GOVERNMENT OF WESTERN AUSTRALIA

WorkCoverWA

Modernising WA's Workers Compensation Laws

Workers Compensation and Injury Management Bill 2021 (Consultation Draft)

Guide

August 2021

Public comment on the Consultation Draft of the Bill should be submitted to consultation@workcover.wa.gov.au by **10 November 2021**

For further details see workcover.wa.gov.au.

Contents

1. The legislative framework for workers compensation

The *Workers' Compensation and Injury Management Act 1981* (the Act) provides a framework for every aspect of the workers compensation and injury management scheme in Western Australia. This includes:

- the workers and employers covered by the scheme;
- the forms of compensation;
- how the claim process works;
- injury management and returning injured workers to work;
- dispute resolution;
- mandatory insurance by employers and self-insurance;
- constraints on common law proceedings for negligence;
- scheme administration by WorkCover WA;
- licensing, approval and regulation of service providers.

The Act has served the State well but over time has become complex, unwieldy and now fails to provide sufficient clarity on fundamental concepts and processes.

Some provisions can be traced back more than 100 years and a plethora of successive amendments to the 1981 Act and judicial interpretation have rendered it disjointed and confusing.

Over the years there have also been major industrial, technological and commercial developments including changes to the way workers are engaged and the way we communicate in a digital world. The rigidity of the Act has failed in some cases to respond to these developments and challenges.

There is a need to modernise the Act so it is contemporary in its language and policy, and provides flexibility to respond to what is a dynamic commercial, industrial, medical and social environment.

The *Workers Compensation and Injury Management Bill 2021 (Consultation Draft)* has been developed following extensive stakeholder consultation and aims to modernise the legislation while preserving the fundamental aspects of the scheme that have served Western Australians well.

2. The journey to the new Act

In 2009 the Barnett Government supported a two-stage review of Western Australia's workers compensation legislation. Stage 1 was completed in 2009 with the redesign of the dispute resolution system and the introduction of a number of policy amendments, including removal of age limits on entitlements.

The focus of stage 2 of the review is to deliver a modern workers compensation statute.

Discussion Paper

In September 2013, WorkCover WA released a Discussion Paper consisting of 182 proposals for a new statute. The proposals were informed by scheme monitoring, research and stakeholder feedback.

WorkCover WA received 66 submissions on the Discussion Paper and held forums and meetings with various stakeholder groups on the proposals.

Final Report

In June 2014, WorkCover WA released the *Review of the Workers' Compensation and Injury Management Act: Final Report* (Final Report) consisting of 171 recommendations for the drafting of a new Act.

WorkCover WA received 28 submissions in response to the Final Report.

In February 2018, the McGowan Government approved the drafting of a Bill to modernise the workers compensation legislation in Western Australia, based on the recommendations contained in the Final Report.

The McGowan Government also confirmed its commitment to continue the consultative approach to the review, with an undertaking to publicly release and consult on a draft of the Bill before its introduction to Parliament.

Priority amendments in 2018 and 2020

The Government amended the Act in 2018 to implement the Final Report recommendations relating to increased entitlements and better support for dependants of workers who die in work related accidents.

In 2020 the Government enacted other priority reforms through the *Workers' Compensation and Injury Management Amendment (COVID-19 Response) Act 2020.* This amendment Act removed a number of barriers and constraints in the Act relating to the COVID-19 pandemic, including Final Report recommendations to remove the common law termination day.

2021 State election commitments

In the lead up to the 2021 State election the McGowan Government reiterated its commitment to introduce a Bill to modernise workers compensation laws following public consultation, and announced some additional election commitments for inclusion in the Bill.

The following 2021 election commitments are provided for in the Bill:

- an increase in the cap on medical and health expenses compensation from 30% to 60% of the general maximum amount (known as the prescribed amount in the current Act);
- an extension to the period, from 13 to 26 weeks, before income (weekly) compensation payments step down;
- a prohibition on employers attending medical appointments of injured workers.

Indicative cost estimates associated with these election commitments are summarised in Chapter 22 of this Guide.

The draft Bill & this Guide

The *Workers Compensation and Injury Management Bill 2021 (Consultation Draft)* implements the balance of the Final Report recommendations, the State Government's 2021 election commitments, and a small number of issues that have arisen since 2014.

This Guide provides a snapshot of the headline amendments and provides an overview of each Part of the Bill.

3. Public consultation and submissions

Consultation and public submissions

Consultation on the draft Bill provides stakeholders with an opportunity to review and provide comment on the Bill before it is finalised and submitted to the Minister for introduction to Parliament.

To ensure the Bill achieves its purpose of delivering a modern and clear Act submissions are welcomed on all aspects of the Bill and the following general matters:

- the structure of the Bill and the sequencing of Parts and Divisions and the placement of sections to ensure they are in a logical order;
- the particular wording of provisions to ensure they are legally sound and easily understood;
- whether the fundamental provisions that provide who is covered, the compensation payable and processes for claiming compensation and dealing with disputes are clear;
- the use of regulations (subsidiary legislation) to appropriately deal with certain matters where flexibility is required to respond to unforeseen issues;
- how provisions might be improved for clarity and readability including use of navigational aids;
- the transitional and savings provisions to ensure all claims and proceedings arising under the current Act are addressed when that Act is repealed.

You do not have to address every aspect of the Draft Bill. Your submission can address as many, or as few, parts and provisions as you want.

Consultation period

The public consultation period for submissions on the *Workers Compensation and Injury Management Bill 2021 (Consultation Draft)* is open until **10 November 2021**.

Submission requirements

All submissions must be accompanied by the *Modernising WA's Workers Compensation Laws Submission Cover Sheet* – available on the WorkCover WA website.

Your completed coversheet and submissions may be provided by mail or email to the attention of the Manager Policy and Legislative Services:

Email: consultation@workcover.wa.gov.au

Mail: WorkCover WA, 2 Bedbrook Place, SHENTON PARK WA 6008

Note: All commonly accessible electronic formats will be accepted for submissions but Word documents are preferred. You are also encouraged to use the submission template available on the WorkCover WA website to assist in organising your submission.

Submissions publicly available

All submissions will be published on the WorkCover WA website, unless you specify that your submission is confidential. The *Modernising WA's Workers Compensation Laws Submission Cover Sheet* will prompt you to indicate your preference.

Supporting information

Other than this Guide, the following resources may help to understand the Bill and the changes from the current legislation:

- Information Sheets provide summary information on a number of topical issues;
- A *Comparison with Current Act by Key Provisions* table compares the Bill with the current Act on key provisions;
- A *Comparison with Current Act by Section Number* table identifies the consultation Bill clause numbers for corresponding sections of the current Act, or whether a section of the current Act is being repealed.
- The 2014 *Review of the Workers' Compensation and Injury Management Act 1981: Final Report* contains the background and recommendations for drafting a new Act on which the Bill is based.

These resources are available on the WorkCover WA website.

Information sessions

WorkCover WA will also be holding information sessions which will provide an opportunity for interested persons to understand the journey to modernise WA's workers compensation laws and ask questions before finalising a submission.

Please refer to the WorkCover WA website for availability of the information sessions and to make a booking.

Next steps - after the public consultation period ends

After the public consultation period ends, WorkCover WA will review the submissions and prepare a consultation report for the Minister and finalise a Bill for introduction to Parliament.

4. Headline amendments in the Bill

The focus of the Bill is to deliver a clear and modern workers compensation Act. The modernisation of the Act is supported by a number of headline amendments which are outlined below.

Coverage	Claim Process
Worker	**Single claims process**
• Definition of 'worker' based on 'employee' for Pay As You Go (PAYG) tax withholding under Commonwealth taxation law • Flexibility for regulations to include or exclude specific work arrangements – e.g. disability support workers	• Simplified process and procedure for making and determining claims • Same procedure for claims whether for medical expenses and/or income compensation
Injury	**Liability decisions and provisional payments**
• Definition of 'injury' includes personal injury by accident and disease – no change • Injury from employment the legislative construct for work related injury • Psychological or psychiatric condition excluded if it wholly or predominantly arises from reasonable administrative action	• Same liability decision timeframes apply to insurers and self-insurers • Provisional payments to commence if liability decision not given to worker within prescribed period • Deemed liability acceptance if liability decision not given or given late
Prescribed (presumptive) diseases	**Consent authority**
• Flexibility to prescribe presumptive (work related) diseases in regulations	• Legislative authority for the collection and disclosure of a worker's personal information
Pre-employment screening	**Dust disease & noise induced hearing loss**
• Employers prohibited from seeking information about previous compensation claims as part of pre-employment screening	• Dust disease claim process and panel determination clarified and streamlined • Framework for noise induced hearing loss assessment moved to regulations but thresholds for compensation retained

Entitlements	Injury Management
Income compensation	**Return to work**
• Income compensation payments calculated on pre-injury earnings over a 12-month period • Extension to the period, from 13 to 26 weeks, before income compensation payments step down - 2021 election commitment • 85% step down applicable after 26 weeks of payments • Base award rate of pay as a minimum protection for award workers • Accrual and taking of leave clarified • Clear provisions and processes for discontinuing, reducing or suspending payments	• Return to work programs retained • Definition of return to work linked to pre-incapacity position or suitable employment • Requirement for worker to attend return to work case conferences. Must not be used for medical examination or liability purposes
Medical and health expenses	**Treating medical practitioners & certificates of capacity**
• Medical and health expenses limit increases from 30% to 60% of the general maximum amount - 2021 election commitment • First aid and emergency transport costs covered but not part of capped medical entitlement • Fees payable for medical and health expenses fixed by Ministerial order	• Recognition of the role of the treating medical practitioner and right of workers to choose their treating medical practitioner • Employer attendance at medical examination prohibited - 2021 election commitment • Clarity around information a certificate must contain – focus on the worker's capacity for work
Settlements	**Workplace rehabilitation**
• Settlement provisions clarified with settlements able to be made 6 months from injury date • Settlement before 6 months in prescribed circumstances • New process for access to permanent impairment lump sum	• Workplace rehabilitation to be an injury management expense of the employer, not a form of compensation
Catastrophic injuries support scheme	**Pre-incapacity position and suitable employment**
• Insurance Commission's catastrophic injuries support scheme extended to cover workplace accidents • Access to lifetime care and support • Income compensation entitlement and • common law rights preserved	• Clear employer obligation to provide pre-incapacity position or provide suitable employment • Definition of suitable employment clarified • Clear prohibition on dismissal of worker due to injury

5. Finding your way - structure of the Draft Bill

The Draft Bill has 15 parts. The parts of the Bill and main provisions in each Part are set out in the table below.

There are bracketed references in clause headings of the Bill for assistance during consultation which will be removed before a final Bill is prepared for introduction to Parliament. These bracketed references correspond to section numbers of the current Act that the relevant clause is replacing. Where the bracketed reference says 'new' this indicates a new provision for which there is no comparable provision in the Act.

This table is designed to help you navigate the draft Bill and identify parts or provisions that may be of interest.

	Part of Bill	Key Provisions in Part
1	Preliminary	Key terms Injury and Injury from employment Worker and employer
2	Compensation for injury	Employer liability for compensation Forms of compensation Claiming compensation Provisional payments Income compensation Compensation for medical and health expenses Compensation for miscellaneous expenses Lump sum compensation for permanent impairment Lump sum compensation for noise induced hearing loss Compensation for dust disease Compensation for death of worker Settlement of compensation claim

	Part of Bill	Key Provisions in Part
3	Injury management	Return to work Duties of employer, insurer and worker Return to work case conferences Employment obligations Treating medical practitioners and certificates of capacity Workplace rehabilitation
4	Medical assessment	Medical examination of worker Assessing degree of permanent impairment
5	Insurance	Employer obligations Licensed insurers Self-insurance Insurance premiums Default insurance fund Uninsured employers Insurer and self-insurer insolvency Acts of terrorism Contributions to Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Fund
6	Dispute resolution	Conciliation Service and Arbitration Service Conciliation Arbitration Regulations, rules and practice notes Offences Appeals to the District Court Costs
7	Common law	Constraints on common law proceedings and damages Prevention of double recovery Remedies against third parties Choice of law

	Part of Bill	Key Provisions in Part
8	Administration	WorkCover WA Administration of WorkCover WA Staff of WorkCover WA Ministerial directions
9	Financial provisions	General Account Trust Account
10	Management and disclosure of information	Approved forms and electronic processes Disclosure of information
11	Regulation and enforcement	Inspectors Inspections and investigations Contravention of Act Offences
12	State with which employment connected	Connection of employment with State
13	Miscellaneous	Protection from liability Regulations Regulations may adopt codes Review of Act
14	Savings and transitional provisions	General Compensation Injury management Dispute resolution Medical assessment Uninsured liabilities Settlement agreements Common law damages proceedings Insurance Administration
15	Other Acts repealed or amended	Acts repealed Acts amended

6. Part 1 – Preliminary

Part 1 defines terms frequently referred to in the Act. It also establishes the fundamental concepts of 'injury', 'injury from employment', and the meaning of 'worker' and 'employer'.

Injury and injury from employment

The meaning given to 'injury' and 'injury from employment' in the Bill (cl. 6) is substantively the same as the defined term 'injury' (s. 5(1)) in the current Act.

An injury is a personal injury by accident or a disease (or the recurrence, aggravation or acceleration of a pre-existing disease). A personal injury by accident and a disease are both an injury for the purposes of the Act, but the legal test for determining whether an injury arose from employment is different for personal injury by accident and disease. This difference is in the current Act and is replicated in the Bill.

Exclusion of injury: reasonable administrative action

Clause 7 of the Bill provides that a psychological or psychiatric disorder is not an injury from employment that a worker experiences, if it results wholly or predominantly from administrative action that is not unreasonable and harsh on the part of an employer.

The clause reflects recommendation 18 of the Final Report and is consistent with most other workers compensation jurisdictions. It extends the existing exclusion for stress resulting from disciplinary matters to psychological or psychiatric disorders resulting from general performance management.

Prescribed (presumptive) diseases

Clause 10 provides for regulations to be made which establish a presumption of work-related injury for prescribed diseases contracted by workers in prescribed employment.

The clause replaces, but is consistent with, section 49F of the Act that was inserted by the *Workers' Compensation and Injury Management Amendment (COVID-19 Response) Act 2020*.

The regulation making power needs to be flexible to accommodate occupational diseases and classes of employment if the circumstances justify it in the future. The most appropriate method to address presumptive diseases is through regulations. This is to ensure the list of presumptive diseases remains current and there is a flexible and quick method to ensure new diseases can be accommodated.

The COVID-19 pandemic illustrated this clearly. Prior to December 2019 this novel disease did not exist and to require an act of Parliament to create a special presumption for health care workers who contract COVID-19 is not desirable. Section 49F of the current Act provided this flexibility and the framework is replicated in clause 10.

The Bill retains in specific provisions the presumption for workers who contract a dust disease via exposure to asbestos or mineral dust (cl. 113), and the presumption for firefighters who contract one of 12 cancers (cl. 11).

Schedule 3 of the current Act (which includes a list of largely otiose presumptive diseases) will be repealed with all required presumptive diseases from Schedule 3 to be included in regulations made under the new Act. The presumption for health care workers who contract COVID-19 will be remade under the new regulations.

The rationale for a regulation making power to prescribe a contemporary list of presumptive diseases arose from a 2015 *Deemed Diseases in Australia* report commissioned by Safe Work Australia. That report recommended a list of diseases that should be covered by a presumption based on epidemiological evidence. The criteria used to develop the list of deemed diseases included:

- a strong causal link between the disease and occupational exposure;
- clear diagnostic criteria—there had to be little question about whether or not the claimant really had the disease that was the subject of the claim;
- the disease comprises a considerable proportion of the cases of that disease in the overall population or in an identifiable subset of the population.

See the link below to the *Deemed Disease in Australia* report which includes the recommended list of diseases and corresponding occupations for use by states and territories when considering presumptive provisions:

safeworkaustralia.gov.au/doc/deemed-diseases-australia

Safe Work Australia is currently undertaking a review to ascertain whether the 2015 recommended list of deemed diseases requires updating. The Government will consider the diseases and occupational exposures in the *Deemed Disease in Australia* report, and any revised report, for inclusion in the regulations under the new Act.

Worker and employer

Clause 12 provides for a new definition of 'worker' based on an 'employee' for Pay-As-You-Go (PAYG) withholding under Commonwealth taxation law.

The reference to 'PAYG withholding' is to the *Taxation Administration Act 1953* (Commonwealth) administered by the Australian Taxation Office. The definition of 'worker' therefore aligns with that of an 'employee' for PAYG withholding purposes under Australian Taxation Office laws. An online tool is available on the ATO website to assist workers and employers to find out whether a person is an employee for tax purposes.

Clause 12 replaces the current two limb definition of 'worker' in section 5(1) which defines a worker as a person engaged under a contract of service or a contract for service.

Prescribed workers and excluded workers

Clause 13 provides flexibility for the regulations to provide that an individual of a specified class or description is a 'worker' and for the identification of their employer, for the purposes of the Act.

The clause is intended to provide for certain people to be covered in the scheme even though the person may not be an employee to whom PAYG withholding applies.

The types of workers or working arrangements covered by regulations has not been determined and consultation will occur as part of the development of regulations under the Act. The type of working arrangements may include:

- religious workers nominated by the governing body of a church;
- gig workers performing work on demand in the digital or sharing economy;
- support workers in the disability services sector.

The exclusion from the definition of 'worker' that currently applies to serving police officers and aboriginal police liaison officers will be replicated in the regulations, as they are covered for work injuries under the *Police Act 1892* and their industrial arrangements. However, regulations will also retain the existing provision that deems a police officer or aboriginal police liaison officer who suffers an injury and dies as a result of the injury as a 'worker' in order to facilitate compensation to their dependants.

Labour hire arrangements

Clause 14 clarifies the existing position in the current Act that labour hirers are employers of workers that are temporarily lent or let on hire to another person.

Jockeys

Clause 15 replicates the existing arrangements for covering jockeys when racing, doing riding work or performing the usual duties of a jockey for a licensed trainer.

Working directors

Clause 16 largely replicates the existing opt-in arrangements for working directors. To be covered for workers compensation a working director must:

- be a company director as defined in the *Corporations Act 2001* (public company director exclusion removed);
- undertake work for the business and receive remuneration as a director that is in substance for personal manual labour or services;
- be named on the workers compensation policy;
- declare estimated remuneration at inception of the policy;
- declare actual remuneration at the end of each policy period (renewal).

The Final Report did not recommend major changes to the working director provisions other than removing the exclusion for public company directors (the new definition of company director does not exclude public company directors) and clarifying that working directors are not covered by the minimum income compensation provisions (provided for in cl. 58). The latter is required as many directors declare earnings well below the minimum rate of earnings under the *Minimum Conditions of Employment Act 1993.*

7. Part 2 – Compensation for injury

Part 2 integrates the claim process and consolidates in one part of the Act the various forms of compensation that an employer is liable to pay workers following an injury. Key changes include:

- relocation of compensation provisions from a schedule to the main part of the Act, and restructuring and reordering the provisions in a logical way (from injury and claim, to compensation and settlement);
- a single claim process for compensation regardless of whether a worker is claiming income compensation and/or medical and health expenses compensation;
- an obligation on insurers and self-insurers to make provisional payments if a liability decision is not given within the permitted time;
- deemed liability acceptance if no liability decision is given or given late;
- simplification of the method for calculating income compensation;
- an extension to the period, from 13 to 26 weeks, before income compensation payments step down (2021 election commitment);
- an increase in the medical and health expenses capped amount from 30% to 60% of the general maximum amount (2021 election commitment);
- changes to the legislative framework for noise induced hearing loss;
- clarification of the lump sum entitlement for dust disease and improvements to the claim and assessment process;
- introduction of a new process for settlement of claims.

There is no substantive change in the forms of compensation and the maximum amount(s) of compensation payable to workers, other than the 2021 election commitments to increase the medical and health expenses capped amount and the extension to the period, from 13 to 26 weeks, before income compensation payments step down.

General principles

Division 1 sets out the general principles including the fundamental obligation that an employer is liable to pay compensation if a worker suffers an injury from employment.

Each form of compensation listed in clause 18 is covered in detail in a separate Division within Part 2. As in the current Act, some forms of compensation are only payable for certain kinds of injury (e.g. noise induced hearing loss) or where the injury results in incapacity for work (income compensation) or permanent impairment (lump sum for permanent impairment).

Liability for compensation arises only if a worker's employment is connected with this State. There is no change to the current law regarding state of connection, other than relocation of the lengthy provisions into Part 12. Clause 19(3) clarifies the liability status for workers injured outside of Australia by reinserting the 2-year limit on absence from Australia that applied before the provision was amended in 2004.

There is a new requirement for employers to inform workers of the right to claim compensation following an injury from employment. This change, along with clause 4 prohibiting contracting out of liabilities, addresses the risk of alternative compensation arrangements to the Act being implemented.

Claim process

Clauses 24 - 36 set out the procedure and relevant provisions in respect of a worker's claim for compensation.

A claim for compensation is made following an injury from employment. The claim process applies in relation to a claim for medical, health and miscellaneous expenses compensation, income compensation, or lump sum compensation for permanent impairment resulting from a dust disease (cl. 25).

The claim procedure and relevant provisions are described below.

Claim made by worker

- A claim is made by a worker by giving their employer a completed claim form and certificate of capacity for the claim (cl. 26).
- An insured employer must give the worker's claim to their insurer within 7 days (cl. 27).

Claim received by insurer or self-insurer: liability or deferred decision notice

- An insurer or self-insurer must give the worker a *liability decision notice* or a *deferred decision notice* within 14 days (cl. 29).
- A liability decision notice indicates whether the insurer or self-insurer accepts, or does not accept, the employer is liable to compensate the worker for the injury.
- In the case of an incapacity claim the liability decision notice must state whether or not the insurer or self-insurer accepts that the employer is liable to pay income compensation for incapacity for work. An incapacity claim is a claim where the certificate of capacity submitted with the claim indicates the worker has an incapacity for work.
- A deferred decision notice is to be issued where more time is required to make a decision.

Liability decision notice or deferred decision notice not given, or given late

If a liability decision notice or deferred decision notice is not given as and when required, the insurer or self-insurer is deemed to accept the employer is liable to pay compensation, including income payments of compensation if the worker has an incapacity for work certified in the certificate of capacity. Compensation must then commence (cl. 29(6), 48).

Deferred decision notice given – subsequent liability decision not made in time

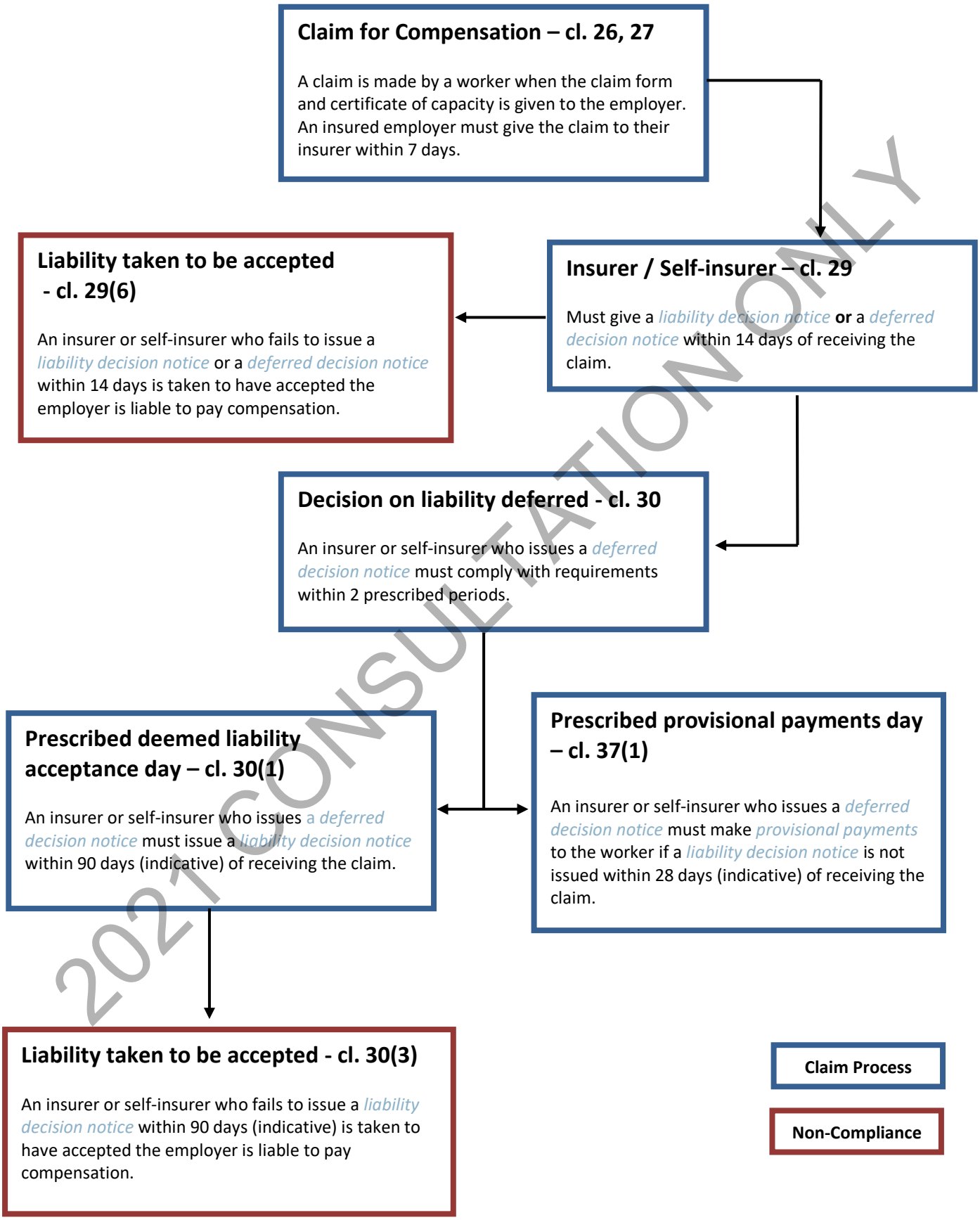
- If a deferred decision notice is given a liability decision notice must be given as soon as possible (cl. 30).
- If a liability decision notice is not given by the day prescribed by the regulations as the 'provisional payments day', provisional payments are payable (cl. 37). The prescribed provisional payments day is likely to be 28 days from when the claim was given to the insurer or self-insurer.
- If a liability decision notice is not given by the day prescribed by the regulations as the 'deemed liability acceptance day' (likely to be 90 days from when the claim was given to the insurer or self-insurer) the insurer / self-insurer is deemed to accept the employer is liable, including income payments of compensation if the worker has an incapacity for work certified in the certificate of capacity. Compensation must then commence (cl. 30, 48).

The liability decision notice requirements and consequences for non-compliance are illustrated on page 18.

These are important reforms to ensure claims are managed in a timely way and workers can access compensation quickly.

Different claim forms can be approved for different kinds of claims. For example, claims relating to a dust disease may be in a different form to a standard claim form to ensure the information collected relates to the assessments undertaken and the questions a Dust Disease Panel is required to determine. If the claim is in respect of a dust disease, the time within which a liability decision notice must be given is 14 days after the insurer or self-insurer is notified of the determination of a Dust Disease Medical Panel in respect of the claim (instead of within 14 days after the claim is given to the insurer or self-insurer - cl. 118).

Summary of liability decision notice requirements



Provisional payments

Provisional payments are payable if, after issuing a deferred decision notice, a liability decision notice has not been given to a worker before the day prescribed by the regulations (the prescribed provisional payments day). The prescribed day is likely to be 28 days from when the claim was given to the insurer or self-insurer (i.e. an additional 14 days to give a liability decision notice).

Subdivision 3 (cl. 37- 45) sets out the provisional payment provisions, including how and when provisional payments are made, the amounts payable, and when payments stop.

The total amount of provisional payments for medical and health expenses compensation will be limited to 5% of the general limit for medical and health expenses. The general limit for medical and health expenses compensation will be reset from 30% to 60% of the prescribed amount and indexed annually (2021 election commitment). The cap on provisional payments for medical and health expenses compensation for the 2021 financial year would therefore be 5% ($7,175) of the total amount for medical and health expenses for the relevant financial year ($143,507).

Provisional payments for income compensation are subject to the maximum weekly rate of income compensation (2 x Average Weekly Earnings).

Provisional payments are not recoverable from workers if liability is subsequently not accepted. However, if liability is subsequently accepted or determined any provisional payments made contribute towards compensation caps and in discharging the employer's liability (for example, as part of a settlement).

The provisional payments regime is illustrated on page 20.

Provisional payments regime

Provisional Payments – cl. 37 - 45

- Not classified as payments of compensation (as employer liability is yet to be determined)
- Based on income compensation and / or medical and health expenses compensation
- Calculated and paid in the same way as if they were compensation
- Amount paid for provisional payments included in caps if liability accepted
- Not recoverable from the worker even if it is determined the employer is not liable to pay compensation to the worker
- Recoverable from another employer if it is agreed or determined that another employer is liable to compensate the worker.

Provisional Payments based on Income Compensation – cl. 42

Made for the period that begins on the day the worker first has an incapacity for work and ends when:

- the worker no longer has any incapacity for work; or
- a *liability decision notice* is issued; or
- liability is taken to have been accepted under cl. 30(3).

Provisional Payments based on Medical and Health Expenses Compensation – cl. 41

Made for the period that begins on the day of the worker's injury and ends when:

- a *liability decision notice* is issued; or
- liability is taken to have been accepted under cl. 30(3).

Total amount limited to 5 % of ***medical and health expenses general limit amount*** ($7175 for the 2021/22 financial year).

Part 2 Division 3

Income compensation.

Part 2 Division 4

Compensation for medical and health expenses.

Authority for collection and disclosure of information

In order to make liability decisions and manage claims, insurers and self-insurers must have access to a worker's medical and personal information relevant to the injury and claim (cl. 34).

Treating medical practitioners may also need to discuss the worker's medical condition and return to work options with the worker's employer and insurer.

If a worker makes a claim clause 34 authorises the collection of relevant information about a worker by an authorised discloser, and authorises the disclosure of relevant information about a worker by an authorised discloser to an authorised recipient.

Disclosure to an unauthorised person is an offence.

Authorised disclosers and authorised recipients will be set out in regulations. It is intended the authorised disclosers and authorised recipients will be those persons referred to in the current claim form 2B:

Authorised discloser	Authorised recipient
Medical practitioner Health professional Insurer or self-insurer and agents of the insurer or self-insurer Medical practice, clinic or hospital	Medical practitioner Health professional Workplace rehabilitation provider Insurer or self-insurer Agents of an insurer or self-insurer assisting with claim and injury management Legal practitioners Claim investigators WorkCover WA

Regulations may include provision for the form and manner (e.g. paper and/ or electronic records) of the collection and disclosure and may provide for any limitations on the relevant information about a worker permitted to be collected and disclosed.

Limitations may apply in regulations to ensure, for example, that information is not collected and disclosed about medical information unrelated to a worker's injury and claim. For instance, the form of the authority and regulations may limit access to a worker's history of a psychological injury if the claim is made solely in relation to a physical injury.

Income compensation

Clause 47 provides for the fundamental liability of an employer to pay income compensation if a worker's injury results in total or partial incapacity for work. There is no substantive change in the liability for this entitlement from the current Act except the change in name from "weekly payments" to "income compensation" and an extension to the period, from 13 to 26 weeks, before income compensation payments step down (2021 election commitment – see below).

The obligation to pay income compensation within 14 days of liability acceptance or determination (cl. 48) also reflects the existing obligation. Payments must be made on normal pay days with the first payment backdated to the date of incapacity. The general limit on total income compensation (cl. 52) and process and thresholds for accessing additional payments (cl. 53) are also the same as the current Act.

No income compensation is payable for a time during which a worker earns, or is able to earn, in suitable employment an amount equal to or greater than the amount of the income compensation that would apply if the worker were totally incapacitated for work. The amount of compensation for partial incapacity for work (cl. 49(2)) is comparable to current arrangements, but a new definition of 'suitable employment' has been inserted into the Bill (cl. 165) as that term is currently undefined and has caused confusion in the past.

For example, a position created or modified to accommodate a worker's restrictions or return to work program will be considered 'suitable employment' under the new legislation if the worker has some capacity to work and is deriving earnings from that modified position.

Calculation of average earnings and rate of income compensation

Clarifying and simplifying the legislative arrangements for calculating income compensation is one of the headline amendments.

Clause 55 sets out the method for determining a worker's pre-injury weekly rate of income with reference to the worker's pre-injury average earnings in the position over a one-year period, or period employed in the position if employed for less than one year. The definition of 'earnings' (cl. 46) includes overtime, bonus payments and allowances.

This method applies regardless of whether a worker is covered by an award or not, but there is a minimum safety net rate of weekly income compensation payable - discussed below.

Subclause 55(5) clarifies that any period a worker has taken a break from work without pay is excluded from the calculation of the worker's average weekly rate of earnings in the position.

Clause 56 provides for the amount of income compensation payable with reference to the worker's pre-injury weekly rate of income, and delivers on a 2021 election commitment to extend the period, from 13 to 26 weeks, before income compensation payments step down.

For the first 26 weeks the amount of income compensation payable is the worker's pre-injury weekly rate of income (cl. 56(2)). After the first 26 weeks the amount of income compensation payable steps down to 85% of the worker's pre-injury weekly rate of income (cl. 56(3)). However, the rate of income compensation payable to a worker is subject to a maximum rate (cl. 57) and a minimum rate (cl. 58) – as in the current Act.

Subclause 56(4) clarifies the meaning of a 'week' in the context of the 26-week period referred to in subclauses 56(2) and (3). This clarifies when the week starts and that a week means a week in which income compensation is payable for any day or days of the week. Any intermittent week of full capacity where no income compensation is payable for any day of that week would not be a week that counts towards the 26-week period.

Minimum weekly rate of income compensation

A safety net minimum weekly rate of income compensation (cl. 58) applies in the event the step down to 85% of a worker's pre-injury weekly rate of income would otherwise result in income compensation falling below:

- the base award rate under provisions of an industrial instrument to which the worker would be entitled to be paid in a week; or
- the minimum amount to which the worker would be entitled under the *Minimum Conditions of Employment Act 1993* to be paid in a week - the current safety net for non-award workers.

No minimum safety net applies to certain workers whose earnings and conditions are not set out in an industrial award or agreement (cl. 58(7)). This includes jockeys who are paid by results, workers who are given board and lodging in lieu of earnings, working directors who receive their declared earnings, or seasonal or other workers who are ordinarily employed for only part of the year (see discussion on seasonal and casual workers below).

Maximum weekly rate of income compensation

A maximum weekly rate of income compensation applies, which will be prescribed in regulations (cl. 57).

It is intended the regulations will prescribe the same maximum weekly compensation rate (2 times Average Weekly Earnings) that applies under the current Act immediately before commencement of the new Act (cl. 537). There is no intention to change the mechanism for indexation of the maximum weekly rate in regulations. Clause 537 protects against any variation in the regulations that would reduce the maximum weekly rate of income compensation.

Seasonal and casual workers

Stakeholder views are sought on the method for calculating income compensation for seasonal and casual workers.

Clause 55(6) largely replicates the formula in the current Act (Sch 1 cl. 14) for calculating weekly payments for seasonal workers ordinarily employed in a position for only part of the year, though the clause as drafted will not apply to 'casual' workers. Clause 55(6) makes a proportionate reduction in the average weekly rate of earnings by taking the aggregate earnings over a year and dividing that sum by 52– as does the current Act.

For example, a person working for only 8 weeks of the year during summer with weekly earnings of $1000 per week would result in income compensation paid at the rate of $153 per week ($8,000/ 52).

WorkCover WA is seeking feedback as to whether clause 55(6) requires further clarification or whether it should be repealed. The particular issues are:

- Uncertainty in the meaning of 'seasonal or other worker who is ordinarily employed in a position for only part of the year'. For example, should the provision apply only in relation to industrial instruments that stipulate the period of the year the person is employed to do work? Alternatively, should it apply to any short-term employment of a fixed duration without any expectation of ongoing employment with that employer each year (e.g. a casual contract for two months)?
- The current Act equates casual workers with seasonal workers (not replicated in the cl. 55(6)) who are employed for part of the year, which is an incorrect characterisation of modern casual employment.

Clause 55(1) can derive the pre-injury weekly rate of income for all workers, regardless of their employment status or period employed (full-time, part-time, casual, intermittent employment).

If clause 55(6) was deleted, the earnings of seasonal workers would be calculated under clause 55(1), like any other worker. However, the default method would produce a different pre-injury weekly rate of income for a seasonal worker because their earnings would be averaged only over the period they worked in the position. For example, if a seasonal worker was working for an 8 week period over January and February and was receiving a flat rate of $1000 per week they would receive $1,000 in income compensation per week if incapacitated during that 8 week period (not $153 per week in the earlier example if clause 55(6) is retained).

The deletion of clause 55(6) would have the effect of treating seasonal workers no differently to workers employed on fixed term contracts of less than one year, or workers on permanent contracts that have been employed for less than one year.

Feedback is invited on the most appropriate methodology for calculating the pre-injury earnings of seasonal and casual workers (in order to derive the weekly rate of income compensation payable) and whether cl. 55(6) - which applies a proportionate reduction in the preinjury rate of earnings - should be retained, clarified further or deleted.

Leave while entitled to income compensation

Clause 62 clarifies the treatment of sick leave, annual leave and long service leave.

For any period for which a worker is entitled to receive income compensation:

- the worker is entitled to take annual leave, long service leave - or in the case of teachers - a teacher's vacation entitlement;
- the worker's entitlement to receive income compensation is not affected by the worker being entitled to, or taking, leave of that kind – these leave entitlements are concurrent entitlements to the worker's entitlement to income compensation;
- the worker accrues entitlements to annual leave, long service leave and sick leave that the worker would have accrued if the worker had not been entitled to receive income compensation for that period – this clarifies a long standing issue and is consistent with most other jurisdictions;
- the worker is not entitled to take sick leave – this reflects section 130(1) of the *Fair Work Act 2009.*

Sometimes workers take sick leave while a workers compensation claim is being processed and before the relevant insurer or self-insurer has made a liability decision. If sick leave is taken in these circumstances and the worker subsequently receives income compensation clause 62(3) requires:

- the amount paid as sick leave to be taken as being paid towards income compensation;
- any period of sick leave to which the sick leave entitlement relates to be reinstated.

Reducing, suspending and discontinuing income compensation

Part 2 Division 3 Subdivision 4 sets out the circumstances for reducing, suspending and discontinuing income compensation payments.

Once an entitlement to income compensation is established and payments commence the payments cannot be reduced, suspended or discontinued, except in accordance with the Act, or with the written consent of the worker (cl. 63).

A reduction, suspension or discontinuation may be authorised to give effect to a provision of the Act relating to the calculation of compensation payable - or any limit on compensation - or to give effect to a direction of a conciliator or an order of an arbitrator.

Clauses 64 - 67 deal with other specific circumstances where payments may be reduced, suspended or discontinued:

Discontinuance or reduction: worker has returned to work (cl. 64)

- Clause 64 requires an employer to give notice to a worker to reduce or discontinue income compensation payments based on the worker returning to work. The definition of 'return to work' and the meaning of 'suitable employment' have been clarified as part of these changes.
- The notice must specify the basis for the reduction or discontinuance with reference to the earnings of the worker and the amount, if any, of income payments that will be paid to the worker for any partial incapacity for work.
- If the worker has returned to work in suitable employment with some other employer, the worker's earnings in that employment must be verified. These provisions allow for an earlier reduction or discontinuation of income payments than the current Act whilst ensuring the worker is given clear notice as to the basis for the reduction or discontinuation of income compensation payments.

Discontinuance or reduction: medical evidence (cl. 65)

- If an employer has medical evidence as to a worker's capacity for work or the extent to which the incapacity is a result of the worker's injury clause 65 applies before income payments can be reduced or discontinued. The process largely replicates the existing section 61 notice obligation and 21-day period for the worker to make an application to dispute the proposed action.

Suspension: worker not residing in State (cl. 66)

- Where a worker who is not residing in the State fails to provide a declaration of their identity and capacity for work at the required intervals, income compensation payments may be suspended (not discontinued) by the insurer or self-insurer. Before a suspension takes effect the insurer or self-insurer must provide a warning notice to the worker about their obligation to provide a declaration and that income payments will be suspended from a specified date if the worker fails to provide the declaration. Income compensation payments must recommence when an insurer or self-insurer receives the required declaration from the worker.

Suspension: worker in custody (cl. 67)

- Income payments are suspended if a worker is in custody or serving a term of imprisonment. Unlike the current Act, which requires an order of an arbitrator, payments can be suspended if the employer has written confirmation of the factual circumstances from the relevant government authority.

Review of income compensation

Clause 69 replicates the substance of section 62 of the current Act and allows for an arbitrator to review income compensation payments on application of the worker or employer. Should a dispute arise about any other entitlement, an application can be made in the normal manner (as a dispute under Part 6).

Section 60 of the current Act - and the pathway of concurrent dispute applications under sections 60 and 62 of the current Act - have not been retained in the Bill.

Compensation for medical and health expenses

Part 2 Division 4 provides for medical and health expenses compensation incurred by a worker as a result of an injury, and delivers on 2021 election commitment to increase the cap on medical and health expenses compensation from 30% to 60% of the general maximum amount (known as the prescribed amount in the current Act).

Regulations will prescribe compensable health services and any provider eligibility requirements (cl. 72, 75) that are not listed in clause 72. The intention is to prescribe health services and providers currently listed or defined as 'approved treatment' in the current Act.

Fees payable for medical and health expenses will be fixed by Ministerial order, rather than regulations, on the recommendation of WorkCover WA (cl. 74). This is a more flexible and contemporary approach to setting fees for medical and health services and allows for the order to adopt provisions of other publications as they relate to health services and fees. For example, other jurisdictions adopt in full, or part, fees, service descriptors and billing rules in the *Australian Medical Association List of Medical Services and Fees* or the *Medicare Benefits Schedule List of Medical Services.*

A medical and health expenses general limit will continue to apply to a worker's entitlement, but will increase from 30% to 60% of the general maximum amount (cl. 70, 76). The limit will be indexed annually in accordance with the regulations (as it is currently).

The provisions for a standard increase (cl. 78) and special increase (cl. 79) in the medical and health expenses general limit, and the criteria that apply to each increase, are substantively the same as the current Act.

There is a change in the characterisation of 'workplace rehabilitation' expenses from a form of compensation to an injury management expense – see Part 3 Injury Management. There is no intention to limit funding available for workplace rehabilitation, or the way in which workplace rehabilitation services are provided.

Compensation for miscellaneous expenses

Part 2 Division 5 provides for miscellaneous expenses compensation, which covers the same small number of medical and health related expenses included in the current Act (wheelchair, surgical appliances or artificial limb etc).

They are classified as miscellaneous expenses because there is no aggregate limit on these expenses (as there is for medical and health expenses). The expenses must be reasonable.

The key change from the current Act, as recommended in the Final Report, is to include first aid and emergency transportation as a miscellaneous expense. The result is that any costs incurred for ambulance or air transportation services would not be included in the worker's medical and health expenses general limit.

Lump sum compensation for permanent impairment

Part 2 Division 6 provides for lump sum permanent impairment compensation in relation to certain impairments resulting from a personal injury by accident.

The table of impairments, the maximum amount payable for each item, and the aggregate limit on permanent impairment compensation are the same as the current Act.

Clause 94(3) clarifies that permanent impairment compensation is payable only when the employer's liability to compensate the worker for the injury is commuted by a registered settlement agreement. That is, the entitlement cannot be accessed unless it also finalises the whole claim. This is consistent with how the law operates currently and with the Final Report.

There is a new process for agreement (cl. 102) or determination (cl. 103) of the degree of permanent impairment. The steps are:

- The worker must be assessed by an approved permanent impairment assessor (formerly approved medical specialist).
- The worker gives the assessment and a permanent impairment notice to the employer requesting agreement with the assessed degree of permanent impairment.
- The employer must within 28 days indicate agreement with the worker's assessment or, if there is no agreement, the employer must request a further assessment (with the cost paid by the employer).
- If the employer has requested a further assessment the further assessment must be provided to the worker within 14 days after the further assessment is received. The worker and employer may agree on the degree of permanent impairment in the original or further assessment (or any percentage within the range of the original or further assessment).
- If agreement cannot be reached the worker may apply for an arbitrator to determine the worker's degree of permanent impairment (cl. 103).

The above process provides some transparency and timeframes to the usual practice under the current Act.

In Part 2 Division 11 (Settlement of compensation claim) the permanent impairment notice indicating the worker and employer's agreement on the degree of permanent impairment (or determination) will be lodged with the settlement application under clause 149. There will no longer be a separate election process for permanent impairment compensation.

Lump sum compensation for noise induced hearing loss

Part 2 Division 7 provides for lump sum noise induced hearing loss compensation. The maximum amount payable for noise induced hearing loss compensation has not changed, nor have the thresholds for accessing the entitlement:

- initial noise induced hearing loss of at least 10%;
- further noise induced hearing loss of at least 5%.

Legislative improvements have been made to clarify that assessments of noise induced hearing loss must be done in accordance with the regulations (rather than a mix of Act, regulations, approved procedures). Any assessment done in accordance with the regulations is *prima facie* evidence of noise induced hearing loss for the purposes of a claim for noise induced hearing loss compensation (cl.108). There is also a pathway for assessments to be disputed (cl. 110).

There are many technical aspects to testing for hearing loss and assessing the percentage of noise induced hearing loss. WorkCover WA currently has an extensive level of oversight over the audiometric testing process, procedures, approval or registration of audiometric officers and audiologists, and equipment used in testing.

WorkCover WA has also played a central role in the assessment and claim process including holding records of baseline and subsequent audiometric tests, full audiological and ENT assessments, identifying workers of potential claims, and arranging hearing tests and assessments.

The Bill provides for these technical aspects to be prescribed in regulations. As part of the development of regulations WorkCover WA will consult industry on a model to be implemented including:

- any compulsory testing and monitoring for hearing loss in workers;
- the persons authorised to test for and assess hearing loss;
- the persons authorised to make an noise induced hearing loss assessment;
- the methods and equipment authorised or required to be used to test for and assess hearing loss (or compliance with standards that must be met);
- the claim process;
- the methodology for apportionment of liability between employers;
- the making and keeping of records in respect of hearing tests and assessments;
- access to and communication of the results of hearing tests and assessments.

Compensation for dust disease

Part 2 Division 8 provides for:

- dust diseases that are taken to be compensable work-related injuries;
- a Dust Disease Medical Panel determination on issues relevant to dust disease compensation claims and actions for damages;
- a specific lump sum entitlement if impairment results from a dust disease.

The four dust diseases – pneumoconiosis or silicosis, mesothelioma, lung cancer and diffuse pleural fibrosis - are all covered under a similar presumption of work injury in the current Act, if the worker has been exposed to asbestos at work (or in the case of pneumoconiosis or silicosis, exposed to mineral dusts harmful to the lungs).

The lump sum entitlement for permanent impairment from dust disease (cl. 116) is comparable to the lump sum entitlement under Schedule 5 of the current Act for these diseases.

The Dust Disease Medical Panel and panel procedures are similar to the current Act (currently Industrial Diseases Medical Panel).

As recommended in the Final report the claim process has been clarified. A claim is made in the normal manner but before a liability decision is made by the insurer or self-insurer the claim must be given to the WorkCover WA CEO for referral to a Dust Disease Medical Panel. The panel makes a binding determination on questions relating to the diagnosis of the disease, the extent of any incapacity (relevant if the claim relates to income compensation), and the degree of permanent impairment (relevant if the claim relates to permanent impairment compensation and/ or access to common law).

The insurer or self-insurer's liability decision (in Part 2 Division 2) must be made within 14 days of being notified of the Panel's determination.

Part 7 Division 2 (Common law, cl. 425) includes a special provision for dust disease damages claims based on current section 93R of the Act, which provides for the following:

- The degree of permanent impairment to be assessed by a Dust Disease Medical Panel (not by an approved permanent impairment assessor), or as agreed by the worker and employer. If the worker has claimed compensation for a dust disease the Panel will assess the degree of permanent impairment for common law purposes under clause 120.
- Deeming mesothelioma to be at least 25% whole person impairment.

Compensation for death of worker

In 2018 the Government brought forward amendments to improve entitlements for dependants of workers who die in work related accidents, based on recommendations in WorkCover WA's Final Report.

Part 2 Division 9 replicates the 2018 amendments and only makes drafting improvements, including consolidation in one Part of all provisions relating to the claim process and compensation payable on the death of a worker.

There are no changes to the structure or quantum of compensation payable to dependants or the claim process.

Settlement of compensation claim

Part 2 Division 11 deals with settlement of a workers compensation claim.

A settlement commutes to a lump sum the liability of an employer to pay compensation to a worker in respect of the injury and discharges that liability.

Registration of a settlement agreement under Part 2 Division 11 is the only pathway to settle or finalise a workers compensation claim.

An application to register a settlement can only be made if the following criteria are met, unless there are exceptional circumstances:

- the insurer or self-insurer has accepted liability to compensate the worker for the injury, or an arbitrator has made a determination on that liability; and
- a period of at least 6 months has elapsed since the date of the worker's injury.

The criteria are similar to that which applies to redemptions under section 67 of the current Act, however the 6-month period in the Bill applies from the date of injury, not the period that income compensation is payable.

It is recognised there will be circumstances where settlement may be in the best interests of all parties even though the criteria have not been satisfied. Regulations will prescribe circumstances where the criteria may not apply. Indicative circumstances include:

- a claim is made by a worker under a temporary work visa where return to work is not possible or the worker is required to return to their country of origin;
- the claim has been accepted and the worker is leaving the Commonwealth either permanently or indefinitely;
- liability for the claim is contested in more than one jurisdiction (a cross border matter);
- a claim relating to a dust disease;
- any claim where a medical practitioner certifies the worker's death is imminent;
- where the claim relates to a psychological injury and a medical practitioner certifies that delayed resolution of the claim is likely to be detrimental to the worker's health;
- a conciliator has issued a Certificate of Outcome.

Settlement agreements will continue to be scrutinised by the Director for genuineness and to ensure the amount of permanent impairment compensation (if payable) is the correct amount to which the worker is entitled, and the worker is aware of the consequences of the settlement agreement (cl. 153).

Clause 155(2) clarifies the amount in the settlement agreement must be paid within 14 days after the agreement is registered, or if another law prevents payment within that period, within 7 days after payment is permitted under the other law. The latter relates to Commonwealth social security legislation which prevents payment until the Department of Human Services has investigated and given clearance for any debt owed by the worker to the Federal Government.

There is a limit on lump sum compensation included in a settlement agreement (cl. 156) that comprises both income compensation and permanent impairment compensation. This limit on combined compensation reflects the current Act.

Savings and transitional provisions

See Part 14 for savings and transitional provisions relating to injuries, claims, compensation and settlements arising or pending under the current Act on commencement of the new Act.

8. Part 3 – Injury management

Part 3 provides for Injury Management.

Provisions for injury management systems and return to work programs are retained in the same form as the current Act.

As indicated in the Final Report there are new provisions relating to a worker's attendance at, and the conduct of, return to work case conferences (cl. 164).

Clause 162 clarifies a worker's duties in the return to work process. These duties include:

- participating in the establishment of any return to work program that an employer is required to establish;
- complying with reasonable obligations placed on the worker under a return to work program;
- complying with any requirement to attend a return to work case conference;
- providing progress certificates of capacity to the worker's employer, or the employer's insurer, within 7 days of receiving them.

Clause 163 sets out the consequences of a worker's refusal or failure to comply with these duties. Clause 163 consolidates existing provisions including powers of an arbitrator to make orders to comply with the duty, suspend income compensation payments, or cease the entitlement to income compensation after repeated non-compliance following an earlier order.

Part 3 Division 3 clarifies the role of the worker's treating medical practitioner and the issuing of certificates of capacity. There is provision for health professionals, other than the worker's treating medical practitioner, to issue certificates in prescribed circumstances. If prescribed, these circumstances are likely to be limited to minor or short duration lost time claims or in remote or regional areas where workers may not have access to their treating medical practitioner.

Clause 170(1) reinforces the existing position of worker choice of treating medical practitioner. Clause 171 prohibits the worker's employer, or the employer's insurer or agent, being present in a medical examination of the worker (2021 election commitment).

Employers have an obligation to make the worker's pre-injury position available or provide suitable employment (cl. 165, 166). The term 'suitable employment' is defined and clarified in clause 165. The obligation applies for a 12-month period from the date of the worker's incapacity for work.

A worker cannot be dismissed solely or mainly due to the worker's incapacity for work and cannot be dismissed for any reason unless the employer has given the worker notice in the approved form at least 28 days before the dismissal takes effect (cl. 168). These employment protection obligations do not affect rights or obligations under other laws.

Clause 167 requires host employers to cooperate with labour hirers in respect of actions taken by the labour hirer to comply with its obligations with respect to return to work programs and providing suitable employment.

Workplace rehabilitation

Part 3 Division 4 provides for the provision of workplace rehabilitation services by approved workplace rehabilitation providers.

There is a change in the characterisation of workplace rehabilitation. Under the current Act workplace rehabilitation services are confusingly characterised as a form of compensation additional to the medical and health entitlement. This is an incorrect characterisation of workplace rehabilitation that is unique to WA. During 2019/2020 over 84% of referrals to approved workplace rehabilitation providers were made by insurers – which clearly shows workplace rehabilitation is utilised as part of injury management and not as a form of compensation.

Workplace rehabilitation is central to injury management and the Bill treats the services as an injury management expense for which an employer is liable in specific circumstances (it is not included as a form of compensation in Part 2).

Under the revised framework an employer is liable to pay for costs of workplace rehabilitation services by an approved workplace rehabilitation provider, if it is reasonably necessary to do so (cl. 172).

Regulations will address the circumstances in which it is reasonably necessary for a workplace provider to provide workplace rehabilitation services, the services that can be provided, processes for requesting or selecting providers, and the maximum amount payable in relation to a worker's injury (cl. 180 - currently set at 7% of the prescribed amount or $16,743 based on the indexed amount in 2021/2022).

Savings and transitional provisions preserve vocational rehabilitation programs in operation when the new Act commences (cl. 566).

Clauses 173 - 181 provide for the approval and regulation of workplace rehabilitation providers, including maximum fees and charges.

Savings and transitional provisions provide that a person approved as a vocational rehabilitation provider under the current Act is taken to be approved as a workplace rehabilitation provider under the new Act (cl. 565) but will be subject to the new Act. This means providers will be subject to the approval criteria, conditions, performance monitoring and fee orders in the new Act from commencement of the new Act.

9. Part 4 – Medical Assessment

Part 4 consolidates the following medical assessment provisions:

- medical examination of workers initiated by insurers or self-insurers;
- assessment of degree of permanent impairment;
- approval and regulation of permanent impairment assessors.

The current Act provides for insurers and self-insurers to have workers reviewed by a medical practitioner arranged and paid for by the employer. Division 2 consolidates and simplifies the existing provisions including the process where a worker does not comply with a requirement for medical examination.

Division 3 also consolidates existing provisions relating to the assessment of a worker's degree of permanent impairment, assessment procedures, and the issuing of Permanent Impairment Guidelines by WorkCover WA.

Division 4 provides for approval and regulation of permanent impairment assessors (currently referred to as approved medical specialists), including approval criteria and conditions, compliance, suspension and cancellation. Savings and transitional provisions provide that a medical practitioner who was an approved medical specialist under the current Act is taken to be a permanent impairment assessor under the new Act, but is subject to the new Act. This means approved permanent impairment assessors will be subject to the approval criteria, conditions, compliance framework and fee orders in the new Act.

10. Part 5 - Insurance

Part 5 contains the insurance provisions and includes the following areas:

- employer obligations;
- workers compensation insurance brokers;
- licensed insurers and self-insurers;
- insurance premiums;
- the Default Insurance Fund;
- uninsured employers;
- insurer and self-insurer insolvency;
- acts of terrorism.

Employer obligations: workers compensation policy

Clause 205(2) maintains the fundamental employer obligation to effect and maintain a workers compensation policy to cover workers suffering injuries from employment.

Clause 205(1) defines a 'workers compensation policy' with reference to the scope of employer liabilities required to be insured, and is consistent with section 160(1) of the current Act. There is small, but important, change to clarify that the workers compensation policy is covering the employer's liabilities that arise in respect of employment during the period of insurance.

Standard employer indemnity policies currently issued by insurers generally provide indemnity to the insured employer for payments arising if a worker suffers an injury during the policy period.

However, it is not strictly the injury occurrence during the policy period that is indemnified but the employer's liability to pay compensation where the liability arises in respect of the worker's employment with the employer during the period. An example is a latent onset disease such as mesothelioma that manifests years after exposure to asbestos dust. The disease is caused by exposure to asbestos while working in employment many years before and it is the workers' compensation policy that insured the employer over the relevant period that caused the injury that will respond to the claim, irrespective of when the injury occurs.

As an injury from employment is compensable, a workers compensation policy therefore responds to an employer's liability to pay compensation or damages for injury in respect of employment during the period of insurance.

As part of the implementation of the new Act the terminology in workers compensation policies issued by insurers will need to align with the definition in clause 205(1). Clause 240 provides for the form and terms of workers compensation policies to be standardised in regulations.

Employer obligation: provision of information

Clause 206 requires employers when effecting and renewing a workers compensation policy to provide a declaration of aggregate remuneration in respect of workers employed by the employer. This is consistent with the current Act.

An employer applying for the issue or renewal of a workers compensation policy must also provide to the licensed insurer any other information required by the regulations (cl. 206(4)). This is to enable the insurer to have sufficient information about the risk profile of the employer in order to issue or renew the policy, or provide a quote of the premium payable. Clause 239(2) provides that an insurer is not required to issue or renew a policy or provide a quote unless the information is provided by the employer.

Offences

The offence provisions for failing to effect or renew a workers compensation policy, or for failing to provide a remuneration declaration (or one that is provided but is known to be false and misleading) are similar to the current Act (cl. 207). However. the penalty has increased from $5,000 to $10,000 in respect of each of the employer's workers to whom the offence relates.

These are maximum penalties that are seldomly awarded in the courts. In practice only a small proportion of offences progress to prosecution. Most offences for failing to effect or renew a workers compensation policy are dealt with via an infringement notice and modified penalty. The increase in the maximum penalty is required to ensure it can be applied when necessary and is appropriate for high risk, recidivous offenders.

Employer records

Clause 212 sets out an employer's record keeping obligation relating to workers employed for each period of insurance. Clause 214 provides for an insurer to recover the cost of undertaking an audit of employer records if there is a serious misstatement in the information provided that is relevant to the calculation of the premium.

Workers compensation insurance brokers

Insurance brokers play an important part as an agent of employers in connection with workers compensation insurance under the Act.

Despite this role brokers are not recognised in the current Act. An Insurance Brokers Code of Practice, developed collaboratively by WorkCover WA and the National Insurance Brokers Association, provides clear guidelines for insurance brokers operating within the workers' compensation system. This is supported by ongoing industry engagement and training on issues affecting brokers.

This method of self-regulation, engagement and training is preferred over a formal licensing regime. Clause 216 provides for a scheme for the registration of workers compensation insurance brokers should it be required in the future.

Contractors and subcontractors

Subdivision 2 replicates the substance of section 175 of the current Act, which establishes joint and several liability between a principal and contractor to pay compensation to workers of the contractor suffering an injury in specific circumstances. Separate sections deal with claims and indemnity.

In practice many principal contractors require contractors to indemnify them for the principal's liability to pay compensation that arises under the Act, before work is commenced (e.g. on major construction, mining projects). The indemnity is statutorily provided for in clause 220. The mechanism used to achieve that indemnity is usually an extension to the contractor's workers compensation policy that names the principal. Clause 240 provides for the terms, conditions and form of a workers compensation policy to be standardised in regulations. The regulations will provide for principal indemnity extensions.

A new provision (cl. 224) clarifies that where an indemnity is in place a principal is not required to make a remuneration declaration under cl 207 as a (deemed) employer of the contractors' workers. This will only apply if the contractor who employs the worker holds a workers compensation policy that indemnifies the principal in respect of any liability that arises when the worker is engaged in work in respect of which the worker is a contract worker of the principal.

Avoidance arrangements

Part 5 Division 2 Subdivision 3 deals with 'avoidance arrangements' for workers compensation liabilities, which is akin to sham contracting.

No material changes are made to the current provisions other than drafting improvements.

Licensed insurers

Part 5 Division 3 sets out a new approach for the licensing and regulation of insurers. This includes:

- insurers must hold a licence from WorkCover WA to issue a workers compensation policy (cl. 229);
- insurer licences will be granted by WorkCover WA - rather than the Minister (cl. 230, 231);
- regulations may specify criteria that must be satisfied for the grant of an insurer licence (cl. 231);
- an insurer licence is subject to conditions prescribed by the Act, regulations or WorkCover WA (cl. 232);
- insurer licences may be fixed term or granted to remain in force indefinitely (cl. 233);
- WorkCover WA will monitor and review the functions of insurers to determine whether they are being carried out in compliance with the Act, regulations and licence conditions (cl. 235);
- WorkCover WA may suspend or cancel an insurer licence (and/ or issue an improvement notice) if an insurer fails to satisfy the criteria for the grant of a licence, or fails to comply with any provision of the Act or regulations, or a licence condition (cl. 234, 236).

The difference between licence criteria and conditions is that criteria is a state of affairs that must be satisfied, while a condition is something that must be complied with.

It is intended the existing requirements for insurer approval relating to sufficient material and financial resources will be carried through as licence criteria in the regulations. The conditions will include the existing insurer and self-insurer principles and standards of practice. These are additional to the many compliance requirements imposed on insurers set out in the Act and regulations (for example, to provide liability decision notices on time, to indemnify employers etc).

Savings and transitional provisions provide that an approved insurer under the current Act is taken to be a licensed insurer under the new Act (cl. 591), but is subject to the new Act. This means insurers approved under the current Act will be subject to the licence criteria, conditions, performance monitoring and compliance requirements in the new Act and regulations.

Specialised insurers

There are new provisions for specialised insurers.

An insurer licence may be granted, subject to a specialised insurer condition, that limits the insurance business carried out under the licence to a particular industry or class of business or employer (cl. 237).

Special provisions also apply to the Insurance Commission of Western Australia (ICWA). ICWA will be taken to be a licenced insurer and the licence will be subject to a specialised insurer condition that limits ICWA to the insurance of public authorities under the *Insurance Commission of Western Australia Act 1986*. Various provisions impacting on insurers or insured employers in the Bill are modified or not applicable to ICWA and public authorities (for example, provisions relating to premium assessment based on an industry classification order, as ICWA has a different methodology for determining premium contributions by public authorities).

Section 44 of the *Insurance Commission of Western Australia Act 1986* will be deleted as that provision currently establishes public authorities as a group of employers that are self-insured in respect of insurance arrangements managed by ICWA (cl. 626).

Obligation to insure

Clause 239 provides for the existing obligation that requires insurers to issue or renew a workers compensation policy to any employer who makes a request. The obligation extends to providing a quote of the premium to be demanded for the issue or renewal of a workers compensation policy.

In order to issue or renew a policy, or provide a quote of the premium, insurers require information about the risk profile, safety performance and claims experience of the employer. If the information required is not provided insurers are unable to assess and price the risk appropriately. Clause 239(2) modifies the insurer's obligation to issue or renew a policy, or provide a quote, if the employer has failed to comply with a request to provide the information.

Terms of insurance and forms of policies

Clause 240 provides for regulations to limit, modify or exclude any requirement for employers to have a workers compensation policy in respect of certain liabilities (e.g. to pay damages in respect of a claim brought in respect of an injury occurring outside of Australia), or to limit the amount insured (e.g. aggregate amount of damages arising out of all claims in respect of a single event).

The provision also provides for the form, content, terms and conditions of a workers compensation policy to be prescribed in regulations. This will impact on the wording of employer indemnity policies as some, or possibly all, terms of a workers compensation policy will be set out in regulations, rather than as contractual conditions made by the insurer at its discretion (though most are standardised currently).

The existing standard employer indemnity policy wording will be reviewed as part of the development of regulations. Also see clause 244 (refusal of indemnity) which will also affect the terms of insurance.

Adjustable premium policies

Clause 241 provides a framework for adjustable premium policies (also known as burning cost policies).

Refusal of indemnity

Regulations will set out the permitted circumstances in which a licensed insurer may refuse to indemnify an employer against liability to pay compensation or damages in respect of an injury to the employer's workers (cl. 244).

In practice indemnity refusal is rare. Where it has occurred, it has always been in relation to indemnity for common law damages only and due to conduct of the employer being grossly negligent in causing the injury. Though rare, this circumstance does not appear to warrant indemnity refusal and undermines the point of insuring against claims for damages. There are likely to be very limited (or none at all) circumstances prescribed but this issue will be canvassed further in the development of regulations along with the development of a standard form policy.

In the event indemnity refusal is permitted, clause 244(3) provides for notification to WorkCover WA, the employer and worker within 5 days after the decision to refuse indemnity. Clauses 244(4) – (6) address what happens to the claim if the notice is sent before or after the insurer is required to make a liability decision, and how disputes about the indemnity refusal and the employer's liability for compensation are dealt with.

Self-insurance

Part 5 Division 4 sets out a new approach for the licensing and regulation of self-insurers, which mirrors the approach for insurers. In summary:

- self-insurers must hold a self-insurer licence;
- self-insurer licences will be granted by WorkCover WA - rather than the Governor;
- regulations may specify criteria that must be satisfied for the grant of a self-insurer licence;
- a self-insurer licence is subject to conditions prescribed by the Act, regulations or WorkCover WA;
- self-insurer licences may be fixed term or granted to remain in force indefinitely;
- WorkCover WA will monitor and review the functions of self-insurers to determine whether they are being carried out in compliance with the Act, regulations and licence conditions;
- WorkCover WA may suspend or cancel a self-insurer licence (and/ or issue an improvement notice) if a self-insurer fails to satisfy the criteria for the grant of a licence, or fails to comply with any provision of the Act or regulations, or a licence condition.

Clause 251 applies sections 231 - 236 (licensed insurers) in respect of a self-insurer licence in the same way as they apply to an insurer licence.

Group self-insurer licence

There has been confusion in the past regarding the status of self-insurers that cover liabilities of a number of employers or related entities (such as subsidiaries).

The Bill clarifies the meaning of 'self-insurer', 'self-insurer licence', 'self-insurer liability' and 'group self-insurer licence' (cl. 203).

A group self-insurer licence is issued to the holder of a licence (e.g. a parent company) with the licence extended to cover related entities (e.g. wholly owned subsidiaries). Each of the related entities to which the licence extends is part of a group of related self-insurers covered by the licence (cl. 249). Clause 250 provides that the holder (or former holder) of a group self-insurer licence is jointly and severally liable for self-insurer liabilities of an employer that arose while the employer was a self-insurer.

Self-insurer securities

Part 5 Division 4 Subdivision 2 provides for self-insurer securities including flexibility for securities other than a bank guarantee if approved by WorkCover WA, review and variation of security amounts, and calling on the security in the event of a failure of a self-insurer to meet it liabilities (e.g. insolvency).

Clause 255 clarifies that WorkCover WA may demand payment under a self-insurer security to the extent of any payments made or to be made by WorkCover WA on a claim under Part 5 Division 8 (this will arise when a self-insurer is insolvent - see clauses 280, 281).

Self-insurer savings and transitional arrangements

Savings and transitional provisions provide an employer that was a self-insurer under the current Act is taken to have been granted a self-insurer licence under the new Act, but is subject to the new Act (cl. 592). This means self-insurers approved under the current Act will be subject to the licence criteria, conditions, performance monitoring and compliance requirements in the new Act and regulations.

Clause 592(3) converts employers who belonged to a group of employers who were self-insurers under the current Act to employers covered by a group self-insurer licence in the new Act. Only one of the employers of the group will hold the licence and WorkCover WA will engage with self-insurers before the Act is implemented to ensure the correct entity is identified as the group self-insurer licence holder and that the licence correctly identifies the related entities to which the license extends.

Savings and transitional provisions (cl. 592(5)) also provide that self-insurer securities given by self-insurers under the current Act are taken to be securities under the new Act.

Insurance premiums

Clauses 256 and 257 provide for the making of an industry classification order and the fixing of recommended premium rates by WorkCover WA. This is substantively the same as the current Act. An industry classification order classifies all industries for the purposes of recommending a premium rate for each industry class.

The existing provisions that prohibit an insurer from charging a loading on a recommended premium rate of more than 75%, unless permitted by WorkCover WA, are not replicated in the Bill. However, the provisions for appeal of the premium rate or industry classification of the employer (now called review of premium charged) has been retained and clarified (cl. 258).

A premium review can only be undertaken if the premium charged is at least 75% greater than the relevant recommended premium rate (reflective of the current loading requirement). Provisions for the review process have also been streamlined to ensure parties have made reasonable efforts to resolve the issue.

The Default Insurance Fund

Part 5 Division 6 provides for the Default Insurance Fund.

The safety net governance and funding review

The workers compensation scheme in Western Australia provides for a 'safety net' to meet various scheme and system risks. The 'safety net' (entitlement protection) is a collective term to describe the arrangements which apply to liabilities with respect to:

- workers of an uninsured employer;
- workers employed by an employer whose insurer has become insolvent;
- workers injured as a result of an act of terrorism;
- asbestos related claims from waterfront workers.

The safety net elements of the scheme have evolved over time and are currently provided for in four separate Acts which contain distinct and overlapping governance arrangements and funding sources.

The funds generally combine risk and operational elements making it difficult to project future cost and/ or liabilities. For example, the WorkCover WA General Account is both a special purpose account used to pay for claims from workers of uninsured employers and is the funding source for WorkCover WA operations. The General Account is funded via an annual levy on insurers and self-insurers.

The Employers' Indemnity Supplementation Fund (EISF) was established under the provisions of the *Employers' Indemnity Supplementation Fund Act 1980* and exists primarily to guard against the collapse of an insurer. This is funded via a direct levy on employers imposed when circumstances require.

The EISF also pays claims under the *Waterfront Workers' (Compensation for Asbestos Related Diseases) Act 1986* and the *Workers' Compensation and Injury Management (Acts of Terrorism) Act 2001*.

In a parallel process to the review of the Act that resulted in the Final Report, WorkCover WA released a discussion paper proposing legislative amendments relating to the funding and governance arrangements for safety net elements of the scheme. The proposals focused on how the various governance and funding mechanisms might be enhanced to respond to current and future claims.

Summary of Default Insurance Fund - Divisions 6 - 10

The safety net governance and funding discussion paper proposed the various safety net elements be consolidated into a single fund in the principal Act, called the Default Insurance Fund. The proposed model is reflected in Part 5 Divisions 6 - 10 of the Bill and encompasses:

- liabilities for claims relating to uninsured employers currently funded via the WorkCover WA General Account (Division 7);
- liabilities of insolvent insurers currently funded via the EISF and liabilities of insolvent self-insurers including use of the self-insurer security (Division 8);
- initial liabilities relating to acts of terrorism currently provided for under the EISF and subsequently recovered from insurers and self-insurers via contribution agreements (Division 9);
- liabilities of the scheme established under the *Waterfront Workers' (Compensation for Asbestos Related Diseases) Act 1986* (Division 10);

The Default Insurance Fund replaces the EISF (and General Account for uninsured employer claims) as the funding source for the above liabilities. As a result, the following Acts will be repealed:

- *Employers' Indemnity Supplementation Fund Act 1980;*
- *Workers' Compensation and Injury Management (Acts of Terrorism) Act 2001;*
- *Waterfront Workers' (Compensation for Asbestos Related Diseases) Act 1986*

A comparison of safety net arrangements in the current Act and this Bill (the new Act) is illustrated at the end of this section.

Administration

WorkCover WA has the direction, control and management of the Default Insurance Fund (cl. 259). There is provision for WorkCover WA to enter into an agency arrangement in connection with the performance of its functions. This could include engaging a specialist entity to manage claims from uninsured employers, insolvent insurers, or pursuing recoveries.

Contributions to the Default Insurance Fund

Payments from the Default Insurance Fund will be met by a levy contribution from licensed insurers and self-insurers (cl. 264). Whether a levy is required for a financial year, and the contribution amount, will be based on the amount standing to the credit of the Default Insurance Fund and the amount required to provide for all existing and expected liabilities. These assessments will be based on actuarial advice.

The contribution methodology that applies to each insurer or self-insurer is the same methodology that applies to contributions to WorkCover WA's General Account (based on premium income for insurers and notional premium for self-insurers).

Acts of terrorism

In line with Final Report recommendations the *Workers' Compensation and Injury Management (Acts of Terrorism) Act 2001* is repealed (Part 15) and all relevant provisions relating to acts of terrorism are integrated into the principal Act. Part 5 Division 9 provides for:

- A statutory definition of 'act of terrorism' based on the Commonwealth's *Criminal Code Act 1995*, modified to ensure application to personal injury (cl. 289).
- Ministerial declaration as the sole trigger to activate acts of terrorism claims (cl. 290).
- An employer who has a compensation liability in respect of a declared act of terrorism may claim on WorkCover WA for payment or reimbursement (cl. 292).
- Amounts paid to satisfy claims are payable from the Default Insurance Fund (cl. 292).
- Regulations may impose a claims limit on the total liability of all employers in respect of a declared act of terrorism (cl. 293). Either or both of the following limits may be imposed:
  - A limit on the total amount of the compensation liability for claims payable during a specified period; or
  - A limit on the total amount of the claims that are payable in respect of a particular declared act of terrorism (the Final Report recommended a limit of $100 million per terrorism event).
- The present exclusion regarding common law liabilities relating to terrorism claims will be maintained.

Comparison of Safety Net Arrangements - Current Act and Bill

Current Act - Safety Net Arrangements			New Act - Safety Net Arrangements		
Safety Net	**Fund**	**Levy Arrangements**	**Safety Net**	**Fund**	**Levy Arrangements**
Uninsured employer	WorkCover WA's General Account	Levy on insurers and self-insurers	Uninsured employer	Default Insurance Fund	Levy on insurers and self-insurers
Insolvent insurer	Employers' Indemnity Supplementation Fund	Levy on employers	Insolvent insurer	Default Insurance Fund	Levy on insurers and self-insurers
Acts of terrorism	Employers' Indemnity Supplementation Fund	Contributions from insurers and self-insurers	Act of terrorism	Default Insurance Fund	Levy on insurers and self-insurers
Insolvent self-insurer	None. Self-insurer guarantee only	None	Insolvent self-insurer	Security and Default Insurance Fund for any excess of guarantee	Levy on insurers and self-insurers – excess of guarantee
	General Account - if employer uninsured, no longer exists or cannot be found.	Levy on insurers and self-insurers	Dust diseases if employer uninsured, no longer exists or cannot be found.	Default Insurance Fund	Levy on insurers and self-insurers
Specified asbestos diseases - pneumoconiosis, lung cancer, mesothelioma and diffuse pleural fibrosis	Employers' Indemnity Supplementation Fund, if employer's insurer is insolvent	Levy on employers	Dust diseases if employer's insurer is insolvent	Default Insurance Fund	Levy on insurers and self-insurers
	Employers' Indemnity Supplementation Fund, if worker is a waterfront worker	Levy on employers	Dust diseases - waterfront workers.	Default Insurance Fund	Levy on insurers and self-insurers

11. Part 6 – Dispute resolution

Part 6 provides for dispute resolution and continues the existing Conciliation Service and Arbitration Service. There are no significant changes to the dispute resolution framework, other than the discontinuation of the regime for independent registered agents. Changes relate to the structure of the legislation, improve efficiencies, and clarify a small number of issues.

Structure of the Conciliation Service and Arbitration Service

Part 6 Division 2 consolidates provisions relating to:

- establishment of the Conciliation Service and Arbitration Service;
- designation and functions of Director and Registrar;
- designation of conciliators and arbitrators;
- delegation by Director or Registrar.

Consolidation of provisions common to both conciliation and arbitration

Many sections in the current dispute resolution part of the Act are common to both conciliation and arbitration proceedings but are duplicated in separate Divisions. Those provisions are now consolidated into Part 6 Division 5 –

- provision of information to another party or medical practitioner (cl. 365);
- representation (cl. 366);
- litigation guardians (cl. 367);
- interpreters and assistants (cl. 368);
- ways of conducting proceedings (cl. 369);
- proceedings to be in private (cl. 370);
- notice of proceedings (cl. 371);
- abrogation of privilege against self-incrimination (cl. 372);
- legal professional privilege in relation to medical reports (cl. 373);
- other claims of privilege (cl. 374);
- powers in relation to documents produced (cl. 375).

Dismissal of proceeding

Clause 340 provides for the grounds on which an arbitrator may dismiss a proceeding whether by on application of a party to the proceeding or on the arbitrator's initiative.

Use of experts by arbitrators

Clause 343 provides for referral to a medical expert in place of medical panels which are discontinued.

Reconsideration of decision on basis of new information

Clause 355 replicates section 217A of the current Act. Modifications make the process of applying for a reconsideration and the determination by an arbitrator clearer.

Publication of decision and reasons

Clause 258 provides for arbitrator decisions to be published in such manner the Registrar considers appropriate. The Registrar may also limit publication.

Making of rules

Clauses 381 and 382 provide for the Director to make Conciliation Rules and the Registrar to make Arbitration Rules - instead of the Minister.

Clause 496 (Service and facilitation of electronic processes) will apply to the Rules. This means the Rules may, in relation to conciliation or arbitration proceedings, address: use of electronic databases and document systems, electronic lodgment of documents, service, exchange and authentication of documents, and the status and effect of things done electronically.

Registered independent agents

As recommended in the Final Report the Bill discontinues the regime for registered agents, with registered independent agents transitioned out of the scheme over a two-year period from the commencement date of the new Act. The arrangements are set out in the savings and transitional provisions (cl. 573).

This change does not affect the ability for parties to be represented by an ‘authorised agent’ in conciliation and arbitration proceedings (cl. 366). There will no longer be a separate requirement for agents to be registered with WorkCover WA (such as employees of insurers), other than independent registered agents over the two-year transitional period.

12. Part 7 – Common Law

Part 7 sets out various matters relating to common law claims which are largely based on the current Act provisions albeit restructured and reordered:

- constraints on common law proceedings and damages;
- prevention of double recovery;
- remedies against third parties;
- choice of law.

Constraints on common law proceedings and damages

The threshold requirements for the awarding of damages (cl. 421) are the same as the current Act:

- the worker's degree of permanent whole of person impairment must be at least 15%;
- the worker must elect to retain the right to seek damages.

Clause 421 clarifies the threshold requirements apply to both the commencement of proceedings and the awarding of damages.

The *Workers' Compensation and Injury Management Amendment (COVID-19 Response) Act 2020* discontinued the termination day that previously applied to elections for common law damages.

The maximum damages award for less than 25% impairment (cl. 423) is the same as the current Act, as are the provisions for a reduction in compensation following the election.

Clause 425 includes special provisions for dust disease damages claims including referral to a Dust Disease Medical Panel for assessment of the worker's degree of permanent impairment.

Double recovery

A key change in the double recovery provisions relates to the filing of a common law settlement agreement. While the agreement must continue to be filed with the Director, the Director no longer has any role in scrutinising common law settlements for fraud or misrepresentation (cl. 432).

13. Part 8 – Administration

Part 8 provides for the establishment of WorkCover WA and its functions and powers, the appointment of WorkCover WA Board members and Board administration, and the staff of WorkCover WA.

There are no substantive changes from the current Act. Clause 447 consolidates the various functions of WorkCover WA in one place. There are minor changes to Board meeting and administration provisions to align with contemporary drafting conventions for statutory authorities, and flexibility for meetings to be held remotely or for an issue to be decided without a meeting if an issue requires it (cl. 464, 465).

Savings and transitional provisions (Part 14 Division 10) continue the governing body of WorkCover WA as the WorkCover WA Board, and all appointed members immediately before commencement of the new Act are taken to be appointed under the new Act.

14. Part 9 – Financial Provisions

Part 9 sets out the financial provisions including:

- Application of the *Financial Management Act 2006* and the *Auditor General Act 2006* to WorkCover WA;
- Establishment of the General Account to fund WorkCover WA operations;
- Establishment of the Trust Account (for investment of moneys and payments to dependent children of workers who die in work accidents).

General Account

WorkCover WA operations are funded by a levy on approved insurers and self-insurers (Part 9 Division 2) which is paid into the General Account. This arrangement applies under the current Act and continues under the new Act. Savings and transitional provisions provide for the continuation of the General Account (cl. 598).

The only change in relation to the General Account is that liabilities relating to uninsured employers will no longer be payable from the General Account. The liabilities of uninsured employers will be payable from the Default Insurance Fund (under Part 5 Division 7).

The contribution methodology for the General Account that applies to each insurer or self-insurer is the same methodology that applies currently for the General Account and is based on premium income for insurers and notional premium for self-insurers. The same methodology will also apply with respect to contributions to the Default Insurance Fund.

Trust Account

The Trust Account (Part 9 Division 3) exists to make payments to dependent children of workers who die in work related accidents and to make payments to persons under legal disability. Moneys are invested as a common fund.

Savings and transitional provisions provide for the continuation of the Trust Account (cl. 598).

15. Part 10 – Management and Disclosure of Information

Part 10 provides for approved forms and electronic processes, and various provisions relating to confidentiality and disclosure of information.

Approved forms & electronic processes

Some forms, documents and notices will continue to be prescribed in regulations or, if related to disputes, prescribed by the conciliation rules or arbitration rules.

However, many scheme related forms that are unsuitable for regulations or rules will now be in a form approved by the WorkCover WA CEO. Clause 495 provides for the WorkCover WA CEO to approve scheme related forms and documents (such as the claim form, certain notices) and to determine the manner in which approved forms are to be created, recorded, provided or exchanged.

Clause 496 facilitates electronic processes and is an important change in the context of digitisation and modern communication methods. Regulations, arbitration rules or conciliation rules may provide for the following –

a) the means by which documents and information given under the Act may or must be created, recorded, given, exchanged, accessed or obtained;

b) the creation, recording, giving, lodging and exchange of documents and information by electronic means for, or related to, the purposes of this Act, including the use of an electronic database or document system;

c) when the giving, lodgment or exchange of documents and information is taken to be effected;

d) the authentication of documents and information given, lodged or exchanged;

e) the production of documents and information kept electronically;

f) the status and effect of things done electronically under the rules or regulations.

In light of these changes most hard coded references in the current Act to how documents must be given, exchanged, or verified are not replicated in the Bill. It is envisaged a staged approach will be taken in the future to the making of regulations and rules under clause 496 as not all processes are capable of being done electronically - due to legal, technical or practical reasons.

Disclosure of information

Part 10 Division 2 addresses various circumstances where information disclosure is required, permitted or prohibited.

Clause 503 maintains the existing default position of confidentiality. A person must not, directly or indirectly use or disclose any information obtained by the person because of:

- the person's office, position, employment or engagement under or for the purposes of the Act; or
- any disclosure made to the person under or for the purposes of the Act.

This prohibition on disclosure does not apply if the information is already in the public domain or is statistical or other information that could not reasonably be expected to lead to the identification of any person to whom it relates. It also does not apply if the disclosure is authorised.

Authorised disclosures include:

- for the purposes of, or in connection with, performing a function under the Act or another law;
- as required or authorised under the Act or another law (e.g. see cl. 34 which provides for collection and disclosure of information in the claim process);
- for the purposes of any legal proceedings arising under this Act or another law;
- under an order of a court or other person or body acting judicially;
- with the consent of the person to whom the information relates; or
- in other circumstances prescribed by the regulations.

Clause 501 requires WorkCover WA to disclose information to the WorkSafe Commissioner or Department CEO that is relevant to occupational safety and health (continuing the existing obligation).

Clause 502 permits WorkCover WA to disclose information such as the identity of a worker's employer and the employer's insurance status at a specified time or period. The information must be for the purpose of ascertaining liability, contribution or recovery in relation to a compensation or common law claim (for example, a dust disease that may be connected to employment in the 1970's or 1980's).

Clause 497 preserves the right of the Minister to have information in the possession of WorkCover WA.

Clause 498 clarifies that information held by the Conciliation Service or Arbitration Service is to be available to WorkCover WA, on the request of the WorkCover WA CEO, to enable WorkCover WA to perform its functions and to compile and record statistics, records and reports.

Clause 499 consolidates existing provisions which require licensed insurers and self-insurers to provide information to WorkCover WA. The information relates to liability and costs associated with workers' compensation and common law claims made by workers, injury management and return to work, and insurance policy and premium information. Clause 500 provides authority for WorkCover WA to direct scheme participants to provide information relevant to its functions in an approved form.

Clause 505 prohibits disclosure of claim information for pre-employment screening purposes. This assists in removing discriminatory practices such as where workers are asked to disclose any previous workers compensation claim - which is then taken into account in considering the worker's suitability for employment with the prospective employer.

16. Part 11 – Regulation and Enforcement

Part 11 provides for regulation and enforcement and includes provisions for inspections and investigations for compliance purposes, prosecutions and infringement notices, and various offences.

Part 11 Divisions 2 - 4 replicate sections 175A – 175D of the current Act. These sections have been broken down into several shorter clauses and placed into separate Divisions in Part 11 for ease of reading and have been updated with contemporary drafting language.

Inspectors and investigations for compliance purposes

Clause 507 replicates section 175A(1) of the current Act and provides for inspectors to be designated by the CEO.

Clause 509 outlines the various compliance purposes for which an inspector may carry out an inspection.

Clause 508 replicates section 175A(4) of the current Act and provides for the issue of identity cards to inspectors and requirements for inspectors to produce the identity card when exercising powers.

Clauses 510 - 512 replicate the various powers an inspector has under section 175B of the current Act relating to entering a place. Clauses 514 - 516 also replicate the various powers an inspector has under section 175B and 175D of the current Act relating to accessing documents and information, and requiring persons to answer questions.

Contravention of Act

Division 5 clauses 517 - 520 replicate sections 309, 310, 312 and 313 of the current Act and place them into an appropriately titled Division (instead of being 'Miscellaneous' in the current Act).

Infringement notices and the Criminal Procedure Act 2004

Part XA of the current Act (Infringement notices and modified penalties) provides a standard set of provisions for infringement notices and modified penalties. Comparable provisions for most other statutes are contained in the *Criminal Procedure Act 2004* to prevent the same provisions being repeated in numerous acts in WA legislation.

It is intended the new Act will be prescribed in Schedule 1A of the *Criminal Procedure Regulations 2005* which will facilitate regulations to be made under the new Act to replicate existing regulations for infringement notices and modified penalties.

Clause 521(2) extends the time (compared to the current Act) for giving an infringement notice from 6 months to 12 months. This reflects the complexity of some investigations and will allow for minor matters to be dealt with by way of an infringement notice instead of court prosecutions.

Offences

Clauses 522 - 526 replicate sections 94(4), 175D(1)(a), (c), (d), (e) and 308 of the current Act and place them into an appropriately titled Division instead of being in various parts of the Act.

Penalties have been updated throughout the Bill though the amount of each fine is retained in the Bill rather than a penalty unit system as recommended in the Final Report. This is due to drafting conventions in WA legislation.

17. Part 12 – State with which employment connected

Clause 19 of the Bill establishes the fundamental requirement that liability for compensation arises only if the worker's employment is connected with this State.

Part 12 includes the detailed provisions for working out the state in which a worker's employment is connected. It is included in Part 12 to avoid clutter in the very early part of the Act dealing with general principles that apply to compensation for injury.

18. Part 13 – Miscellaneous

Part 13 contains the miscellaneous provisions.

Clause 532 inserts provisions for judicial notice of WorkCover WA's common seal and the signature of statutory officer holders in the conciliation and arbitration services (cl. 532).

Clauses 533 - 536 provide protection from liability in relation to the performance of functions by certain persons and statutory office holders.

General maximum and other adjustable amounts

Clause 537 provides for compensation caps or limits to be adjusted or indexed in accordance with the regulations. It is consistent with the methodology provided for by the *Workers' Compensation and Injury Management Amendment (COVID-19 Response) Act 2020*, but is redrafted in light of changes to terminology and provisions in the Bill to describe the various entitlements and the caps and limits that apply to them.

The 'general maximum amount' (as that term is used in the Bill) is a value that is applied to the maximum amount of the sum of income compensation and permanent impairment compensation that a worker can be paid. It will be aligned to the prescribed amount of $239,179 which is the maximum amount that applies to these entitlements in the current Act for the 2021/2022 period. Savings and transitional provisions (cl. 562) automatically update the amount of $239,179 if the prescribed amount immediately before commencement of the new Act changes. The general maximum amount will automatically change to align with the prescribed amount immediately before commencement of the new Act.

Regulations and Codes

Clauses 538 - 539 provide for a general regulation making power and the adoption of codes or subsidiary legislation in regulations. An example of a code that would be adopted in regulations in the future would be technical standards that apply to assessing binaural hearing loss in workers claiming noise induced hearing loss compensation.

Review of the Act

A standard review clause is inserted (cl. 540) requiring a review of the operation and effectiveness of the Act at intervals of not more than 5 years.

19. Part 14 – Savings and transitional provisions

Savings and transitional provisions provide for the treatment and status of pending matters at the time when the new Act comes into operation and the *Workers' Compensation and Injury Management Act 1981* and other related statutes are repealed (see Part 15).

The savings and transitional provisions refer to the current *Workers' Compensation and Injury Management Act 1981* as the 'former Act'.

General approach

The general approach with the savings and transitional provisions is that the new Act (the Bill when enacted) operates as a continuation of the former Act. Any pending matter (as defined) continues and must be dealt with under the corresponding provisions in the new Act as if it arose under the new Act (cl. 545).

The new Act applies to any injury or death, an employer liability, and any insurance policy issued before commencement of the new Act - subject to Part 14 (there are some exceptions below).

Transitional regulations may be made to address any transitional matter not specifically addressed in Part 14 (cl. 543). Directions can also be made about which provisions in the former Act correspond with provisions in the new Act and may modify the effect of either the former Act or new Act in relation to pending matters (cl. 546).

Pending claims under former Act

Clause 549 provides that any claim for weekly payments of compensation made under the former Act that was not decided before commencement day must be dealt with as a claim for income compensation under the new Act, as if made under the new Act.

A former Act claim that is not decided before commencement day is where liability was not accepted by the insurer or self-insurer, an arbitrator had not determined liability, or the provisions in the former Act that provide for default liability do not apply (as a result of a failure by the insurer or self-insurer to comply with section 57A(3) or 57B(2)).

Other clauses address where a claim was disputed (cl. 549(4)) or deferred (cl. 549(5),(6)) before commencement day.

Compensation

Clause 552 converts entitlements to compensation under the former Act to entitlements to compensation under the new Act, and clause 554 provides for the treatment of compensation caps. The Act does not renew or revive a liability for compensation under the former Act that was discharged or extinguished under the former Act.

Clause 553 addresses the calculation of income compensation that commenced as weekly payments under the former Act.

Other specific entitlements established under the former Act that have corresponding provisions in the new Act that are dealt with by the savings and transitional provisions include:

- lump sum compensation for permanent impairment (cl. 557);
- noise induced hearing loss (cl. 558);
- compensation for death of a worker (cl. 559);
- compensation for AIDS (cl. 561).

In the event the amount of $239,179 is no longer the 'prescribed amount' when the new Act commences, Clause 562 updates the general maximum amount to the same amount as the prescribed amount that applied under the former Act immediately before commencement of the new Act.

Injury management

Part 14 Division 3 preserves any return to work program or workplace rehabilitation services being provided for an injured worker immediately before the commencement of the new Act.

Sections 84AA and 84AB of the former Act - which relate to maintaining the worker's pre-injury position, and the employer's obligation to notify workers and WorkCover WA about any intention to dismiss a worker - continue to apply in respect of an injury occurring before commencement day. This is because it is problematic to apply the new employment protection provisions (which are also penal provisions) retrospectively.

Dispute resolution

The new Act applies to a dispute arising before, on or after commencement day, including a matter arising under the former Act (cl. 568). This includes 'pending dispute proceedings' though the conciliation rules, arbitration rules or regulations in force under the former Act will apply unless a transitional direction specifies otherwise (cl. 570).

Transitional directions may be made by the Director or Registrar to modify the provisions of the Act in their application to pending dispute proceedings to facilitate the appropriate resolution of the dispute. The directions may also deal with other circumstances such as varying the operation of the conciliation rules, arbitration rules or regulations in their application to a pending dispute proceeding, or may terminate a pending proceeding (cl. 571).

Registration of independent agents

As recommended in the Final Report the Bill discontinues the regime for registered agents. Clause 573 transitions registered independent agents out of the scheme over a two-year period from the commencement date of the new Act.

This change does not affect the ability for parties to be represented by an 'authorised agent' in conciliation and arbitration proceedings (cl. 366). There will no longer be a separate requirement for agents to be registered with WorkCover WA (such as

employees of insurers), other than independent registered agents over the two-year transitional period.

At the end of the transition period the scheme for the registration of independent agents is terminated, and the registration of any independent agent will cease.

Regulations will provide for the registration framework during the transition period including regulating the conduct of registered independent agents, limiting certain agent services, conditions on registration, and circumstances in which registration may be suspended or cancelled.

Medical assessment

Clause 574 provides that medical practitioners who were approved medical specialists under the former Act are taken to be approved permanent impairment assessors under the new Act. Clause 575 clarifies that permanent impairment assessments under the former Act are taken to be an assessment under corresponding provisions of the new Act.

Insurer and self-insurer insolvency

Part 14 Division 6 deals with various transitional issues including unpaid amounts payable from the General Account before commencement day for uninsured liabilities to be payable from the Default Insurance Fund (cl. 577).

Clause 579 provides for any amount standing to the credit of the fund under the *Employers' Indemnity Supplementation Fund Act 1980*, to be credited to the Default Insurance Fund (as the Default Insurance Fund picks up the liabilities under the repealed *Employers' Indemnity Supplementation Fund Act 1980*).

Settlement agreements

Clause 580 provides for settlement agreements received for registration before the commencement day to be dealt with under the former Act provisions, and to be registered as if registered under the new Act.

Common law proceedings

Part 14 Division 8 deals with transitional matters relating to common law proceedings, including circumstances in which the former common law provisions or new common law provisions apply to existing claims (cl. 583, 584).

Insurance policies

Clause 587 preserves workers' compensation policies in force under the former Act and ensures the former Act policies cover compensation payments in the new Act in respect of liabilities that arise from employment during the period of insurance in the policy.

Insurance policies issued to mining employers by Insurance Commission

Clause 590 relates to insurance policies issued under the former Act by the Insurance Commission of Western Australia relating to certain industrial diseases suffered by workers of mining employers.

Under the former Act a separate regime was established for insuring mining employers against claims for compensation by workers suffering the following respiratory diseases: pneumoconiosis, lung cancer, mesothelioma and diffuse pleural fibrosis (via an industrial diseases policy).

The Insurance Commission is the only insurer authorised to issue and underwrite industrial diseases policies. This specialised insurance arrangement is not replicated in the new Act.

Clause 590 provides that an industrial diseases policy issued or renewed by the Insurance Commission as referred to in section 162 of the former Act and in force immediately before commencement day:

(a) continues in force on and from commencement day;

(b) does not apply to a liability arising in respect of employment on or after commencement day

The reference to a 'liability arising in respect of employment on or after commencement day' is not a reference to the worker's employment when the disease is contracted.

Latent onset diseases such as mesothelioma manifest years after exposure to asbestos dust. The disease is caused by exposure to asbestos while working in employment many years before and it is the insurance policy that covered the employer over the relevant period of that employment that exposed the worker or caused the injury that will respond to the claim, irrespective of when the injury occurs.

Historical industrial diseases policies (those for which the period of insurance expired before commencement day) and current industrial diseases policies (those that are in force on commencement day with a period of insurance expiring after commencement day) will continue to cover mining industrial diseases contracted on or after commencement day but only if the disease arises from employment before commencement day.

This is already the case for historical industrial diseases policies (which only ever covered disease arising from employment before commencement day). The transitional provisions of the Bill impose this limitation on current industrial diseases policies (which would otherwise have covered disease arising from employment on or after commencement day).

The effect of clause 590 is that current industrial diseases policies issued by the Insurance Commission lapse on commencement day for employment on or after commencement day. The coverage that a current industrial diseases policy would have provided to a mining employer for employment on or after commencement day is instead provided by the standard workers compensation policy that the employer holds.

Clause 621 makes consequential amendments to the *Insurance Commission of Western Australia Act 1986* to reflect the Insurance Commission's ongoing role in undertaking liability under industrial diseases policies arising in respect of employment before the commencement day.

Insurers and self-insurers

Clauses 591 and 592 have the effect of converting approved insurers and self-insurers immediately before commencement day to licensed insurers and licensed self-insurers respectively.

In the case of self-insurers the transitional provision addresses self-insurers who before commencement day are part of a group self-insurer approval, and the status of the security (bank guarantee) which will be taken to apply to the licensed self-insurer under the new Act.

Administration

Part 14 Division 10 continues the WorkCover WA governing body as the WorkCover WA Board and continues all appointed members. It also continues the General Account and Trust Account, and inspectors.

20. Part 15 – Acts repealed or amended

Part 15 Division 1 repeals the following Acts:

1. *Workers' Compensation and Injury Management Act 1981.* This is the current principal Act that is being replaced.
2. *Workers' Compensation and Injury Management (Acts of Terrorism) Act 2001.* Arrangements for liabilities associated with acts of terrorism are integrated into Part 5.
3. *Employers Indemnity Policies (Premium Rates) Act 1990*. This Act is redundant.
4. *Employers' Indemnity Supplementation Fund Act 1980.* Relevant provisions from this Act are integrated into Part 5 Divisions 6-10 as part of the operation of the Default Insurance Fund.
5. *Waterfront Workers (Compensation for Asbestos Related Diseases) Act 1986*. Relevant provisions are integrated into Part 5 Division 10.

Part 15 Division 2 provides for consequential amendments to other Acts. At this stage not all consequential amendments are included in Division 2 for consultation purposes. Only the following major consequential amendments are in Part 15:

1. Changes to the *Fire and Emergency Services Act 1998* in light of amendments to terms used in the Bill that need to be cross referenced in the FESA Act (i.e. the presumption of work-related injury for volunteer firefighters who contract cancer; compensation for volunteer firefighters).
2. Amendments to various Acts to provide for catastrophically injured workers to receive lifetime care and support under the catastrophic injuries support scheme managed by the Insurance Commission of Western Australia. For a summary of the catastrophic injury support scheme amendments see section 21 of this Guide.

21. Catastrophic injuries support scheme for workplace accidents

The WA Government implemented a no-fault catastrophic injury support scheme (CISS) for motor vehicle accidents on 1 July 2016, which is administered by the Insurance Commission of Western Australia.

The CISS provides lifetime treatment care and support for people catastrophically injured in motor vehicle accidents and covers spinal cord injury, traumatic brain injury, amputations, burns and permanent blindness in accordance with criteria set out in the *Motor Vehicle (Catastrophic Injuries) Regulations 2016.*

The lifetime care services are person-focussed and include medical (including pharmaceutical), dental treatment, rehabilitation, ambulance services, respite care, attendant care, domestic assistance, aids and appliances, prosthesis, educational and vocational training, and home and transport modifications.

This Bill provides for lifetime care and support under the CISS established by the *Motor Vehicle (Catastrophic Injuries) Act 2016* to be extended to cover catastrophically injured workers who have a compensable workers compensation claim.

Key features include:

- the Insurance Commission will assess eligibility of injured workers with reference to the existing criteria (catastrophic injury) and evidence of an established entitlement under the new Act (which will be evidenced by notice of acceptance or determination of liability in the workers compensation scheme);
- the cost of injured worker participation in the CISS will be funded by a contribution by insurers and self-insurers, collected by WorkCover WA and paid to the Insurance Commission;
- participation in the CISS does not affect a worker's right to receive income compensation under the Act but an employer's obligation to pay medical, health and miscellaneous expenses compensation will cease upon participation in the CISS;
- participation in the CISS does not affect common law rights but damages cannot be awarded for lifetime care costs while the injured person is a CISS participant.

The model adopted in the Bill implements a National Disability Insurance Scheme bilateral agreement between the WA and Commonwealth Governments.

Extending the CISS to injured workers requires new provisions to be inserted into the workers compensation legislation and amendments to be made to various other Acts – described below.

Motor Vehicle (Catastrophic Injuries) Act 2016 amended

Part 15 Division 2 Subdivision 4 amends the *Motor Vehicle (Catastrophic Injuries) Act 2016*. Key changes include:

- Title of Act amended to *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016* (cl. 628- 629).
- New defined terms to extend the operation of the Act to catastrophically injured workers including 'worker', 'workplace accident' and 'workplace injury' (cl. 631).
- Consequential amendments to terms such as 'catastrophic injuries support scheme' and 'catastrophic injury' to extend to workers catastrophically injured in workplace accidents (cl. 631).
- New clause for the application of the *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016* to workplace injuries (cl. 632):
  - Act applies prospectively to a workplace injury resulting from a workplace accident that occurs on or after the commencement day.
  - Act will not apply to any workplace injury unless there is an established entitlement to compensation in respect of the injury resulting from a workplace accident; that is the injured person has made a claim under the *Workers' Compensation and Injury Management Act 2021* (this Bill) and liability has been accepted or determined under that Act. This will be evidenced by the notice of liability acceptance or an order of an arbitrator made under the workers' compensation legislation and provided to the Insurance Commission by the insurer or worker.
- A person is not eligible to apply to become a participant in the CISS in respect of a workplace injury unless the person resides in Australia at the time of the application (cl. 634). Note, participation of a person in the CISS is suspended while the person is absent from Australia (cl. 636 - similar to motor vehicle accident participants).
- An obligation on insurers and self-insurers to provide relevant information about an injured worker to the Insurance Commission if an injured worker's injury appears likely to be a catastrophic injury (cl. 643).
- Section 22 of the *Motor Vehicle (Catastrophic Injuries) Act 2016* is deleted (cl. 640). Section 22 currently provides for the Insurance Commission to recover costs from employers (insurers or self-insurers) if the Insurance Commission has paid for costs in respect of participants catastrophically injured in motor vehicle accidents that are compensable in the workers' compensation scheme. Section 22 is redundant now that the CISS extends to workers suffering catastrophic injuries in workplace accidents.

Workers Compensation and Injury Management Amendment Bill 2020 – CISS related provisions

Part 2 Division 4 & 5 – effect of participation in the catastrophic injuries support scheme

An employer ceases to be liable for medical and health expenses compensation (cl. 81) or miscellaneous expenses compensation (cl. 93) to the extent that the compensation is for expenses incurred or to be incurred after the worker becomes a participant in the CISS.

The employer will be relieved of the liability to provide compensation for those expenses following notification that a worker is a participant in the CISS.

Part 2 Division 11 - effect on settlement of participation in catastrophic injuries support scheme

Clause 150 provides that a settlement agreement must not provide for compensation in respect of medical and health expenses compensation or miscellaneous expenses compensation for which an employer has ceased to be liable as a result of the worker becoming a participant in the catastrophic injuries support scheme.

Part 5 Division 11 – contributions to the Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Fund

The cost of extending the catastrophic injuries support scheme to injured workers will be funded by a levy on licensed insurers and licensed self-insurers in the workers compensation scheme.

There are very few catastrophic workplace injuries and the cost impact is likely to be very small.

Part 5 Division 11 provides for contributions to be made by licensed insurers and licensed self-insurers to the Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Fund (the CIF), through WorkCover WA.

Clause 300 provides for the Insurance Commission to determine the relevant amount of the contribution payable in respect of workplace injury liabilities having regard to the amount standing to the credit of the fund and the amount required for all existing and expected workplace injury liabilities. The amount will be based on actuarial advice.

WorkCover WA will calculate the required contributions (cl. 301) and collect the contribution for crediting to the CIF (cl. 302). The contribution and collection methodology mirrors that of the insurer and self-insurer contributions to WorkCover WA's General Account and Default Insurance Fund, but will be remitted to the Insurance Commission for payment into the CIF.

Motor vehicle (Third Party Insurance) Act 1943 amended

Part 15 Division 2 Subdivision 5 makes amendments to the *Motor vehicle (Third Party Insurance) Act 1943.*

These are consequential amendments to references and terms that are being amended in the *Motor Vehicle (Catastrophic Injuries) Act 2016* and the *Workers' Compensation and Injury Management Act 1981.*

Insurance Commission of Western Australia Act 1986 amended

Part 15 Division 2 Subdivision 3 makes the following CISS related amendments to the *Insurance Commission of Western Australia Act 1986*:

- Section 6 is amended (cl. 621 - functions of Insurance Commission) to reflect the extended *Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Act 2016.*
- Sections 15 and 16 are amended (cl. 623, 624) which relate to moneys available to the Insurance Commission, and establishment and composition of funds. The amendments include the amended Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Fund, and contributions credited to that fund by WorkCover WA via licensed insurers and licensed self-insurers.
- A new section 49 is inserted which is a transitional provision providing that the Motor Vehicle and Workplace Accidents (Catastrophic Injuries) Fund is a continuation of the Motor Vehicle (Catastrophic Injuries) Fund (cl. 627).

Civil Liability Act 2002 amended

Part 15 Division 2 Subdivision 1 makes amendments to the *Civil Liability Act 2002* by replacing section 13A of that Act (cl. 608 - 609).

Section 13A restricts damages if payments are received under the catastrophic injuries support scheme. Section 13A is amended to apply to participants in both motor vehicle accidents and workplace accidents and operates to restrict any damages awarded in respect of any treatment, care and support needs that have arisen during a period a person is a participant in the CISS or will or may arise in the future.

22. Indicative cost impacts

Workers' compensation liabilities are funded through insurance premiums, or directly by self-insurers. WorkCover WA operations are funded by a levy on approved insurers and self-insurers.

No material premium impacts are expected as a result of modernising WA workers compensation laws in line with WorkCover WA's Final Report recommendations.

There are likely to be cost impacts associated with two of the Government's 2021 election commitments, and the catastrophic injury support scheme for workplace accidents (Part 21 of Guide). Preliminary cost estimates for these changes are summarised below.

As part of the consultation process WorkCover WA is engaging the scheme actuary to provide a final cost assessment for the Bill inclusive of the election commitments and the catastrophic injury support scheme for consideration by the Government before the Bill is finalised and introduced to Parliament.

2021 state election commitments

In the lead up to the 2021 State election the McGowan Government announced the following additional election commitments:

- an increase in the point at which income (weekly) compensation payments step down from 13 to 26 weeks;
- an increase in the cap on medical and health expenses compensation from 30% to 60% of the general maximum amount (known as the prescribed amount in the current Act);
- a prohibition on employers attending medical appointments of injured workers.

There are no material cost impacts associated with the prohibition on employers attending medical appointments.

Income compensation step-down

In Western Australia, income compensation payments for non-award workers currently step down to 85% of pre-injury earnings after week 13, while Award workers generally lose any amounts for overtime, or any bonus or allowance after week 13.

The election commitment would see the stepdown point change from 13 to 26 weeks.

The change to the stepdown period has the potential to impact approximately 4,000 workers annually representing about 15.8% of claims. Preliminary costings estimate a **1.63%** increase in the average premium rate would result from this change.

Medical and health expenses compensation cap

Western Australia has a monetary limit for compensable medical and health expenses (30% of the Prescribed Amount, currently $71,754 and indexed annually) with provision for extensions in certain circumstances.

The 2021 election commitment would see the limit increase from 30% to 60% of the prescribed amount (the general limit). This would result in an increase in the capped amount from $71,754 to $143,507. The amounts that apply to the two extensions of the capped amount will be retained as they are in the current Act. There is no increase in the general maximum amount of compensation (e.g. income compensation) as a result of this change.

Preliminary costings estimated an increase of between **0.63%** and **1.40%** in the average premium rate resulting from this change. A range is given in the estimate due to a high level of uncertainty.

Catastrophic injury support scheme

The cost of providing lifetime care and assistance to catastrophically injured workers is likely to be immaterial given the very low incidence of catastrophic workplace injury. Any increased cost will be met by a levy on licensed workers compensation insurers and self-insurers operating in the statutory workers compensation scheme.

Preliminary costings in 2016 estimated that WA will have an average of 7.8 catastrophic workplace injuries annually at a net annual cost of **$4.4 million** in 2016. This is a very small cost impact in the context of the annual total cost of workers compensation entitlements and services, which is approximately $1 billion.

The preliminary analyses of providing lifetime care and assistance in the WA scheme used the number of serious injuries as a proxy for catastrophic injuries and is subject to uncertainty about the number and cost of claims.

As part of its review of the Bill the scheme actuary will undertake a revised estimate of the likely claim numbers and cost of extending entitlements to catastrophically injured workers and can directly draw on claim cost experience from the Catastrophic Injury Support Scheme for motor vehicle accidents implemented in 2018.