

ALA QLD Submission on In Person Conferences

The Lack of Commitment to have Face-to-Face Conferences in Regional Queensland

10 December 2021

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Our Standing to Comment

The ALA is well placed to provide commentary on this issue.

Members of the ALA regularly advise clients all over the country that have been caused injury or disability by the wrongdoing of another.

Our members advise clients of their rights under current state based and federal schemes, including motor accident legislation, workers compensation schemes and Comcare. Our members also advise in cases of medical negligence, product liability and other areas of tort.

We therefore have expert knowledge of compensation schemes across the country, and of the specific ways in which individuals' rights are compromised or supported by different Scheme models.

Our members also often contribute to law reform in a range of host jurisdictions in relation to compensation, existing schemes and their practical impact on our clients. Many of our members are also accredited specialists in their field. We have a strong presence in regional areas in Queensland and regularly hold continuing legal education events in regional centres. Our membership has seen, first hand, the impacts of insurers or their lawyers refusing to attend face to face conferences.

Introduction

For many years, insurers have engaged solicitors from independent law firms to act on their behalf when defending common law personal injury claims brought by injured people. The usual practice is to have a number of law firms on their 'panel', and then to select a law firm from the panel to act in a particular matter. In many matters, panel firms are not engaged until after the matter becomes litigated. ALA supports the principle and practice of using panel firms as distinct from the "in house" model which has failed historically in Queensland.

Historically, some local law firms were engaged by most insurers to undertake their work. By having a physical presence in the region where the injured person is located and where the claim is to be brought, meant face to face conferences were conducted. Currently, there are only two panel law firms located outside of Brisbane who are engaged to undertake insurance work on behalf of a number of insurers. One firm, based in Cairns, is presently transacting claims for WorkCover Queensland, at least one licenced self-insurer and a number of CTP insurers. The other firm, based in Toowoomba, transacts work for WorkCover Queensland. We are aware of and commend insurers' push to have a regional panel. However we are aware of at least one firm which purports to have a full time presence in a regional centre, but we understand that office is rarely staffed. The reduction in the number of panel firms being based or having a full time presence in the regions has inevitably meant the erosion of the face to face conference, and led to tensions on the question of face to face participation in alternative dispute resolution (compulsory conferences and mediations) mandated under each of the *Workers' Compensation and Rehabilitation Act 2003 (WCRA)*, *Motor Accident Insurance Act 1994 (MAIA)* and *Personal Injuries Insurance Act 2002 (PIPA)*.

Prior to Covid-19, a practice had developed, as a result of much hard work of our members over time, of insurers or their solicitors attending conferences face to face in the region where the claimant was located, and where Court proceedings would ultimately be filed if litigated. With the Covid-19 restrictions and lockdowns occurring, understandably, accommodations were made to enable video or tele-conferencing of conferences in order to avoid delays in matters proceeding. Whilst this was not ideal, it was preferential

to matters stalling given the uncertainties of the pandemic. However, since the lifting of the Covid-19 restrictions, and the “opening up” of Queensland to regional travel, our regional members are reporting continual pushback from insurers and their lawyers in returning to travel to the regions to attend face to face conferences. There are currently no travel restrictions in place prohibiting travel between Brisbane and any regional centre in Queensland. Despite this, many insurer representatives continue to refuse to travel to the regions. There is no consistency as to the panel firms selected by insurers appointed to regional matters. Further, there is a lack of consistency in both insurers and panel lawyers as to their willingness to attend conferences face to face in regional areas. However, it is our members’ experience that some firms are far more strident in their unwillingness to agree without earlier disputation, to physically attend those conferences.

A typical process, where there is pushback from a panel firm to regional conferencing, to arrange a conference in the regions is as follows:

- Claimant solicitor proposes dates for convening of conference;
- Respondent replies requesting they attend by phone or video link;
- Claimant responds objecting and requiring the conference be convened in person;
- Respondent replies they will only attend if they have more than one conference to attend, or alternatively continues their objection;
- Claimant solicitor threatens a Court application seeking their in person attendance;
- Respondent eventually replies nominating one date they will attend for the convening of a “bulk” conference day, which is inevitably later in time than the originally nominated date;
- Further correspondence is exchanged until a date is finally agreed.

The above demonstrates the inevitable delays that are occurring in having face to face conferences convened, sometimes months after the original date was proposed, with capitulation usually only after an application to Court is threatened. Such unnecessary communication also increases the claimant’s legal costs. These delays and additional work for the claimant’s lawyers are antithetical of the objects of the governing legislation set out in WCRA s.273, MAIA s.3 and PIPA s.4, to facilitation the just and expeditious resolution of the real issues in claims at a minimum of expense. These difficulties also run counter to successive Queensland government’s proper acknowledgement of the fact that Queensland is the most decentralised jurisdiction in Australia and that recognition for over 100 years has been recognised by the fact that we have in Queensland Supreme Courts with sitting Judges in Cairns, Townsville and Rockhampton, and District Courts with sitting Judges in regional centres of Maroochydore, Rockhampton, Townsville, Southport and Cairns.

The legislative provisions (S.289 of the WCRA, s.38 PIPA and s.51B MAIA) contemplate that the conference will be held face to face unless to do so would be unreasonable:

Section 289 WCRA

(8)The claimant in person, a person authorised to settle on the insurer’s behalf and a person authorised to settle on behalf of any contributor must attend the conference and actively participate in an attempt to settle the claim, unless the claimant or person has a reasonable excuse.

(9) If it would be unreasonable for all parties to attend at the same place, for example, because of distance or illness, the conference may be conducted by telephone conferencing, videoconferencing or another form of communication that allows reasonably contemporaneous and continuous communication between the parties.

Section 38 PIPA

(6) Each party must, unless the party has a reasonable excuse, attend the compulsory conference and actively participate in an attempt to settle the claim.

(7) The compulsory conference may be conducted, if the parties agree, by using any technology that reasonably allows the parties to hear and take part in discussions as they happen.

Example—

Teleconferencing

Section 51B MAIA

(10) Each conference participant must (unless he or she has a reasonable excuse) attend the compulsory conference and actively participate in an attempt to settle the claim.

(11) The compulsory conference may be conducted, if the parties agree, by telephone, closed-circuit television or another form of communication allowing contemporaneous and continuous communication between the parties.

Reasonable circumstances to not attend in person would clearly include a resumption of Government mandated pandemic related travel restrictions. If an insurer representative, despite an absence of Government mandated travel restrictions, were precluded from travel for health reasons, we note that each of WorkCover Queensland, the four CTP insurers and the public liability insurers are all very large organisations capable of re-allocating that matter to someone not precluded from travel, or alternatively brief counsel who can attend in person. Our members are flexible when reasonable circumstances genuinely arise.

The ALA firmly believes in the quality of legal services provided by legal practitioners in the regions of Queensland, and believes that residents living in regional areas of Queensland should have equal access to justice as those living in and around Brisbane.

Consequences of lack of Face-to-Face Conferences in Regional Queensland

There are a number of consequences that follow from the refusal of insurers or their panel lawyers to attend conferences in person in regional Queensland:

- a. The impact on injured claimants, insurers, and the insured (usually the employer);
- b. The impact on regional solicitors and barristers;
- c. The effect that a lack of local knowledge can have on the running of claims;
- d. The perception that regional practitioners perform sub-standard work.
- e. Negative effects upon Courts.

The Impact on Injured Claimants, Insurers and the Insured

Not having face to face conferences in the local region can impact on all parties to a claim, including the injured person and their experience of the legal system, as well as the insurer and the insured. The main impacts are:

- The impact on the claimant. For lawyers, this is an everyday occurrence. The claimant (usually) only has one claim. Taking them out of their home to a foreign environment in a room full of lawyers is a daunting experience. Add to that the lack of a familiar environment, being out of their element, and fatigue, increases the distress of a claimant. Adding to the distress of claimants should be something to be avoided as amongst other things, it reduces the prospects of resolving matters at alternate dispute resolution (ADR);
- Increased costs to the claimant in travelling to Brisbane to attend a face to face conference (particularly in non-costs recovery claims);
- Delay to the claim;
- Increased costs to both parties in “arguing” the issue as to whether the conference should be convened in person in the region; and
- An increase in claimant dissatisfaction in the legal process, which can have a flow on effect to the general opinion of insurers.

These impacts are explored below through an examination of the pre-court and compulsory conference procedures.

In the usual course of a personal injury damages claim, the claimant initially lodges their claim, the parties investigate the claim, and the matter progresses to a mandated Compulsory Conference. A Compulsory Conference is usually held as a face to face meeting between the injured person together with their legal representatives, and the solicitors representing the respondent. At this conference, each party has an opportunity to verbally present their case to the other party before offers are exchanged in an attempt to resolve the claim. The majority of personal injury claims resolve at the Compulsory Conference. However if the matter cannot be resolved at the Compulsory Conference, Court proceedings are lodged. A pre-trial mediation is then held in some matters. If the matter does not resolve, the trial will be held in the local region.

When a local lawyer is briefed to defend regional matters, the convening of a Compulsory Conference in person is a straightforward matter. However, when Brisbane based solicitors are briefed to defend personal injury claims brought in regional Queensland, the Compulsory Conference must progress in one of the following ways:

- The Brisbane based solicitor travels to the region to attend the Compulsory Conference;
- The injured worker travels to Brisbane to attend the Compulsory Conference; or
- The Compulsory Conference occurs by way of telephone or video link.

Each of these situations and the impact on the parties and the running of the claim is explored below.

Brisbane Solicitor travels to Compulsory Conference

There is significant benefit in the Compulsory Conference occurring face to face, including:

- In the experience of our members, there is a higher success rate in resolving personal injury claims when the conference is held face to face;
- The Respondent lawyers have the opportunity to meet with the injured person to see how they present and view their injuries if this is possible, which allows them to have a clearer picture of the claimant and the claim;
- The claimant has the opportunity to discuss the impact of their injury, which is an important part of their experience in accessing the legal system. They get to judge the strength and conviction of their opponents' arguments;
- The insured, usually the local employer, having the opportunity to attend and participate in the conference process and meet with their representative face to face;
- The legal representatives are able to convene face to face and communicate both verbally and non-verbally. This provides the best opportunity for the parties to read and understand each other, and gives the best opportunity to overcome any issues with a view to resolving the claim;
- Where there is more than one respondent to the claim, the benefit of the legal representatives convening in person and having the opportunity to communicate both verbally and non-verbally is enhanced;
- Minimises the claimant's travel, which from regional areas is usually by a combination of air and road, when many claimants find such travel difficult and painful due to their injuries;
- Minimising the cost to claimants associated with travel. Many claimants are in financially precarious positions due to their injuries;
- Giving the parties the opportunity to utilise counsel in the Compulsory Conference and ADR process. In most major regional centres there is a local bar, and local counsel are usually more familiar with the settings within which injuries have occurred;
- Making the information exchange and negotiation process more effective. Our members' experience is that when the parties and their representatives can confer in one place, in person, the interactions are more likely to be considered and meaningful and the prospects of a timely resolution are improved. In doing so, and acknowledging that the Uniform Civil Procedure Rules do not expressly apply to the pre-court processes under the legislation, it is our members' experience that in-person conferences, locally proximate to the place of injury, are more likely to "facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense."
- Facilitating the objectives of the legislation referred to above, including the legislative requirement in the objects of the various Acts to ensure that claimants are treated fairly by insurers.

Brisbane based practitioners are often reluctant to travel to regional areas. Our members understand that this travel takes them outside of their normal work hours and away from their office for substantial periods, including the time of the flights itself, and travel to and from the airport. The nature of a decentralised state is that this can involve disruption from the usual work routine. Those alterations can and should be anticipated and planned for.

This leads to some panel law firms and insurers expressing reluctance to travel to attend ADR in regional areas. This can either be by way of a complete refusal to travel, or refusing to travel until a time that is convenient to them or when they have already arranged travel to the regions. This can cause unnecessary delays in progressing claims, increased costs, engendering stakeholder dissatisfaction (both for the claimant and the insured).

Further, when panel solicitors refuse to travel to regional areas to attend ADR in person it sends a clear message to injured persons regarding the justice system. Our regional members regularly note that claimants in this situation feel as though their injury and claim is not important. Personal Injury claims often take a number of years before the matter is ready to progress to a Compulsory Conference. The conference is the culmination of months if not years of preparation, angst, and anticipation for the claimant. It is not always easy for claimants to understand why they do not have an opportunity to meet with the solicitor who is defending their matter and to hear what they have to say face to face, or alternatively why the convening of the conference is delayed until a date that the solicitor is already travelling to the regions. Further, employers are often individuals who also do not understand the process. Having the conference face to face gives the insured person the opportunity to attend and participate in the process. Face to face conferences are a powerful psychological positive to claimants' perceptions that their injury and the impacts of it are being taken seriously, and to insured employers who may also feel strongly about their position. Meaningful, face to face engagement in the pre-court conference enhances the prospects of resolution.

In our submission, if a panel law firm commits to undertaking work on behalf of an insurer who services regional Queensland, and indeed the insurer themselves, this includes a commitment to properly servicing that region by attending the conference in person. We understand that successful tenderers for panel work have given such a commitment.

Worker Travels to Brisbane to Compulsory Conference/Mediation

Some of our members report feeling that there is no alternative if the matter is to be conferenced promptly, than to travel to Brisbane. This requires the claimant and the claimant's solicitor to travel to Brisbane for the Compulsory Conference, as well as Counsel if they have been briefed locally in the region. Under the various legislation, the majority of workers and many claimants have no right to recovery of any of these travel costs and they must be deducted from their settlement monies. This results in the claimant receiving less money "in hand", and being less satisfied with the legal process.

Further, claimants who bring damages claims often experience a worsening of their symptoms with long periods of travel. A typical day of travelling to, and attending a conference is usually:

- Drive or be driven to the airport, noting claimants in more remote areas can be required to drive a number of hours to get to the nearest regional airport;
- Waiting time at the airport;
- Return flights to Brisbane, which can be in excess of 2 hours duration each way from Cairns, for example;
- Travel from the airport to the ADR;
- Attend at the ADR for a number of hours;
- Being accommodated in an unfamiliar hotel at additional expense;

- Returning the following day, meaning additional time away from family and/or work; or
- Alternatively, an extremely long day returning on an afternoon or evening flight, with the return drive home.

Claimants with physical injuries can suffer a flare up of their symptoms as a result of this extensive travel. Claimants with a psychological condition may become quite anxious about this travel, particularly if they are from a remote area and do not often travel, or have an early flight which cuts into their sleep. Some claimants have never travelled to Brisbane before, or even outside their regional area, which causes further anxiety. This type of physical pain or psychological anxiety, when coupled with the claimant's already existing nervousness about what is a stressful day for them, can detract from the possibility of a settlement as the claimant cannot focus solely on the issues at hand at the conference.

Furthermore, it is common for claimants to bring a trusted friend or family member to support them at the conference as it can be an overwhelming and stressful process. If the claimant is required to travel to attend the conference, they are denied the opportunity to bring a support person as a result of the costs involved.

An increase in symptoms as a result of being forced to travel, and a lack of support at the conference, can both lead to an increase in claimant dissatisfaction in the legal process.

Further, if the insured is also located in the regional area, they lose the opportunity to participate in the conference unless they choose to attend by video or telephone, thereby losing the benefits outlined above, and leading to dissatisfaction on their part also.

Video Link or Telephone

Convening the conference via telephone or video link means that injured claimants and respondent solicitors or insurers lose the opportunity to gauge non-verbal communications, including body language and facial expressions, which can hinder the settlement of claims and cause them to move into the litigated phase, causing additional costs to both the insurer and the claimant, and stakeholder frustration.

With the increase in conferences occurring by this means as a result of Covid-19, our members have seen first-hand the real detriment caused by not meeting face to face, in addition to the matters outlined above, including:

- Difficulties with internet connection causing frequent drop-outs;
- Background noise hindering the ability of participants to properly hear submissions;
- Insurers or their representatives becoming uncontactable throughout the course of the conference;
- Particularly in multi-party matters, difficulties in finding suitable platforms able to host several different "rooms";
- Insurers or their representatives becoming distracted during the course of the conference, usually attending to other work (checking emails, answering phone calls) during breaks;
- An increase in the duration of the conference, thereby increasing the cost to the claimant;
- Delays in the exchange of MFOs or provision of the Discharge at the conclusion of the conference.

Impact on Regional Lawyers

The longer term consequence is that there will ultimately be less lawyers in the regions who are experienced in personal injury claims. Not only does this take away opportunities for lawyers based in the regions to practice in this area, but it also minimises and centralises lawyers with skills in this area to a small group of lawyers in Brisbane. Law firms in the regions are major employers. The centralisation of law firms in Brisbane reduces employment opportunities in the regions, and is prejudicial to young regional lawyers and development of their career path.

There is also a flow on effect to the regional Bar, as lawyers are called upon to make recommendations to their clients as to which barristers to brief to act in the matters, considering viability to the claim, level of expertise of the barrister, and convenience. Given the compulsory conference is usually the first time the parties will convene in person, the logistics of how the conference will be convened is often a key consideration when a claimant briefs a barrister.

If Brisbane based solicitors or insurers decline to conduct conferences in person regionally and claimants feel pressured to travel to Brisbane for the conference, the two options for claimants in terms of briefing Counsel can both be costly. The first option is to brief regional Counsel and fly them to Brisbane. In this circumstance, the claimant has to bear the cost of the claimant, their solicitor and barrister to travel to Brisbane. The second alternative is to brief Counsel in Brisbane. This has a flow on effect that Brisbane barristers may be more likely to be briefed by claimants who would ordinarily brief local Counsel. However, if a claimant has made the decision to brief a barrister in Brisbane but the matter is not resolved at the Compulsory Conference, court proceedings are commenced in the regional Court. The flow on effect of having already briefed Brisbane Counsel is that the claimant then has to bear the costs of flying their Brisbane barrister regionally to conduct their trial or any future mediation that may occur. Thus, what initially may have seemed to be a more cost effective option could prove to be the most expensive option of all to the claimant.

Conversely, by Brisbane panel lawyers briefing local barristers in the relevant region, this furthers opportunities for the local bar, and minimises travel costs for insurers.

The increased briefing of Brisbane barristers to act in regional claims potentially limits the number of personal injury barristers in regional areas and withdraws work from those practitioners who have already developed their practice in personal injuries in a regional area. It sends the message that if lawyers want to practice law in the personal injury sphere then they need to be in Brisbane. The ALA stands strongly against that idea and believes that Queensland should support and encourage a quality legal presence and Court infrastructure in all major regional centres in Queensland, which is congruent with residents of Queensland having access to justice statewide.

Lack of Local Knowledge

When insurers choose not to brief local lawyers to defend claims, it restricts the opportunity for the running of the claim benefiting from local knowledge, by way of:

- The ability of the lawyer to meet with the employer face to face; and
- The lawyer's local knowledge.

Lawyer's Access to Employer

If local lawyers are briefed to represent WorkCover or public liability insurers in regional claims, or by lawyers attending the regional centre, it is easy for them to meet with employers or the insured and access sites if it may be helpful to the claim. This is particularly so when the circumstances of the accident include complex scenarios or machinery, as they often do. One of our members reports a situation when after an unsuccessful compulsory settlement conference, the panel lawyer attended the employer premises for the first time. This resulted in further documents being discovered which ought to have been disclosed prior to the conference, and would likely have helped with the resolution of the claim. Our members indicate that in defending personal injury claims they have found it to be of great benefit to be able to access employers and worksites to assist in defending claims. They also report that this increases employers' satisfaction in the legal process. By attending a conference in person, even if the solicitor or insurer is Brisbane based, they can use the opportunity to meet with the insurer, or attend a site visit, to gain that local knowledge.

Lawyer's Local Knowledge

Lawyers practicing in regional areas are far more familiar with the locations and circumstances of particular workplaces and accident sites, which can be helpful in their understanding of the claim. Regional claims involve a higher percentage of injuries sustained in manual type employment. Dealing with multiple claims from a single industry or employer gives practitioners the ability to understand the circumstances of a claim more effectively, and understand the policies of particular employers. Familiarity of locations of motor vehicle accidents can also be of utmost importance in assessing liability in motor vehicle accident claims.

Further, local knowledge can also be important in realistically assessing the quantum of the claim, which, if not assessed correctly, is a barrier to early resolution of the claim. For example, the distances between certain areas and the practical challenges faced by clients living in a particular region can impact the quantum of a damages claim because:

- An injured claimant may not have access to conveniently located appropriate treatment, and may not be able to readily access such treatment, or may have to travel to access this treatment;
- The impact that the claimant's injuries have on their ability to travel may be particularly important if they are based in a regional or remote location. Our members report that it is not uncommon for Brisbane based lawyers to be unaware of the large distances that regional clients are required to travel, even to access areas such as Cairns, Townsville or Mackay;
- The jobs available to a claimant may be limited if they cannot return to work in their previous capacity, which can impact on economic loss.

A Brisbane based lawyer may not fully take these aspects into consideration when defending a claim due to a relative lack of local knowledge. By travelling to the region, or at least briefing counsel to attend the conference, they can take the opportunity to speak with the employer or the insured, attend the accident site, and understand in more detail the local nuances of the claim.

Perception of Regional Practitioners

The refusal of insurers and Brisbane based solicitors to attend the regional area where the claimant lives, and where the claim will ultimately be litigated, conveys an impression that WorkCover Queensland, insurers, the Motor Accident Insurance Commission, and by extension, the executive arm of Queensland Government, consider the work of regional practitioners to be sub-standard, and de-values their contribution to the claim. It sends a message that the time of the regional practitioner is less valuable than their Brisbane counterpart.

Perception of the Courts

We consider that regional judiciary would share our view about the benefits of ADR being conducted with all of the parties being represented and physically conferring. We note that there is authority to the effect that the person with the actual authority to negotiate and provide instructions, with the appropriate delegation, should also be personally present¹.

Summary and Recommendations

Having regard to the matters contained within this submission, we would like to meet in the near future with a view that the recipient of this letter give clear direction that the following policies and procedures apply:

1. That unless the claimant indicates a desire otherwise, or Government restrictions preclude the ADR from occurring in person, that the compulsory conference occur in the region where the injured worker is located;
2. That the respondent panel lawyer be required to physically attend the ADR unless the respondent panel lawyer has briefed counsel to physically attend the ADR;
3. That the person attending the conference have full authority to resolve the claim on the day of the conference without recourse to another person for instructions.

In our submission, ensuring face to face conferences are convened in the regions is:

- More cost effective;
- More effective in achieving early settlement of claims;
- More efficient in the overall conduct of the claim;
- Generating a higher level of satisfaction to injured claimants and insured persons;
- More effective in retaining local expertise and skill in regional centres;
- Demonstrates a meaningful commitment by insurers (statutory insurers being an extension of an arm of government) to Queensland's regional centres and the court infrastructure in Australia's most decentralised state.

¹ See for example *Hall v Logan City Council*, unrep. 06.08.13, P & E Appeal No. 4772 of 2012, Rackemann J; *Kennedy v Cassady & Anor* [2006] QSC 097; *Brady v Woolworths Limited* [2009] QDC 1; *Read v State of Queensland* unrep. 21.06.13 No.235 of 2013, Henry J; *Crouch v Woolworths Limited* unrep. 26.11.13 No.664 of 2013, North J.

We welcome the opportunity to discuss these matters in January or February 2022.

Sarah Grace

A handwritten signature in black ink, appearing to read 'Sarah Grace', written in a cursive style.

**Queensland Branch President,
Australian Lawyers Alliance**