



Independent  
Review Office

18 November 2022

By email: [REDACTED]

Pauline Kavanagh  
Manager Workers & Home Building Compensation Regulation  
Scheme Design, Policy and Performance  
State Insurance Regulatory Authority

Dear Ms Kavanagh

**Confidential and targeted consultation: amendments to the Workers Compensation Regulation 2016 - entitlement to costs associated with managing children's lump sum death benefit**

Thank you for the opportunity to provide a submission on the proposed amendments to the *Workers Compensation Regulation 2016* (Regulation). Thank you also for the briefing provided to the Independent Review Office (IRO) on Monday 31 October 2022.

The proposed amendments to the Regulation fall into two categories:

- The first category prescribes the methodology to calculate additional compensation for fees payable to the NSW Trustee and Guardian (TAG) pursuant to section 25(1A) of the *Workers Compensation Act 1987* (WCA) – as yet uncommenced – for the costs of investing or otherwise managing a dependent child's lump sum death benefit awarded under section 25(1) of the WCA.
- The second category concerns a number of minor amendments including provisions for service of documents and disclosure of information.

The IRO's submission will focus on the first category of amendments.

**Funds management costs**

The IRO has had the opportunity to provide informal feedback on some aspects of the proposed amendments during the course of the consultation process. However, it would be appropriate to consolidate that feedback as part of this submission, in addition to commenting on the draft amendment to the Regulation itself.

Pursuant to section 25(1)(a) of the WCA, dependents of workers whose death results from a compensable injury are entitled to an award of lump sum compensation. Where those beneficiaries are children under the age of 18 (infants), the compensation is generally paid to a surviving parent, or the TAG. The State Insurance and Regulatory Authority (SIRA) estimates there are approximately 60 infant beneficiaries every year whose awards of compensation will be paid to the TAG.

The TAG is responsible for administering award monies held in trust until the infant reaches the age of 18 years, or the monies are disbursed at an earlier time. The TAG charges various fees to carry out this work.

Currently, no additional amount is awarded to infant beneficiaries for the fees levied by the TAG (funds management costs). It is generally recognised that, as a consequence, the awards of compensation are eroded over time, leaving infant beneficiaries in a worse position than other

beneficiaries of lump sum death benefits. The insertion of section 25(1A) into the WCA is intended to remedy this detriment.

The IRO strongly supports providing for an additional compensation payment for funds management costs. It is apparent from the examples of calculations based on the proposed clause 177 of the Regulations - provided by SIRA as attachments to the consultation material - that funds management costs are likely to be substantial for even relatively small awards and significantly diminish the value of compensation awarded to infants pursuant to section 25 of the WCA.

The IRO notes section 25(1A) was introduced into the WCA by the *Motor Accidents and Workers Compensation Amendment Act 2022*. The section was to commence by proclamation, but that has not yet occurred, and it is now subject to amendment by the Personal Injury Commission Amendment Bill 2022, which is currently before Parliament.

The current version of section 25(1A) is in the following terms:

(1A) If the lump sum death benefit is paid to the NSW Trustee for the benefit of a dependant in accordance with section 85 after the commencement of this subsection, the employer must, subject to the regulations, pay as additional compensation fees of a kind prescribed by the regulations concerning investing or otherwise managing the sum for the dependant's benefit.

The proposed amended version is in these terms:

(1A) If the lump sum death benefit is paid to the NSW Trustee for the benefit of a dependant in accordance with section 85 after the commencement of this subsection, the employer must also pay compensation for the cost of investing or otherwise managing the sum for the dependant's benefit.

(1B) The regulations may make provision about the compensation payable under subsection (1A).

(1C) Without limiting subsection (1B), the regulations may provide for the following—

(a) the kinds of fees for which the compensation is payable,

(b) the method for determining the amount of compensation payable, including the matters to which the Commission must have regard in making the determination

Neither version of the section explicitly favours a method for the calculation of funds management costs.

The options for payment of funds management costs include:

1. A single payment for all such costs incurred over the entire period monies are held by the TAG, or
2. Payment as and when costs are incurred.

The proposed amendments to the Regulation would create a method of calculating funds management costs as a single payment, rather than ongoing payment of such costs as and when incurred.

### **Merits of the proposed regulation 177**

The IRO will first address the question of whether the option for calculation of funds management costs, proposed by the Regulation, is suitable for achieving the intention of section 25(1A). That intention is reflected in the Minister's Second Reading Speech<sup>1</sup> for the Motor Accidents and Workers Compensation Legislation Amendment Bills 2021:

*This additional compensation entitlement to cover the cost of investing and managing a child's lump sum ensures that the child's lump sum is not at risk of being eroded by fees over time.*

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<sup>1</sup> [Legislative Assembly Hansard - 09 June 2021 \(nsw.gov.au\)](https://www.parliament.nsw.gov.au/committees/legislation/legislation-amendment-bills-2021)

The IRO considers that there is a real potential that any award will be less than the actual costs charged by TAG in managing the funds. This is primarily because it is not possible to accurately calculate, in advance, a single amount equivalent to the TAG's fees over the period during which funds are administered (**see**: Appendix A for a detailed discussion of the issues with the use of a single payment for funds management costs).

Ultimately, the use of a single payment method of calculating funds management costs means an infant beneficiary of an award for death benefits will have no certainty that the amounts they actually will pay to the TAG will be included in the award. Given the factors which may make actual funds management costs greater than the amount calculated by the proposed formula, there is a real prospect that the single payment method will result in an underpayment in the award to the infant. There is therefore a real risk the infant's lump sum will be eroded by fees over time.

### **Terms of the proposed regulation**

While we have reservations about the proposal to provide for a single payment, our view is that the formula in the proposed clause 177 of the Regulations seems capable of being applied without technical difficulty.

The IRO understands the formula in the proposed Regulation is a simplified method of calculating the amount of funds management costs over the entire period an award of compensation may be managed by the TAG. This is because an accurate formula would be extremely difficult, if not impossible, to achieve in view of the complexity of the variables involved. Indeed, some variables may not be capable of accurate quantification as they rely on future events which cannot be predicted – for example, future rates of return on deposits and shares.

Nevertheless, the IRO considers there may be further steps which could be taken to improve the operation of the formula and makes the following recommendations:

1. If it is necessary to implement section 25(1A) by way of a one-off fee prescribed by the Regulation, it may be preferable to increase the flexibility of the formula by amending section 25(1A) to prescribe the amounts identified as 'A' and 'D' and in Tables 1 and 2 of the proposed clause 177 as gazetted amounts, instead of fixed amounts in the Regulation.
2. A thorough review and assessment of the appropriate discount rate to be applied to calculating the net present value of ongoing fees.
3. A thorough review of the formula to see where improvements can be made. The IRO has made a specific recommendation with respect to one aspect of the formula, which is set out in Appendix A.

We have provided a more detailed discussion of the reasons behind these recommendations in Appendix A to this submission.

### **A better alternative**

It will be apparent from the matters set out above that the proposal to calculate a single payment for funds management costs is both complex and will quite probably result in the fee compensation not being equal to the fees charged by TAG, and in many cases possibly proving inadequate, therefore eroding the lump sum benefit.

Therefore, awarding a single amount for all funds management costs may not be the most suitable means of implementing the intention of section 25(1A) – in whichever form it takes.

Alternatively, an award for payment of fund management fees as and when charged by the TAG has the advantage of simplicity, accuracy, flexibility and certainty for the award beneficiary and insurers.

We understand that a reason why this option may not be preferred is that TAG systems are not suited to invoice for and receive payment of the fees it charges. While it is not clear why this might

be the case, in our view this is not a sufficient reason to potentially disadvantage infants awarded a lump sum death benefit.

In this respect, we are aware the TAG regularly receives amounts including initial funds on trust, income from investments and fees. It is also required to disburse amounts at the conclusion of a trust and allocate returns on investment and other amounts incurred in managing assets. We understand the TAG also provides a regular accounting of its activities in each trust, including the fees charged.

Given this, our view is that substantial evidence would be required to demonstrate an unreasonable additional burden for the TAG in charging the actual fund management costs, to discount this approach as against a single award.

It has also been suggested that it is not feasible to draft a statutory provision, or regulation, which makes provision for payment of funds management costs as and when they are charged.

It is unclear why this is the case, as such provisions are not uncommon in legislation. For example, section 60(1) of the WCA provides that an employer is liable to pay the cost of reasonable necessary treatment given to a worker as a result of an injury. These payments are made as and when the treatment is given.

In our view, the Regulation could provide that an employer must pay as compensation the fees charged by the TAG from time to time, calculated in accordance with the *NSW Trustee and Guardian Act 2009*, for investing and otherwise managing the infant's lump sum death benefit.

This approach, in our submission, would ensure the statutory purpose of section 25(1A) of the WCA is fully met.

In addition, the payment of funds management costs on an ongoing basis would appear to impose little additional burden on insurers in view of the fact they are required to make weekly payments of compensation for the benefit of the dependent children pursuant to section 25(1)(b) and (2) of the WCA in addition to any lump sum.

We trust these comments are of assistance. The IRO consents to the publication of this submission.

If SIRA requires further information about these matters, please do not hesitate to contact Marilyn Cassidy, Principal Policy Officer.

Yours sincerely

A black rectangular redaction box covering the signature of Simon Cohen.

Simon Cohen  
Independent Review Officer

**Attachment: Annexure A**