWE Complaints
2017 Q2	873	24	2.7%
2017 Q3	798	29	3.6%
2017 Q4	677	39	5.8%
2018 Q1	807	45	5.6%
2018 Q2	800	46	5.8%
2018 Q3	910	43	4.7%
2018 Q4	861	35	4.1%
2019 Q1	1,359	72	5.3%
2019 Q2	1,557	73	4.7%
2019 Q3	1,932	59	3.1%
2019 Q4	1,595	2	0.1%
2020 Q1	2,000	8	0.4%
2020 Q2	1,871	12	0.6%
2020 Q3	2,218	18	0.8%
2020 Q4	2,001	18	0.9%
2021 Q1	1,981	22	1.1%
2021 Q2	1,868	23	1.2%
2021 Q3	1,884	22	1.2%
2021 Q4	1,525	28	1.8%
2022 Q1	1,583	23	1.5%

## Appendix G - icare claims data

Table 6: icare claims data over Cohort 1 (12 months between 1/10/18-30/9/19) and Cohort 2 (12 months between 1/4/21-31/4/22). Percentages are calculated as a proportion of claims with at least one week of weekly payments during the period. It is noted that QBE data for numbers of workers who sought reviews and whose PIAWE was determined by agreement are not included in the numbers below.

	Cohort 1	Cohort 1	Cohort 2	Cohort 2
Number of workers with a PIAWE of \$155	1,699	5.50%	2,784	4.14%
Number of workers in receipt of the maximum weekly compensation amount	1,675	5.43%	3,685	5.48%
Number of workers who sought an insurer review of their PIAWE	101	0.33%	363	0.54%
Number of workers who sought a review of their PIAWE at the PIC	0	0.00%	19	0.03%
Number of workers who sought a review of their PIAWE at either the Merit Review Service or the Workers Compensation Commission	5	0.02%	0	0.00%
Number of workers whose PIAWE was determined via a PIAWE agreement	0	0.00%	172	0.26%
<b>Total no. of claims</b>	<b>30,874</b>		<b>67,206</b>	

## Appendix H - Suggested recommendations for consideration by PIAWE Reference Group

Table 7: Suggestions considered by the PIAWE Reference Group members. The right-hand column 'Comment' shows the evolution of the suggestions during the meeting on 29 November 2022. The final suggestions considered and voted on by the PRG are denoted by the light teal shading.

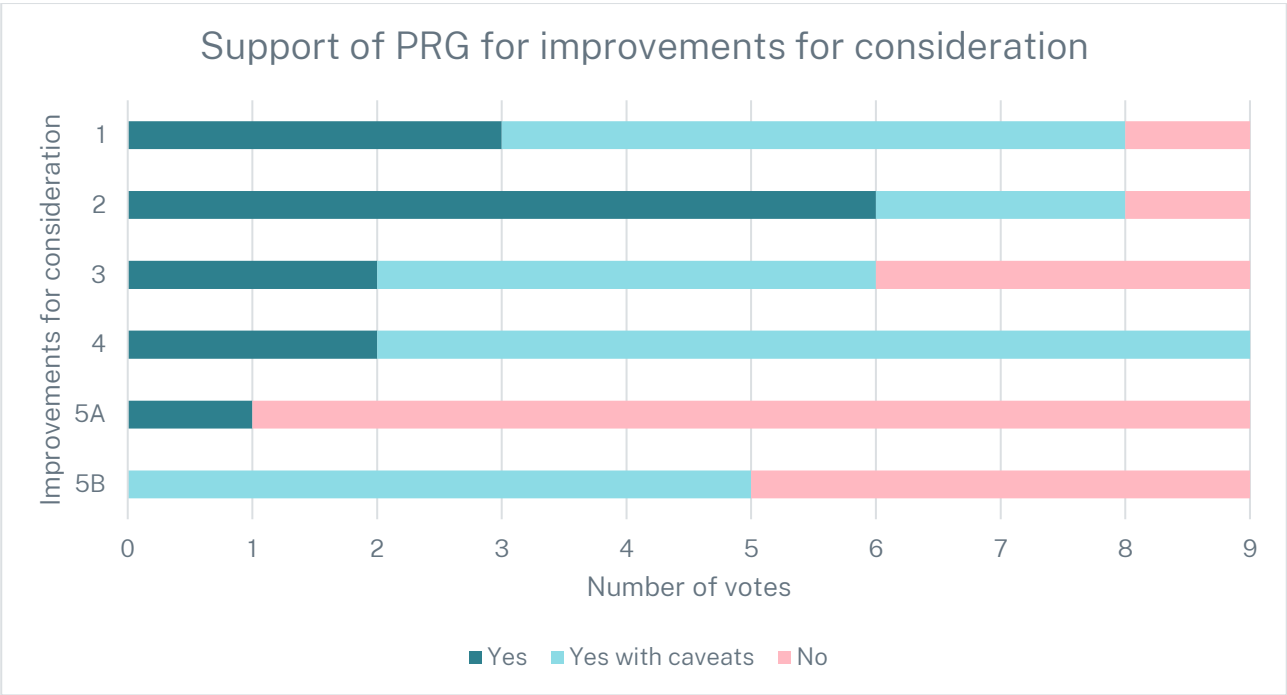
#	Suggested recommendations	Considerations and possible impacts	Comment
‡ (replaced)	Extend the 2019 PIAWE amendments to all workers regardless of date of injury	<ul style="list-style-type: none"> <li>Extending the provisions to all workers (including with dates of injury prior to 21 October 2019) will create a simpler and fairer approach to calculating PIAWE for all stakeholders</li> <li>Would insurers be required to revisit previous calculations to recalculate or wait for workers or their representatives to make the request? Alternatively, would it only apply to workers who later become entitled to weekly payments (with a DOI pre-21 October 2019)?</li> <li>If insurers are required to revisit previous calculations, this would lead to increased administrative burden for insurers, and if workers are not proactively contacted, result in inequity for some workers.</li> <li>Legislative change would be required.</li> </ul>	Note – this recommendation was amended during the meeting. Please refer below for new recommendation #1.
1 (new)	Extend the 2019 PIAWE amendments to all workers regardless of date of injury for new claims lodged (after date of commencement of new legislation)	<ul style="list-style-type: none"> <li>Extending the current provisions to all workers (including workers with a date of injury prior to 21 October 2019) will create a simpler and fairer approach to calculating PIAWE for all stakeholders</li> <li>Legislative change would be required.</li> </ul>	
2	Remove PIAWE from the definition of a work capacity decision	<ul style="list-style-type: none"> <li>Feedback mentioned that PIAWE is not relevant to work capacity, and instead uses information prior to the injury, which leads to confusion. An alternative view was that the determination of PIAWE is intrinsically linked to the amount of weekly compensation payable to a worker.</li> <li>Removal of work capacity decisions would make it easier to change a PIAWE decision once new information comes to light if you</li> </ul>	

#	Suggested recommendations	Considerations and possible impacts	Comment
		<p>aren't required to pursue a formal dispute</p> <ul style="list-style-type: none"> <li>How will a worker's right to objective review be preserved?</li> <li>How should an appropriate notice period for a change in PIAWE which results in a reduction in weekly payments be determined?</li> <li>Legislative change would be required.</li> </ul>	
3	Adjust PIAWE provisions to enable a fair calculation of PIAWE for workers who have had workers compensation payments during their relevant earning period	<ul style="list-style-type: none"> <li>The current relevant earning period provisions have limited value in preventing an "absurd" outcome for the worker in some cases, e.g., where workers have no capacity as at the date of the subsequent injury.</li> <li>How should PIAWE be calculated for the subsequent injury?</li> <li>Any new proposed approach could consider where multiple employers are liable.</li> <li>Legislative or regulation change would be required for any new methods to determine PIAWE for these workers.</li> </ul>	
4	Simplify the process for reaching a PIAWE agreement, including simplifying the PIAWE Agreement form	<ul style="list-style-type: none"> <li>Feedback said that requiring agreements to be in writing is burdensome</li> <li>Feedback from employers and workers indicated they find providing supporting information as well as the application form more difficult or time consuming than providing pay histories</li> <li>If timeframes for workers and employers to reach an agreement are difficult to meet, what timeframes are appropriate?</li> <li>SIRA's PIAWE Agreement form is not mandated, however contains all requirements in the Regulation. Simplification of the form may require Regulation changes.</li> </ul>	
5 (replaced)	Adjustment to the relevant earning period provisions	<ul style="list-style-type: none"> <li>Shorter period to reduce the burden of gathering 52 weeks of wages, leave and employment related evidence</li> <li>Unpaid leave exclusions - there can be a large potential for variance in excluding days from earning period</li> </ul>	Note – this recommendation was split into two parts – see new 5A and 5B below.

#	Suggested recommendations	Considerations and possible impacts	Comment
		<ul style="list-style-type: none"> <li>Should the relevant earning period provisions be amended?</li> <li>How would flexibility, fairness and applicability to different workers (equity) be preserved, without increasing the number of disputes?</li> <li>Legislative and/or regulation change would be required for any changes.</li> </ul>	
5A (new)	Adjustment to the relevant earning period provisions – shorter relevant earning period	<ul style="list-style-type: none"> <li>Shorter period (e.g., 4 weeks) to reduce the burden of gathering 52 weeks of wages, leave and employment related evidence</li> <li>Should the relevant earning period provisions be amended?</li> <li>How would flexibility, fairness and applicability to different workers (equity) be preserved, without increasing the number of disputes?</li> <li>Legislative and/or regulation change would be required for any changes.</li> </ul>	
5B (new)	Adjustment to the relevant earning period provisions – amend unpaid leave provisions	<ul style="list-style-type: none"> <li>Unpaid leave exclusions - there can be a large potential for variance in excluding days from earning period</li> <li>Should the relevant earning period provisions be amended?</li> <li>How would flexibility, fairness and applicability to different workers (equity) be preserved, without increasing the number of disputes?</li> <li>Regulation change would be required for any changes.</li> </ul>	
6 (removed)	Consider alternative options for the gathering of evidence, for example, use of taxable income	<ul style="list-style-type: none"> <li>Taxable income includes amounts not just for work performed, and deductions (that are not already excluded in the current definition of 'earnings') which reduces income</li> <li>Some workers may not submit tax returns – an alternative method of determining their PIAWE would be required</li> <li>Income will in most cases not relate to the relevant earning period, and therefore will not be a representation of recent earnings</li> <li>Timely access to taxable income information would require data</li> </ul>	This recommendation was withdrawn during the meeting. The group confirmed that using taxable income as an alternative method of determining PIAWE should not be a recommendation, and the intent of

#	Suggested recommendations	Considerations and possible impacts	Comment
		sharing agreements or systems to be established <ul style="list-style-type: none"> <li>• Use of payment summaries as an item of earnings evidence is already allowed</li> <li>• Legislative change would be required.</li> </ul>	the taxable income submission has changed. Voting was not required.
7	Consider changes to SIRA guidance	<ul style="list-style-type: none"> <li>• SIRA to consider changes to online guidance and information based on PIR activity findings. This may include clarification or simplification of certain content (e.g., around PIAWE agreements or information targeted at workers) or providing further information where gaps have been identified.</li> </ul>	Voting not required, but comments were welcome.
8	Insurers may consider reviewing processes and procedures	<ul style="list-style-type: none"> <li>• Insurers to consider PIR findings and consider improvements to processes and procedures, e.g., correspondence to workers and employers and related communications to ensure clarity and to manage expectations regarding timeframes</li> </ul>	Voting not required, but comments were welcome.

# Appendix I - PIAWE Reference Group support for proposed improvements



Nine PIAWE Reference Group member organisations voted to express their support (or lack of support) for each suggested recommendation from Table 7: icare, EML, Self-Insurers Association, Independent Review Office, AI Group, CFMEU, Law Society, Australian Lawyers’ Alliance, and another legal representative. Voting on improvements 7 and 8 from the table above was not required.



## Appendix J - PIAWE determination based on date of injury – number of workers impacted

*Table 8: Number of claims where the first weekly payment and the date of notification (date entered into insurer system) was made in the third and fourth years after the date of injury (DOI). The count of claims is based on the year of the injury and the year notified. 3 and 4 years were chosen as it has already been more than 3 years since the 2019 amendments commenced.*

Year of injury	Total no. of claims	Claims with first weekly payment made 3 years after date of injury	Claims with first weekly payment made 4 years after date of injury
2013	99,986	19	10
2014	95,038	24	12
2015	92,978	44	10
2016	92,168	38	10
2017	92,359	44	15
2018	98,733	47	8
2019	99,419	18	0

## Disclaimer

This publication may contain information that relates to the regulation of workers compensation insurance, motor accident compulsory third party (CTP) insurance and home building compensation in NSW. 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.

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