

# Investigation into WorkSafe self-insurers

Submission to the Victorian Ombudsman

15 August 2022



## Contents

<b>Who we are</b> .....	<b>4</b>
<b>Introduction</b> .....	<b>5</b>
<b>Key issues</b> .....	<b>5</b>
Recommendations .....	6
<b>Common law settlements</b> .....	<b>7</b>
<b>Conclusion</b> .....	<b>8</b>

## 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.<sup>1</sup>

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

---

<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).

## Introduction

1. The ALA welcomes the Ombudsman's own motion investigation into the claims management processes adopted by employers that self-insure their workers ('self-insurers') and appreciates the opportunity to provide submissions.
2. Unfortunately, although self-insurers represent a small percentage of total scheme remuneration, they are the source of a significant proportion of complaints received by members of the ALA from injured workers. Due to the limited oversight that WorkSafe has over self-insurers, there is no adequate forum for those complaints to be addressed.
3. By contrast, workers who are employed by employers whose WorkCover claims are managed by WorkCover agents, are able to raise concerns directly with WorkSafe and have access to a non-litigious independent review of insurer decisions through the Workers Compensation Independent Review Service (WCIRS).
4. However, the ALA acknowledges and supports the steps taken by self-insurers in the early negotiation of common law damages settlements. This practice fast tracks an injured worker's exit from the WorkCover scheme, and importantly, the ALA considers that it improves recovery outcomes by affording workers restorative justice.

## Key issues

5. The nature of the complaints by workers in relation to the claims management by self-insurers is not dissimilar to those identified in the 2016 and 2019 investigations by the Ombudsman regarding the management of complex claims by WorkCover agents.
6. The key findings in those reports reflect the experience of ALA members and the injured workers they represent whose WorkCover claims are managed by self-insurers. These include:
  - Unreasonable decision-making: this includes decision making that is illogical and that relies upon the selective use of evidence;
  - Self-insurers maintaining unreasonable decisions at the conciliation stage and acting unreasonably during conciliation, forcing workers to issue court proceedings; and

- The selective use of independent medical examiners ('IMEs'): this often includes the use of multiple medical examiners in relation to a single dispute allowing the self-insurer to disproportionately balance IME opinions against treating doctors' opinions.
  - The ALA has also observed instances of selective use of briefing materials being provided to IMEs.

## Recommendations

7. The ALA recommends that two actions be taken which would provide workers with avenues to raise concerns regarding self-insurer behaviour and to dispute decisions without the need for litigation:

- 1) Self-insurer decisions should be included in the scope of decisions able to be reviewed by the WCIRS:

WCIRS has afforded injured workers with an avenue to seek scrutiny of agents' decisions. Even in circumstances where a decision is maintained by the WCIRS, the process allows a worker to better understand the path of reasoning adopted in the making of a decision. This avenue of review should be available to all injured workers.

- 2) WorkSafe should increase its oversight over self-insurer decision making and behaviour:

Although WorkSafe delegates the management of claims to agents, it plays a key role in overseeing the conduct of agents to ensure that workers receive appropriate entitlements. This level of oversight should be extended to self-insurers.

This may be done by regularly auditing decision making by self-insurers and by affording workers and stakeholders with a forum to provide complaints and feedback.

This will also provide consistency in decision making practices between WorkCover agents and self-insurers.

## Common law settlements

8. The Ombudsman's 2019 report identified that about 25 per cent of all active weekly payments claims involved workers who had been in receipt of weekly payments for more than 130 weeks. An increasing number of these claims were mental injury claims.
9. It is well understood that long-term work-related injuries, and long term reliance on the WorkCover scheme, represent a disproportionately high cost to the scheme and also leads to negative health and financial outcomes for workers.
10. Although common law compensation is intended to provide workers with compensation for their injury, it does much more than that. It provides workers with a sense of reparation for the damage caused by their injury. Workers often relay to members of the ALA that after the conclusion of their common law claim they feel vindicated and are finally able to put their injury behind them.
11. To access common law damages, a worker must demonstrate that they have suffered a serious injury in negligent circumstances. Both the issue of serious injury and negligence can be the subject of litigation and protracted negotiations which can result in a worker having to wait 3-4 years to receive compensation. This delay makes it difficult for workers to move on with their lives.
12. Unlike WorkSafe agents, self-insurers take a proactive approach in relation to common law damages and initiate early discussions with injured workers regarding common law damages. These discussions often result in the negotiation of a global settlement which can provide the worker with compensation for their pain and suffering, pecuniary loss and in some circumstances their future medical expenses.
13. This early access to common law damages reduces a workers' reliance on weekly payments. Importantly, it also represents for workers the taking of responsibility by an employer for the occurrence of an injury which serves as an acknowledgement of the harm caused.
14. The ALA supports the early resolution of common law claims and the benefit that this can have on outcomes for injured workers. It seeks that this practice be maintained and invites collaboration with self-insurers to further streamline the processes involved.

## Conclusion

15. The Australian Lawyers Alliance (ALA) welcomes the opportunity to provide this submission and look forward to the outcome of your investigation.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'LF', written on a light blue background.

**Lachlan Fitch**

**President, Victorian Branch Committee**

**Australian Lawyers Alliance**